STATE OF MICHIGAN
MICHIGAN SUPREME COURT

TRIAL LAWYERS ASSOCIATION OF WAYNE COUNTY JUVENILE COURT; SUE E. RADULOVICH, P.C.; SUE E. RADULOVICH, as Next Friend of NADIA E., a Minor; SUE E. RADULOVICH, as Next Friend of TOMMIE P., a Minor; DEBORAH TRENT; DEBORAH TRENT, as Next Friend of TONY B., a Minor; MURIEL SHILLINGFORD; MURIEL SHILLINGFORD, as Next Friend of KIMBERLY S., a Minor; JEREMY BRAND; JEREMY BRAND, as Next Friend of NAOMI S., a Minor; JEREMY BRAND, as Next Friend of KYISHIA R., a Minor, JEREMY BRAND, as Next Friend of TERRI N., a Minor; SYDNEY L. RUBY; SYDNEY L. RUBY, as Next Friend of CLARENCE S., a Minor; SYDNEY L. RUBY, as Next Friend of WILLIAM and WESLEY D., Minors; PATRICK DEVINE; PATRICK DEVINE, as Next Friend of JUSTIN S., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Case No.
Hon.

HON. MARY BETH KELLY, CHIEF JUDGE THIRD JUDICIAL CIRCUIT COURT, in her official administrative capacity; THIRD JUDICIALCIRCUIT COURT, jointly and severally,

Defendants.
_____/

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_____/

BRIEF IN SUPPORT OF PLAINTIFFS' COMPLAINT FOR SUPERINTENDING CONTROL

-ORAL ARGUMENT REQUESTED-

PROOF OF SERVICE

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STATEMENT OF JURISDICTION

This Court has original subject matter jurisdiction over this matter pursuant to Michigan Constitution, Article 6, Sections 1 and 4, MCLA § 600.219, and MCR 3.302. This action is brought pursuant to the above-cited laws governing this Court's superintending control authority to redress violations of the 5th and 14th Amendments of the United States Constitution. It is brought, in addition, to redress violations of the Michigan Constitution, Art. 6, §§ 1 and 4, and Art. 1, §§ 2 and 17; and the Michigan Juvenile Code, *inter alia* MCLA §§ 712A.1(3), 712A.4(4), 712A.13a(c), 712A.13a(g), 712A.13b(6), 712A.17(1)(b), 712A.17c(2), 712A.17c(7), 712A.17c(9), 712A.17c(10), 712A.17d, 712A.18f(3); 712A.19a(6) and 712.17.19b.

STATEMENT OF ISSUES OF PRESENTED

1. Does the Supreme Court of Michigan have subject matter jurisdiction for this Complaint for Superintending Control, which challenges the general practices of a lower court?

   Plaintiffs answer: Yes.

2. Should the Supreme Court of Michigan exercise superintending control over the Third Circuit Court Family Division Juvenile Section where Defendants have violated clear legal duties and Plaintiffs have no adequate alternative legal remedy?

   Plaintiffs answer: Yes.

3. Is Defendants' removal of counsel without a finding of good cause shown on the record a violation of clear legal duties, under both MCLA § 712A.17c (9) and the due process clause of the United States and Michigan Constitutions?

   Plaintiffs answer: Yes

4. Does the Defendants' implementation of "group" contracts to provide exclusive representation to children in child protective and delinquency proceedings result in the violation of the children's rights to effective assistance of counsel?

   Plaintiffs answer: Yes.

5. Does LAO 2006-08 create a systemic violation of children's right to effective assistance where duly appointed counsel may be removed without good cause shown on the record, lump sum contract result in high caseloads with insufficient individual compensation, "groups" are appointed to represent children instead of an individual attorney, and the court fails to include a system for screening conflicts?

   Plaintiffs answer: Yes

6. Do Defendants violate Plaintiff Attorneys' due process and property rights, and create improper ethical dilemmas for Plaintiff Attorneys, where Defendants order Plaintiff Attorneys to turn over client files to unnamed replacement counsel?

Plaintiff answers: Yes

7. Do Plaintiffs lack adequate legal remedy where the court's general practice of removing properly appointed individual attorneys, pursuant to LAO 2006-08, is being challenged and individual appeals from hundreds of improper removal orders are not adequate to address the underlying systemic problems created by LAO 2006-08 §III, or the removed attorneys lack standing to assert such appeals and the children lack the ability to appeal on their own behalf, or the court of appeals lacks jurisdiction to hear appeal based on a challenge to the lawfulness of the local administrative order?

   Plaintiffs answer: Yes

8. Do Plaintiffs lack adequate legal remedy where the court's general practice of appointing contractor "groups," as opposed to individual attorneys, to represent children in child protective and delinquency proceedings is being challenged, where the children do not even know who their appointed attorneys are, where the individual attorneys retained by the contractor "groups" end up with excessive caseloads and inadequate flat fee compensation, resulting in ineffective assistance of counsel, and there is no right of appeal available to the juveniles for challenging said practice?

   Plaintiffs answer: Yes

INTRODUCTION/STATEMENT OF FACTS

The Parties

Plaintiffs in this original action consist of three primary groups, on behalf of themselves and all others similarly situated,[1] challenging the lawfulness and constitutionality of Defendant Third Circuit Court's Local Administrative Order (LAO) 2006-08, **[Exh. 1]** promulgated by Judge Mary Beth Kelly, acting in her official administrative capacity as Chief Judge for the Defendant Third Judicial Circuit Court. LAO 2006-08, §§ III.A.C. and D, effectuated on September 22, 2006, introduced a new circuit court general practice regarding the appointment of counsel for children brought under the jurisdiction of the court, both in child protective[2] and delinquency proceedings. Plaintiffs contend that those provisions of LAO 2006-08 have resulted, and are substantially likely to continue to result, in such systemic deficiencies in the assigned counsel system that a severe and unacceptably high risk has been created that children are and will continue to be denied their constitutional and statutory rights to meaningful and effective assistance of counsel.

The three Plaintiff groups are:

1) The Trial Lawyers Association of Wayne County Juvenile Court (TLAWCJC), an organizational plaintiff that is a professional association of attorneys who specialize in the representation of juveniles and families in the Family Division – Juvenile Section of the Wayne County Circuit Court. The TLAWCJC exists for the specific purpose of providing professional training and support to its membership, to promote improvements in the administration of justice and advancements in jurisprudence, to improve relations between the legal profession and the

[1] Hereinafter, all references to "Plaintiffs" include "all others similarly situated."
[2] For purposes of this Brief, all references to "child protective proceedings" include all cases arising from allegations of abuse and neglect, or "concerning an offense against a child," as defined by MCR 3.903.

public and to promote the interests of the local legal community particularly at the Wayne County Circuit Court Family Division Juvenile Section.

The TLAWCJC represents the interests of its members and the hundreds of other private juvenile court practitioners who currently represent juveniles as assigned counsel in both protective and delinquency cases in the Third Circuit Court Family Division Juvenile Section and who are being arbitrarily removed from said representation, interfering with the ongoing attorney-client relationships that have been in effect.

The TLAWCJC also represents the interests of its members and the hundreds of other private juvenile court practitioners who, as the direct result of Defendant's issuance and implementation of LAO 2006-08, are no longer eligible for assignment as counsel and/or Lawyer Guardians Ad Litem (LGALs) for juveniles in the Third Circuit Court Family Division Juvenile Section. **[See Complaint, ¶¶ 15-20]**

2) Individual minor children, through their Next Friends, whose rights to meaningful and effective assistance of counsel have been violated as a direct result of the implementation of LAO 2006-08, insofar as their court appointed counsel, some of whom have represented them for years, have been arbitrarily removed by Defendant Kelly, without good cause and in violation of Michigan law, MCLA §712A.17c (9). **[See Complaint, ¶¶ 26-29, 34-35, 40-41, 46-52, 58-61, 66-67, 129-137]** These Minor Plaintiffs, on behalf of themselves and others similarly situated, have also suffered a violation of their constitutional and statutory rights to effective and meaningful assistance of counsel, as described and discussed in the attached Complaint and below. **[See Complaint, ¶¶ 129-144; Sections II.A, B, and C of this Brief, pp. 15-43].** In addition, these Minor Plaintiffs represent the prospective interests of all children who are and who will come under the circuit court's jurisdiction, and who will be denied their statutory and constitutional rights to effective assistance of counsel by virtue of the newly created system.

3) Individual attorneys, on behalf of themselves and all others similarly situated, who have all been improperly arbitrarily removed from their cases by Defendant Kelly. These Plaintiffs have suffered a violation of their due process rights to their attorney-client relationships, to their ability to effectively represent their clients and practice their profession and to their property rights to retain control over their files, and to fully comport with their ethical and statutory obligations to their clients, as a direct result of the implementation of LAO 2006-08.

The Defendants are the Third Judicial Circuit Court, Wayne County, Michigan, and its Chief Judge Mary Beth Kelly, acting in her official administrative capacity.

Factual Background:[3]

The Third Circuit Family Division Juvenile Section (hereinafter "Defendant Court") presides over all juvenile matters within Wayne County, Michigan, in which minors are brought under the court's jurisdiction pursuant to the Michigan Juvenile Code, MCLA §712A.1, *et seq*, either in child protective, or delinquency proceedings. Under both the mandate of the United States and Michigan Constitutions and the statutory provisions relating to juveniles, Defendant Court is required to appoint counsel for indigent children in both child protective and delinquency proceedings. MCLA §712A.17c(2) and (5)

There are twenty-one courtrooms in the Juvenile Section devoted to juvenile matters, including seven judges and fourteen referees. They are divided into seven "pods," each "pod" consisting of three courtrooms, (one judge and two referees). Under the previous individual appointment system, there were several hundred qualified private practitioners on the Defendant

[3] This Statement of Facts presents a general factual overview of the Third Circuit Juvenile Court system and the changes occurring within that system under LAO 2006-08. For a more extensive and detailed presentation of the facts, see the Complaint attached hereto.

Court's Assigned Counsel Eligibility List,[4] each of whom had satisfied the requirements set forth in §III.B of the Local Administrative Order, to be included on the List.

Previously, under the individual assignment system, the court assigned an individual attorney on a rotational basis, among hundreds of qualified private attorneys on the Assigned Counsel Eligibility List, to represent a child. **[Exh. 22, LAO 2006-01, §III.B;** See also **Exh. 32, Affidavit of Radulovich, ¶ 8]** These individual attorneys were compensated under a Supreme Court-approved uniform specific fee schedule, according to the actual work performed on any given case.[5] **[Exh. 22, §III.E.2.]**

Under the Defendants' new contract system, as set forth in LAO 2006-08, Section III, effectuated September 22, 2006, lump sum contracts are now being awarded to a select small number of "attorney groups" to provide exclusive representation to children, in lieu of individual assignments of individual attorneys. (It is Plaintiffs' understanding that Defendant Chief Judge has awarded contracts to a total of five "group" contracts – one to Legal Aid and Defenders Association [LADA], and four to smaller attorney "groups") Each contract, depending on its size, designates a contractor "group" to assume exclusive responsibility for one or more courtrooms, or for one or more pods. Under the new system, the equivalent of five full-time attorneys is to be responsible for each three-courtroom pod.

All the smaller "group" contractors, e.g. Michigan Children's Law Center (MCLC),

[4] In order for individual attorneys to be eligible for the Assigned Counsel Eligibility List, they are required to meet stringent standards specifically set forth within Section III.B of the Third Judicial Circuit Local Administrative Order 2006-01, **[Exh. 22].** Although LAO 2006-01 has been rescinded and replaced by LAO 2006-08 **[Exh. 1]**, Section III.B remains intact, and is not a subject of this superintending control complaint. Each individual attorney Plaintiff is qualified to sit as "house counsel" in the Juvenile Section pursuant to the specific requirements set forth in that provision.

[5] The sufficiency of the individual attorney fee schedule, although a subject of some dispute, is not at issue in the present action.

"Child and Family Law Center,"[6] "Child Advocacy Program," etc., through their respective "group leaders," (i.e. administrators, who are generously compensated out of the contract amount, but who do not necessarily represent any of the juvenile clients), retain independent sub-contractor attorneys, who are assigned to particular courtrooms on particular days and are each paid a flat annual fee, at a full-time rate ranging from $40,000-$55,000.

Rather than being assigned to represent individual children, therefore, the sub-contractors are assigned to individual courtrooms and they then "represent" all the children whose cases are assigned to that respective courtroom, only on the day(s) they are there. The flat annual fee they receive is the same, regardless of the number of children to which they are assigned over the course of a week, a month or a year, and regardless of what needs each case or child has. **[Exh. 32, Affidavit of Radulovich, ¶ 4]**

The one larger group, LADA, rather than retaining independent contractors, has a staff of approximately fifteen lawyers who are paid an annual fixed salary regardless of how many or how few cases they are assigned. Under the terms of LADA's new contract, the fifteen staff attorneys are now responsible for providing exclusive juvenile representation in three of the "pods," or in nine courtrooms.

According to the Third Circuit Court's 2005 Annual Report, that year there were between 8,000 - 9,000 children in the abuse/neglect system and a total of 11,630 delinquency cases in the Juvenile Section. **[Exh. 21]** With five full-time, or full-time equivalent, attorneys assigned to cover each of the seven "pods," there are a total of thirty-five (35) attorneys – twenty (20) from

[6] MCLC is a non-profit organization incorporated solely to provide educational services, not legal services. It is noteworthy that, as of November 16, 2006, after the Child and Family Law Center was awarded their contract, they were still seeking to retain sub-contractor attorneys to work for them. **[Exh. 4, E-Mail Regarding New Contract]**

the smaller contractor "groups"[7] and fifteen (15) from LADA. Even using the 2005 Annual Report's lower number of children in child protective proceedings (8,000), each full-time attorney would have a minimum average child protective caseload of more than 228 children. In addition, with the 11,600 delinquency cases for which they will be exclusively responsible, the minimum average delinquency caseload per attorney will be more than 300 per year.

Part and parcel of this new "group" system of appointing counsel for children includes the unilateral and arbitrary removal of hundreds of properly appointed individual counsel from cases in which they have collectively been representing thousands of children, some for years. Starting on or about October 19, 2006, several weeks after the September 22 effective date of LAO 2006-08, a chain of events began with the mass sending of emails by the Defendant Court to virtually all of the individually appointed counsel and LGALs in active child protective and delinquency proceedings. **[Exh. 3]**. This email advised them that they were being removed from their cases and would be replaced by "attorney groups" to whom the Court had awarded lump sum contracts. The email also mandated the relinquishment of all case materials "…in the referee's courtroom" at the next hearing of these cases. **[See Complaint, ¶ 89; Exh. 3, Branka Emails].**

Shortly thereafter, during the week of October 27, the Court announced, by posting a Notice in the lawyers' lounge of the courthouse, that, effective immediately, those attorneys assigned to delinquency proceedings in front of referees were prohibited from making Judge Demands at upcoming preliminary hearings. **[Exh. 19]** The intent of this Notice was obvious, because only cases assigned to referees were among those from which attorneys were being

[7] While the actual number of attorneys acting as sub-contractors for each "group" is not specifically known at this time, whatever the actual number is, it equals approximately the amount of person-power that would be equivalent to 35 full-time attorneys, substantially fewer than the number of attorneys

Footnote continued on next page

removed.[8]

During this time, on or about October 24, 2006, Plaintiff Attorney Patrick Devine sent a letter to Leonard Branka, Director of Assigned Counsel, objecting both to his removal, in violation of the children's right to representation, and to the inappropriate order to relinquish his case documents. **[Exh. 17]** On November 6, 2006, Defendant Chief Judge Kelly personally responded to the letter, **[Exh. 18]**, even though Devine had neither sent nor cc'd his letter to her. In her letter, Defendant Kelly referred to the purported recommendations of a Juvenile Task Force Report as being the justification for the adoption of LAO 2006-08. In fact, however, the Juvenile Task Force Report **[Exh. 26]**, did not recommend *either* removing counsel from ongoing representation of their clients, *or* replacing the assignment of counsel system from individually assigning eligible and qualified counsel to awarding lump sum contracts to legal "groups." Rather, the Task Force made the following major recommendations, as summarized in Defendants' 2005 Annual Report:

> a) Assigning a judge at the time the case is filed;
>
> b) Creating blended dockets for referees that included both neglect and delinquency cases;
>
> c) Requiring a scheduling order at the initiation of a case to keep within the applicable time standards;
>
> d) Enhancing the process of service procedures; and
>
> e) Creating a Docket Review Committee in order to set goals and monitor compliance with case processing time standards.

[Exh. 21, p. 8; See also **Exh. 26, pp. 6-8,** for comprehensive list of all of the Task Force's

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previously available.

[8] It should be noted that the initial round of emails sent to attorneys included cases assigned to judges as well, but Defendants subsequently indicated that was an error and that only cases assigned to referees were having attorneys removed. **[Exh. 20, 11/6/06 Branka E-mail].**

Recommendations**].**

Defendant Chief Judge Kelly's letter also stated that LAO 2006-08 "*requires* the substitution of Children's [sic] counsel in the post dispositional hearing phase." **[Exh. 18,** (Emphasis added)**].** In fact, however, LAO 2006-08 gives the Chief Judge full discretion to remove counsel, using the language, "…Chief Judge *may* reassign counsel…" **[Exh. 1, §III.D.2]** Section D.3 of the LAO also states explicitly that "…the Chief Judge *retains the discretion to allow* the moving attorney to remain as assigned counsel," upon a showing of "special circumstances," **[Exh. 1, §III.D.3]**, the definition of which is left entirely up to the court.[9]

Starting on or about November 13, 2006, Plaintiff attorneys, and all those similarly situated, started receiving, en masse, computer-generated "Order of Removal of Assigned Counsel" forms with a computer-generated stamp purporting to be the signature of "Mary Beth Kelly, Chief Judge." **[Exhs. 6-16]**[10] The issuance of these Orders has continued up through April 9, 2007, when the Court circulated several hundred new "Order of Removal of Assigned Counsel and Appointment of New Counsel" forms, via e-mail. **[Exh. 16(b)]** These Orders have removed the properly assigned counsel as the attorneys/LGALs, without the consent or even the knowledge of their clients, and replaced them with the contractor "groups," with no individual attorney actually identified as counsel for any child. **[Complaint, ¶¶ 26-29, 34-35, 40-41, 46-52, 58-61, 66-67, 97, 100]** The Orders also required that each previously appointed attorney "…provide to newly appointed counsel…" certain specified documents from their own files. None of the "newly appointed counsel" is identified by name other than by the "groups" which have been awarded the lump sum contracts. **[Exh. 6-16]** Defendant's Orders thus not only

[9] See Argument II.A, *infra* at pp. 16-23, for full legal discussion of Defendants' violation of MCLA §712A.17c(9) regarding this issue.

[10] See Argument II.A.2, fn 30, *infra*, for legal discussion of the invalidity of computer-generated

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violated the attorneys' property rights, but also ordered Plaintiff attorneys to violate their ethical duties to their clients.[11]

As a result of this new "group" contract system of appointment, coupled with the mass removal of individual counsel from their cases, the attorney pool from which attorneys and LGALs can now be appointed has thus dramatically decreased, from several hundred to the approximately thirty-five full-time equivalent attorneys described above, pp. 4-6. This includes a significant reduction in the number of African-American attorneys by more than two-thirds, from approximately 85 (with the number growing annually), to approximately 25.[12] **[Exh. 34, Affidavit of Trent, ¶ 5].** Moreover, every child who is now either represented by newly appointed counsel or, as in the Minor Plaintiffs in this case, substituted new counsel pursuant to Defendant's Orders of Removal, is assigned only a "group" rather than an individual attorney. **[Complaint ¶¶ 96-97; Exh. 6-16 Orders of Removal]** As of the date of filing this action, thousands of children under the court's jurisdiction, including Minor Plaintiffs herein, have now been assigned a "group" counsel or LGAL, with no individual attorney specifically assigned to represent them or having established any contact with them. **[Complaint, ¶¶ 26-29, 34-35, 40-41, 46-52, 58-61, 66-67, 97, 100].**

In the Complaint, attached hereto, Plaintiffs have detailed several exemplary cases to date where the "group" that has been appointed to replace the original individual LGAL has failed to perform the duties of an LGAL. For example, in the cases of Minor Plaintiffs Nadia E. **[Complaint ¶¶ 26-27]**, Tommie P. **[¶¶ 28-29]**, Tony B. **[¶¶ 34-35],** Kimberly S. **[¶¶ 40-41]**,

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signatures on court orders.

[11] See Argument II.E, *infra* at pp. 44-45 for further discussion.

[12] See Argument II.C.2.b.ii, *infra* at, pp. 39-40 for discussion of how this reduction in the number of African-American attorneys impacts the rights of juveniles in Wayne County to effective assistance of counsel.

Naomi S. **[¶¶ 46-47]**, Kyishia R. **[¶¶ 48-50]**, Terri N. **[¶¶ 51--52]**, Clarence S. **[¶¶ 58-59]**, William and Wesley D**. [¶¶ 60-61]**, and Justin S. **[¶¶ 66-67]**, no one on behalf of their respective "group" counsel, all of whom have been appointed to replace these Minor Plaintiffs' individually appointed LGALs, have even identified or introduced themselves to these children, nor has anyone contacted either the children's former LGALs or their custodial guardians in order to determine their best interests.

Another dramatic example of how the "group" contract system fails to represent the best interests of the children is provided through the Affidavit of Plaintiff Jeremy Brand. **[Exh. 31, ¶¶ 15-21].** He represents the mother in a child protective proceeding. In November, 2006, the assigned individual attorney was removed as the children's LGAL and replaced by "LADA," with no individual attorney named. **[Exh. 31, ¶ 17].** Between December 15, 2006 and February 28, 2007, there were four hearings before the referee, at which three (3) different LADA attorneys have appeared on behalf of the children, all identifying themselves as "LADA" and without meeting any of the substitution of counsel requirements of MCR 3.915(D). **[Exh. 31, ¶19].** As of this date, it is unclear whether any individual attorney has established a relationship or is taking responsibility to ensure that these children are being effectively represented, as required by MCLA §712A.17d, or within the meaning of MCLA §§ 712A.13a(1)(c) and (g). **[Exh. 31, ¶ 18].**

At the fourth hearing described in Plaintiff Brand's Affidavit, following the previous three hearings at which several witnesses had testified and the referee had issued several orders, Brand moved to allow his client to have visitation with her children, under the supervision of the father. The LADA attorney appearing on behalf of the children, who had not been present at the prior three hearings and who, it was clear, had no knowledge of the prior proceedings, objected to this arrangement, which was undoubtedly in the best interest of the children. **[Exh. 31, ¶¶ 20-**

21]. This is a glaring example of the serious problems caused by the "revolving door" system of "group" appointment of counsel. **[**See also, **Exh. 32, Affidavit of Radulovich, ¶ ¶ 10-15]**

These contracts are being awarded at the sole and exclusive discretion of the Defendant Chief Judge, based on the "lowest overall cost" and according to a combination of factors "…as the Court deems to be in *its* best interests," **[Exh. 2, Request for Proposals (RFP), §§III.D.2 and 3, pp. 6-7,** (emphasis added)**],** rather than what is in the children's best interest. By replacing the individual appointment system with Defendant's handpicked multi-million dollar "group" contract system, the Third Circuit Court, acting through Defendant Chief Judge, has relinquished, indeed abandoned, its prior role as the gatekeeper to assure that the statutory and constitutional rights of each child are protected.

Plaintiffs now seek an Order of Superintending Control from this Court, declaring unlawful the Third Circuit Court's Local Administrative Order 2006-08, insofar as Sections III.A., C. and D. constitute the court's general practice and have violated, or are substantially likely to violate,[13] Plaintiffs' and all others' similarly situated, statutory and constitutional rights. As such, LAO 2006-08 violates clearly established legal duties for which there is no other adequate remedy.

ARGUMENT

Central to this action are the constitutional right to effective assistance of counsel, the Michigan Juvenile Code, MCLA §712A.1 *et seq*, with the philosophy expressed therein, and the Michigan Court Rules, Subchapter 3.900. This Court, through its enactment of the Michigan

[13] It should be noted that when, as in this case, the issue before the Court is the constitutional integrity of the judicial process rather than the particular impact on the outcome of any one particular case, proof of the likelihood of the occurrence causing harm is sufficient to justify relief without awaiting actual injury. *Wilson v Mintzes,* 761 F2d 275, 285 (6th Cir 1985), *Linton v Perini*, 656 F 2d 207, 211-12 (6th Cir 1981), *NYCLA v New York,* 192 Misc 2d 424, 431-2; 745 NYS2d 376 (2002).

Court Rules, has explicitly acknowledged that the philosophy expressed in the Juvenile Code is of paramount importance in construing and applying all the Michigan Court Rules in Subchapter 3.900, involving juveniles:

> The rules **must be interpreted and applied in keeping with the philosophy expressed** in the Juvenile Code.

MCR 3.902(B) (Emphasis added).

Through the enactment of LAO 2006-08, Defendants have adopted a general practice that systematically subverts this philosophy and violates clearly established statutory and constitutional rights to consistent, effective and meaningful representation of children in the Third Judicial Circuit Court, Family Division Juvenile Section. As such, because there is no adequate legal remedy, an Order of Superintending Control is the only appropriate relief.

I. THE SUPREME COURT HAS SUBJECT MATTER JURISDICTION OVER THIS PETITION FOR SUPERINTENDING CONTROL BECAUSE IT CHALLENGES A LOCAL ADMINISTRATIVE ORDER THAT ESTABLISHES UNLAWFUL GENERAL PRACTICES FOR THE ATTORNEY APPOINTMENT SYSTEM IN WAYNE COUNTY JUVENILE COURT.

This Court has original jurisdiction to adjudicate this matter, pursuant to MCR 3.302, *Lapeer County Clerk v Lapeer Circuit Judges,* 465 Mich 559; 640 NW2d 567 (2002), *Recorders Court Bar Association v Wayne County Circuit Court,* 443 Mich 110; 503 NW2d 885 (1993). The Michigan Constitution provides: "The Supreme Court shall have general superintending control over all courts…" Const. 1963, Art 6, § 4. This authority has been reinforced by this Court and by the legislature, in court rules and by case law, and applies to claims, like the instant one, which challenge the validity of a local circuit court administrative order. MCLA 600.219; MCR 3.302; *Lapeer County Clerk v Lapeer Circuit Court,* 469 Mich 146, 154; 665 NW2d 452 (2003) [*Lapeer County II*], *Lapeer County Clerk v Lapeer Circuit Judges,* 465 Mich 559; 640 NW2d 567 (2002) [*Lapeer County I*], *Recorders Court Bar Association, supra*. MCR 3.302 sets

forth the basic parameters for the exercise of superintending power over lower courts and where jurisdiction lies, as described below in pertinent part:

> (A) Scope. A superintending control order enforces the superintending power of a court over lower courts or tribunals.
>
> Policy Concerning Use. If another **adequate** remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See subrule (d)(2), and MCR 7.101(a)(2), and 7.3-4(a)
>
> * * *
>
> (D) **Jurisdiction**
>
> (1) The Supreme Court, the Court of Appeals, and the circuit court have jurisdiction to issue superintending control order to lower courts or tribunals….

(Emphasis added).

In *Lapeer County I*, *supra*, this Court articulated the basis for its broad superintending control powers, compared to the more limited superintending control authority of the Court of Appeals. In that case, the plaintiff county clerk initially filed a complaint for superintending control in the Court of Appeals challenging, as in the instant case, the validity of a local administrative order that had been issued by the Chief Judge of the Lapeer County Court.[14] The Court of Appeals held that it had jurisdiction and granted the plaintiffs' requested relief. *Id* at 565. This Court reversed, unequivocally holding that *only* the Supreme Court has original jurisdiction to entertain such a claim. *Id* at 574.

In reaching its decision, this Court took great care to analyze and explain the specific legal and constitutional bases for the Supreme Court's original jurisdiction over all claims that arise from the general operations of the lower courts and, in particular, claims which, as here, challenge the validity of circuit court administrative orders. The Court held that:

> … an action for superintending control is the proper means for the county clerk to

[14] The administrative order in question reassigned certain duties from the county clerk, to whom such duties had been statutorily delegated, to court staff. *Id* at 564.

> challenge the validity of the circuit court's administrative order. If so, however, **only this Court has jurisdiction to entertain such an action**.

Id at 574. (Emphasis added).

Similarly, in *Recorder's Court Bar Association, supra,* the plaintiffs challenged a court-wide fixed fee system implemented by the chief judge through a local administrative order in the Wayne County Circuit/Detroit Recorder's Courts. As in this case, the matter was properly before the Supreme Court because it involved a challenge to the general practice of the lower courts. *Id* at 571, n.8. In *Lapeer County I, supra,* this Court discussed *Recorder's Court*:

> …[I]n *Recorder's Court Bar Ass'n,* the plaintiffs challenged the fee schedule for appointed counsel jointly established by the Wayne Circuit and Detroit Recorder's Courts. **Because the challenge was to the general practices of the lower courts, only this Court had jurisdiction, and the case was properly filed here.**

Id. (Emphasis added).

The instant case, like both *Lapeer County I* and *Recorder's Court*, challenges the lawfulness of a local administrative order, constituting a general practice of the court. In particular, Plaintiffs herein challenge the way in which LAO 2006-08 has substantially altered the general practice of assigning, removing and compensating counsel for the representation of children in child protective and delinquency proceedings in the Third Circuit Court Family Division Juvenile Section.

This reorganization does not arise out the unlawful removal of a single LGAL or the ineffective representation of one child. Rather, it constitutes a general practice of the Juvenile Court as ordered by LAO 2006-08. As such, this action for superintending control, seeking to rescind those unlawful provisions of LAO 2006-08, is properly before this Court. Moreover, as fully discussed below, in Sections II and III of this Brief, because Defendant's promulgation of LAO 2006-08 violates clear legal duties (Section II) for which there is no adequate legal remedy (Section III), Plaintiffs are entitled to an Order of Superintending Control, both reappointing the

individual attorneys who were improperly removed pursuant to LAO 2006-08 and rescinding the new "group" appointment system created by the administrative order.

II. THE COURT'S GENERAL PRACTICE UNDER LAO 2006-08 RESULTS IN A FAILURE TO PERFORM A CLEAR LEGAL DUTY AND A SYSTEMATIC VIOLATION OF PLAINTIFFS' RIGHTS UNDER THE U.S. AND MICHIGAN CONSTITUTIONS AND MICHIGAN STATUTES

The governing standard for superintending control has been set forth by this Court as follows:

> For superintending control to lie, the petitioners must establish that the respondents have failed to perform a clear legal duty *and* the absence of an adequate legal remedy.[15]

Recorder's Court, supra, 443 Mich at 134, citing MCR 3.302(B) and *Frederick v. Presque Isle County Circuit Judge,* 439 Mich 1, 14-15; 476 NW 2d 142 (1991). (Emphasis in original).

The attorney appointment system created by LAO 2006-08 results in the violation of the Minor Plaintiffs' statutory and constitutional rights. Through the promulgation of this administrative order, Defendant has violated specific statutory requirements of the Michigan Juvenile Code, to wit MCLA §§712A.13a(1)(c) and (g), 712A.17c(2), 712A.17c(7) and 712A.17c(9). Moreover, in promulgating LAO 2006-08 Defendant Kelly has abandoned her clear legal duty of ensuring that children who come under the jurisdiction of the court are afforded effective and meaningful assistance of counsel. In addition to violating the state law rights of children, this also violates the due process clause of both the United States and Michigan Constitutions. US Const Ams V and XIV, Const 1963, Art 1, §§ 17 and 20.[16]

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[15] The absence of an adequate legal remedy is discussed in full in Section III of this Brief, *infra* at pp. 45-49.

[16] In addition, it should be noted that because LAO 2006-08 implicates substantive statutory and constitutional rights, it goes beyond the scope of what is properly considered a "local administrative order." It is well established that a circuit court local administrative order is appropriate only for the limited purpose of governing internal court management. MCR 8.112(B). *Schendler v Schendler,* 235 Mich App 230, 232; 596 NW2d 643 (1999), *Employees & Judge of the Second Judicial Dist. Court v Hillsdale Co,* 423 Mich 705, 723; 378 NW2d 744 (1985) [superintending control granted when local administrative order, compelling funding appropriations for staff salaries, exceeded the scope of its

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A. DEFENDANTS VIOLATE MCLA §712A.17c(9) BY UNLAWFULLY REMOVING COUNSEL UNDER LAO 2006-08

1. MCLA §712A.17C(9) REINFORCES THE COMMITMENT TO CONTINUITY OF REPRESENTATION IN CHILD PROTECTIVE PROCEEDINGS.

One of the most glaring ways in which Defendants fail to perform a clear legal duty through the promulgation of LAO 2006-08 is the administrative order's conflict with the statutory prohibition against discharging attorneys or LGALs in child protective proceedings as long as the child continues to be subject to the jurisdiction of the court. MCLA §712A.17c (9) states in pertinent part:

> An attorney or lawyer guardian ad litem appointed by the court under this section shall serve until discharged by the court. If the child's case was petitioned under section 2(b)[17] to this chapter, **the court shall not discharge the attorney for the child as long as the child is subject to the jurisdiction, control, or supervision of the court,** … **unless the court discharges the attorney for good cause shown on the record**…

(Emphasis added).

Despite this plain language, LAO 2006-08, Sections III.D.2 and 3, (purporting to have only to do with internal court management), directly conflicts with the statute by providing as follows:

> D. Removal of Counsel
>
> * * *
>
> 2. The **Chief Judge may reassign counsel** during the post-dispositional stage of a case in order to expeditiously implement this Plan as indicated in Section III(A) and to ensure that the interests of the children and the public are properly served.
>
> 3. Upon receiving notice of reassignment, **an attorney may bring a motion before the Chief Judge** to remain as the assigned counsel in one or more cases. Upon a

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authority]. As such, to the extent that it extends beyond mere procedural matters and adopts policies implicating substantive statutory and constitutional rights, (as more fully discussed below), unless it is approved by the Michigan Supreme Court as a local court rule, pursuant to MCR 8.112(A), it is invalid as a matter of law. *Employees & Judge, supra* at 723, n.7, *Schendler, supra* at 232-3. For purposes of this Brief, however, Plaintiffs assume arguendo that LAO 2006-08 is a "local administrative order" within the meaning of the court rules.

[17] Section 2(b) refers to the appointment of LGALs in child protective proceedings.

> **demonstration of special circumstances, the Chief Judge retains the discretion to allow the moving attorney** to remain as assigned counsel.

[Exh. 1, LAO 2006-08, pp. 7-8]. (Emphasis added).[18]

This provision of the LAO thus fundamentally changes the standard for the removal of an LGAL, from the strictly limited standard of "good cause shown on the record," imposed and defined by the legislature, to the undefined and subjective standard of "special circumstances" left entirely to the discretion of the Chief Judge. As such, it improperly empowers the Chief Judge with the discretionary authority to arbitrarily remove properly appointed counsel or LGALs, against whom there have been no complaints or allegations of impropriety in the representation of their juvenile clients, and with no finding of good cause shown on the record. Finally, it shifts the burden of proof from the court, as required under MCLA §712A.17c(9), to the attorney, to demonstrate "special circumstances," which is left entirely to the discretion of the Defendant Chief Judge to define and either accept or reject. This in itself flies in the face of both the plain language and underlying philosophy behind the Juvenile Code, MCLA §712A.17c (9).

Section 712A.17c(9) reflects the overall philosophy of the Michigan Juvenile Code which strongly disfavors substitution of LGALs and envisions that one attorney will develop a close relationship with his or her minor client and, through independent investigations, will thus be in an informed position to advocate for her needs. MCLA §712A.17d, MCR 3.915(D). While the Court of Appeals, in *In re AMB,* 248 Mich App 144; 640 NW2d 262 (2001), acknowledged that there is "…no absolute requirement that the same attorney represent a child throughout a protective proceeding," the court further opined that:

> …when read together, MCR [3.915(B)(2)(a)], the attorney appearance rule, and MCR

[18] It almost goes without saying that when there is a conflict between a local administrative order and a statute, the statute undoubtedly controls. See, e.g., *People v Joker,* 63 Mich App 421; 234 NW2d 550 (1975).

> [3.915(D)], the attorney discharge rule, demonstrate a policy that favors consistent legal representation when possible, thereby disfavoring attorney substitutions.

Id at 230.[19]

The requirements of MCR 3.915(D), primarily regarding substitution of LGALs at individual hearings, provides, in pertinent part:

> (2) An attorney or lawyer-guardian ad litem appointed by the court…shall serve until discharged by the court. The court may permit another attorney to temporarily substitute for the child's lawyer-guardian ad litem at a hearing, if that would prevent the hearing from being adjourned, or for other good cause. Such a substitute attorney must be familiar with the case…The court shall inquire on the record whether the attorneys have complied with the requirements of this subrule.

The specific language of MCLA §712A.17c (9) was added in 1997, in response to a number of recommendations from the Lieutenant Governor's Children's Commission (the "Binsfeld Commission"), specifically addressing the importance of continuity and consistency of legal representation and, in particular, the attorney/LGAL-child relationship.[20] Indeed, because of the importance of continuity in the attorney-client relationship to the overall ability to provide competent, independent and zealous representation, the Defendant's arbitrary removal of counsel pursuant to LAO 2006-08 violates not only the Michigan Juvenile Code, MCLA §712A.17c(9), but also the children's constitutional right to effective assistance of counsel.[21]

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[19] In fact, the key finding of the court in *In re AMB, supra,* was that precisely because a substitute LGAL improperly appeared for the critically-ill premature infant child in that case – an attorney who was neither familiar with the circumstances nor prepared for the gravity of the situation – the child tragically died. *Id* at 231-233.

[20] This principle has also been articulated and reaffirmed by numerous highly respected child advocacy organizations, reports and publications, not least of which include: the American Bar Association's Center on Children and the Law and National Center for State Courts, **[Exh. 23, Court Improvement Program Summary of Recommendations: Assessment of Probate Courts' Handling of Child Abuse and Neglect Cases]**; the National Association of Counsel for Children (NACC), **[Exh 24, NACC Recommendations, p. 6];** and the Muskie School of Public Service at the Cutler Institute for Child and Family Policy-ABA Center of Children and the Law (Muskie-ABA). **[Exh. 25, Muskie/ABA Court Improvement Program Reassessment, p. 146]** See pp. 36-39 below, *infra,* for fuller discussion of the findings and recommendations of these professional child advocacy organizations.

[21] This constitutional violation applies to both child protective and delinquency proceedings, and arises

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2. THE COURT MAY ONLY DISCHARGE AN ATTORNEY "FOR GOOD CAUSE SHOWN ON THE RECORD".

Removal of an appointed attorney for "good cause" is a long-recognized standard under Michigan law. It is related to the facts and circumstances of each case and the performance of the attorney in his or her representation of the client. The Michigan Court of Appeals has held in no uncertain terms that a court's determination of "good cause," for purposes of removing an attorney, has clearly defined constitutional and statutory parameters.

Although Plaintiffs have found no Michigan cases interpreting the meaning of the phrase "for good cause shown on the record" specifically within the context of MCLA §712A.17c (9), there have been numerous cases, both within Michigan and from other jurisdictions, that have defined how "good cause" is to be determined for removing an appointed attorney. *People v Johnson*, 215 Mich App 658, 662-663; 547 NW2d 65 (1996), *appeal granted in part*, 453 Mich 901; 554 NW2d 321 (1996), *appeal dismissed*, 560 NW 2d 638 (1997), *People v Durfee*, 215 Mich App 677, 681; 547 NW2d 344 (1996), *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993). See also, *In re MRS*, 400 NW2d 147 (Minn App, 1987), *Buntion v Harmon*, 827 SW2d 945, 948-949 (Tex Crim App, 1992), *Stearnes v Clinton*, 780 SW2d 216 (Tex Crim App, 1989).

From the plain meaning of the statutory language,[22] and applying the rule of ordinary usage and common sense,[23] it is indisputable that the burden is on the court to establish a factual

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under both the Michigan and United States Constitutions. See pp. 25-43, *infra*, for full discussion of the constitutional implications.

[22] See, *Rossow v Brentwood Farms Development Inc.*, 251 Mich App 652, 659; 651 NW2d 458 (2002), *Bio-Magnetic Resonance, Inc v Department of Public Health*, 234 Mich App 225, 229; 593 NW2d 641 (1999) (unless defined in the statute, words should be interpreted by their plain meaning).

[23] See, *In re Dawson*, 232 Mich App 690, 696; 591 NW2d 433 (1998) (court must use common sense in construing a statute), *In re Gaipa*, 219 Mich App 80, 84-85; 555 NW2d 867 (1996), *Bay Trust Company v Agricultural Life Insurance Co*, 279 Mich 248, 253; 271 NW 749 (1937).

basis for the discharge or removal of an attorney or LGAL who has been duly appointed to represent a juvenile in a child protective proceeding. Construed within the context[24] of the philosophy of the Juvenile Code and the widely recognized importance of having the same attorney represent the child for as long as the child is under the jurisdiction of the court, the "good cause shown on the record" must pertain to the actual conduct of the lawyer, vis-à-vis his or her representation of the actual child, *not* the convenience of the court or the creation of "authority" through promulgation of an unlawful administrative order.

The Michigan cases that address the propriety of removing appointed counsel uniformly have looked at the conduct of the attorney, i.e., whether or not the attorney behaved in a manner that warranted removal. *Johnson, supra; Durfee, supra;* and *Arquette.* In no case is the convenience of the court or cost saving a valid reason to dismiss appointed counsel. In fact, quite the contrary is true. In *Arquette, supra,* the Court of Appeals specifically held:

> Although we recognize that a trial court is entitled to control the proceedings in its courtroom, it is not entitled to do so at the expense of a defendant's constitutional rights. Cf. *State Bar of Michigan v Cramer,* 399 Mich 116, 134; 249 NW2d 1 (1976).

Id. at 826.

In *People v Johnson, supra,* the defendant's appointed counsel was removed for challenging an interim order issued by the trial judge and for his refusal to comply with that interim order. *Johnson* at 663. On appeal, the court found that the removal was improper and that:

> A court may remove a defendant's attorney on the basis of gross incompetence, physical incapacity, or contumacious conduct.

People v Johnson at 662. See also, *People v Durfee* at 681; *People v Arquette* at 231.

[24] See, *Bio-Magnetic Resonance, Inc., supra* at 230. ["…because even the most common word can have a number of meanings, **a court must also consider the context** in which it appears in order to determine which of these ordinary meanings it carries in the statute under scrutiny." (Emphasis added).]

It is instructive to note that in the events leading up to this action, Plaintiff Attorney Radulovich filed a *Motion to Strike the Orders of Removal* on her LGAL cases. **[Exh. 27; See also Complaint, ¶ 101]** When Plaintiff Radulovich raised the issue of the LAO's conflict with the statute, Defendant Chief Judge Kelly responded by shielding herself with the self-proclaimed authority of LAO 2006-08. **[Exh. 28, Kelly Opinion. pp. 5-6;** See also **Complaint, ¶¶ 102-103].** She seized on language in the *Johnson* opinion that noted "….the absence of any authority by the trial court to remove counsel," **[Exh. 28, p. 6]** and then distinguished *Johnson* by finding that she, unlike the trial court in *Johnson*, had "authority" by virtue of LAO 2006-08. **[Exh. 28, p. 6].**

However, this is simply wrong. A court may not create its own authority through promulgation of an unlawful local administrative order. Moreover, contrary to Defendant Judge Kelly's assertion that "…the power to appoint an office or position necessarily carries with it the power of removal" **[Exh. 28, p. 7]**,[25] it is well established that the fact that counsel in these cases are court appointed does *not* carry with it the court's power to remove counsel without the requisite good cause shown on the record. As the Texas court in *Stearnes v Clinton, supra* aptly noted:

> …the **power of the trial court to appoint counsel to represent indigent defendants does not carry with the concomitant power to remove counsel at his discretionary whim.** As noted, to hold otherwise would be to discriminate between retained counsel and appointed counsel without a semblance of rationality.

Stearnes, supra at 223. (Emphasis added).

Sections III.D.1 and 2 of LAO 2006-08 disregard the explicit statutory mandate of

[25] The cases relied upon by Defendant Kelly, *Brand v Common Council of City of Detroit*, 271 Mich 221, 228; 261 NW 52 (1935) and *State ex rel Minor v Eschen*, 74 Ohio St 3d 134, 139; 656 NE2d 940 (1995), are inapposite. They apply exclusively to the power to make political and employment appointments,

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MCLA §712A.17c(9), they fly in the face of important policy considerations regarding representation of children, and they unlawfully empower Defendant Chief Judge with the self-appointed discretionary authority to remove hundreds of properly appointed counsel arbitrarily, without good cause shown on the record. This provision of the administrative order also unlawfully shifts the burden of proof onto the attorneys, on behalf of their juvenile clients, to show "special circumstances" in order *not* to be removed as counsel. This is a very difficult, if not impossible in some cases, task, given the fact that the definition of "special circumstances" is entirely within the discretion of Defendant Chief Judge and there is no adequate way to challenge the Court's authority, despite the clear statutory conflict.

Therefore, Defendant Chief Judge Kelly's arbitrary removal of hundreds of properly appointed LGALs in ongoing child protective proceedings, pursuant to LAO 2006-08, through the issuance of computer-generated "Orders of Removal" with stamped signatures of Defendant Chief Judge,[26] without a hearing or finding of good cause as to each individual attorney's representation of each of their individual clients, is a general practice of the court which blatantly violates clearly established law for which there is no adequate legal remedy.

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having nothing to do with the constitutional right to counsel for indigents.

[26] It should be noted that the computer-generation of hundreds of generic "Orders of Removal of Assigned Counsel," with a computer-generated signature purporting to be that of Defendant Chief Judge Kelly, is a violation of law in and of itself. See *Campbell v Evans*, 358 Mich 128, 131; 99 NW2d 341 (1959), *In re AMB, supra*, MCLA 712.10(1)(c), MCR 2.602. It is anticipated that Defendant will make the untenable argument that these "Orders of Removal" are merely administrative, not involving the discretion of the court and that there is thus nothing improper about issuing computer-generated orders without her actual signature. On the contrary, even according to the plain language of LAO 2006-08, upon which Defendant Chief Judge relies to support her authority to remove attorneys from their cases, these orders are being issued pursuant to the discretion of the Chief Judge, ("The Chief Judge *may* reassign counsel…"), they are highly substantive, with statutory and constitutional implications, as argued herein, and are by no means comparable to simple administrative orders, such as computer-generated dismissals for lack of progress. As such, the "Orders of Removal" are procedurally not even valid orders.

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B. <u>VIOLATION OF MICHIGAN JUVENILE CODE: APPOINTMENT OF "GROUP" RATHER THAN INDIVIDUAL ATTORNEY</u>.

In addition to the violation of MCLA §712A.17c (9), Defendants' new contract assignment system allows for a limited number of hand-picked "groups" to be awarded multi-million dollar contracts to provide "exclusive representation for juveniles in both delinquency and child protective proceedings…," **[Exh. 1, §III.A]**, thereby violating the specific provisions of the Michigan Juvenile Code which require the appointment of one individual attorney or LGAL to each child. See MCLA §§ 712A.13a(c) and (g); 712A.17c(2) and (7); and 712A.17d(1). For example, MCLA §712A.17d sets forth in very specific terms the duties and powers of LGALs, making explicitly clear that a LGAL's "...duty is to the child, and not the court," and that, as such, he or she has the following obligations, at a minimum:

> (a) The obligations of *attorney-client privilege.*
>
> (b) To serve as the *independent representative for the child's best interests*, and be entitled to full and active participation in all aspects of the litigation…
>
> (c) To … *conduct… an independent investigation* including, but not limited to, *interviewing the child*, social workers, family members, and others necessary, and *reviewing relevant reports* and other information….
>
> (d) To *meet with or observe the child* and *assess the child's needs* and wishes with regard to the representation and the issues in the case [before the pretrial hearing, before the initial disposition, and other enumerated instances].
> * * *
> (g) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.
>
> (h) To *attend all hearings and substitute* representation only with court approval.
> * * *
> (j) To *monitor the implementation of case plans and court orders*, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem *shall*

See *Campbell v Evans, supra, In re AMB, supra,* MCLA 712.10(1)(c), MCR 2.602.

> *inform the court if the services are not being provided in a timely manner*, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.

MCLA §§712a.17d(1) (Emphasis added).

In addition, as the court in *AMB, supra,* held, "…lawyers have duties to their clients that may transcend the minimum standards of conduct that the Legislature imposes in a statute. Clients, whether children or adults, have the right to expect their attorney will perform these duties." *In re AMB, supra* at 225.

The tasks outlined above clarify that a LGAL must be intimately familiar with specific circumstances of each case. This principle is also illustrated by the stringent standards of attorney substitution outlined in MCR 3.915(D)(2), which requires that a substitute:

> …be familiar with the case and, for hearings other than a preliminary hearing or emergency removal hearing, must review the agency case file and consult with the foster parents and caseworker before the hearing unless the child's [LGAL] has done so and communicated that information to the substitute attorney. The court shall inquire on the record whether the attorneys have complied with the requirements of this subrule.

It is inherently clear that the plain language of the statutory and court rule requirements for proper representation of children does not include the appointment of "groups" without identifying an individual attorney who is ultimately responsible for each child. Yet, that is precisely what Defendant's new "group contractor" system does, with no requirement that the case be handled consistently by any one individual from that organization. **[See Exh. 6-16, Orders of Removal].**

The facts set forth in the Complaint attached hereto, in the Statement of Facts above, *supra* at pp. 1-11, and in the Affidavits of Jeremy Brand and Sue Radulovich **[Exhs. 31 and 32]**, dramatically illustrate the systemic violations of both the spirit and the letter of the Michigan Juvenile Code as well as due process violations discussed below, *infra* at 25-43, by removing properly appointed individual counsel for the children and by failing to appoint individual

attorneys to vigorously represent the rights of children.

C. VIOLATION OF DUE PROCESS RIGHT TO MEANINGFUL AND EFFECTIVE ASSISTANCE OF COUNSEL, U.S. CONSTITUTION, 5TH AND 14TH AMENDMENTS AND MICHIGAN CONSTITUTION, CONST. 1963, ART. 1, § 20.

1. THE CONSTITUTIONAL AND STATUTORY RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN JUVENILE PROCEEDINGS HAS BEEN WELL ESTABLISHED.

a. *In re Gault*: Due Process Right to Counsel in Delinquency Proceedings.

It is by now axiomatic that criminal defendants, regardless of their economic status, have a constitutional right, through the Sixth Amendment, to effective assistance of counsel. *McMann v Richardson,* 397 US 759; 90 S Ct 1441; 25 L Ed 2d 763 (1970), *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), *People v Pubrat,* 451 Mich 589; 548 NW2d 595 (1996). The precise constitutional right of children to effective and meaningful assistance of counsel in juvenile proceedings has had a more convoluted history, however, largely due to the unique place that children have had in our society, vis-à-vis their respective relationships to their parents and to the state. As the U.S. Supreme Court opined in 1967:

> From the inception of the juvenile court system, [in 1899] wide differences have been tolerated – indeed insisted upon – between the procedural rights accorded to adults and those of juveniles.

In re, 387 US 1, 14; 87 S Ct 1428; 18 L Ed 2d 527 (1967).

By 1967, however, when the U.S. Supreme Court decided the landmark case of *In re Gault, supra,* it clarified once and for all, that despite the history of treating juveniles in delinquency proceedings differently from adults in criminal proceedings, there are compellingly important reasons to ensure that children be afforded the same right to counsel. The basic notions of due process and fairness, as well as the proposition that "…neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," have now long been generally accepted as the requisites for the constitutional validity of juvenile delinquency proceedings. *In re Gault,*

supra,[27] *Kent v United States*, 383 US 541; 86 S Ct 1045; 16 L Ed 2d 84 (1966), *Gallegos v Colorado*, 370 US 49; 82 S Ct 1209; 8 L Ed 2d 325 (1962), *Haley v Ohio*, 332 US 596; 68 S Ct 302; 92 L Ed 2d 224 (1948), *In re Belcher*, 143 Mich App 68, 71; 371 NW2d 474 (1985).

The *Gault* Court, therefore, held in no uncertain terms that:

> …the **Due Process Clause of the Fourteenth Amendment requires** that **in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed**, the child and his parents must be notified of **the child's right to be represented by counsel** retained by them, or **if they are unable to afford counsel, that counsel will be appointed to represent the child**.

Id, at 41. (Emphasis added).

Since the *Gault* ruling, the constitutional right to appointed counsel for indigent juveniles in delinquency proceedings has thus also been unequivocally established as the law in Michigan. US Const Ams V and XIV, MCLA Const 1963, art 1, §§ 17 and 20, MCLA §712A.17c (2), MCR 3.915(A)(2), *In re Carey*, 241 Mich App 222, 227; 615 NW2d 742 (2000).

b. <u>Right to Counsel in Child Protective Proceedings</u>.

Just as the Supreme Court's landmark ruling in *Gault* recognized that children in delinquency proceedings are entitled to the same constitutional rights to counsel as adults, our legal system is rapidly recognizing that children who are pulled into the legal system through no fault of their own -- as subjects of child protective proceedings, and usually as those who are most profoundly affected and least able to voice their views effectively on their own -- are similarly entitled to the same meaningful and effective counsel. US Const Ams V and XIV, MCLA Const. 1963, Art 1, §§ 17 and 20, *Kenny A. v Perdue, 356 F Supp 2d 1353 (ND Ga*,

[27] See also, *Id* at 13, fn8, citing *Pee v United States*, 107 US App DC 47; 274 F2d 556 (1959), *Application of Johnson*, 178 F Supp 155 (DCNJ 1957), *People v Dotson*, 46 Cal2d 891 (1956), *Wissenburg v Bradley*, 209 Iowa 813; 229 NW 205 (1930), *Bryant v Brown*, 151 Miss 398; 118 So 184 (1928), *In Interests of Carlo and Stasilowicz*, 48 NJ 224; 225 A2d 110 (1966), *In Matters of W and S*, 19 NY2d 55; 277 NYS2d 675; 224 NE2d 102 (1966), *Dendy v Wilson*, 142 Tex 460; 179 SW 2d 269 (1944).

2005), In re EP, 234 Mich App 582, 597-98; 595 NW2d 167 (1999) (overruled on other grounds by *In re Trejo,* 462 Mich. 341; 612 NW2d 407 (2000)), *New York County Lawyers Association (NYCLA) v New York,* 763 NYS 2d 397, 410; 196 Misc 2d 761, 779 (NY Sup.Ct. 2003). See also, Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-first Century,* 6 Nev L.J 692 (2006), Gerard F. Glynn, *The Child's Representation under CAPTA: It Is Time for Enforcement,* 6 Nev LJ 1250 (2006), Muskie School of Public Service & American Bar Association (Muskie/ABA), *Michigan Court Improvement Program Reassessment* (2005), Recommendations 22-28 **[Exh. 25, p.191],** and National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001). **[Exh 24, pp. 4-5].**

The Michigan Court of Appeals has declared the constitutional right to counsel in child protective proceedings, as follows:

> … **[T]he right to due process…indirectly guarantees assistance of counsel in child protective proceedings. Thus, the principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings.** *In re Simon,* 171 Mich App 443, 447; 431 NW2d 71 1988), *In re Trowbridge,* 155 Mich App 785, 786, 401 NW2d 65 (1986).[28]

In re EP, supra at 597-98.[29] (Emphasis added).

This right is further conferred by Federal and Michigan statutes and by the Michigan Court Rules. See, e.g., the Federal Child Abuse Prevention and Treatment Act (CAPTA), 42

[28] In *Trowbridge, supra,* the Court of Appeals held that the parent's right to counsel in parental termination hearings is a "…fundamental constitutional right guaranteed by the equal protection clauses of the United States and Michigan Constitutions. [citations omitted]" *Id* at 786.

[29] It should be noted that the Court of Appeals in *AMB, supra,* points to *In re EP, supra* for the mistaken proposition that the right to counsel in a child protective proceeding is only statutory, not constitutional. *AMB, supra* at 221-222. However, the *EP* court's intent to give constitutional weight to this issue is clear in the above quotation. Plaintiffs contend that, with respect to this issue, *AMB* is simply wrong.

USC § 5101 *et seq*,[30] MCLA §§ 712A.17c(7), MCR 3.915(B)(2).

Indeed, other jurisdictions have specifically addressed the constitutional basis for a child's right to counsel in child protective proceedings and provide helpful guidance. In *Kenny A., supra*, the U.S. District Court for the Northern District of Georgia was recently faced with the precise legal and constitutional questions regarding the rights of children to effective assistance of counsel in deprivation and termination-of-parental rights (TPR) proceedings. In that case, the federal court found that, even if there were not a state law statutory right to counsel, (which does exist in Michigan), such a right is guaranteed under the Due Process Clauses of both the United States and Georgia Constitutions. *Id.* at 1359-60. The court's rationale is based on the fact that children involved in such proceedings have fundamental liberty interests at stake regarding their own safety, health, and well-being, an interest in maintaining the integrity of their family unit and in having a relationship with their biological parents. *Id.* at 1360.

In determining the question of what "process" is due to adequately protect such interests, the *Kenny* court applied the following three-part test enunciated by the U.S. Supreme Court in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976):

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: **First**, the private interest that will be affected by the official action; **second**, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and **finally**, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id 424 US at 334 -35. (Emphasis added).

In applying the *Mathews* three-prong test, the *Kenny* court found that the private liberty

[30] CAPTA requires that all states receiving federal child welfare funds must provide a guardian ad litem, who may be an attorney or a court appointed special advocate, to represent a child in child protective proceedings. 42 USC § 5106a(b)(2)(A)(xii).

interests -- the children's safety, health, and well-being, their interest in maintaining the integrity of their family unit and in having a relationship with their biological parents -- supported, as they do in the instant case, a due process right to counsel in child protective cases. *Kenny A.*, *supra* at 1361. The court further found that appointment of counsel to represent the best interests of children was the best procedural method to preserve those private interests. The court also found that the government's, i.e. the court's, interests were the same as the children's, in the sense that the court is obligated to protect and preserve the child's safety and well-being. *Id*.

The *Kenny* court further found that the children's right to counsel in child protective proceedings is guaranteed by the Georgia Constitution due process clause, which reads: "No person shall be deprived of life, liberty, or property except by due process of law." Georgia Const., Art.1, §1. The Michigan Constitution's due process clause is virtually identical, to wit: "No person shall… be deprived of life, liberty or property, without due process of law." Const. 1963, Art.1, §17. Also, the U.S. Constitution provides: "…nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV.

In *NYCLA*, *supra*, the plaintiffs challenged the attorney compensation rate scheme for New York's assigned counsel system, alleging that it violated indigent children's, among others, constitutional right to effective assistance of counsel. The court, in finding for the plaintiffs, fully agreed that children have a constitutional right to effective assistance of counsel in both child protective and delinquency proceedings, recognizing the importance of this right in family court proceedings, insofar as:

> …the appointment of counsel [is] essential to secure due process. [citation omitted] Family Court litigants, like the accused in criminal cases, are entitled to the assistance of counsel that is meaningful and effective.

NYCLA, 196 Misc 2d at 779.

The *NYCLA* court further found that, as applied to the instant case, the failure to

adequately compensate assigned counsel amounts to a violation of that right, insofar as it results in an insufficient number of attorneys handling excessive caseloads. The combined scenario of too few attorneys available to represent too many children and getting paid too little per case, results in unavoidable financial disincentives to vigorously represent their clients, was and is, consequently, a violation of the right to counsel. In so holding, the court stated:

> The issue … is whether New York State's failure to increase the compensation rates for assigned counsel violates the **constitutional** and statutory **right to meaningful and effective representation**. This court finds beyond a reasonable doubt that it does…
>
> … There is a substantial need for assigned counsel to represent … children …in family … proceedings.

Id. at 762. (Emphasis added).

c. <u>Right to Counsel Means *Effective* Assistance</u>

Implicit in the right to counsel is the right to *effective* assistance. The Michigan Court of Appeals, in *In re EP*, *supra*, explicitly held, within the context of due process rights in child protective proceedings, that:

> [t]he right to counsel guaranteed by the United States and Michigan Constitutions, U.S. Const., Am. VI; Const. 1963, Art. 1, § 20, is the right to *effective* assistance of counsel.

Id. at 597, citing *People v Pubrat*, *supra*. (Emphasis added). *See also*, *Kenny*, *supra* at 1361-2, *Nicholson v Williams,* 203 F Supp 2d 153, 239 (ED NY 2002), *Efitts v Lucey,* 469 US 387, 395; 105 S Ct 830; 83 L Ed 2d 821 (1985), *McMann*, *supra* ["It has long been recognized that the right to counsel is the right to the effective assistance of counsel"], *AMB*, *supra*, *In re Simon,* 171 Mich App 443, 447; 431 NW2d 71 (1988), *In re Trowbridge*, *supra* at 786.

2. DEFENDANT CHIEF JUDGE, THROUGH THE PROMULGATION AND IMPLEMENTATION OF LAO 2006-08, HAS ENGAGED IN A GENERAL PRACTICE WHICH VIOLATES CHILDREN'S CONSTITUTIONAL AND STATUTORY RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL.

Defendants, through the promulgation and implementation of LAO 2006-08, amounting

to a general practice of the court, have violated not only Michigan statutory law but also the Minor Plaintiffs' fundamental right to effective assistance of counsel as set forth above. This deprivation manifests itself in a number of ways, which, when viewed in the totality, amounts to a situation in which there is no adequate legal remedy to correct without a declaration from this Court acting in its superintending control authority. The various individual ways in which Defendants violate Plaintiffs' constitutional and statutory rights to effective assistance of counsel, are as follows and fully discussed below: **a)** By arbitrarily removing assigned counsel from their ongoing cases in violation of MCLA §712A.17c(9),[31] thereby interfering with established attorney-client relationships without any evidence of wrongdoing on the part of the original appointed attorneys; **b)** By dramatically reducing the number of individual attorneys, including African-American attorneys, and creating a system which results in excessive caseloads, inadequate flat fee compensation, and financial disincentives for vigorous and effective advocacy; **c)** By appointing groups rather than individuals to represent the children, thereby creating a "revolving door" system of representation, subverting the restrictions on substitution of counsel, and interfering with the professional standards regarding the criteria necessary to provide effective and meaningful representation of children.; and **d)** By failing to have in place any mechanism for screening conflicts within and among the "group" contractors.

a. <u>Arbitrary Removal of Counsel, In Violation of Statute, Violates Constitutional Right to Effective Assistance of Counsel</u>.

As fully discussed above, *supra* at pp. 16-23, Defendants' arbitrary removal of counsel, pursuant to Section III.D.3 of LAO 2006-08, without the required showing of "good cause" is a blatant violation of MCLA §712A.1c(9) and Michigan common law. Such conduct also violates

[31] See discussion of statutory violation above, *supra* at pp. 16-23**.**

the constitutional parameters of children's right to effective assistance of counsel, along with the professional standards of practice that have been promulgated. It is well recognized that once the attorney-client relationship has been established, that relationship must not be disrupted by a court without a very serious reason to do so. Michigan case law has unequivocally established that arbitrary removals of appointed counsel in the criminal context are a violation of the constitutional right to counsel. *People v Johnson, supra, People v Durfee, supra, People v Arquette, supra.*

In addition to the aforementioned Michigan cases, other jurisdictions have also addressed the constitutional implications of removal without the consent of either the attorney or the client. For example, in a relevant case arising from Texas, the appellate court held:

> [T]**he circumstances under which a trial judge may replace appointed trial counsel are narrowly circumscribed by the state and federal constitutions**.
>
> * * *
>
> [A] trial judge does not have discretion to replace appointed trial counsel over the objection of both counsel and the defendant when the only justification for such replacement is the trial judge's personal practice, experience, feelings or preference. Rather, there must be some principled reason, apparent from the record, to justify the trial judge's *sua sponte* replacement of appointed counsel…

Buntion v Harmon, 827 SW 2d 945, 948-949 (Tex Crim App, 1992). (Emphasis added). *See also, Stotts v Wisser,* 894 SW 2d 366, 367 (Tex Crim Apps, 1995).

i. Strong Policy Considerations, Coupled With the Philosophy of the Michigan Juvenile Code's Prohibition Against Removal of Counsel, Are Important Factors To Ensure Effective Representation of Children

Continuity is an important constitutional component of the effective representation of children. As discussed above, *supra* at pp. 16-23, this has been established both by the statutory language, MCLA §712A.17c(9) and by the underlying philosophy of the Michigan Juvenile Code. Consistency has a direct bearing on the effectiveness of counsel, particularly in child protective cases. For example, among the recommendation by the ABA Center on Children and the Law and the National Center for State Courts to the Michigan Supreme Court State Court

Administrative Office, regarding handling of child protective cases by the Michigan courts, was the following:

> **Recommendation 17**: All courts presiding over child abuse and neglect cases should implement procedures that guarantee that each child and parent are appointed trained and skilled attorneys in advance of initial preliminary hearings and **who will continue representation to each child and parent until a plan of permanency is implemented**…

[Exh. 23, Court Improvement Program Summary of Recommendations: Assessment of Probate Courts' Handling of Child Abuse and Neglect Cases] (Emphasis added).

In addition, the National Association of Counsel for Children (NACC) has issued *Recommendations for Representation of Children in Abuse and Neglect Cases* (2001) which include certain "systemic safeguards." The very first recommendation on their list, indicative of its paramount importance, along with explanatory Comment, is as follows:

> 1. Children need competent, independent, and zealous attorneys. The system of representation must require the appointment of competent, independent, zealous attorneys for every child at every stage of the proceedings. **The same attorney should represent the child for as long as the child is subject to the court's jurisdiction.**
>
> * * *
>
> **Comment C:** Continuity of representation is important to the child. **The same lawyer should represent the child for as long as the child is under the jurisdiction of the court.** Temporary substitution of counsel, although often unavoidable, should be discouraged. Any substitute counsel must be familiar with the child and the child's case.

National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001). **[Exh. 24, NACC Recommendations, p. 6]** (Emphasis added).

Another study conducted by the Muskie School of Public Service at the Cutler Institute for Child and Family Policy and the American Bar Association Center on Children and the Law (Muskie-ABA), looked specifically at Michigan in evaluating courts' ability to meet the needs of children under their jurisdiction. That group also recognized the importance of continuous and consistent representation and recommended that the Michigan Supreme Court Administrator's

Office (SCAO):

> 28. Establish Court rules specifying that subject to advance court approval for exception, **the same attorney will represent the client** (including DHS) **at all stages of the court process** ***and that members of the same firm or organization cannot substitute for the individual attorney.*** Establish strict criteria for exemptions.

Muskie/ABA, *Michigan Court Improvement Program Reassessment* (2005). **[Exh. 25, p. 146]** (Emphasis added).

The unlawful removal of attorneys in violation of MCLA §712A.17c(9) thus violates not only state law but also Minor Plaintiffs' constitutional right to effective assistance of counsel.

b. <u>Exclusive Lump Sum Contracts Result In Unacceptably High Caseloads with Insufficient Individual Compensation and a Drastic Reduction of African-Americans from the Attorney Pool, In Violation of the Right to Effective Assistance of Counsel</u>.

In addition to the constitutional implications of removing individually appointed counsel, the elimination en masse of the pool of hundreds of assigned counsel previously available to represent indigent children, and replacing them with a select few private attorney "group" contractors to provide exclusive juvenile representation is yet another way in which children's right of effective counsel is being violated.[32]

Defendants' new contract system, as described more fully in the Statement of Facts, *supra* at pp. 1-11, and the attached Complaint **[¶¶ 71-128]**, rewards low bids rather than realistic bids, places cost containment and the best interest of the *court* before quality of representation, and results in far fewer lawyers available to represent a far greater percentage of the children, with little or no court oversight regarding the amounts being paid to their individual attorney

[32] The previous individual appointment system was by no means perfect, and could be improved by increasing the fee schedule, but at least with several *hundred* as opposed to several *dozen* attorneys available to represent the children, it is eminently more protective of the children's rights to counsel than is Defendant's lump sum "group" contract system under LAO 2006-08.

sub-contractors.[33] The compensation scheme for paying the sub-contractors, regardless of how many or how few children they represent, based on a flat annual fee, with each contractor paying at different rates for their services, (from contract to contract), also results in no parity in the different sub-contractors' pay or consideration of the caseload-to-pay ratios. **[Exh. 32, Affidavit of Radulovich].**

Defendant Chief Judge Kelly has demonstrated her abdication of the court's oversight responsibilities in her Opinion dated January 31, 2007, where she wrote that, because "…the Court negotiated individual contracts with various affiliated groups of attorneys and the fee that the Court has agreed to pay these groups was a matter of bargaining and agreement…," there is no requirement that the Court be bound by the "...line of authority…that concerns reasonable compensation under fee schedules." **[Exh. 28, pp. 9-10]** Defendant Kelly further explicitly stated that the court need not exercise any oversight with respect to how the contractor "groups" compensate their sub-contractors:

> …[T]here is simply no authority for this Court to interfere in the private business affairs of affiliated groups of attorneys on the issue of compensation among attorneys in a given group.

[33] A special report released by the Bureau of Justice Assistance and cited by the ABA Center on Children and the Law, identified the following relevant **deficiencies** with contract systems for providing indigent, including juvenile, representation:

- **Place cost containment before quality.**
- Result in lawyers with fewer qualifications and less training doing a greater percentage of the work.
- Offer limited training, supervision, or continuing education to new attorneys or managers.
- **Reward low bids rather than realistic bids.**
- **Provide unrealistic caseload limits or no limits at all.**
- Do not provide support staff or investigative or expert services.
- Do not provide for independent monitoring or evaluation of performance outside of costs per case.
- Do not include a case-tracking or case management system and do not incorporate a strategy for case weighing.

Gary A. Lukowski and Heather J. Davies, ABA Center on Children and the Law, *A Challenge for Change: Implementation of the Michigan Lawyer- Guardian Ad Litem Statute* (2002), p. 24-25, **[Exh. 30]** quoting from Robert L. Spangenberg et al., U.S. Department of Justice, *Contracting for Indigent Defense Service: A Special Report 13* (2000). (Emphasis added).

[Exh. 28, p.10, fn 5].

On the contrary, in *Recorder's Court, supra,* after an extensive evidentiary hearing regarding the Third Circuit Court's fixed fee system for appointed counsel in criminal cases, this Court, relying on the court appointed special master's findings, held that the fixed fee system was unlawful. The Court found that fixed fees for appointed counsel results in a financial disincentive to vigorously defend his or her client. Quoting the special master's findings, the Court noted:

> The incentive, if a lawyer is not paid to spend more time with and for the client, is to put in as little time as possible for the pay allowed… [T]he system of [fixed-fee] reimbursement of assigned counsel …creates a conflict between that attorney's need to be paid fully for his services and obtaining the full panoply of rights for the client.

443 Mich at 115.

In practice, LAO 2006-08 creates essentially a similar fixed fee system as was found unlawful by this Court in *Recorders Court, supra,* without calling it by name. This results, by definition, in a financial disincentive to vigorously represent any single client, which in turn violates the Plaintiff Minors', and all others similarly situated, constitutional right to effective assistance of counsel.

Moreover, the resulting increase in individual caseloads, averaging more than 200 children per year in child protective cases and 300 or more delinquency cases per year, are substantially higher than any of the caseloads previously handled by individual appointed counsel and unacceptably higher than any of the nationally recognized professional standards of practice, described below.

i. NACC and ABA Professional Standards of Practice Regarding Caseloads and Attorney Compensation.

Defendant Kelly has also opined that the court need not abide by ABA caseload standards, because there is no court rule that mandates such. **[Exh. 28, p. 10, fn 5]** Regardless

of the existence, or not, of a court rule, there is no question that the court is bound to abide by the constitutional requirements to ensure that children are effectively represented. In *Kenny, supra,* the U.S. District Court took judicial notice of the nationally recognized professional standards of practice regarding appropriate caseloads in the representation of children. *Kenny, supra* at 1356. The NACC *Recommendations for Representation of Children in Abuse and Neglect Cases* include the following systematic safeguards, which cap LGAL full-time caseloads at a maximum of 100 children per year and which stress the important relationship between individual attorney compensation and effective assistance of representation to children:

> 2. **Children need attorneys with adequate time and resources**. The system of representation must include **reasonable caseload limits** and at the same time provide **adequate compensation** for attorneys representing children.
>
> > **Comment A:** The NACC recommends that **full time attorney** represent **no more than 100 individual clients at a time**, assuming a caseload that includes clients at various stages of cases, and recognizing that some clients may be part of the same sibling group. **This is the same cap recommended by the U.S. Dept. of HHS Children's Bureau and the American Bar Association**.[*FN2 omitted*] One hundred cases averages to 20 hours per case in a 2000-hour year.
> >
> > **Comment B:** For the sake of the child client and the interests of the system, **attorneys must be provided appropriate and reasonable compensation**. The **NACC adopts the following position of the Dept. of HHS** on this point: **"Primary causes of inadequate legal representation of the parties in child welfare cases are low compensation and excessive caseloads.** Reasonable compensation of attorneys for this important work is essential. **Rather than a flat per case fee, compensate lawyers for time spent.** … **The need for improved compensation is not for the purpose of benefiting the attorney, but rather to ensure that the child receives the intense and expert legal services required.**

National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001). **[Exh 24, NACC Recommendations, p. 7].**

Also, the Muskie-ABA group made several similar recommendations specifically for Michigan, including: "…minimum standards for attorney compensation… [G]uidelines regarding maximum attorney caseloads…" Muskie/ABA, *Michigan Court Improvement*

Program Reassessment (2005). **[Exh. 25, p. 191]**[34]

The *Kenny* court also cited testimony by NACC Director Marvin Ventrell, who stated that a child advocate attorney could not possibly provide effective representation if the attorney had a number of clients significantly above 100, and certainly not for a caseload over 200 clients. *In re Kenny, supra* at 1362.

Similarly, in *NYCLA, supra*, the court found that the unreasonably low compensation rate for appointed attorneys resulted in a denial of the right to effective assistance of counsel. *Id* at 783. Defendant Chief Judge Kelly's system masks the small attorney pool and high caseload problem by appointing an organization, rather than an individual attorney. It gives the appearance of representation, but the facts reveal that this is in name only. The contractor "groups" do not have enough individual attorney sub-contractors to allocate a reasonable number of cases to each attorney and compensate them commensurate with their per/case workload. As the *NYCLA* court noted:

> [L]itigants suffer irreparable constitutional harm… when they are represented by overburdened and inattentive assigned counsel who fail to, or are unable to, perform the basic tasks necessary to provide meaningful and effective representation…

NYCLA, supra at 784.

With child protective caseloads exceeding more than 228 children per year and delinquency caseloads exceeding 330, it is inevitable that these children will not obtain effective

[34] The Muskie/ABA group also made the following comment:

> "There are currently no state standards guiding the compensation of attorneys representing parents and children in Michigan. It would seem to make sense that the SCAO promulgate such standards. For example, it seems grossly unfair for a child or parent in one court to be potentially disadvantaged in representation because of a compensation system that discourages case preparation outside of court appearance time. Every child and parent deserves the highest possible quality of representation in these proceedings. **Though reasonable compensation alone cannot ensure that quality and needs to be combined with other factors (e.g., appropriate training and reasonable caseloads), it is nonetheless vitally important and**

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assistance of counsel under the new contract system.

ii. Drastic Reduction in African-American Attorney Pool Further Damages Children's Right to Counsel.

Another seriously detrimental side effect of Defendant Kelly's elimination of hundreds of qualified individual attorneys from the pool of assigned counsel has been a dramatic decline in the number of African-American attorneys now available to represent children by approximately two-thirds, from approximately 85 to approximately 25. This is occurring within a community where approximately 80% of the children under the jurisdiction of the Wayne County Circuit Court, Juvenile Section, are African-American. **[See Exh. 29, Michigan Citizen, 2/25/07; Exh. 33, Shillingford Affidavit, ¶¶ 5-6; Exh. 34, Trent Affidavit, ¶¶ 4-7;].**

It is widely acknowledged that understanding the cultural context in which a family lives is vital to representing the best interests of a child. "In abuse and neglect cases, the law… rules, but the facts are always colored by the cultural and sub-cultural context." Marvin Ventrell and Donald Duquette,[35] Eds., *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases* (Denver, CO: Bradford Publishing Company, 2005) pp. 97-99. As authors Ventrell and Duquette point out, "How can the attorney purport to speak for the child when the attorney does not understand who the child is? If the attorney is to advocate for the best interests of the child, under whose norms or standards will 'best interests' be defined?" *Id* at 97. In order to ensure fair and equal representation for children of color, it is self-evident that the legal profession must encourage that the attorneys representing children are racially, ethnically and socio-economically diverse and knowledgeable

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should be made a priority." **[Exh. 25, Muskie/ABA Reassessment, p. 146]** (Emphasis added).

[35] Donald Duquette is, ironically, a founder of the Michigan Children's Law Center, and the Director of the Child Advocacy Law Clinic at the University of Michigan Law School. Marvin Ventrell is the CEO of the National Association of Counsel for Children (NACC).

of the role that race, ethnicity and class play in a given situation. *Report of the Working Group on the Role of Race, Ethnicity, and Class,* 6 NevLJ 634, 636 (2006).[36] Further, diversity within the courtroom provides an opportunity for children to see adults who they perceive as being successful, when many children under the court's jurisdiction do not often have that opportunity. **[Exh. 34, Trent Affidavit, ¶¶ 6-7].**

African-American attorneys are in the best position to communicate with and understand the cultural background of the vast majority of the children that they represent. **[Exh. 34, Trent Affidavit, ¶¶ 6-7].** By drastically cutting the number of African-Americans from the attorney pools, Defendant Judge Kelly has alienated the vast majority of the children under her jurisdiction and damaged the effectiveness of their constitutional right to counsel.

c. <u>The Appointment Of "Groups" Instead Of Individual Attorneys Sets Up A "Revolving Door" System of Representation, Further Depriving Children Of Effective Assistance Of Counsel</u>

As fully discussed above, *supra* at pp. 23-24, the appointment of "groups" in lieu of individual attorneys violates several statutory provisions of the Michigan Juvenile Code. The practical and human consequence is that it creates a "revolving door" kind of representation system and deprives children of the ability to form a consistent relationship with any single attorney. By assigning each contractor "group" to a given courtroom, as described at pp. 4-5 above, with that "group's" sub-contractors each assigned to cover that particular courtroom only on certain days of the week, the inevitable result is that attorneys who are unfamiliar with a particular child or that child's case will necessarily have to regularly step in and "represent" any

[36] This Report resulted from a 2006 conference, *Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham,* held at the University of Nevada, Las Vegas, William S. Boyd School of Law. Each Conference working group issued a report with several recommendations to improve the quality of representation for children. The above cited proposition is contained in Recommendation Four of that Working Group.

child that has been appointed to their organization on any given day of the week, thus the "revolving door." In addition, it subverts the substitution of counsel rule, MCR 3.915(D), and ultimately deprives children of their right to effective assistance of counsel.

This outcome is dramatically exemplified by both the allegations set forth in the Complaint regarding the individual Minor Plaintiffs, **[¶¶ 26-29, 34-35, 40-41, 46-52, 58-61, 66-67]**, and by the Affidavits of Plaintiffs Brand, Radulovich and Shillingford **[Exhs. 31-33],** and discussed in the Statement of Facts, *supra* at pp. 10-11**.** It is thus clear that the newly appointed contractor "groups" are not providing continuous representation. Defendant Judge Kelly has furthermore created a systematic exception to the requirements for attorney substitution, a procedural safeguard of the rights of children. Thus, children are not provided with continuous, competent legal representation for delinquency or child protective proceedings.

d. The Contract Bidding System through Defendant's Implementation of LAO 2006-08, Fails to Include a System for Screening Conflicts, Thereby Further Violating The Right To Effective Assistance of Counsel.

The *Request for Proposal for Legal Services for Juveniles* (RFP) **[Exh. 2]** circulated by Defendant Kelly to solicit bids for the contracts articulated specific criteria for contract bids,[37] including the requirement that proposed contractors/vendors certify that they have "…no interest…that would give rise to a conflict of interest between itself (including its attorneys) and the Court or any judge in the Juvenile Section…" **[Exh. 2, §III.A.2.h]** However, the RFP mentions nothing about requiring proposed contractor/vendors to include in their proposals any plan for checking for conflicts of interest between any parties that they, through their independent contractors, represent.

It is well settled that prejudice to a client is presumed when counsel has a conflict of

interest. *Cuyler v Sullivan,* 446 US 335, 345-50; 100 S Ct 1708; 64 LEd2d 333 (1980), *McNeal v US,* 17 Fed Appx 258, 261-62; 2001 WL 391980 (6th Cir 2001). In *McNeal,* the Sixth Circuit Court of Appeals noted that when counsel fails to properly screen for conflicts and one arises, "…counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Id.*

The Michigan Rules of Professional Conduct specifically prohibit lawyers who have previously represented one party in an action from subsequently representing "…another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client…" MRPC 1.9(a). The rules also specifically prohibit lawyers associated with a firm[38] from representing a person who any other member of the firm "…would be prohibited from doing so by rule…1.9(a)…" MRPC 1.10(a).

It is undeniably true that many families find themselves under the jurisdiction of the Juvenile Court several times over the course of many years. As such, the potential for a conflict is substantially increased by a system that exclusively appoints a "group," as opposed to an individual, to represent every child whose matter is brought before a particular referee or judge. It is indisputable that at least one of the "group" contractors, namely LADA, has represented both juveniles and parents in numerous child protective cases. It is also known, that there are attorneys sub-contracting with at least one of the "groups", i.e. MCLC, who have either represented or are representing parents, or who have previously represented the State in cases where MCLC is now being assigned as LGAL in child protective cases or as assigned counsel in delinquency proceedings for children in those families. **[Exhs. 32-34, Affidavits of Radulovich,**

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[37] See further discussion of the RFP at p. 11, above. Also, see **Complaint ¶¶ 75-77, 115**.

[38] According to the Comments to the Rules of Professional Conduct, "firm" is defined to include "legal services organizations." See MRPC 1.10, Cmt "Definition of 'Firm'". Also, "…a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client…" MRPC 1.10, (Cmt "Principles of Imputed Disqualification").

Shillingford and Trent].

This problem also underscores the serious constitutional risks inherent in a system that does not have such a conflict screening mechanism in place, which Defendant's court appointment contract system does not have. In *NYCLA, supra,* the court addressed this precise issue head-on when it stated:

> The assigned counsel plan serves a vital and important function by providing representation to indigent defendants and respondents in cases where the institutional providers have a conflict of interest…**These conflicts of interest occur frequently in juvenile delinquency cases and on a regular basis in child protective proceedings.**

Id. at 765. (Emphasis added).

e. <u>The Aggregate Effect of LAO 2006-08 Creates A Systemic Violation of the Constitutional Right to Effective Assistance of Counsel</u>.

All of the ways in which Defendant's implementation of LAO 2006-08 has or is substantially likely to operate, when viewed in its totality, i.e., the removal of counsel of record without good cause; a contract system that results in excessively high caseloads and inadequate flat fee compensation to sub-contractors; the appointment of "groups" rather than individual attorneys, including the elimination of two-thirds of the African-American attorney pool; and the failure to have a conflict screening procedure, leads to the undeniable conclusion that Defendants, through LAO 2006-08, violate the clearly established statutory and constitutional rights of children, including the Minor Plaintiffs in this action, to effective assistance of counsel.

D. <u>VIOLATION OF MICHIGAN JUVENILE CODE: BEST INTEREST OF CHILD</u>

The law is clear that when Michigan Courts assume jurisdiction over children, they do so with a statutory mandate that any action, with regard to the assignment of counsel, must be undertaken only with consideration of the best interests of the child. See, e.g., MCLA §§ 712A.1(3); 712A.4(4); 712A.13a; 712A.13b(6); 712A.17(1)(b); 712A.17c(2)(e) and (10); 712A.17d(1)(b); 712A.18f(3); 712A.19a(6) and 712A.19b. As well, it is acknowledged as such

by this Court in MCR 3.912 and 3.913, et al.

The actions of the Defendants, as described and set forth above, have failed to take into account the best interests and welfare of the child/children. This failure has been evident in all of the ways that are thoroughly discussed above.

All of these actions, combined, result in an overall system of attorney appointments on behalf of children that violates the philosophy and mandate of the Michigan Juvenile Code that requires the best of the children to govern. LAO 2006-08 fails this mandate.

E. VIOLATION OF ATTORNEYS' DUE PROCESS RIGHTS AND ETHICAL DUTIES.

The October emails sent by Leonard Branka**,** require Plaintiff attorneys, and all others similarly situated, to "relinquish all relevant materials…in the referee's courtroom." **[Exh. 3]** The subsequent Orders of Removal require them to turn over specific portions of their client files to unnamed "newly appointed counsel." **[Exhs. 6-16]** Although the Defendant Court's subsequent Orders of Removal more specifically identify the documents to be turned over, **[Exhs. 6-16],** they do not identify any individual substitute counsel, and there is no exception indicated, for example, for those documents which are protected by attorney-client privilege, or which may contain an attorney's handwritten work-product notes. These orders, therefore, both interfere with the property interest of attorneys in their client files without due process of law, and, place attorneys in an impossible ethical position that compromises their professional duties and violate the Rules of Professional Conduct.

The primary legal authority that is relevant to the property rights of the attorneys strongly supports the conclusion that an attorney's files belong neither to the client nor to the court.[39]

[39] Further, many portions of files are exclusively the property of the attorney, including but not limited to

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Ethics Opinions, R-19 (2000) and R-5 (1989). This authority, combined with the Rules of Professional Conduct, which make perfectly clear that, to the extent that any parts of the file belong to the client, it is the lawyer's ethical obligation to ensure the safekeeping of all of the client's papers and property. MRPC 1.15 and 1.16. Moreover, MRPC 1.6 ethically obligates attorneys to preserve and protect the sanctity of attorney-client confidentiality. By ordering Plaintiff Attorneys, and all other removed counsel, to either "relinquish" their complete files in the courtroom generally, or to turn certain documents over to unnamed "newly appointed counsel," Defendants in essence require these attorneys to violate both their own property rights and the Rules of Professional Conduct.

III. THERE IS NO ADEQUATE LEGAL REMEDY FOR THE DEFENDANTS' FAILURE TO PERFORM CLEAR LEGAL DUTIES.

Superintending control is appropriate where, in the face of a circuit court's systemic violation of clear legal duties, there is no other adequate legal remedy short of Supreme Court intervention. MCR 3.302; *Recorders' Court, supra* at 134; *Frederick, supra* at 14-15. In this case, as fully discussed above, Defendants have violated at least two clear legal duties: 1) the immediate violation of MCLA §712A.17c (9) in hundreds of open cases, through the mass removal of all individually appointed counsel/LGALs; and 2) the court's general practice, under LAO 2006-08, which violates children's constitutional and statutory right to effective assistance of counsel. There is no adequate legal remedy available for either of these violations, although for different reasons.

A. THERE IS NO ADEQUATE LEGAL REMEDY TO ADDRESS DEFENDANT'S GENERAL PRACTICE IN VIOLATION OF MCLA §712A.17c(9).

Generally, when parties have a meaningful appeal available to them, the court rule

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privileged and attorney work product information. Ethics Opinions, R-19 (2000); R-5 (1989).

governing superintending control, MCR 3.302, as applied by this Court, has established that superintending control is not appropriate. *Frederick, supra.* However, in cases where, as here, although an individual appeal may be technically available but such a remedy fails to resolve the underlying systemic problem arising from the court's general practices, then superintending control is entirely appropriate. *Recorder's Court, supra.*

With respect to the specific removal of all the individual attorneys representing children, pursuant to LAO 2006-08 §III.D, including Plaintiffs in this action, the appellate remedy, if available at all, is inadequate at best. Defendant's decisions to remove counsel in all these cases are not based on one, or even several, wrongly decided removals in one or more cases; rather, the decisions in all the cases are based on the general practice of the court which arose from the unlawful promulgation and implementation of LAO 2006-08. As such, Plaintiffs challenge the validity of the administrative order itself and, as expressly held in *Lapeer I, supra,* "…only this Court has jurisdiction to entertain such an action." *Id* at 574. And, in *Recorders Court, supra,* this Court aptly recognized that:

> ….even if attorneys were routinely granted relief on appeal, all they would have to look forward to is another appeal after the next assignment *because the underlying problem would remain unchanged.* Under such circumstances, the legal remedy is inadequate. [FN32]
> [FN32: Equitable relief is routinely granted to plaintiffs on the basis of inadequacy of legal remedy where they can show that "[t]he defendant acts in such a way that the plaintiff may be required to bring more than one suit to effectuate his legal remedy." Dobbs, Remedies, § 2.5, p 57.]

Recorder's Court at 135. (Emphasis added).

In Recorder's Court, this Court granted superintending control, finding that the fixed fee compensation system for assigned counsel criminal cases "…systematically fail[ed] to assure that individual attorneys [were] reasonably compensated for the services they perform[ed]…" *Id* at 135. Although the local administrative order at issue in *Recorder's Court* provided for an

extraordinary fee mechanism by which assigned counsel could petition the chief judge for additional payment where above-average effort had been expended, *Id* at 120, this Court specifically found this to be an inadequate legal remedy.

Similarly in this case, while LAO 2006-08 §III.D.3 allows each individual LGAL/counsel to file a motion to the Defendant Chief Judge, at her discretion, to present "special circumstances" why that LGAL/counsel should not be removed from that case, as fully set forth above, this process in itself violates the law (MCLA §712A.17c (9)) by imposing on each attorney the burden of convincing the Defendant court why they should not be discharged. This, in itself, flies in the face of the statutory language imposing the burden the burden on the court to find "good cause shown on the record" before removing a LGAL. Thus, in this case, even if every child, through their counsel, appealed every removal of their LGAL on a case-by-case basis, and even if the vast majority of such motions were granted, the underlying problem would remain unchanged. LAO 2006-08 would continue to "authorize" Defendant Chief Judge unfettered discretion to continue removing appointed counsel, in violation of the statutory prohibition.[40] Only this Court is empowered to adjudicate the validity of this administrative order. *Lapeer I, supra.*

Moreover, the extent to which said motions are denied, those children have no appellate remedy. First, they are in no position to pursue an appeal on their own to challenge removal of their LGAL/counsel. Further, their newly appointed counsel/legal "groups" have an inherent conflict between the best interests of the Plaintiff children to retain their original counsel, and their own interests in remaining as the newly appointed LGAL. Finally, whether the removed

[40] This is further illustrated by the fact that on April 6, 2007, Defendant Court circulated, via email, several hundred new Orders of Removal. **[Exh. 16(b), samples]**

LGAL/counsel has standing to appeal on behalf of his or her former client is questionable at best. For example, when Plaintiff Radulovich brought her motion before Judge Kelly, protesting her removal as LGAL from 6 of her child protective cases (on behalf of 36 children) and as appointed counsel in one delinquency case, Judge Kelly denied the motion in its entirety **[Exh. 28]** and then explicitly refused to recognize the former LGAL's standing to argue on behalf of the client from which she was being unlawfully removed. **[Exh. 28, p. 10; Exh. 31, ¶ 6]**

Finally, even if they were to appeal, based on a wrongful denial of a motion alleging "special circumstances" pursuant to LAO 2006-08 §III.D.3, the Court of Appeals would have jurisdiction only to consider whether the requisite "special circumstances" existed, not to adjudicate the court's general practice or the validity of the LAO itself. *Lapeer County I, supra* at 574. Thus, no adequate remedy is available except for a writ of superintending control by this Honorable Court.

B. THERE IS NO ADEQUATE LEGAL REMEDY TO ADDRESS THE VIOLATION OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

More problematic, in terms of adequate legal remedy, is how LAO 2006-08 is substantially likely to result in depriving children of their constitutional and statutory right to effective assistance of counsel, and leaves no one to raise that concern on the child's behalf.

In *Frederick, supra,* the Court found inadequate legal remedy where the plaintiff was disputing a decision that was issued by a court administrator, not a court order. Therefore, there was no available appeal. *Id* at 14-15. In this case, Plaintiffs dispute not only the individual cases of removal or a single instance of ineffective assistance. Rather, Plaintiffs challenge the entire system created by Sections III.A and D of the administrative order. As in *Frederick, supra,* challenging such an administrative order is unappealable in the traditional sense.

LAO 2006-08 creates a system that is fundamentally unfair to children by both

interfering with the existing attorney-client relationships in literally hundreds of cases, and by replacing the previous appointment structure with one that will inevitably result in far fewer attorneys available to represent the thousands of children in need.

There is simply no adequate legal remedy short of an order of superintending control from this Court declaring those provisions of LAO 2006-08 invalid. Defendant Chief Judge Kelly has failed in her legal duty to ensure effective representation to children under the jurisdiction of the Wayne County Circuit Court, Family Division, Juvenile Section; she has interfered with attorney-client relationships and prevented LGALS to perform their statutorily mandated duties; and she has put the economic interest of the court above the best interests of the children. As demonstrated above, there is no adequate legal remedy for these failures.

RELIEF REQUESTED

WHEREFORE, for these reasons, Plaintiffs respectfully request that this Court:

1. Issue an Order of Superintending Control ordering Defendant to rescind and repeal §§ III A and III D of Local Administrative Order 2006-08 ("LAO 2006-08") insofar as said provisions violate the statutory and constitutional rights of Plaintiffs and all others similarly situated;
2. Reinstate the individual attorneys who have been unlawfully removed as counsel for their juvenile clients;
3. Order that no more removals of counsel be ordered by Defendant Court during the pendency of this matter before this Court;
4. Schedule a discovery time line and evidentiary hearing, insofar as this Court deems necessary and appropriate;
5. Award attorney's fees and costs as provided for under the law; and
6. Order whatever other relief is deemed reasonable and just under the circumstances.

Plaintiffs further request that this Court grant Oral Argument, pursuant to MCR 7.304 (E).

Respectfully submitted,

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