

Presentation of CPCS FY08 Budget Request
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Joint Committee on Ways and Means
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Less than two years ago, the General Court unanimously passed Chapter 54 of the Acts of 2005, An Act Providing Counsel to Indigent Persons. This law finally brought an end to the indigent counsel crisis which had raged throughout Massachusetts for several years. It did so by increasing the hourly rates for private counsel in FY06, as recommended by the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts (Rogers Commission), by adding 130 Committee for Public Counsel Services (CPCS) staff attorney positions to bring balance to the counsel assignment system in the District and Juvenile Courts, by tightening controls over the indigency determination and verification process, and by easing the process by which courts may treat misdemeanor or violation offenses as civil infractions rather than crimes.

The effectiveness of this landmark legislation is severely imperiled by the House 1 proposal. The House 1 appropriation of \$150,457,859 for CPCS falls \$43 million short of the CPCS funding request for FY08 services, it is more than \$17 million short of FY07 spending; and it is \$4.6 million short of the funds available to CPCS for the current fiscal year. House 1 fails in the following specific ways: **First**, it fails to continue current funding in line item 0321-1513 for already hired and trained CPCS Chapter 54 staff attorneys. **Second**, it fails to provide funding to fill the remaining positions required by Chapter 54. **Third**, it fails to fund either the second year (fiscal year 2007) or the third year (fiscal year 2008) of the hourly-rate increases for assigned private counsel which were a centerpiece of the Rogers

Commission report. **Fourth**, it fails to fund the cost of filling the vacancies created by the selection of leadership positions for the new Chapter 54 offices, and the maintenance of the staff salary increases which the Legislature provided last year to finally achieve salary parity for CPCS staff with other state employees.

House 1, then, is a recipe for disaster. It invites a return to the toxic mix of inadequate hourly rates of private counsel compensation and inadequate numbers of CPCS staff attorneys which brought the assigned counsel system into a condition of constitutional violation, as the Supreme Judicial Court unanimously concluded in *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004), the case which led to the formation of the Rogers Commission and ultimately the enactment of Chapter 54. The following funding steps are essential, if the promise of the legislation is to be achieved, and the right to counsel fulfilled:

- 1. Private Counsel Hourly Rates Must be Increased:** The Rogers Commission's recommendation for rate increases in FY06 was funded in the end-of-fiscal year supplemental appropriation; but the increases recommended by the Commission for FY07, although they were included in the Senate budget, did not survive the budget conference process. Now, in FY08, it is essential to keep faith with the Commission by making significant progress toward implementation of the increases which were recommended unanimously by its members.
- 2. Line Item 0321-1513 Must be Fully Funded:** Additional staffing of assignments in District and Juvenile Courts was a critical component of the 2005 legislation. When partial funding for these positions was appropriated in July, 2006, CPCS acted quickly to hire, house and train over 90 qualified attorneys who have been doing an excellent job supplementing the representation by private assigned counsel throughout the Commonwealth. Full funding of **\$10,654,111** in this account will enable CPCS to complete the hiring which the Legislature ordered to bring some balance into the counsel assignment system.
- 3. Pre-Chapter 54 Staff Positions Must be Preserved:** Line items 0321-1500 and 1505 which were funded in FY07 in the combined amount of \$17,916,411 require an increase in FY08 of **\$1,515,209** in order to refill Superior Court-level public defender positions which were made vacant by the selection of experienced attorneys to lead the new offices, and to annualize the salary equity for CPCS staff positions which was just achieved last year.

4. Budget Amendments or Outside Sections: There is a need for several changes to permit more effective provision of counsel services by CPCS in FY08:

- a) Elimination of limit on payments for prior-year services: Line item 0321-1510 limits total payments for prior fiscal year counsel services to \$1 million, and line item 0321-1520 imposes a \$500,000 limit on payments for prior year vendor services under the court cost statute. The principal impact of these limits is the destructive one of prohibiting any payment for months on end for services long since provided. Late payments are already discouraged by a 10% penalty required by statute. These artificial limits should be removed.
- b) Removal of 1,400 hour "new assignment cap": Chapter 54 contains, in the last paragraph of section 2, a provision that any assigned private counsel "is prohibited from accepting any new...assignment to represent indigents after he has billed 1400 billable hours during any fiscal year." While undoubtedly well-intended, this provision has frustrated CPCS efforts to accurately track private counsel compensation, as many private lawyers simply delayed their quarterly billing until late in the final quarter of FY06 to avoid any interruption in their ability to accept new assignments. The provision is also unnecessary, because CPCS already implements an 1,800 hour annual billing limit which may not be exceeded, and with which all assigned counsel are familiar.
- c) Allowance of Juvenile Delinquency as well as District Court representation by staff counsel: Section 5 of Chapter 54, as currently written, authorizes staff attorney representation in any District (or Municipal) Court, but fails to authorize representation in delinquency cases in the Juvenile Court. This is unwise, as it deprives child clients of access to staff counsel representation on the same basis as older persons. Within the limited scope of the staffing initiative, representation by staff counsel should be available to youthful clients charged with delinquency offenses, as it now is to adult clients charged with crimes within the jurisdiction of the District Court. This change is easily accomplished by inserting the words "and juvenile court" immediately following the words "district court" in the second sentence of Section 5.

d) Create a staff unit for Bridgewater State Hospital
Commitments: Virtually all of the nearly 6,000
civil commitment cases for which CPCS annually bears
responsibility are assigned to private counsel.
This is one of the last practice areas in which CPCS
representation is restricted almost 100% to private
counsel, with only a very minimal staff oversight
component. This year, we have proposed creation of
a staff office to provide representation in the most
serious of these commitment cases, those which may
result in confinement in the maximum security
setting of Bridgewater. The \$435,000 first-year
appropriation for this office would be partially
offset by a reduction of \$331,000 in private counsel
costs. In future years, without start-up costs, the
expense would be roughly equal.

Thank you for your consideration and your support of these
requests.