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**THE COST OF EXPANDING THE NUMBER OF CPCS STAFF ATTORNEYS
TO REPRESENT FIFTY PERCENT OF ALL INDIGENT CLIENTS WHO
ARE ENTITLED TO THE ASSISTANCE OF PUBLICLY FUNDED COUNSEL**

This is the third of three reports which the Committee for Public Counsel Services (CPCS) is required to submit pursuant to line item 0321-1500 in the Fiscal Year 2010 General Appropriation Act (Chapter 27 of the Acts of 2009). First, in Part I, we describe CPCS's "mixed system" for providing effective indigent representation, which must be kept in mind whenever the question of allocating cases between public staff and assigned private counsel is being considered. Next, in Part II, we describe our experience with the one existing CPCS practice area, Superior Court serious felony representation, in which a roughly equal allocation of cases between staff attorneys and private counsel has long existed, and in which relative costs and benefits can be compared. In Part III of the report, we outline the scope and cost of building a staff component of sufficient magnitude to handle "[fifty] percent of all indigent cases assigned to the committee." Finally, we conclude in Part IV with our observations and recommendations for legislative action.

I. The Fundamental Principle: The Best Indigent Representation Systems Employ a Mix of Public and Private Counsel

When the Legislature passed Chapter 211D of the Massachusetts General Laws in 1983, it properly set out a significant role for both salaried public staff counsel and assigned private counsel in the new agency. This inclusion is consistent with the longstanding standard set by the American Bar Association, which calls for "the active and substantial participation of the private bar," in combination with the utilization of salaried staff counsel, in any statewide assigned counsel system. See *ABA Standards, Providing Defense Services, Standard 5-1.2*. The *ABA Ten Principles of a Public Defense Delivery System*, which have been adopted by national indigent defense organizations such as the National Legal Aid and Defender Association

(NLADA) and the American Council of Chief Defenders (ACCD), confirm that providers of indigent representation should use a mixed assignment system. The second of the Ten Principles states that: "Where the case load is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar." See *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (The Constitution Project, 2009) at 33.

Our experience of over a quarter century proves that it is true in practice and not just in theory that an assigned counsel system provides better representation to its indigent clients by including both qualified public staff attorneys and qualified private lawyers in the delivery of that representation. The presence of staff counsel brings a necessary and influential CPCS institutional presence to the ongoing collaboration and negotiation with the judiciary, prosecutors, and state agencies such as DCF, DMH, DYS and DOC. Without such an institutional presence, indigent clients would be disadvantaged by the lack of a similarly strong and focused state agency voice to protect their interests in such vital matters as the application of rules of court, compliance with discovery requirements, and the scheduling of trials in all cases; adherence to appropriate bail requirements in criminal and delinquency cases; and the provision of appropriate services to children and families in child welfare cases. Staff attorneys also have access to close daily supervision and collaboration with colleagues, both in their local offices and via specialized agency support. Finally, local CPCS staff offices offer resources and support for members of the private bar.

Highly qualified private lawyers strengthen the CPCS program in different ways. Attorneys who have gained CPCS certification in their areas of specialization have also often earned a reputation for excellence among their peers in the local bar. Their participation in the representation of indigent clients helps ensure support in the wider legal community for effective representation of the poor. They may bring more years of experience in the courtroom, and may have had exposure to a broader range of cases. Under the CPCS system, they too enjoy local support and oversight by mentors and supervising attorneys. Most importantly, the availability of both staff attorneys and private counsel guards against excessive workloads on the part of either; and excessive workloads are demonstrably the most significant cause of ineffective representation of indigent clients.

The extensive use and careful oversight of qualified private counsel is a hallmark of the CPCS assignment system, which has received widespread recognition for its success in affording fully competent representation to indigent clients in every case, whether it be civil or criminal, whether its location is in Boston or in Berkshire, and whether the client's lawyer is a public defender or a certified private counsel. See Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 *Hastings Law Journal* 835, 908-910 (2004); *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (ABA Standing Committee on Legal Aid and Indigent Defendants) (2004) at 36 ("The statewide system in Massachusetts provides effective training and oversight of private assigned counsel"); *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, (The Constitution

Project) (2009) at 194 n.52 (identifying CPCS as one of the “few notable exceptions” in providing effective oversight of private counsel).

Both public and private lawyers are essential components of a vibrant system of representing indigent clients. This is the reason why CPCS has concentrated its programmatic advocacy for many years on addressing the absence or the underrepresentation of staff counsel in particular practice areas and in particular geographic regions of the Commonwealth; and not on proposing drastic changes in the mixed assignment model for providing effective representation. We will return to this important point in our Conclusions and Recommendations in Part IV of this report.

II. Public Defenders and Certified Private Counsel in Superior Court

The one practice area within CPCS in which roughly equal numbers of clients are represented by public defenders and certified private counsel is in the defense of Superior Court felony prosecutions. These are serious cases with State Prison consequences, often to the extent of a mandatory term of incarceration, or a maximum sentence of life imprisonment. The public defenders and private counsel who represent CPCS clients in these complex and consequential cases are thoroughly qualified, highly motivated, and seriously underpaid.

Historically, dating back to the creation of the Massachusetts Defenders Committee in 1960, Superior Court felony defense has been the one indigent client practice area in which there has always been a very significant public defender presence. In fiscal year 2009, for example, CPCS staff public defenders provided representation in 56% of the 12,487 case assignments, with the remaining 44% being assigned to CPCS-certified private counsel. It seems reasonable, therefore, to look to the comparative cost of providing representation under this existing, close to equal, division of responsibility.

During FY09, the average cost to CPCS of providing public staff counsel in a Superior Court felony case was \$1,293. This compares quite favorably to the average CPCS expenditure of \$1,630 per case for assigned private counsel. Indeed, this direct cost to the CPCS appropriation is \$337 or 21% cheaper. However, the cost to CPCS is not the same as the cost to the Commonwealth. When the non-CPCS budgetary cost to the Commonwealth for pension, health and other off-budget costs is factored in, the staff counsel cost advantage is either neutralized, or the cost advantage shifts toward assigned private counsel. If one uses the Comptroller’s FY10 Fringe Benefit rate of 26.42%, the total cost to the Commonwealth for each staff counsel representation case rises from \$1,293 to \$1,635, which is almost identical to the average cost for private counsel. If one were to use the 33.12% calculation proposed by the Comptroller for FY11, the staff cost would further increase to \$1,721, or five and a half percent more expensive than private counsel.

There are three significant points to be made concerning this Superior Court felony case cost comparison. First, in order to be cost-competitive with private counsel, public counsel staff must be responsible for some significant share of the case assignments. At present,

Superior Court felony defense is the only practice area in which CPCS staff attorneys handle a sufficient share of the cases to permit meaningful cost per case comparisons.¹ Second, the reality is that it takes a full complement of practicing staff attorneys to make the most efficient use of the Commonwealth's investment in office space, supervisory, and other essential resources. See n.1. Third, any comparison of "cost" must answer the question whether staff counsel costs are to be measured solely by the expenditure from the CPCS annual appropriation ("CPCS cost"), or whether they are to include costs which are not reflected in the CPCS appropriation, although they are borne by the Commonwealth ("Commonwealth cost"). From the overriding perspective of the Commonwealth's fiscal condition, it seems clear that the total cost to the Commonwealth is the superior and more accurate measurement.

III. Projecting the Cost of a Possible Expansion of the Public Attorney Staff to Handle Fifty Per Cent of All Indigent Cases Assigned to the Committee, including (a) the number of additional attorneys needed; (b) the associated costs; (c) the projected annualized cost; and (d) the estimated savings the Commonwealth would realize

We have carefully calculated the costs and benefits of envisioning and implementing the possible expansion which this question presents. It became immediately apparent that to build such a dramatic expansion would be the work, not of a single fiscal year, but of at least a three to five year period of transition, which would include significant planning in the areas of office acquisition, development of supervisory resources, expansion of technological and human services capacity, and assurance of continued quality control.²

- (a) The Number of Additional Attorneys: We calculate that seven hundred and forty-six (746) additional attorneys would be needed in order for CPCS staff lawyers to handle 50 percent of all cases, assuming a total agency case responsibility equal to FY09. Of this number, 592 attorneys would dedicate their time entirely to client case

¹ As noted in the *Report of the Committee for Public Counsel Services Regarding the Progress of the Public Defender Division*, which we filed on March 9, 2010, the District Court public defender offices established pursuant to Chapter 54 of the Acts of 2005 have, at the end of their first two full years of operation, achieved a significant degree of progress and are contributing successfully as an integral part of the assigned counsel system in the District and Municipal Courts. While their caseloads have grown steadily, they are not as cost-effective as the assignment of private counsel. CPCS has noted that their cost-effectiveness has been hampered by the existence of twenty vacant positions for which the infrastructure--such as office space, a supervising attorney, furniture and a telephone system--is already in place. To fill these vacancies is therefore a high CPCS priority in the FY11 budget now under consideration. Indeed, we have calculated that its fiscal benefit exceeds its cost by more than one million dollars. See CPCS Budget Request dated March 1, 2010.

² With respect to care and protection cases, it is doubtful whether ethical rules governing attorneys would permit CPCS staff attorneys to handle more than 25-30% of all assignments. Nearly all care and protection cases require the appointment of an attorney for a mother, a separate attorney for a father, and one or more attorneys for the children. As in criminal cases involving co-defendants, these arrangements are necessary because of the potential--or the actuality--of the parties having conflicting positions in the litigation. Generally, under the Massachusetts Rules of Professional Conduct, these attorneys cannot be from the same firm. Thus, in a case in which more than one party is entitled to a CPCS attorney (such as the typical multi-party care and protection case), only one of those parties would be assigned a staff attorney.

representation, 115 would devote half time to case representation and half time to supervision of less experienced attorneys, 36 would be attorneys in charge of offices who would likewise devote half time to client representation and half time to their managerial and supervisory duties, and 3 would supervise geographical regions of the state for quality and efficiency and report to the appropriate Deputy Chief Counsel.

- (b) The Associated Costs: To build and support a system which employs this number of attorneys would require fourteen additional District Court offices, fourteen additional Children and Family Law offices, and five additional Juvenile Delinquency offices. These offices would be co-located wherever possible, in order to economize on lease and office management costs. In addition, we would create two staff attorney offices for Murder representation, and an additional Appeals Unit office. Finally, as aforesaid, we would supplement our fiscal, administrative and technological staff in order to avoid degrading our current level of efficiency. The annual cost of staff salaries and DD costs is estimated at \$49,845,745, which is 87.1% of the total cost. Office rentals would cost \$4,695,855 (8.2%). All other support including mileage reimbursement for necessary travel would cost \$2,714,657 (4.7%).
- (c) The Projected Annualized Cost: We have calculated the total annual cost of operating the expanded system at \$57,256,257, in addition to our spending on current staffing levels (\$29,395,024 in FY10). In the first year of operation, we would expend an additional \$3,893,490 in one-time startup costs for furniture, cubicles, computers and telephone installation. Thus, in the first year of full operation, the additional cost of the expanded program would be \$61,149,747. Please see the attachment labeled **CPCS TOTAL** for further detail as to the calculation of these figures.
- (d) Estimated Savings the Commonwealth Would Realize: The Commonwealth would not realize any savings by the degree of staff expansion described in this Report. It is true that, standing alone, the CPCS appropriation would be reduced by an estimated \$6.067 million in the first year of operation, and by an estimated \$9.96 million annually thereafter. This is because the agency staffing costs described in the preceding paragraph would be exceeded by the annual \$64,811,561 cost of compensating counsel at the existing hourly rates. But the cost to the Commonwealth must fairly be read to include the additional costs (primarily pension benefits and health care contributions) which the Commonwealth bears for every state employee, but which do not appear as part of the state agency appropriation. How much are those costs, as a percentage of the additional staff salary total? We know that for the current fiscal year, FY10, it is 26.42%; and we know that for FY11, the Comptroller has recommended a rate of 33.12%. See Comptroller Memo FY#2011-01 (January 26, 2010). Adding these fringe benefit costs to the CPCS direct budgetary costs has the effect of increasing total Commonwealth costs to a range of between \$70,178,692 (using the FY10 fringe rate) to \$73,765,178 (using the FY11

fringe rate) for the recurring annual cost to the Commonwealth of operating the expanded program. This is from \$5,367,131 to \$8,953,616 per year more expensive than maintaining the current allocation of cases between public staff and private counsel. In the first year of operation, the increased cost to the Commonwealth is naturally higher, in a range from \$9,260,621 (FY10 fringe) to \$12,847,106 (FY11 fringe).

IV. Conclusions and Recommendations

(a) Cost

This report demonstrates that the cost differences between the current, predominantly assigned private counsel system (except with respect to Superior Court felony defense) and an equal allocation of assignments between private counsel and public staff attorneys are not great, in comparison to the overall cost of providing competent counsel to every client. A shift to 50% public staff representation saves the agency money, but adds expense for the Commonwealth. Either way, the difference constitutes a modest component of the total cost of providing counsel.

Where staff offices already exist, however; where leases have already been signed and where supervision and support is already in place and being paid for, it is undoubtedly cost-effective to provide a staff counsel appropriation sufficient to fill each of those offices with a staff attorney. This is exactly what we advocate in our March 1, 2010 **CPCS FY 2011 Budget Request--In Response to House 2** (please see attached copy). Specifically, we advocate the filling of 20 District Court and 7 Superior Court staff attorney positions which are currently vacant, whose \$958,000 cost is far outweighed by anticipated savings of \$2,002,000.

Similarly, the addition of one auditor to our Audit and Oversight Unit, as recommended by the State Auditor, will more than pay for itself, as it will enable us to track and correct overbilling by vendors who provide services pursuant to the Indigent Court Cost Act.

(b) Quality, Balance and Structure: the Need for Juvenile Delinquency Staff Offices

While the cost ramifications of effecting a dramatic alteration of the counsel assignment structure may be comparatively modest, this Report also spotlights the importance of achieving a proper mix of public and private counsel in every CPCS practice area and in every county. Where that mix currently exists, Massachusetts enjoys the benefits of a counsel assignment system which is superior to that of any other American state. Where it does not exist--as it does not exist for any child charged with juvenile delinquency or a youthful offender cases outside of except in Roxbury or Worcester--a critical component of a fully effective system of representation is absent. CPCS has attempted to mitigate this absence by creating a Youth Advocacy Department (YAD) which is working to improve attorney performance levels statewide. Specifically, YAD is providing much-needed training and support to the over five hundred private attorneys who provide representation in juvenile delinquency and Youthful

Offender cases throughout the state. The efforts of the two staff members who develop and deliver juvenile-specific training through YAD's Juvenile Defense Network and by facilitating our Juvenile Defense Advisory Council are augmented by the staff of our YAD trial offices in Worcester and Roxbury. In addition to handling their caseloads, the members of these offices assist in training, respond to requests for advice, and share their knowledge regarding available resources which promote the healthy development of young and vulnerable clients.

In addition to supporting the competent practice of law by juvenile defenders, the Youth Advocacy Department is teaching a model of representation consistent with the mandate of the Massachusetts Juvenile Court that life success is a critical component of legal success. But for children to receive the same quality of counsel and the same institutional support as adult CPCS clients do, YAD needs to have staff offices in additional critical locations.

Therefore, in our FY11 budget request, CPCS has proposed the creation of three additional juvenile delinquency staff offices in Lawrence/Lowell, Springfield/Holyoke and Fall River/New Bedford. These small, four-attorney offices will allow YAD to enhance the quality of representation for children in these areas by providing the optimal mix of a small public staff component to supplement and support the majority private bar delivery system. Each of these communities has a high volume of juvenile cases and a large population of struggling teens. In addition to case representation, it is intended that these offices will provide local training and mentoring, and expertise in accessing services from other state agencies and local providers of services for "at risk" young people and their families. Working in cooperation with YAD, these offices would build a solid foundation for the leadership, training and support of the statewide juvenile indigent defense bar. Opening these offices has an almost negligible impact on the annual budget (see March 1 budget request, attached), but will have a dramatic and positive impact on the quality of advocacy provided to poor children throughout the Commonwealth. As importantly, their creation will help make the Massachusetts juvenile justice system become ever fairer and more effective.

(c) Toward the Development of a Comprehensive Mixed Assignment System

One cannot undertake the exercise of contemplating and assessing the fiscal impact of radical change in the indigent counsel assignment system without reflecting anew upon the fundamental question of what kind of system would serve clients and the Commonwealth best. As indicated earlier in this Report, our research and our experience have demonstrated the superiority of a mixed system which makes effective use of both private attorney and public counsel resources. We are fortunate in Massachusetts to have such a system partially in place today. What is needed in future years, then, is not radical surgery, but the continuous structural improvement of a legal services delivery system which works well but, like any other, can be made to work better. What is needed is to fill in, over time, the gaps which exist in our mixed system, by adding staff attorneys in those practice areas or locations where none are now present.

In our FY 11 budget request, we proposed filling twenty staff attorney vacancies in our existing District and Municipal Court offices, filling seven staff attorney vacancies in our Superior Court offices, and hiring one additional staff auditor. We also proposed the creation of three new juvenile delinquency offices which would employ a total of twelve attorneys along with support staff. These proposals would fill important gaps in our mixed assignment system, and they should be implemented in this budget cycle.

Going forward, we recommend that the General Court fill the remaining gaps in our assignment system in future years by adding a modest staff component in currently unbalanced CPCS practice areas such as mental health commitment cases, murder trials and appeals, care and protection appeals, and Child in Need of Services cases. In addition, YAD and CAFL staffing must be added in the locations which currently lack any staff presence, so that each county enjoys the benefit of a mixed assignment system in juvenile delinquency and Children and Family Law cases, as they currently do with respect to criminal matters.

We appreciate the opportunity this study has afforded us to analyze the cost and the efficacy of our current counsel assignment system, and to reflect upon how it might be further improved. We stand ready to work with the judicial, legislative and executive branches in pursuit of that goal.

Respectfully submitted:

A handwritten signature in cursive script that reads "William J. Leahy". The signature is written in black ink and is positioned to the left of the typed name and title.

William J. Leahy
Chief Counsel

March 16, 2010

CPCS TOTAL

Attys & Support	Tot FTE	Tot Stff	Salaries	FAE
AIC	36.00	36	3,111,000.00	18.00
Supv Atty	115.00	115	8,543,770.00	57.50
Atty	592.00	592	27,236,807.08	592.00
SW	72.00	72	2,485,285.92	
Investig	88.00	88	2,525,201.48	
AA	63.00	63	2,205,000.00	
Sec	55.00	55	1,402,500.00	
Total Attys & Support	1,021.00	1,021	47,509,564.48	667.50
Admin				
Regional Supervisors	3.00	3	300,000.00	
Regional Mgr SW	2.00	2	140,000.00	
Regional Mgr Investig	2.00	2	120,000.00	
CIO	1.00	1	95,000.00	
HR Generalist	1.00	1	62,000.00	
HR Spec	1.00	1	52,000.00	
HR Spec	3.00	3	120,000.00	
Facilities Mgr	1.00	1	50,000.00	
IT Tech Supp	5.00	5	195,000.00	
IT Programmer	2.00	2	100,000.00	
Public Def AA	2.00	2	100,000.00	
Acctg Clks	2.00	2	68,000.00	
Total Admin	25.00	25	1,402,000.00	
Total Salaries			48,911,564.48	
DD Costs			934,210.88	
Salaries + DD Costs			49,845,775.36	
Travel + Supplies			1,307,800.00	
Space			4,695,855.44	
Computers			420,000.00	
Copiers			303,000.00	
Lexis			161,974.00	
Telephone			298,992.00	
Postage			34,560.00	
Furniture & Cubes				3,038,645.00
Phone system				809,845.00
Server				45,000.00
GRAND TOTAL			57,256,256.76	3,893,490.00
YEAR 1 TOTAL				61,149,746.76
Private Atty Cost			64,811,561.18	64,811,561.18
Savings in 1510			7,555,304.42	3,661,814.42
Savings in 1520 (Private Investigators)			2,405,330.88	2,405,330.88
Total CPCS Budget Savings			9,960,635.30	6,067,145.30
State Budget Cost (Fringe Benefits)			12,922,435.34	12,922,435.34
TOTAL STATE BUDGET COST			70,178,692.10	74,072,182.10
Net Cost to State Budget FY10 Fringe Rate			(5,367,130.92)	(9,260,620.92)
State Budget Cost (Fringe Benefits)			16,508,920.80	16,508,920.80
TOTAL STATE BUDGET COST			73,765,177.56	77,658,667.56
Net Cost to State Budget FY11 Fringe Rate			(8,953,616.38)	(12,847,106.38)

COMMITTEE FOR PUBLIC COUNSEL SERVICES
FY 2011 Budget Request - In Response to House 2

March 1, 2010

Appropriation Line 0321	1500	1518	1510	1520	Total
	Admin & Operations	Indigent Client Fees (Revenue)	Private Counsel Compensation	Indigent Court Costs	
FY 2010 Appropriation	\$ 28,645,024	\$ 750,000	\$ 125,370,957	\$ 13,532,500	\$ 168,298,481
Estimated Deficiency 11/25/09			\$ 34,564,043	\$ 0	\$ 34,564,043
Revised Estimated Deficiency 2/4/10			\$ 32,947,234		\$ 32,947,234
PROJECTED FY 2010 SPENDING (as revised 2/4/10)	\$ 28,645,024	\$ 750,000	\$ 158,318,191	\$ 13,532,500	\$ 201,245,715
MAINTENANCE BUDGET REQUEST (11/25/09)	\$ 28,645,024	\$ 750,000	\$ 166,881,750	\$ 13,938,475	\$ 210,215,249

Additional Budget Proposals	1500	1510	1520	Net Cost
Juvenile Defender Offices (Springfield/Holyoke, New Bedford/Fall River, Lowell/Lawrence) 10 months	\$ 811,194	\$ (802,857)		\$ 8,337 *
Add 1 Auditor to Audit & Oversight Unit @ \$50,000 Annual Salary	\$ 52,000		(100,000)	\$ (48,000)
Fill Attorney Positions to Occupy Current Vacant Office Space (20 District Court & 7 Superior Court Attorneys)	\$ 958,202	\$ (2,002,000)		\$ (1,043,798)
TOTAL BUDGET REQUEST	\$ 30,466,420	\$ 750,000	\$ 13,838,475	\$ 209,131,788
Total Budget Request vs. 11/25/09 Maintenance Request % Increase / or (Decrease)	6.36%	0.00%	(0.72%)	(0.52%)

* The Net Cost in the first year is related to one-time startup costs (e.g. computers, phone systems, etc.) that do not occur in future years. In FY 2012 and future years net savings of \$51,550 annually are expected.