

**REPORT OF THE COMMISSION TO STUDY THE
PROVISION OF COUNSEL TO INDIGENT PERSONS
IN MASSACHUSETTS**

Chapter 253 of the Acts of 2004

House Majority Leader John H. Rogers, Chairman, the Honorable Robert W. Banks,
John M. Claffey, Thomas Drechsler, Paul R. Haley, Mary Jo Kennedy,
J. Donald Monan, S.J., Paul F. Ware, Jr., W. Paul White

APRIL 2005

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I. EXECUTIVE SUMMARY

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), and in the cases that followed this seminal case, the United States Supreme Court held that the Sixth and Fourteenth Amendments to the United States Constitution guarantee the provision of counsel to indigent persons accused of a crime who face the possibility of a jail sentence. The Supreme Court deemed that the state, not the federal government, was the appropriate entity to guarantee this constitutional protection. Since *Gideon*, the Commonwealth of Massachusetts has administered the provision of indigent counsel through various programs, culminating in 1983 with the creation of the Committee for Public Counsel Services (CPCS). The ultimate issue before the Commission is to make recommendations to ensure that the Commonwealth of Massachusetts is meeting its constitutional duty to provide counsel to indigent persons in the most efficient and effective manner.

The Commission was established pursuant to chapter 253 of the Acts of 2004 to study the provision of counsel to indigent persons in Massachusetts. It commenced its work in October 2004 and held eight public hearings over the ensuing six months. The Commission heard testimony from more than forty witnesses during more than twenty-five hours of hearings, and it received and reviewed a substantial amount of written materials from all quarters of the judicial system.

From the oral testimony and written materials received by the Commission, the picture of CPCS that emerges is one of a program that is operationally sound. Nonetheless, the Commission has identified four primary areas of concern that we believe are limiting CPCS from more effectively and efficiently achieving its core mission: to provide fully-qualified legal representation to indigent persons throughout Massachusetts. The areas of concern that must be addressed if CPCS is to carry out its mission are: (i) the imbalance in the ratio between CPCS staff attorneys and private bar advocates; (ii) incredible burden imposed on the judicial system by the number of misdemeanor offenses that currently require the appointment of counsel; (iii) the low hourly compensation rates paid to private attorneys, and; (iv) the need to ensure that funds devoted to providing indigent representation are spent only on those persons who are truly indigent. In addressing these factors, the Commission has deliberately avoided ranking any one as more fundamental or important than others because we believe that each has key importance in effectively meeting the constitutional rights of indigents.

The Commission's report sets forth a series of recommended actions, both near-term and long-term, that will address the aforementioned areas of concern:

- Implement two pilot projects in the District Court to have newly hired CPCS staff attorneys represent indigent persons, and authorize CPCS to hire an additional twenty staff attorneys to handle Children and Family Law (CAFL) cases and Juvenile Court cases;
- Reduce the caseload of both CPCS and the District Court by amending the statutes governing certain non-serious misdemeanors so that these offenses are penalized

with harsh civil penalties rather than illusory criminal penalties. Also, establish a permanent body that would be charged with reviewing on a periodic basis all criminal statutes to categorize offenses as either “Class A misdemeanors”, which would be subject to potential incarceration, or “Class B misdemeanors”, which would always carry no possibility of incarceration.

- Increase the hourly rate of compensation paid to private attorneys over a 3-year period to provide a reasonable financial incentive to retain those qualified and experienced private attorneys currently handling CPCS cases and to attract a greater number of attorneys to this practice area. The Commission would also recommend that the current cap of 1850 hours that a private attorney is able to bill during the calendar year be reduced to 1500 hours per year. Finally, the Commission recommends that - starting in FY09 - the Commonwealth commit to a formula that would ensure that the hourly rates paid to private counsel are maintained at no lower than the 75th percentile of hourly rates paid to private attorneys representing indigent defendants in comparable states.
- Amend the indigency verification statute and procedures to ensure that only truly indigent persons are appointed counsel.

The Commission believes that by implementing these recommended actions the Commonwealth of Massachusetts will demonstrate a renewed commitment to Gideon’s promise.

II. SOME HISTORICAL PERSPECTIVE

(A) A look at the legal representation of indigent persons in Massachusetts

The ultimate issue before the Commission is to make recommendations to ensure that the Commonwealth of Massachusetts meets its constitutional duty to provide counsel to indigent persons in the most efficient and effective manner. To understand the nature of this challenge, an historical commentary on the representation of indigent persons in Massachusetts must begin with *Gideon v. Wainwright*, 372 U.S. 335 (1963).

In *Gideon*, the United States Supreme Court held that the Sixth and Fourteenth Amendments to the United States Constitution guarantee the provision of counsel to indigent persons accused of a crime in state felony proceedings.¹ In so doing, the court deemed that the states, and not the federal government, were the appropriate entities to guarantee this constitutional protection. This mandate charged each of the states with developing and implementing a program to provide counsel to eligible indigent persons, but the Supreme Court afforded the states discretion as to how best to comply with this obligation. Consequently, there is no uniform approach amongst the states for the administration of the provision of counsel to indigent persons, a fact which the Commission confirmed during its analysis of the various indigent representation systems now in use.

Each state administers the provision of indigent counsel differently, including but not limited to, the manner by which each of the following are effectuated: compensation rates and levels; the appointment process; eligibility for counsel through indigency verification; and ratios of public salaried staff counsel vs. privately contracted counsel. While some states implement a statewide indigent counsel program, other states, such as California, administer the program on a county-by-county basis.² Since *Gideon*, the Commonwealth of Massachusetts has administered the provision of indigent counsel through different programs, culminating in 1983 with the creation of the Committee for Public Counsel Services (CPCS).

Before the creation of CPCS, there was no single agency in Massachusetts responsible for the appointment of counsel to persons eligible for legal representation.³ Such services were provided by the Massachusetts Defenders Committee (MDC), county bar advocate programs, the Roxbury Defenders Committee (RDC), and by direct judicial appointment of counsel from court lists.⁴ In 1959, the Massachusetts Supreme Court promulgated Rule 10 of its General Rules, which required the appointment of counsel for indigent defendants in Superior Court non-capital felony cases.⁵ Rule 10 has subsequently

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² See The Spangenberg Group, *State and County Expenditures for Indigent Defense Services in Fiscal Year 2002* (September 2003); prepared for the American Bar Association.

³ Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation, *Striking a Balance: Adequate Compensation-Effective Representation: Fair compensation for Criminal Justice Attorneys* 18; November, 1994.

⁴ *Id.* at 18-19.

⁵ Boston Bar Association, *Brief of Amicus Curiae in Lavalley* 3 (June 29, 2004) (citing 337 Mass. 813 (1958)).

been amended and revised to require the appointment of CPCS in all but exceptional circumstances.⁶

The MDC was established and funded by the Legislature in 1960 to represent indigent defendants charged with a felony.⁷ In 1969, the SJC ruled that the right to counsel for indigent defendants extended to cases “for which a sentence of imprisonment may be imposed”.⁸ In 1976, the SJC established the Committee on the Appointment of Competent Counsel for Indigent Criminal Defendants in the District and Municipal Courts [the “Wilkins Committee”] in an effort to reorganize the various means by which indigent counsel was provided and to recommend a centralized system for the provision of indigent counsel.⁹ The concept of a centralized system came to fruition in 1983 with the creation of CPCS.

CPCS was established by chapter 673 of the Acts of 1983 and its governing statute is codified in chapter 211D of the Massachusetts General Laws. CPCS was established to plan, oversee and coordinate the delivery of criminal and certain non-criminal legal services by all salaried public counsel, bar advocate and other assigned counsel programs and private attorneys serving on a per case basis.¹⁰ The committee is governed by fifteen members, each of whom is appointed by the Supreme Judicial Court for a term of three years.¹¹ Pursuant to chapter 211D, CPCS is divided into the public defender division and the private counsel division.¹² The public defender division consists of between 100 - 120 salaried staff attorneys who are full-time employees of the Commonwealth.¹³ The private counsel division consists of private attorneys who enter into a contract with CPCS through one of twelve bar advocate programs.¹⁴ These attorneys are compensated by an hourly rate. In 1985, two years after CPCS was established, compensation rates were stabilized for the first time at \$25 per hour for out-of-court work and \$35 per hour for in-court work. While it is the Legislature that constitutionally is empowered to appropriate public funds, CPCS is statutorily assigned the responsibility of establishing rates of compensation and recommending a rate structure to the Legislature every two years.¹⁵ In April 2004 the private counsel division rate structure was as follows: \$30 per hour for District Court cases; \$39 per hour for non-homicide Superior Court cases, and; \$54 per hour for murder cases.

(B) Some underlying problems exposed

In May of 2004, a shortage of private attorneys and CPCS staff attorneys in Hampden County resulted in several criminal defendants being held in custody pending the

⁶ *Id.* at 6. (citing 355 Mass. 803 (1969)).

⁷ *Id.* at 8.

⁸ *Id.* at 9 (quoting Arnold R. Rosenfeld, The Right to Counsel and Provision of counsel for Indigents in Massachusetts: The Hennessey Era, 74 Mass. L. Rev. 148, 149 (1989)).

⁹ *Id.* at 6.

¹⁰ See G.L. c. 211D, § 1.

¹¹ *Id.*

¹² *Id.*

¹³ See Committee for Public Counsel Service’s website; www.mass.gov/cpcs/.

¹⁴ *Id.*

¹⁵ G.L. c. 211D, §11.

appointment of counsel.¹⁶ As a result, petitions were filed by CPCS and the American Civil Liberties Union seeking relief pursuant to G.L. 211D on behalf of criminal defendants who were being held without counsel by order of judges in both Springfield and Holyoke.¹⁷ The petitioners argued that the court should order a higher rate of compensation for assigned counsel because the Commonwealth had failed to provide these indigent defendants with representation.¹⁸ After thirty-three more unrepresented indigent defendants in Hampden County were added as petitioners the cases were consolidated and reached the SJC.¹⁹

The Supreme Judicial Court declared that the shortage of lawyers in the Hampden County bar advocates program was caused by a low rate of attorney compensation authorized by the annual budget appropriation.²⁰ The court also stated that there had been “little change” in the hourly rates for private counsel since 1986 and that the rates were “among the lowest in the nation.”²¹ The court, however, took notice that the “Legislature is keenly aware of the defendants’ constitutional right to counsel and of the demands that right makes on the public treasury.”²² Accordingly, the court declined to exercise its inherent powers and did not order judges to authorize compensation rates in excess of what the Legislature had appropriated.²³ Instead, the court focused its decision on formulating a remedy to the “continuing constitutional violation suffered by indigent criminal defendants in the courts of Hampden county.”²⁴

(C) Remedial initiatives since the *Lavallee* decision

The *Lavallee* court urged cooperation between the legislative, executive, and judicial branches of government in “fashioning a permanent remedy for what can now fairly be seen as a systematic problem of constitutional dimension.”²⁵ Consequently, a brief discussion of recent actions both by the legislative and executive branches to fashion such a remedy is warranted. The FY04 budget funded the bar advocate program based upon anticipated costs at an amount of \$72.3 million, albeit at rates of compensation that were lower than those recommended by CPCS.²⁶ The Romney administration vetoed \$13 million of these funds, noting that the “reduction was consistent with House 1 recommendations.”²⁷ Bar advocates subsequently lobbied the Legislature to override the Governor’s veto. Rather than immediately voting to override the Governor’s veto, the Legislature afforded the Administration ample opportunity to initiate their own proposals to reform CPCS. As those efforts were rejected by bar advocates and representatives of CPCS, the Legislature appropriated \$16 million for the bar advocate programs and indigent defense costs in an

¹⁶ See *Lavallee v. Justices in Hampden Superior Court*, 442 Mass. 228 (2004).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 229

²¹ *Id.* at 230

²² *Id.* at 243.

²³ *Id.*

²⁴ *Lavallee*, 442 Mass. 228, 244 (2004)

²⁵ *Id.* at 244.

²⁶ In 2002 CPCS recommended rates of \$60/hr. for District Court, \$90/hr. for Superior Court, and \$120/hr. for murder cases pursuant to G.L. c. 211D, §11.

²⁷ See St. 2003, c. 26

FY04 supplemental budget.²⁸ The Governor signed this supplemental budget on April 5, 2004.

The FY05 budget funded anticipated bar advocate costs while factoring in the costs saved from the new indigency verification program proposed by the House and established by an outside section of the budget.²⁹ The budget engrossed by the House funded the bar advocate program at \$72.1 million and further increased the CPCS appropriation to provide for an additional 15 staff attorneys.³⁰ The final FY05 appropriation for the bar advocates program was \$67 million, which reflected the figure in the Senate engrossed budget. Also in 2004, the Legislature authorized an across-the-board increase of \$7.50 per hour on bar advocate rates and created the present Commission.³¹

Chapter 253 of the Acts of 2004 established the Commission to study the provision of counsel to indigent persons in Massachusetts. The enabling statute provides:

“There shall be a commission to study the provision of counsel to indigent persons who are entitled to the assistance of assigned counsel either by constitutional provision, or by statute, or by rule of court. The commission shall be composed of 9 persons, including 3 members to be appointed by the speaker of the house of representatives, 3 by the president of the senate, and 3 by the governor.

The commission shall examine all aspects of the provision of counsel in such cases, including but not limited to (i) the frequency of the assignment of counsel to indigent persons, (ii) the feasibility of changes, consistent with chapter 211D of the General Laws, to control or reduce the frequency of case assignments, (iii) the cost of providing counsel in such cases; (iv) the adequacy of existing procedures for determining and verifying the eligibility of persons who request the assignment of counsel; (v) the adequacy of existing procedures for the assessment and collection of counsel fees from persons who have been determined to be eligible for assigned counsel; (vi) the existing balance, and the adequacy of that balance, in each practice area and county between the provision of legal representation by salaried staff counsel and certified private counsel; (vii) the frequency with which neither salaried staff counsel nor certified private counsel are available to represent a defendant entitled to publicly funded representation; (viii) the impact of the current hourly rate paid to certified private counsel on the availability or non-availability of such counsel to defendants entitled to publicly funded representation; and (ix) the feasibility and potential benefits of providing representation to indigent persons predominantly through the assignment of salaried staff counsel rather than certified private counsel. The commission shall report its findings and recommendations together with drafts of legislation as may be necessary to carry such recommendations into effect by filing the same with the clerks of the house and senate on or before February 1, 2005.”³²

The Commission commenced its work in October 2004 and proceeded to hold eight hearings over the next six months. It heard testimony from more than forty witnesses

²⁸ See St. 2004, c.65

²⁹ See St. 2004, c.149

³⁰ See House Bill 4601, April 30, 2004.

³¹ See St. 2004, c.253, 352.

³² See St. 2004, c. 253.

during more than twenty-five hours of hearings. It solicited and received written materials from more than fifty witnesses including, but not limited to, court leaders, bar advocates, bar associations, advocacy groups, and district attorneys for purposes of gathering critical information, identifying problems and generating potential solutions.

Due to the volume of materials submitted to the Commission, the breadth and complexity of the task at hand and the crucial need to perform a comprehensive analysis resulting in realistic recommendations, the Commission formally requested an extension of its reporting deadline from February 1, 2005 to April 6, 2005.

The extension of the reporting deadline was essential for the Commission to complete a top to bottom assessment of all aspects of the current CPCS program and make meaningful recommendations as to the most efficient and cost effective way to provide fully qualified legal representation to indigent persons throughout Massachusetts. The Legislature subsequently granted the Commission an extension to April 1, 2005.³³

III. FINDINGS AND CONCLUSIONS

From the testimony of legal experts, judges, district attorneys, practitioners, bar associations, and advocates, and from the vast amount of written materials reviewed by the Commission, the picture of CPCS that emerges is one of a program that is operationally sound. Nonetheless, the Commission has identified four primary areas of concern that are hindering CPCS from more effectively and efficiently achieving its core mission: to provide fully-qualified legal representation to indigent persons throughout Massachusetts. These four factors have evolved over the years and fault for the present state of affairs cannot, and indeed should not, be attributed to any one cause, entity or constituency. Moreover, in addressing them below, the Commission has deliberately avoided ranking any one as more fundamental or important than others because we believe that each has key importance in effectively meeting the constitutional rights of indigents.

The four primary areas of concern and certain additional conclusions that must be addressed if CPCS is to carry out its mission are as follows:

(A) The present ratio of private bar advocates to CPCS staff attorneys reflects a disproportionate reliance on private attorneys

In FY04 more than 2,500 private bar advocate attorneys (“private attorneys”) handled 182,528 assignments, while approximately 100 full-time CPCS staff attorneys handled slightly more than 9,200 cases.³⁴ Virtually all of the cases assigned to CPCS staff attorneys were felony offenses in the Superior Court, which means that District Court assignments were handled almost exclusively by private attorneys. These numbers illustrate that the present system is asking private attorneys to handle about 95% of the entire indigent caseload. The Commission could find no other state or county-based system that employs

³³ See St. 2005, c. 6, §17.

³⁴ Figures provided by CPCS.

such a ratio between private attorneys and public defenders to provide representation to indigent persons.

When CPCS was created in 1983 it was envisioned, at least in part, as a program that would provide private attorneys with a means to augment an existing legal practice while gaining valuable in-court experience. The idea was that representing indigent persons would allow private attorneys to supplement their income while simultaneously building a private practice.³⁵ Moreover, as noted in *Lavallee*, the work voluntarily undertaken by private attorneys willing to accept CPCS cases is in the nature of public service because the source of compensation is the “limited public treasury”.³⁶

There has been, however, a gradual yet persistent movement away from that original intent, as an ever increasing number of private attorneys derive all or a significant part of their income from CPCS cases.³⁷ As more and more private attorneys have come to rely almost exclusively on CPCS cases for their livelihood it is understandable how this group has come to feel underpaid for their services. Such feelings, however, overlook the fact that the hourly rates paid to CPCS private attorneys were never intended to be sufficient to sustain a private practice.³⁸

While many witnesses told the Commission that the best indigent defense systems are comprised of a mix of full-time staff attorneys and fully qualified private attorneys, no witness was able to do much more than speculate as to what the optimum “mix” should be for the Commonwealth. Speculative evidence is not probative for resolving cases in the courtroom, nor should it serve as a foundation for determining how best to staff that same courtroom. The most consistent theme that evolved from the relevant testimony was that affirmative steps should be taken to provide a more effective balance between the use of public staff attorneys and private attorneys. Section A of the *Recommended Actions* below is the Commission’s attempt to outline how to compile accurate and complete data in order to first ascertain the appropriate ratio for Massachusetts and then move gradually toward that ratio.

(B) The number of non-serious misdemeanor offenses requiring the assignment of counsel strains already limited resources

The fact that there were approximately 120,000³⁹ case assignments in the District Court in FY04 speaks to the incredible burden imposed on the judicial system by the number of misdemeanor offenses that currently require the appointment of counsel. During the course of the Commission’s work, witnesses repeatedly cited the need to review all

³⁵ See Committee on the Appointment of Competent Counsel for Indigent Criminal Defendants in the District and Municipal Courts, *Interim Report* - Conclusion 5; (December 16, 1976)

³⁶ *Lavallee*, at 239.

³⁷ From FY99 to FY04, the number of private bar advocate attorneys earning more than \$50,000 per year increased from 548 to 938.

³⁸ See Boston Bar Association, *Brief Amicus Curiae* in *Lavallee* 26, 28 (June 29, 2004).

³⁹ In FY04 private bar advocate attorneys billed 1.22 million hours to handle District Court and Juvenile Court case assignments. Figures provided by CPCS.

criminal statutes to determine what changes could be made to reduce the number of court-appointed misdemeanor assignments.

Mr. Robert Spangenberg of The Spangenberg Group, a national expert on indigent defense systems, testified before the Commission that Massachusetts appoints counsel to represent indigent defendants charged with misdemeanor offenses far more frequently than any other jurisdiction. According to Mr. Spangenberg, few jurisdictions even come close to the number of misdemeanor offenses that are handled by court-appointed counsel. This is true even though district attorneys have had the discretion to treat a misdemeanor offense as a civil infraction since 1995.⁴⁰ It is not very difficult, therefore, to see how the vast array of misdemeanors requiring the appointment of counsel, when combined with the reality of a shrinking pool of attorneys willing to accept CPCS cases and an apparent unwillingness on the part of district attorneys to exercise their statutorily granted discretion, would result in a caseload that both overburdens private attorneys and drains the resources of the court system.

According to figures provided to us by CPCS, between FY00 and FY04 the courts assigned counsel in more than 22,000 cases to represent indigent persons charged with operating a motor vehicle after a license or registration has been suspended. During that same period, there were 13,590 case assignments for shoplifting, 11,641 case assignments for disorderly person/disturbing the peace, 7,421 case assignments for trespass, and 4,268 case assignments for larceny by check.⁴¹ Treating these five offenses as civil infractions would have reduced CPCS's District Court caseload by nearly 59,000 case assignments over that 4-year period, which works out to an average of 14,750 cases per year. CPCS projects that it could have realized savings of approximately \$8.5 million had these offenses been handled with harsh civil penalties rather than illusory criminal penalties.

If this Commission were merely to recommend an increase in the hourly rates paid to private attorneys it would simply increase the overall cost of what is already a very expensive program, and it would do nothing to address the issue of the enormity of the District Court caseload. The Commission strongly believes that no meaningful reform of the problems plaguing the CPCS system can proceed without also undertaking the task of reducing or modifying the non-serious misdemeanor offenses that currently result in the appointment of counsel.

The Commission realizes that any proposal to abrogate the right to counsel for certain non-serious offenses will give rise to political pressures on both the Legislature and the executive branch. In fact, recent efforts by the Legislature to address this issue have been met with inflammatory headlines accusing the Legislature of being "soft on crime". While these concerns should not be trivialized, the Commission is convinced that the process of identifying those non-serious misdemeanors that are routinely being disposed of with fines or cost assessments should start immediately. Those offenses would then be handled in a non-criminal manner under the appropriate circumstances, such as when they are charged as stand-alone offenses.

⁴⁰ See G.L. c. 277, §70C, which was signed into law in 1995.

⁴¹ See William J. Leahy, 2005 Report to the Legislature on the Committee for Public Counsel Services, (February 16, 2005).

As set forth in Section B of the *Recommended Actions*, the Commission is prepared to recommend that civil penalties be imposed for certain non-serious offenses now, and that a permanent body be created to evaluate which additional non-serious offenses should be handled in a similar fashion.

(C) Relatively low compensation rates discourage attorneys from accepting CPCS cases

There is no disputing that the hourly rates paid to private attorneys handling CPCS cases are lower than most other jurisdictions. However, the current rates should not be construed to mean that Massachusetts does not expend significant resources in meeting its constitutional duty to provide indigent representation services. In FY04, Massachusetts spent in excess of \$77 million to compensate private attorneys for representing indigent persons. In FY02, Massachusetts ranked 6th in spending on indigent defense services when compared to all other states,⁴² and is consistently near the top when spending is measured on a per-capita basis. The amount expended on CPCS private attorneys has increased 42% over the last five years – from \$64.5M in FY99 to \$77M in FY04. There is also little dispute that Massachusetts spends a significant amount each year on indigent defense services, a fact that illustrates the Legislature’s commitment to the CPCS program, even during what has been a challenging fiscal crisis. That being said, it is the relatively low hourly rates that are repeatedly cited as the overarching reason for private attorneys to turn away from CPCS work.

At this time last year, private bar advocates were paid \$30 per hour for District Court cases, \$39 per hour for Superior Court cases and \$54 per hour for work on murder cases.⁴³ In August 2004, the Legislature approved an across-the-board increase of \$7.50 for all these rates; so that the hourly rates now paid to bar advocates are \$37.50, \$46.50 and \$61.50, respectively. Even with this rate increase, and as evidenced by the unremitting nature of the *Lavallee* case, a growing number of private attorneys throughout the state are either refusing to accept CPCS cases or dramatically reducing their CPCS caseload. The Commission received testimony, both oral and written, from several private bar advocates who indicated that they had long since passed the point where it was economically feasible for them to accept CPCS cases. Having a smaller pool of attorneys willing to do CPCS work means that it takes longer both to appoint counsel to represent an indigent person and to bring that defendant’s case to trial, and that attorneys who continue to participate in the program must take on much heavier caseloads. These consequences are real and dire to indigent persons in need of legal counsel, and they only serve to undermine the efficiency of a judicial system that already must compete for limited financial resources.

The adverse pressures and burdens that these low hourly rates are imposing statewide on CPCS’s ability to retain fully qualified private attorneys to represent indigent

⁴² See The Spangenberg Group, *State and County Expenditures for Indigent Defense Services in Fiscal Year 2002* (September 2003); prepared for the American Bar Association.

⁴³ Children and Family Law (CAFL) cases were paid at a rate of \$39/hr. and Children in Need of Services (CHINS) cases were paid at a rate of \$30/hr.

persons compels the Commission to recommend a rate increase. Specific recommendations and the framework for implementing them are set forth in Section C of the *Recommended Actions* below.

(D) Procedures to verify claims of indigency have historically been hampered

Since 1958, Massachusetts has recognized and safeguarded the right to counsel for indigent persons charged with serious crimes.⁴⁴ The cases that followed *Gideon's* lead further secured this constitutional right by mandating that the states provide counsel to indigent persons charged with misdemeanors who face the possibility of a jail sentence.⁴⁵ As noted above, even during this climate of fiscal uncertainty Massachusetts currently spends in excess of \$92 million a year to carry out *Gideon's* charge. Because the CPCS system is always competing with other equally worthy – and sometimes constitutionally or statutorily mandated – programs, it is imperative to ensure that funds devoted to providing indigent representation are spent only on those persons who are truly indigent.

Under CPCS's enabling statute, the process used to determine whether the appointment of counsel is appropriate can be summarized as follows: first, a probation officer attempts to verify whether or not a person is indigent; second, the probation officer provides the court with a written report stating his opinion as to the person's ability to pay for counsel; third, if the person is deemed indigent, the court assigns the case to CPCS, and; finally, CPCS relies upon the bar advocate programs to assign the case to a private attorney.⁴⁶ The crucial first step is the probation officer's ability to verify a person's claim of indigency. Unless the probation officer is provided timely access to the objective information needed to verify the defendant's ability to pay for counsel, then the chance that money intended for CPCS is being depleted on non-indigent persons is increased unnecessarily.

The Legislature recently instituted several important changes intended to improve a probation officer's ability to verify a person's claim of indigency. As part of the FY05 budget, G.L. c. 211D, §2½ was rewritten to require that: (1) the probation officer explain to the defendant both the definition of "indigency" and the consequences of misrepresenting any financial information; (2) the defendant certify under the pains and penalties of perjury that the information provided is true and he has not concealed any information relevant to his financial status; (3) the probation officer re-assess the defendant's indigency no later than 60 days after the appointment of counsel, and every 6 months thereafter, and; (4) any person found to have materially misrepresented or omitted financial information for purposes of wrongfully obtaining counsel shall immediately have the representation terminated and be assessed costs of not less than \$500.⁴⁷ The Legislature also directed the Office of the Commissioner of Probation (OCP) to enter into interagency service agreements with the Department of Revenue, the Registry of Motor Vehicles, the Department of Medical

⁴⁴ In 1958 the Supreme Judicial Court promulgated Rule 10 of the General Rules, requiring the appointment of counsel for indigent persons charged with felonies in the Superior Court.

⁴⁵ See *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁴⁶ See G.L. c. 211D, §2 and §5.

⁴⁷ See St. 2004, c. 149 §195.

Assistance, and the Department of Transitional Assistance to facilitate immediate access to data and other information needed to verify a claim of indigency.⁴⁸

The OCP has informed the Commission that it is grateful to have these improved tools at its disposal and genuinely encouraged by the preliminary results. Although the OCP was only able to relay anecdotal evidence as to the early success of the new indigency verification procedures, they nonetheless believe that they are on the right track toward ensuring that only truly indigent persons are appointed counsel. More time is needed, however, before a more thorough assessment can be done to document the efficiencies and savings realized by these changes. Until that data is compiled, the Commission would only recommend making what are best characterized as technical changes to the indigency verification statute. Those recommendations are set forth below in Section D of the *Recommended Actions*.

(E) Additional conclusions

Although the four secondary findings set forth below either do not warrant a specific recommended action at this time or are beyond the scope of our task, the Commission nonetheless believes that each is significant enough to require thoughtful consideration by those persons dedicated to making the judicial system work for all of the citizens of Massachusetts.

(1) Private bar advocates should not be eligible for state employment benefits

Bar advocates accepting cases for the private counsel division of CPCS should not be eligible for participation in either the group health insurance program or retirement system offered to state employees. CPCS's enabling statute specifically provides that "neither individuals nor members nor participants in any group, corporation or association with whom the committee may contract under this paragraph shall be considered to be or have any rights as state employees."⁴⁹ That prohibition remains in effect today.⁵⁰

Private attorneys willing to accept CPCS cases are not full-time or part-time employees, they are independent contractors providing a service, albeit a valuable service, to the Commonwealth for a fee. Allowing private attorneys to participate in and benefit from such state employee benefit programs would significantly increase the cost of the CPCS program and set an expensive precedent for all other independent contractors now working for the Commonwealth.

(2) Salary increases are warranted throughout the judicial system

The Commission acknowledges the testimony of many witnesses who cited the critical need to increase the salary levels of other state employees working within the judicial

⁴⁸ See St. 2004, c. 149 §212.

⁴⁹ See St. 1983, c. 673 §6.

⁵⁰ G.L. c. 211D, §6(b).

system, including judges, CPCS staff attorneys, assistant district attorneys and assistant attorneys general. Enhanced salaries make it easier to retain experienced lawyers whose cumulative courtroom knowledge makes the whole judicial process work more equitably and efficiently.

The citizens of Massachusetts and the interests of justice are best served when the judicial system is able to attract and retain the highest quality of legal representation. While the Commission is not fully prepared to make a specific recommendation, it recommends that any feasible salary increase be considered by the Legislature. We use the term “feasible” because we are fully aware of the Commonwealth’s continuing fiscal challenges and are mindful that any increase in the resources devoted to the judicial system must compete with other equally important constitutional funding obligations.

(3) The contracts between the bar advocate programs and the private attorneys should be amended

The contracts currently executed between the bar advocate programs and the private attorneys willing to accept CPCS cases do not include any terms or conditions to require the private attorneys to accept a minimum numbers of cases each year. Consequently, the *Lavallee* court found, and the Commission agrees, that the absence of such an obligation contributed to the difficulty experienced by judges in Hampden County in finding attorneys willing to accept appointments. The Commission, therefore, recommends that consideration be given to amending these contracts to include an obligation on the part of the private attorneys to accept a minimum number of cases each year. For example, a requirement that each attorney accept at least 10 District Court⁵¹ cases per year as a condition of participating in the CPCS system would provide the judicial system with greater safeguards against situations where attorneys are refusing appointments and assist private attorneys by distributing caseloads more equitably.

As an alternative, the Commission would recommend that contracts contain a provision expressly acknowledging that a minimum caseload requirement could be imposed by the court under exceptional circumstances under Rule 6.2 of the Massachusetts Rules of Professional Conduct.

(4) Inter-agency cooperation must be improved

The judicial system is comprised of many separate components that must work in concert with one another if the system is to safeguard the interests of justice as efficiently as possible. The system cannot effectively function unless the Administrative Office of the Trial Court (AOTC) - and the various divisions of the trial court that handle CPCS cases - the district attorneys’ offices, the CPCS administrative office and the various bar advocate programs are committed to and help foster an environment of mutual cooperation.

⁵¹ The required number of cases would be lower for attorneys accepting Superior Court cases and murder cases.

The Commission believes that the judicial system can only achieve optimum performance levels if all of these agencies work together. For example:

- The Supreme Judicial Court and the AOTC should consider taking affirmative steps to reduce waiting time by scheduling multiple hearing sessions each day or dividing proceedings that are scheduled on a particular day between a morning session and an afternoon session.
- The Supreme Judicial Court and the AOTC should take affirmative steps, by rule of court, to require competing components of the judicial system to file only motions and claims that are more likely to serve the interests of justice than needlessly clog the court's docket.
- The OCP and the AOTC should develop procedures to substantially increase the likelihood that a private attorney assigned to represent an indigent person charged with an offense will be appointed to represent that same person for any future, unrelated offense. Mindful of geographical and scheduling conflicts which may preclude this continuity of representation, the Commission is nonetheless convinced that savings and efficiencies will be realized if every reasonable effort is made to have reappointment be the leading objective.
- The administrative office of CPCS must make a concerted effort to increase the number of training slots available each year and, whenever appropriate, make it easier for obviously qualified attorneys to bypass the training and certification requirements.

IV. **RECOMMENDED ACTIONS**

(A) Implement pilot projects and increase public counsel staffing to handle children and family law cases

The current CPCS system relies on private attorneys to handle 95% of the entire indigent caseload. The Commission believes that this ratio is disproportionate when compared to other jurisdictions that utilize a system reliant upon both public defenders and private attorneys, so a concerted effort must be made to more equitably distribute the workload. This is a long-term issue with no immediate fix, and any eventual changes must be balanced against the need to not only retain private attorneys who currently handle CPCS cases but to provide sufficient motivation and justification for attracting new attorneys to this important work.

In *Lavallee* the Supreme Judicial Court acknowledged that the decision of whether “to move away from the privatization of indigent defense services in favor of augmenting the public counsel division is one that is properly and plainly within” the prerogative of the

Legislature.⁵² As noted above, however, the Commission believes that the dearth of objective, verifiable data regarding the financial savings and efficiencies, if any, to be gained from increasing the number of CPCS public staff attorneys impedes any movement in that direction. Accordingly, the Commission recommends the implementation of two pilot projects to handle cases in the District Court and increased staffing to handle the Children and Family Law (CAFL) cases and cases in the Juvenile Court department.

The District Court pilot projects should be located in Hampden County, where the current CPCS crisis reached its zenith, and in Bristol County. Each pilot project will have its own office space and be staffed by fifteen attorneys, one investigator and three support staff.⁵³ These attorneys could be assigned to various districts within each county depending on the court's caseload and they could be transferred within the county to respond to any unexpected circumstances. In response to a specific request from the Commission, CPCS has estimated that it would cost approximately \$1.2 million⁵⁴ to staff and activate each District Court pilot project.

The Commission also recommends that CPCS be authorized to hire an additional twenty (20) attorneys to handle CAFL cases and Juvenile Court cases statewide. CPCS currently operates two offices – in Springfield and Salem – which are staffed with public defenders to provide a “mixed assignment” system in those geographic areas. This staffing increase is justified by the fact that spending on non-criminal cases has grown so rapidly over the last five years that it now consumes approximately one-third of the money appropriated for the CPCS program. The Commission believes that hiring and utilizing additional staff attorneys to handle CAFL and Juvenile Court cases will introduce more stability and cost certainty into this growing element of CPCS's work.

Finally, once each District Court pilot project is operational and the additional staff attorneys have been hired, CPCS should be required to report to the House and Senate Committees on Ways and Means every four months. This report would detail the actual costs incurred in operating the projects, the number of cases handled by each attorney, the number of cases disposed of during each reporting period, and the average time that it took to dispose of such cases. This information would provide the objective data needed to determine the incremental savings and efficiencies, if any, resulting from an increased reliance on public defenders. Those figures may or may not drive any further expansion of the use of public defenders to represent indigent defendants.

(B) The categorization of certain misdemeanor offenses and the creation of a special commission

(1) The Near-Term Recommendations:

The potential deprivation of a citizen's liberty interest for an alleged violation of certain non-serious misdemeanors triggers his constitutional right to counsel, as guaranteed

⁵² *Lavallee*, 442 Mass. at 243 (2004).

⁵³ One attorney would serve as the office's head attorney and two attorneys would serve as supervising attorneys.

⁵⁴ This figure includes one-time costs and recurring annual charges.

by the Sixth and Fourteenth Amendments to the United States Constitution. The Commission heard broad testimony that these minor crimes needlessly result in the appointment of counsel - at great expense to the taxpayers of the Commonwealth - because incarceration invariably is neither sought nor imposed. Consequently, the Commission recommends that these General Laws be amended to more accurately reflect the practical administration of justice in the Commonwealth, while simultaneously yielding significant cost-savings to the taxpayer. These non-serious misdemeanors are as follows: (1) operation of a motor vehicle with a suspended license⁵⁵ or registration, (2) driving while unlicensed⁵⁶ or uninsured⁵⁷, (3) shoplifting⁵⁸, (4) disorderly person or disturbing the peace⁵⁹, (5) trespass⁶⁰, and (6) larceny by check⁶¹. This proposal, however, would not apply to cases involving companion complaints or indictments or multiple offenses arising from the same set of facts. According to the figures provided by CPCS, this proposal will reduce CPCS's caseload - and the District Court docket - by almost 15,000 cases each year and realize annual savings of over \$2.1 million. Having 15,000 fewer case assignments will unshackle the private bar advocates from spending valuable time and taxpayer money on such non-serious crimes. In short, the system of justice would operate more efficiently.

The Commission is convinced that a critical component to reducing the number of non-serious misdemeanors resulting in the appointment of counsel must be a greater emphasis on G.L. c. 277, §70C, which has afforded district attorneys the discretion to treat certain misdemeanor offenses as civil infractions since 1995. There must be a concerted effort to educate and train all participants in the judicial process of the system-wide benefits to be gained from handling appropriate non-serious misdemeanors as civil infractions. Although certain district attorneys have signaled to the Commission a renewed willingness to avail themselves of the discretion provided by §70C, there currently exists a limited incentive for district attorneys to proceed civilly against a defendant. This has been true even if the offenses charged are virtually certain to result in no jail time being sought by the district attorney or imposed by the court.

In the event that the discretionary authority granted by G.L. c. 277, §70C continues to languish, the Commission strongly recommends that the Legislature amend §70C to establish a rebuttable presumption that certain misdemeanor offenses shall be deemed civil infractions unless the Commonwealth files an affidavit at arraignment establishing just cause to the contrary. Thus, the Commonwealth would bear the burden of demonstrating that the facts underlying the misdemeanor offense justify the possibility of incarceration, thereby triggering the appointment of counsel.

Another recommendation requiring further consideration and analysis is to amend G.L. c. 277, §70C, so as to prohibit the appointment of counsel in cases where the district

⁵⁵ G.L. c. 90, §23. However, this would only apply to a first offense and a license suspension that is not related to an OUI conviction or a habitual traffic offender.

⁵⁶ G.L. c. 90, §10.

⁵⁷ G.L. c. 90, §34J.

⁵⁸ G.L. c. 266, §30A.

⁵⁹ G.L. c. 272, §53.

⁶⁰ G.L. c. 266, §120.

⁶¹ G.L. c. 266, §37.

attorney's office informs the court, either at arraignment or pre-trial conference, that it will be proceeding civilly against a particular defendant. Currently, §70C allows the court to retain the discretion to appoint counsel even if the district attorney has moved to treat a misdemeanor offense as a civil infraction. It would seem that once the district attorney has affirmatively moved the court to proceed civilly, then a judge should only be able to appoint counsel under extraordinary circumstances. Further scrutiny of this proposal would identify which, if any, misdemeanors would be exempted from this prohibition.

(2) The Long-Term Recommendation:

The Commission recommends that a permanent body be established to review on a periodic basis all criminal statutes to categorize all offenses as either "Class A" misdemeanors, which would be treated as criminal offenses, or "Class B" misdemeanors, which would always be treated as civil infractions carrying no possibility of incarceration. Any person charged with a Class B misdemeanor would not be eligible for the appointment of counsel. We also recommend that this permanent commission consider and fully evaluate other procedures or programs that could be employed to divert cases from requiring the appointment of counsel without depriving a person of his right to counsel or compromising public safety.

This permanent commission would be comprised of a gubernatorial appointee, legislators, the Attorney General, the Massachusetts Association of District Attorneys, the AOTC, CPCS (both public and private divisions), the Massachusetts Bar Association, and the Boston Bar Association. It is envisioned that the permanent commission would be required to provide the House and Senate Committees on Ways and Means with an annual report detailing how many charges in each class of misdemeanors were filed during the calendar year and the number of misdemeanors resulting in the appointment of private counsel.

(C) Increase the compensation rates

(1) The Near-Term Recommendation:

Prior to last year's rate increase, the private attorneys who have dedicated themselves to representing indigent persons have provided this vital service for many years without any increase in their rate of compensation. To provide a reasonable financial incentive to retain those qualified and experienced private attorneys currently handling CPCS cases and to attract a greater number of attorneys to this practice area, the Commission strongly recommends that the hourly rates paid to private attorneys be increased as set forth below. As noted above, the money needed to fund any increase in the CPCS hourly rates will certainly be competing for scarce state revenues with other equally worthy programs and services. To lessen the immediate fiscal impact of this proposal, however, the Commission further recommends that all rate increases be phased in over a 3-year period.⁶²

⁶² The Commission anticipates that any rate increase approved by the Legislature and signed by the Governor would commence in FY06 on July 1, 2005 and then be phased in during the ensuing fiscal years.

Proposed Rate Increases:

<u>Case Type</u>	<u>FY06</u>	<u>FY07</u>	<u>FY08</u>
Murder	\$100/hr	\$105/hr	\$110/hr
Superior Court ⁶³	\$60/hr	\$65/hr	\$70/hr
District Court	\$50/hr	\$53/hr	\$55/hr
CAFL Cases ⁶⁴	\$50/hr	\$55/hr	\$60/hr
CHINS Cases	\$50/hr	\$53/hr	\$55/hr
FY Total Cost (Projected)	<u>\$24.0M</u>	<u>\$32.5M</u>	<u>\$40.0M</u>

As a companion to the increased hourly rates, the Commission also recommends that the current cap of 1850 hours that a private attorney is able to bill during the calendar year be reduced to 1500 hours per year. Currently, CPCS uses an internal administrative rule to impose the 1850-hour cap. The Commission recommends that CPCS lower the annual cap to 1500 hours to achieve two goals: (i) encourage a broader and more diverse number of attorneys who are willing to accept CPCS cases, thereby more equitably distributing the indigent representation caseload, and (ii) redirect the CPCS system back toward its original purpose of providing a means for attorneys to gain valuable experience while supplementing an individual's law practice without becoming the predominant feature of that practice. CPCS would be expected to implement procedures to allow a private attorney to exceed the 1500-hour cap to ensure continuity of representation for cases assigned before the cap was exceeded.

(2) The Long-Term Benchmark:

The Commission also recommends that - starting in FY09 - the Commonwealth commit to a formula that would ensure that the hourly rates paid to CPCS private counsel are maintained at no lower than the 75th percentile of hourly rates paid to private attorneys representing indigent defendants in comparable states. At first glance this may seem like a rather simple exercise, but the many different ways that other states, and even counties within those states, organize and pay for the representation of indigent persons makes the comparison quite difficult.

The need for a 3-year period to implement all of the hourly rate increases and establish the parameters for such a benchmark arises from the inherent difficulty in determining which jurisdictions are most comparable to Massachusetts' CPCS system. As noted above, the Commission knows of no other jurisdiction that relies so heavily on private

⁶³ This rate will also include sexually dangerous person cases.

⁶⁴ This rate will also include Care & Protection cases, sex offender registry cases, and mental health cases.

attorneys to provide indigent representation. Accordingly, there is a dearth of obvious comparisons. For example, both Connecticut and New Jersey rely almost exclusively on statewide public defender services, with small pools of private attorneys contracted to handle conflict cases.

Unfortunately, the deadline imposed by our enabling statute does not afford the Commission sufficient time to complete the far-reaching research, comparisons, and analysis that must be done to establish the framework for effectuating the 75th percentile benchmark. The Commission, therefore, recommends that CPCS consult with The Spangenberg Group to establish a list of sufficiently comparable jurisdictions and factors that may be used to comprise the database against which the benchmark will be measured. The current statutory directive⁶⁵ that CPCS establish the rates of compensation every two years could be amended to include the requirement that the rates be maintained at the 75th percentile of the comparable jurisdictions.

(D) Amend indigency verification statutes and require additional reporting from the Commissioner of Probation assessing the effectiveness of such procedures

With the implementation of the initiatives crafted by the Legislature in 2004 to verify more effectively that only indigent persons are appointed counsel, probation officers appear to be doing a more effective job of screening out ineligible defendants. Again, the results thus far are preliminary and the proof has been anecdotal. More time, therefore, is needed before the effectiveness of these measures can be fully evaluated. That does not mean, however, that some technical adjustments to the indigency verification statute are not warranted at this time.

The Honorable Martha P. Grace, Chief Justice of the Juvenile Court, thoughtfully provided the Commission with her analysis of G.L. c. 211D, §2½⁶⁶, as well as her ideas as to how to improve problems that she has observed in applying these new procedures to certain Juvenile Court cases. These problems stem from the statute's inconsistency of referring both to "a person claiming indigency" and to "criminal defendant" or "defendant". Any references to "criminal defendant" or "defendant" are inapplicable to a great many Juvenile Court cases that technically are civil cases, including, but not limited to delinquency proceedings, care and protection cases, CHINS cases, and termination of parental rights cases.

It is Chief Justice Grace's contention that the lack of consistency in referring both to "persons" and "defendants" gives rise to the argument that certain provisions of the statute (e.g. the legal counsel fee) are not applicable to civil cases in the Juvenile Court. The Commission agrees with Chief Justice Grace and strongly recommends that §2½ be amended to replace all references to "criminal defendant" or "defendant" with either "person claiming indigency" or "person seeking appointment of counsel". All references to "criminal matter" should be replaced with "court proceeding" for the same reasons. These

⁶⁵ See G.L. c. 211D, §11

⁶⁶ See St. 2004, c.149 §195.

amendments would ensure consistent application of indigency standards and verification procedures and clarify that the legal counsel fee applies to the civil cases being handled in Juvenile Court. This will serve the dual function of increasing revenues by more properly imposing counsel fees and yielding potential cost savings by screening out non-indigent litigants.

These practical clarifications to the indigency verification procedures should be implemented immediately. Any further tightening of the process to ensure that only indigent persons are appointed counsel, however, must await a thorough and objective assessment of the changes implemented by the Legislature during the FY05 budget process. The Commission strongly recommends that once this data is finally compiled and analyzed the OCP report its findings to the Legislature so that any additional improvements to the process can be assessed and implemented as soon as possible.

V. BIBLIOGRAPHY

The following is a list of written materials submitted to the Commission for careful review and consideration. We are thankful for the many people who took the time and effort to respond to our request for information and provide us with information that proved essential to carrying out our charge.

1. Attorney General Thomas F. Reilly, letter dated December 1, 2004.
2. The Honorable Robert A. Mulligan, Chief Justice for Administration and Management, letter dated November 30, 2004.
3. The Honorable Barbara J. Rouse, Chief Justice of the Superior Court Department, letter dated November 30, 2004.
4. The Honorable Lynda M. Connolly, Chief Justice of the District Court Department, letter dated November 30, 2004.
5. The Honorable Charles R. Johnson, Chief Justice of the Boston Municipal Court Department, letter dated November 22, 2004.
6. The Honorable Martha P. Grace, Chief Justice of the Juvenile Court Department, letter dated November 24, 2004, and letter dated January 20, 2005.
7. District Attorney William R. Keating, Norfolk County, letter dated February 9, 2005
8. District Attorney Martha Coakley, Middlesex County, letter dated December 16, 2004
9. District Attorney Daniel F. Conley, Suffolk County, letter received December 1, 2004
10. District Attorney Jonathan W. Blodgett, Essex County, letter dated November 19, 2004
11. District Attorney Michael D. O'Keefe, Cape & Islands District, letter dated November 16, 2004
12. District Attorney Paul F. Walsh, Bristol County, letter dated November 23, 2004
13. William J. Leahy, Chief Counsel of CPCS, outline of oral testimony provided to the Commission, and *2005 Report to the Legislature on the Committee for Public Counsel Services*, dated February 16, 2005.
14. Massachusetts Bar Association, written testimony of President Kathleen M. O'Donnell, dated November 29, 2004, and a copy of the *Brief Amici Curiae*, submitted by the Massachusetts Bar Association and the Hampden County Bar Association in the Lavallee case.
15. Massachusetts Bar Association, *Striking a Balance: Adequate Compensation-Effective Representation, Fair Compensation for Criminal Justice Attorneys*, November 1994.
16. Boston Bar Association, letter of President M. Ellen Carpenter, dated December 1, 2004, and a copy of the *Brief of Amicus Curiae*, with addendum, submitted by the Boston Bar Association in the Lavallee case.
17. Massachusetts Association of Criminal Defense Attorneys, letter dated March 16, 2005.
18. Massachusetts Association of Court Appointed Attorneys, submission dated December 1, 2004.
19. Suffolk Lawyers for Justice, submission dated December 10, 2004.
20. Bar Advocates of Worcester County, Inc., submission dated December 1, 2004.
21. Hampden County Bar Association, letter dated December 2, 2004.
22. Franklin County Bar Association and Franklin County Bar Advocates, letter dated December 1, 2004.
23. American Bar Association, *Ten Principles of a Public Defense Delivery System*, February 2002.
24. Juvenile Bar Association, letter dated November 30, 2004.
25. Essex County Bar Association, letter dated November 23, 2004.
26. Worcester County Bar Association, letter dated December 8, 2004.

27. Hampden County Bar Advocates, Inc., letter dated November 24, 2004.
28. Bar Association of Norfolk County, letter dated November 24, 2004 with attached memorandum.
29. Bristol County Bar Advocates, letter dated January 8, 2005, and statistical analysis of 2004 Bristol County Superior Court trial list.
30. Hastings Law Journal, Norman Lefstein, *In Search of Gideon's Promise: Lessons From England and the Need for Federal Help*, March 2004.
31. Bristol County Bar Advocates, letter dated November 20, 2004 and copy of *Compensation Forum 2004*, dated November 16, 2004.
32. Holland & Knight, LLP, Petition for Relief and Memorandum in Support of Petitioners' Motion to Appoint Special Master, *Arianna S. et al. v. Commonwealth of Massachusetts*, Supreme Judicial Court, SJ 2004-2082.
33. Affidavit of Robert L. Spangenberg, dated June 25, 2004, *Arianna S. et al. v. Commonwealth of Massachusetts*, Supreme Judicial Court, SJ 2004-2082.
34. The Spangenberg Group, *Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview*, August 2003, prepared for the American Bar Association.
35. The Spangenberg Group, *State and County Expenditures for Indigent Defense Services in Fiscal Year 2002*, September 2003, prepared for the American Bar Association.
36. Rosemary J. Cooper, Esq., letter with attached materials dated November 24, 2004, and letter with attached materials dated January 10, 2005.

ACKNOWLEDGMENTS

The Massachusetts Bar Association

The Boston Bar Association

The Western New England College School of Law

SPECIAL ACKNOWLEDGMENTS

The Commission offers its sincere thanks to all of those individuals and organizations which submitted both oral and written testimony. Your efforts on this important issue are greatly appreciated.

The Commission also offers its thanks and appreciation to the following members of the Commission staff:

Robert J. McCarron, Esq.
Counsel to the House Ways and Means Committee

Sean P. Moynihan, Esq.
Counsel to the House Majority Leader

Sean T. Reynolds
Deputy Budget Director of the House Ways and Means Committee

APPENDIX

A

**AN ACT RELATIVE TO THE RECOMMENDATIONS OF THE
PROVISION OF COUNSEL TO INDIGENT PERSONS COMMISSION.**

SECTION 1. Section 11 of chapter 211D of the general laws, as appearing in the 2002 Official Edition, is hereby amended in line 4 by inserting after the first sentence the following:-

For homicide cases the rate of compensation shall be \$100 per hour in fiscal year 2006, \$105 per hour in fiscal year 2007, and \$110 per hour in fiscal year 2008; for superior court non-homicide, including sexually dangerous person cases, the rate of compensation shall be \$60 per hour in fiscal year 2006, \$65 per hour in fiscal year 2007, and \$70 per hour in fiscal year 2008; for district court cases and children in need of services cases the rate of compensation shall be \$50 per hour in fiscal year 2006, \$53 per hour in fiscal year 2007, and \$55 per hour in fiscal year 2008; for children and family law cases, care and protection cases, sex offender registry cases and mental health cases the rate of compensation shall be \$50 per hour in fiscal year 2006, \$55 per hour in fiscal year 2007 and \$60 per hour in fiscal year 2008.

SECTION 2. Section 11 of said chapter 211D is hereby further amended in line 10 by striking the word “two” and inserting in place thereof the word “three”, and by inserting in line 10 after the word “years” the following:-

, and shall include, but not be limited to, the collection, compilation and analysis of the data necessary to establish the hourly rates of compensation paid by all other jurisdictions in the United States to private attorneys who contract to provide legal representation to indigent persons. Such data shall be used to calculate the average hourly rate of compensation paid to said private attorneys by jurisdictions determined by the committee to be comparable to the Commonwealth of Massachusetts. The hourly rate of rate of compensation paid to private counsel under this section as of July 1, 2008 shall be no lower than the 75th percentile of the average hourly rate of compensation paid by said comparable jurisdictions.

SECTION 3. Section 23 of chapter 90 of the general laws, as appearing in the 2002 Official Edition, is hereby amended after the word “dollars” in line 16 of the first paragraph by striking out the following:-

or by imprisonment for not more than ten days, or both;

SECTION 4. Said section 23 of chapter 90 is hereby further amended after the word “dollars” in line 25 of said first paragraph by striking out the following:-

or by imprisonment for not more than ten days, or both

SECTION 5. Section 10 of chapter 90 of the general laws, as appearing in the 2002 Official Edition, is hereby amended after the word “shall” in line 39 of the second paragraph by inserting the following:-

Be punished for a first offense by a fine of not less than five-hundred dollars and not more than one-thousand dollars; and for any subsequent offense shall

SECTION 6. Section 34J of chapter 90 of the general laws, as appearing in the 2002 Official Edition, is hereby amended after the word “dollars” in line 7 of the first paragraph by striking out the following:-

or by imprisonment for not more than one year in a house of correction, or both such fine and imprisonment;

SECTION 7. Section 30A of chapter 266 of the general laws, as appearing in the 2002 Official Edition, is hereby amended after the word “dollars” in line 37 of paragraph seven by striking out the following:-

or imprisonment in a jail for not more than two years, or by both such fine and imprisonment;

SECTION 8. Said section 30A of chapter 266 is hereby further amended after the word “dollars” in line 41 of said paragraph seven by striking out the following:-

or by imprisonment in the house of correction for not more than two and one-half years, or by both such fine and imprisonment

SECTION 9. Section 53 of chapter 272 of the general laws is hereby amended after the word “punished” in line 7 by striking out the following:-

by imprisonment in a jail or house of correction for not more than six months, or

SECTION 10.Said section 53 of chapter 272 is hereby further amended after the word “dollars” in line 8 by striking out the following:-

,or by both such fine and imprisonment

SECTION 11. Said section 53 of chapter 272 is hereby further amended after the word “than” in line 8 by striking out the words “two-hundred” and inserting in place thereof the following:-

one thousand

SECTION 12. Section 120 of chapter 266 of the general laws, as appearing in the 2002 Official Edition, is hereby amended after the word “dollars” in line 9 of the first paragraph by striking out the following:-

or by imprisonment for not more than thirty days or both such fine and imprisonment

SECTION 13. Said section 120 of chapter 266 is hereby further amended after the word “than” in line 8 of said paragraph by striking the words “one hundred” and inserting in place thereof the following:-

one thousand

SECTION 14. Section 37 of chapter 266 is hereby amended after the word “larceny” in line 6 by inserting the following:-

and if said check draft or order is in an amount less than two hundred and fifty dollars shall be punished for a first offense by a fine of not less than five hundred nor more than one thousand dollars,

SECTION 15. Said section 37 of chapter 26 is hereby further amending after the word “larceny” in line 7 by inserting the following:-

, and if the value of said money or property or services is less than two hundred and fifty dollars shall be punished for a first offense by a fine of not less than one thousand dollars.

SECTION 16. Nothing in this act shall be construed to diminish or eliminate the power of arrest of a law enforcement officer pursuant to the provisions of chapters 274 and 276 of the general laws or pursuant to the provisions of any other general law establishing the power of arrest for any law enforcement officer that were in effect prior to the passage of this act.

SECTION 17. Notwithstanding any special or general law to the contrary, there is hereby established two (2) pilot programs of the public defender division of the Committee for Public Counsel Services (CPCS). Said pilot programs shall be established in Hampden County and in Bristol County. CPCS shall hire 15 attorneys, 1 investigator and 3 support staff for each such pilot program and shall provide said attorneys and staff with sufficient office space and office resources. The chief counsel of CPCS shall assign said attorneys throughout the various district court division of the county in a manner that in his determination will result in the most effective and efficient representation of persons

claiming indigency within said county. Said assignment procedure(s) may be amended by the chief counsel of CPCS as he sees fit. The chief counsel of CPCS shall provide quarterly reports to the House and Senate Committees on Ways and Means for a period of 3 years which shall include, but not be limited to, the following: the actual costs incurred in operating the pilot programs, including a detailed itemization of said costs; the number of cases handled by each attorney; the number of cases disposed of during each reporting period; the average time to dispose of said cases; a schedule detailing the court assignments of each attorney; and the rationale for said attorney assignments.

SECTION 18. Notwithstanding any general or special law to the contrary, there is hereby established a permanent commission to study and analyze the imposition of civil penalties on certain offenses within the Commonwealth of Massachusetts. The duties and responsibilities of said commission shall include, but not be limited to, the following: (i) identify all violations of the general laws that are currently classified as a misdemeanor; (ii) determine the number of arrests made per year pursuant to such statutory violations; (iii) determine the number of such arrests which result in charges being filed by a district attorney's office and the percentage of such charges seeking a punishment of incarceration; (iv.) determine the number of cases disposed of per year pursuant to such statutory violations; (v) determine the number of convictions per year pursuant to such statutory violations; (vi) determine the number of persons incarcerated in a house of corrections pursuant to such statutory violations; (vii) the number of occurrences per year in which a district attorney's office exercised the discretion authorized G.L. 277 § 70C.

Based upon an analysis of such data, the commission is further charged with classifying all misdemeanor offenses as either "Class A" misdemeanors or "Class B" misdemeanors. "Class A" misdemeanors would be criminal offenses deemed serious enough to warrant the possibility of incarceration in a house of correction. "Class B" misdemeanors would be criminal offenses deemed non-serious and would be punishable by civil fines with no possibility of incarceration. Any person charged with the violation of a "Class B" misdemeanor would not be eligible for appointment of counsel.

Said commission shall be comprised of the following eleven members: the governor of the commonwealth or his designee; the speaker of the house of representatives or his designee; the president of the senate or his designee; the attorney general of the commonwealth or his designee; the chief justice of administration and management of the trial court or his designee; the chief counsel of the committee for public counsel services or his designee; a designee of the private counsel division of said committee; the president of the Massachusetts association of district attorneys or his designee; the president of the Massachusetts bar association or his designee; the president of the Boston Bar Association or his designee; and the commissioner of probation or his designee.

Said commission shall file an annual report of its activities and any legislative recommendations to the house and senate committees on ways and means no later than December 31st of each year. Said report shall include, but not be limited to, the number of charges in each class of misdemeanors that were filed during the preceding calendar year and the number of such misdemeanors whereby private counsel was appointed.