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2010 Report to the Legislature
on the Committee for Public Counsel Services

I. Preliminary Observations:

At the very outset of this Annual Report, the Committee for Public Counsel Services (CPCS) would like to emphasize a principle of central and recurring significance. It is this: **cost-reduction reforms work, but only when they are implemented and when they are enforced.**

Example #1: In April, 2005, the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts (Rogers Commission) recommended that six categories of low-level misdemeanors, for which virtually no one was ever sent to jail, should be converted to civil infraction status. For the next four years nothing happened, despite our repeated requests for implementation of this eminently sensible proposal. Then, in 2009, the Legislature passed and the Governor signed outside sections to the FY10 General Appropriation Act (GAA) which converted several motor vehicle offenses to civil infraction status, and eliminated incarceration as a permissible disposition for the still-criminal offenses of disturbing the peace and disorderly conduct. Immediately upon enactment of the GAA, the Chief Justices of the District Court and the Boston Municipal Court published instructions to the session judges to guide their implementation of the changes. The result over the first six months of implementation has been a 50% reduction in counsel assignments, a savings to the Commonwealth of over \$600,000, and for the parties involved in the motor vehicle infractions, the elimination of a criminal record.

Example #2: In November, 2008, Governor Patrick requested all state agencies to reduce costs wherever possible. CPCS responded to this request quickly and decisively by making eleven specific changes which, in total, saved an estimated \$1.4 million during the balance of FY09, and will save a further \$4.8 million in FY10. As shown in the body of this Report, one of those changes was to insist, in the face of opposition from the bench and the bar, that CPCS would neither authorize nor pay for an attorney to represent a non-indigent person for "arraignment and

bail only.” Final data for FY09 show that this change prevented 3,000 unnecessary and unwarranted counsel assignments to non-indigents from occurring last fiscal year, resulting in a cost reduction of over \$200,000; and the savings should be greater during this first full fiscal year of reform.

In a similar vein, CPCS actions to eliminate payment to private counsel for taking continuing education classes, to reduce the extent of allowable court waiting time and to reduce the per-mile reimbursement for case-related travel were all tough decisions made in response to our fiscal crisis; and these tough decisions have produced significant savings as described above.

Example #3: CPCS and the Division of Capital Asset Management have worked together to renegotiate lease costs in light of the Commonwealth’s fiscal crisis. In addition, CPCS has relocated staff in order to eliminate its office space at 399 Washington Street in Boston. As a result of these actions, CPCS lease costs have been reduced by \$206,401 in FY10, and will be reduced by \$333,767 in FY11.

There is much more that can be done. In Part III of this Report, we propose specific further actions for your consideration; particularly in the areas of civil infractions and indigency verification enforcement. What CPCS, the Legislature and the Courts have already demonstrated, however, is that actions to control costs do work, when they are enacted and when they are enforced.

II. Answers to Questions Posed in CPCS Appropriation Line Item 0321-1500:

(a) The Number Of Clients Assisted By The Committee In The Prior Fiscal Year:

During fiscal year 2009, CPCS provided full legal representation to indigent or partially indigent clients in 264,539 cases. This is a 1.03% increase (2,694 cases) as compared to the previous fiscal year. This is the smallest full case increase in the last four years. Furthermore, our data reveal that new case assignments actually decreased in FY09 relative to the previous year, for the first time since FY04-FY05.

While full case representation increased slightly in FY09, as described above, the total number of cases in which CPCS provided representation during FY09 actually declined from the previous year, to a total of 282,341. This is because CPCS took unilateral action in November, 2008, to prohibit representation for “arraignment and bail only” in adult cases, as described above. As a result of our action, there were 3,000 fewer “bail only” assignments in FY09 than the year before, and a savings of more than \$200,000.

(b) Any Proposed Expansion Of Legal Services Delineated By Type Of Service, Target Population, And Cost:

CPCS legal representation is available only to those persons who are **guaranteed the right to counsel** by constitutional provision, statute, or rule of court **and** who have been determined to be financially eligible for publicly-funded counsel through the application of Supreme Judicial Court Rule 3:10. However, in every legislative session, bills are passed to be

enacted which create a new criminal or delinquency offense which include a right to counsel; or which establish enhanced or even mandatory punishment hierarchies that increase the likelihood of trials and have the inevitable effect of increasing CPCS counsel costs; or which expand the right to counsel to persons in additional categories of cases. For example, the enactment of the Uniform Probate Code, which became effective on July 1, 2009, provided a right to counsel for minors and persons with disabilities in guardianship petitions. This new entitlement to counsel has already increased CPCS assignments and expenditures during the first half of the current fiscal year, and its cost impact is certain to grow significantly in fiscal years to come.

Meanwhile, in every session for the past two decades, the Legislature has failed to address the fiscal and public safety failure of mandatory sentencing in drug cases. This continuing failure to enact mandatory drug sentencing reform results in CPCS having to spend hundreds of thousands of dollars and costs the Commonwealth many millions of dollars every year.

Chapter 54 of the Acts of 2005 codified a series of indigency verification reforms. One set of reforms authorizes the Probation Department to access information from the Department of Revenue and the Registry of Motor Vehicles in order to verify information provided by persons who request assigned counsel at public expense. Such data checks are intended to be used at the initial or early indigency verification stages, and also for the collection of unpaid counsel fees after the conclusion of a case. Another provision requires the periodic review of eligibility at intervals during the pendency of court proceedings. The efficacy or inefficacy of these now almost five-year old reforms has never been assessed. It is high time that they be assessed in 2010.

(c) The Total Number Of Persons Who Received Legal Services By The Committee, By Type Of Case And Geographic Location:

- (1) Of the 264,539 cases in which CPCS provided full representation in FY09, criminal and juvenile delinquency cases numbered 214,294 or 81%. Civil cases totaled 50,245 or 19%.

Compared to the previous year, full case representation increased by 2,694 assignments or 1.03%. Criminal cases increased by 1,820 (0.86%), and civil cases by 874 (1.77%). While it is gratifying to see the number of full assignments level off after several years of aggressive growth, it is important to point out areas such as Probation Revocation proceedings which increased by 2,675 assignments (10.4%) in FY09. Other areas of significant assignment growth include Sex Offender Registry hearings (14%), criminal appeals (9.8%), and Sexually Dangerous Person post-incarceration civil commitment hearings (9.7%).

- (2) The most frequent types of cases in which CPCS provided representation in FY09, and the percentage increase or (decrease) from the previous fiscal year were:

Criminal Cases

District Court	154,642	(0.1%)
Probation Revocation	28,145	+10.4%
Juvenile Delinquency	14,534	(3.4%)
Superior Court	12,487	(1%)
Appeals	3,986	+ 9.8%

Civil Cases

Care & Protection	24,629	+2.4%
Mental Health	16,679	+ 3.2%
CHINS	8,049	(1.2%)
Sex Offender Registry	889	+14%
Appeals	501	(3.7%)
SDP	465	+ 9.7%

It is noteworthy that, for the first time in several years, the number of District Court criminal cases leveled off and even declined very slightly. It is even more encouraging that new District Court criminal case assignments decreased in FY09 as compared to previous years. Legislative action to complete the civil infraction and indigency verification reforms recommended by the Rogers Commission and enacted by Chapter 54 of the Acts of 2005 are needed now, if these hopeful trends are to continue.

(3) The allocation of private counsel cases by county in FY09 was as follows:

Suffolk	50,300	(19.0%)
Middlesex	37,411	(14.1%)
Worcester	30,351	(11.5%)
Essex	30,178	(11.4%)
Bristol	29,720	(11.2%)
Hampden	25,251	(9.5%)
Plymouth	18,556	(7.0%)
Norfolk	17,596	(6.6%)
Barnstable	8,098	(3.1%)
Berkshire	6,140	(2.3%)
Hampshire	5,856	(2.2%)
Franklin	3,363	(1.3%)
County Unknown	1,617	(0.6%)
Dukes/Nantucket	398	(0.1%)

“County Unknown” encompasses sex offender registry cases and a small number of other cases in which the county of assignment cannot be determined from the available information.

(d) The Costs For Services Rendered, By Type Of Case And Geographic Location:

- (1) The average cost of full legal representation in a CPCS case in FY09 was \$673.90. This is an increase of 3.8% (\$24.66) over the cost per case in FY08. The average cost of providing legal representation in a criminal case in FY09 was \$604.51, or 3.6% higher than last year. The average cost of representation in a civil case was \$969.85, or 3.9% higher than last year.

It is important to note that these figures do not account for the counsel fees which CPCS clients paid to the Commonwealth's General Fund during the last fiscal year. When the \$8,952,213 in FY09 counsel fee contributions is taken into account, with the exception of the \$750,000 which is allocated to CPCS in line item 0321-1518, the average cost per case in FY09 is \$642.89.

In addition to attorney compensation, the cost of full legal representation includes the expense of training, certification, assignment, performance oversight, mentoring, payment processing and auditing for private counsel; and office space, equipment, supplies, secretarial and investigator support, training and supervision for CPCS staff attorneys. This cost does not include indigent party expenses in certain cases, which must be approved by a judge and which are paid from a separate CPCS line item.

(2) The compensation for private counsel representation in FY09 by county was:

Suffolk	\$32,421,799	21.6%
Middlesex	\$23,140,790	15.4%
Essex	\$17,004,729	11.3%
Hampden	\$14,813,874	9.9%
Bristol	\$13,211,965	8.8%
Worcester	\$13,023,269	8.7%
Plymouth	\$10,779,619	7.2%
Norfolk	\$ 8,670,552	5.8%
Barnstable	\$ 4,451,248	3.0%
Hampshire	\$ 3,862,364	2.6%
Berkshire	\$ 3,775,407	2.5%
No County	\$ 3,041,023	2.0%
Franklin	\$ 1,637,462	1.1%
Dukes & Nantucket	\$ 171,677	0.1%

(e) The Amount Paid To The Commonwealth By Clients For Services Rendered, By Type Of Case And Geographic Location:

Indigent or "marginally indigent" CPCS clients paid a record total of \$8,952,213 in counsel fees to the courts during FY09. The distribution of these contributions among the various courts may be found in the Trial Court Revenue Reconciliation Management Report for Fiscal Year 2009. The entire amount collected, with the exception of \$750,000 allocated to CPCS in line item 0321-1518, was deposited into the Commonwealth's General Fund and should be considered as an offset against the total CPCS appropriation and cost allocations described above.

(f) The Average Cost For Services Rendered By The Committee By Type Of Case:

As reported above at (d)(1), the average cost of representation in a criminal case in FY09, without deducting counsel fee collections, was \$604.51, and in a civil case, \$969.85. The

average cost for selected categories of cases, again without deducting counsel fee contributions, is as follows:

Murder (Trial Court):	\$12,294
Murder (Appeal):	\$ 7,190
SDP Commitment:	\$ 3,374
Civil Appeal:	\$ 2,983
Criminal Appeal:	\$ 2,617
Sex Offender Registry:	\$ 1,893
Superior Court Criminal:	\$ 1,452
Care & Protection:	\$ 1,349
Juvenile Delinquency:	\$ 570
CHINS Petition:	\$ 486
District Court Criminal:	\$ 479
Rogers Hearing:	\$ 420
Civil Commitment:	\$ 383
Probation Revocation	\$ 307

(g) The Average Number Of Hours Spent Per Attorney Per Type Of Case:

The average number of hours billed by private counsel in FY09, excluding bail petition and bail-only assignments, was 11.43 hours per case. This compares to an average of 10.90 hours per case in the previous year. For all criminal case representation, the average was 9.91 hours per case. For civil case representation, the average was 17.36 hours per case.

(h) The Feasibility Of The Implementation Of A Flat Rate Compensation System Based On The Type Of Case:

Massachusetts wisely abandoned the discredited flat-rate compensation system in 1987, after a 1986 statewide evaluation conducted by the National Legal Aid and Defender Association concluded that such a system undermined the right to counsel, by establishing a financial disincentive for thorough investigation and case preparation by assigned counsel.

The major inadequacy in the Massachusetts system for providing counsel for the poor pursuant to Gideon v. Wainwright, 372 U.S. 335 (1963), and successor cases and the enactment in 1983 of G.L. Chapter 211D which established the Committee for Public Counsel Services, has been the unacceptably low levels of compensation paid to assigned private counsel and CPCS staff attorneys. Until a few years ago, progress was being made on this front, beginning with the unanimous decision in Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004), through the "Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts" in April, 2005, and ultimately to the landmark Chapter 54 legislation enacted in July, 2005.

The recommendations which follow describe the steps which must be taken now, in 2010, if the progress we have achieved is to endure.

III. Pertinent History and Recommendations for Action:

It required three decisive acts, involving concerted action by all three branches of state government, to rescue the Commonwealth from a complete breakdown of its system for providing counsel for indigent persons who have a constitutional or statutory right to the assistance of counsel. On July 28, 2004, the Supreme Judicial Court decried the inadequacy of compensation paid to private counsel as having created “a systemic problem of constitutional dimension,” and called upon the legislative and executive branches to fashion a solution which would comply with constitutional requirements. Lavallee, 442 Mass. at 232, 244-245. Almost immediately, the executive and legislative branches responded with the establishment of the special commission described above, commonly referred to as the Rogers Commission, which produced its comprehensive proposals for reform on April 1, 2005. Finally, on July 28, 2005--one year to the day after the decision in Lavallee--the Legislature passed Chapter 54, and the measure was enacted into law by the Romney administration the very next day.

Legislative enactments cannot accomplish their intended goals, unless their provisions are implemented as intended, and thereafter assessed. With respect to Chapter 54, this has not occurred. At least four vital tasks remain. Our recommendations are:

(a) The Permanent Commission On Civil Infractions Must Be Activated:

Section 6 of Chapter 54 provides that “there shall be a permanent commission to study and analyze the imposition of civil penalties on certain offenses within the commonwealth” (emphasis supplied). The Commission is instructed to classify misdemeanors as either Class “A” or “B,” the latter of which would not be punishable by any term of incarceration and would include no right to assigned counsel. CPCS has provided case and compensation data which reveal that millions of dollars could be saved annually in counsel costs if Massachusetts were to replace criminal with civil sanctions in a variety of lesser misdemeanor cases. The additional savings generated by the avoidance of unnecessary and counterproductive incarceration costs would be even more significant. **Notwithstanding the mandatory language of section six, the permanent commission to analyze civil penalties envisioned by Chapter 54 has never been activated.**

(b) The Conversion of Six Minor Misdemeanors to Civil Infraction, as Recommended by the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, Must Be Completed:

In its April, 2005, report, the Commission recommended that the following six non-serious misdemeanors be converted to civil-infraction status, except in cases involving additional complaints or multiple offenses arising from the same set of facts: “(1) operation of a motor vehicle with a suspended license or registration, (2) driving while unlicensed or uninsured, (3) shoplifting, (4) disorderly person or disturbing the peace, (5) trespass, and (6) larceny by check.” “Report” at 17 (footnotes omitted). In an appendix to its report, the Commission proposed legislation to implement its recommendation. The failure to approve this sensible cost-reduction reform in 2005 has caused thousands of such cases to continue clogging the District and Municipal Courts, and driving up the costs of prosecutors, defense counsel, and judicial personnel alike. In 2009, the Legislature honored part of this recommendation by converting the

motor vehicle offenses in clauses (1) and (2) to civil-infraction status; and addressed the offenses in clause (4) by eliminating incarceration for a first offense. These initial actions have already produced very impressive results. During the first six months of the current fiscal year, case assignments in these categories have been reduced by over 3,600 cases (50%), with a savings of more than \$600,000. It is imperative that this progress be continued. All of the civil infraction conversions recommended by the Rogers Commission should be enacted in the current legislative session, as proposed by Governor Patrick in the outside sections to his revised FY10 budget proposal submitted in May, 2009.

(c) The Effectiveness of Chapter 54's Indigency Verification Reforms Must be Assessed:

Section 1 of Chapter 54 rewrote G.L. c.211D, §2½, to tighten the rules governing the judicial determination of indigency, and required the Commissioner of Probation to submit quarterly reports to the Ways and Means Committees concerning the effectiveness of the new provisions. Given the dramatic increase in the number of counsel assignments in the District and Municipal Courts during FY06, FY07 and FY08, and the continuing reports we receive that ineligible persons are not adequately screened, a searching examination of the effectiveness of the Chapter 54 provisions is essential.

(d) Funding Must Be Provided to Hire CPCS Staff Counsel Authorized by Chapter 54:

CPCS and the Division of Capital Asset Management have partnered successfully to locate adequate office space in reasonable proximity to the busy District and Municipal Courts in which the Legislature ordered the predominant assigned private counsel system to be supplemented by a modest public defender presence. That funding is an essential component of the CPCS effort to achieve balance and stability in the availability of counsel for our clients.

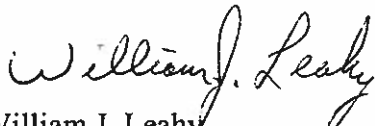
Presently there are 27 vacant staff attorney offices, 20 in the District Court units and 7 in Superior Court locations. The \$958,000 it would take in FY11 funds to fill those public defender positions as of September 1, 2010, would be more than offset by a reduction of \$2 million in the CPCS private counsel compensation line item. This is because the most expensive components of office leadership, supervision, support and lease costs are already in place in these locations.

(e) The Private Counsel Hourly Compensation Rates Recommended by the Rogers Commission Cannot Be Indefinitely Ignored:

The nine members of the Rogers Commission worked carefully and with great diligence to address the problems which had caused the indigent counsel crisis. One of their principal recommendations was to phase in three consecutive years of modest hourly rate increases, so that by FY08 the rates for assigned private counsel would have achieved reasonable levels of \$55 (District Court and CHINS), \$60 (CAFL and Mental Health), \$70 (Superior Court), and \$110 (Murder). Their first-year increases were included in Chapter 54, but the very modest second- and third-year increases of three to five dollars per hour have not been implemented. In 2008 and again in 2009, the Joint Committee on the Judiciary heard testimony from CPCS and many bar association representatives in strong support of bills which would implement the Commission's hourly rate recommendations.

In this period of fiscal crisis, the right to counsel for indigent persons in Massachusetts is at a critical crossroads. With adequate funding and staffing, we will continue to provide the quality of representation to the poor of which this Commonwealth may be proud. Without it, we risk retreating to the intolerable era in which the inadequacy of funding resulted in the wholesale violation of the constitutional right to counsel.

Respectfully submitted:


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February 22, 2010