

**Indigent Defense in Massachusetts: A Case History of Reform**  
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On July 29, 2005 the Massachusetts Legislature made significant systemic changes to the Massachusetts system of indigent defense and substantially increased the appropriation for indigent defense services. A bill was passed that increases hourly compensation rates for court-appointed counsel, significantly expands the statewide public defender program, strengthens indigency verification procedures and establishes two new commissions, one to study decriminalization and one to examine alternative revenue sources to fund indigent defense. The changes came after years of pressure on the Legislature to increase compensation rates for court-appointed counsel by the organization that oversees indigent defense and the organized bar. The major catalysts for change were two lawsuits filed with the highest court in Massachusetts challenging the constitutionality of the provision of indigent defense services, a shortage of qualified court-appointed counsel resulting in hundreds of indigent defendants left without counsel, and the recommendations of a legislative commission charged with evaluating Massachusetts' indigent defense system.

***The Committee for Public Counsel Services***

Massachusetts' state-funded Committee for Public Counsel Services (CPCS) is a fifteen-member body established in 1983 by Chapter 211D of the Massachusetts General Laws to oversee the provision of legal representation to indigent persons in the Commonwealth.<sup>1</sup> Legal representation of indigent defendants, parents and children is provided by a hybrid system of approximately 2,400 private attorneys (called bar advocates) and a full-time, staff public counsel division with 13 regional offices and approximately 110 staff attorneys handling criminal cases. The specific types of cases to be handled by the private counsel division and the public counsel division are set by statute. Bar advocates are appointed in the majority of district court cases, which include misdemeanor cases and initial appearances in some felony cases. It is estimated that private counsel provide representation to more than 90 percent of the over 200,000 new criminal and civil cases assigned to CPCS each year.

The 13 CPCS regional public defender offices are staffed by full-time public defenders representing criminal defendants only in superior court or felony-level cases. In addition, there are two CPCS family law offices with full-time staff representing parents and children in child protective cases, which are initiated to resolve issues of suspected abuse and neglect of children. In addition, CPCS contracts with 12 local Bar Advocate Programs, which are located in the various counties, to provide oversight of the private bar advocates. Bar advocates in turn sign contracts with their local program to provide representation in criminal and juvenile delinquency cases. In most cases these contracts are renewed annually. Private attorneys accepting appointments in children and family law cases (CAFL) are monitored by CPCS, not the bar advocate programs. The system of services provided by CPCS also includes training and

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<sup>1</sup> The creation of CPCS in 1983 signaled a shift in funding for indigent defense services from the counties to a system fully funded by the state.

certifying bar advocates. Judges can appoint counsel only from the list of attorneys certified by CPCS as being qualified to take court appointed cases.

Massachusetts has gone further than almost any other state in defining expectations and the role of court-appointed counsel. CPCS' detailed performance and training standards and oversight of court-appointed counsel are regarded as models for other programs nationally. However, increasingly court-appointed counsel felt that the expectations set out by CPCS asked too much of them, given the low rates of compensation they were paid for court-appointed work.

### ***Compensation Rates for Court-Appointed Attorneys in Massachusetts***

By statute, the Committee for Public Counsel Services is responsible for establishing compensation rates for court-appointed counsel, and periodic review of the rates must be conducted in public hearings throughout the state.<sup>2</sup> However, the rates approved by CPCS are subject to appropriation by the Massachusetts Legislature,<sup>3</sup> and the legislature routinely appropriates funds for rates lower than those approved and requested by CPCS.

The hourly compensation scheme under which assigned counsel in Massachusetts are paid was one of the lowest in the country and had remained essentially the same since 1986. From 1986 to August 2004 the rates paid to assigned counsel remained at: \$39 an hour in care and protection cases; \$30 an hour in CHINS cases; \$54 an hour in murder cases and murder appeals; \$39 an hour in mental health cases, superior court cases and superior court appeals; \$30 an hour in all other appeals, and in district court criminal cases, juvenile court delinquency cases, bail hearings and bail reviews, and sexually dangerous person reviews. For almost 20 years, repeated efforts were made by CPCS administration, bar advocates and the organized bar to lobby for increased rates, but were unsuccessful.

### ***Actions Leading to the Increase in Court-appointed Attorney Compensation Rates and Significant Systemic Reforms in Massachusetts***

In December 2002 CPCS received a number of reports from courts and lawyers regarding a shortage of attorneys in Western Massachusetts who were willing to take new appointments to represent children and parents in child protective cases. The Spangenberg Group (TSG) was hired by CPCS in 2003 to conduct a comprehensive study of the representation in child welfare cases in four western counties in Massachusetts. The report concluded, among other things, that low pay was a major factor for the shortage of attorneys willing to take appointments; however, no additional funds were appropriated to increase the rates.<sup>4</sup>

In early May, 2004, after two days passed where no attorneys appeared in Hampden County (Springfield, MA) to accept new criminal court assignments, and at least 19 indigent

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<sup>2</sup> In 2002 CPCS set the rates at \$60 per hour for district court and juvenile court delinquency cases and CHINS cases; \$90 for non-homicide superior court cases, care and protection cases and mental health cases; and \$120 for murder cases.

<sup>3</sup> See MASS. GEN. LAWS ch. 211D, § 11.

<sup>4</sup> *Western Massachusetts Child Welfare Cases: The Court-Appointed Counsel System in Crisis*. Prepared for the Committee for Public Counsel Services; October 2003.

defendants were being held in custody without counsel, CPCS, joined by the ACLU, filed a petition in the Supreme Judicial Court (SJC) on behalf of unrepresented indigent criminal defendants in Hampden County.<sup>5</sup> *Nathaniel Lavallee, et al. vs. The Justices of the Springfield District Court*, 442 Mass. 228 (2004).

Prior to the SJC's decision in *Lavallee*, the law firm of Holland & Knight, working entirely pro bono, filed a petition in the SJC alleging that Massachusetts system of indigent defense was unconstitutional. *Arianna S., et al. v. Commonwealth of Massachusetts, et al.*, SJ-2004-0282 (filed June 28, 2004). Unlike the *Lavallee* suit, which was filed on behalf of indigent defendants in Hampden County only, *Arianna* was a systemic statewide suit that included not only criminal defendants but child welfare cases as well. See *TSG's Involvement in a Systemic Lawsuit* below for more information on the *Arianna* case.

In early July 2004, after considering the parties' briefs and oral arguments, as well as the briefs of various amici curiae, the SJC declared that the *Lavallee* petitioners were being deprived of their right to counsel under the Massachusetts Declaration of Rights, and ordered respondents to appear before a single justice of the SJC to assist the court in fashioning an appropriate remedy and "to explain why any petitioner held in lieu of bail for more than seven days without counsel should not be ordered released from confinement," or why a petitioner facing a felony, misdemeanor or municipal ordinance violation or charge, who has been without counsel for more than thirty days, should not have his or her charges dismissed without prejudice until counsel is made available for representation.

On July 28, 2004, the SJC released its decision in the *Lavallee* case. The court concluded with "no difficulty... that the petitioners' constitutional right to the assistance of counsel is not being honored." The justices urged the judicial, executive and legislative branches to work together to fashion a permanent remedy for what the court categorized as "a systemic problem of constitutional dimension." To provide an immediate remedy, the SJC ordered trial courts to dismiss charges without prejudice for those defendants who have been facing felony, misdemeanor or municipal ordinance violation charges for more than 45 days without the assistance of counsel. With respect to defendants who have been held in lieu of bail or pursuant to an order of preventative detention for more than seven days without assistance of counsel, trial courts were ordered to release defendants on their personal recognizance with probationary conditions. Three defendants in Hampden County were released pursuant to *Lavallee*.

On August 17, 2004, eight days after three defendants were released because they were not appointed counsel after seven days of entering custody, the SJC issued an order on an "emergency basis," allowing judges in Hampden County, pursuant to Mass. Rules of Professional Conduct, Rule 6.2, to conscript lawyers to take court-appointed criminal cases. Judges were allowed to appoint any attorneys they felt were qualified, whether or not they were certified by CPCS to take appointed cases.

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<sup>5</sup> Hampden was one of the counties facing a shortage of child welfare attorneys studied by TSG in the previous year.

In the face of a growing shortage of available attorneys to represent indigent persons, two lawsuits, and the potential of additional defendants being released from custody pursuant to *Lavallee*, the Massachusetts legislature passed legislation in August 2004 that (1) increased by \$7.50 the court-appointed counsel hourly rates of \$30 in district court cases, \$39 in superior court and child welfare cases, and \$54 in murder cases, through a \$16.3 million supplement to the fiscal year 2005 budget; and (2) established a commission to study the provision of counsel to indigent persons (“An Act Relative to Private Attorneys Providing Public Counsel Services,” Ch. 253 of Acts of 2004).

The commission created by the legislature to study the provision of counsel to the indigent consisted of nine members: three appointed by the speaker of the house of representatives, three by the president of the senate, and three by the governor. Appointed members included attorneys, a retired judge, former and current legislators, and the chancellor of Boston College.

The commission held its first meeting in October 2004. The group was created to study the following: (i) the frequency of assignments of counsel in indigent cases; (ii) possible changes to control or reduce such assignments; (iii) the cost of providing counsel; (iv-v) the adequacy of procedures for indigency determination and for the assessment and collection of counsel fees; (vi) the balance between representation by public defender staff and court-appointed private counsel, in each practice area and in each county; (vii) the frequency in which neither public staff nor private counsel are available for appointment; (viii) the impact of the hourly fees on such availability; and (ix) the feasibility and potential benefits of providing indigent representation predominantly through public defender staff as opposed to private counsel.

A final report was issued by the commission in April 2004. The report recommended that the rate for all court-appointed counsel work be increased above the \$7.50 per hour raise, the state hire more public defenders to work in the district courts and hire more staff attorneys for child welfare cases, de-criminalize certain misdemeanor offenses,<sup>6</sup> and implement stricter indigency standards. Recognizing that merely raising the rates of compensation for court-appointed counsel was not enough to fix the system, the commission stated:

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

Under the commission's recommendations, the hourly compensation rates would increase incrementally over a three-year period, to ultimately reach \$55 (district court, CHINS and

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<sup>6</sup> The misdemeanors include: operation of a vehicle with a suspended license, registration or insurance; shoplifting; disorderly person or disturbing the peace; trespassing, and larceny by check.

juvenile court), \$60 (family law care and protection cases), \$70 (non-homicide superior court cases), and \$110 (murder cases), by fiscal year 2008. In fiscal 2009, the commission recommended that the state commit to a formula that would ensure the hourly rates are not lower than the 75th percentile of those paid to private attorneys representing indigent defendants in comparable states. The commission also recommended the creation of pilot projects in two counties to increase the number of public staff attorneys to handle district court cases. Each county office would increase its staff by 15 attorneys, one investigator and three support staff. CPCS would be required to report to the Legislature every four months for three years on the status of the \$2.4 million pilot project. In addition, the commission recommended CPCS hire an additional 20 attorneys to handle children and family law cases and juvenile delinquency cases statewide.

In late June, the fiscal year 2006 budget passed without additional appropriations for increased compensation rates and no bills were passed implementing the commission's recommendations. Prompted by the lack of action, a number of bar advocates stepped up lobbying efforts to have a supplemental bill passed. A House amendment was filed to increase the compensation rates for the bar advocates and the matter was referred to the Judiciary Committee. The Judiciary Committee held a hearing in June 2005, at which hundreds of people attended and testimony was heard for several hours. The Committee reported favorably on the amendment, however, the Legislative session ended without action.

On July 1, 2005, many bar advocates across the state declined to renew their annual contracts to provide representation in indigent defense and care and protection/family law cases. A shortage of attorneys, particularly in criminal cases, was felt by courts across the state and at one point nearly 500 defendants who were entitled to appointed counsel were without counsel. On July 20, 2005, the State Senate unanimously passed a bill that would increase the hourly compensation rates to the new rates of \$50, \$60 and \$100. The House of Representatives countered with a more sweeping bill that, among other things, called for adding pilot public defender programs staffed by 10 attorneys in each of 13 designated counties in Massachusetts to handle district court cases, raising the hourly court-appointed attorney compensation rates to the same level as the Senate bill and creating a provision that prevents court-appointed attorneys from accepting new assignments after they have billed 1,400 hours during a fiscal year. A conference committee was formed to reconcile the two bills.

Finally, on July 29<sup>th</sup>, a final version was passed by the Legislature and signed by the Lieutenant Governor, who was serving as Acting Governor at the time. The bill raised the rates of compensation to \$50 per hour in district court, CHINS, children and family law, care and protection, sex offender registry and mental health cases; \$60 per hour in superior court non-homicide cases including sexually dangerous persons cases; and \$100 per hour in homicide cases, and the rates were made retroactive to July 1, 2005, the start of the fiscal year. The bill reduced the number of pilot public defender programs initially proposed in the House amendment, from 13 programs to 11, each with 10 attorneys, one investigator and two support staff handling district court cases. CPCS was also told it could hire an additional 20 attorneys to handle children and family law cases and juvenile court cases. The provision that prevents court-appointed attorneys from accepting new assignments after billing 1,400 hours annually remained, as did provisions strengthening indigency verification.

A further provision of the legislation stated that commonwealth attorneys, defendants or the court may, unless the commonwealth objects in writing, “treat a violation of a municipal ordinance, or by-law or a misdemeanor offense as a civil infraction” and thus counsel is not required. When a violation of a municipal ordinance, by-law or misdemeanor offense is treated as a civil infraction, this may not “be used in the calculation of second and subsequent offenses under any chapter, nor as the basis for the revocation of parole or of a probation surrender.”

The new law also establishes two new commissions. The first is a permanent commission to study the possibility of decriminalizing certain misdemeanor offenses. Specifically, the commission is tasked with studying and analyzing “the imposition of civil penalties on certain offenses.” The other is a temporary commission that must submit a report to the Legislature in March 2006 to, among other things, study the feasibility of implementing a “dedicated fee, multiple fees, surcharge or combination thereof to be used for the purpose of providing counsel to indigent persons....” This includes an additional fee for all members of the Massachusetts bar and a surcharge on parking and traffic citations. (Chapter 54 of the Acts of 2005.)

The increased cost for fully funding the new changes will not be known for some time. It is estimated, however, that the 11 public defender pilot programs will cost an additional \$10.2 million,<sup>7</sup> the 20 CAFL attorneys will cost \$950,000, and the increase in assigned counsel compensation will cost \$23.3 million. Therefore, the legislature will need to appropriate an additional \$34.5 million, on top of the \$120 million initially appropriated for fiscal year 2006, to fully fund its new mandate. This would bring the total fiscal year 2006 budget for CPCS to approximately \$154.5 million. In fiscal year 2005 the total CPCS budget, with the \$16.3 million supplement to fund the \$7.50 per hour raise for court-appointed counsel, was \$107.5 million. This is up from the \$98 million appropriated in fiscal year 2004 (which includes a \$16 million supplement that was needed to fully pay all court-appointed counsel in that fiscal year) and \$72.9 million appropriated in fiscal year 2003.

### ***TSG’s Involvement in the Arianna Systemic Lawsuit***

In the fall of 2003, Holland & Knight sought the assistance of The Spangenberg Group to study the assigned counsel system in Massachusetts. Following completion of the initial study, Holland & Knight filed an original petition in the SJC on June 28, 2004, alleging that the system is unconstitutional because, with counsel paid at the hourly rates in place at the time of the suit, it placed indigent children and adults at a severe and unacceptably high risk that they would be deprived of their right to counsel under Massachusetts law. The lawsuit requested that a Special Master be appointed to study the Massachusetts indigent defense system further and make recommendations for improvement. Fifteen local and statewide bar and legal organizations joined the suit as *amici curiae*.

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<sup>7</sup> This number is based upon estimates included in the House of Representatives supplemental bill, which called for an additional 130 attorneys and support staff, rather than the final harmonized version, which called for 110 attorneys and support staff. Thus the actual amount of money needed to fund this portion of the final bill is unknown and may be less than the estimated \$10.2 million.

During April and May of 2004, TSG interviewed over 50 individuals involved in Massachusetts' system for providing assigned counsel for indigent defendants, parents and children, including attorneys, judges, jail and court administrators, managerial staff at CPCS, and staff of county bar advocate programs. This site work included numerous court observations. TSG also reviewed notes from interviews conducted by attorneys with the law firm of Holland & Knight and affidavits secured by Holland & Knight.

TSG further reviewed a CPCS database of records relating to the number of Notices of Assigned Counsel ("NACs"), vouchers submitted and payments made to court-appointed counsel between FY 1998 and FY 2003. To augment the data available from the CPCS database relating to bar advocates, TSG circulated a survey to the 12 bar advocate programs seeking more detailed information including recent changes in the numbers of attorneys taking a leave of absence, accepting fewer cases, and covering duty days.

In addition, working with Dr. Lawrence H. Stiffman, owner of Applied Statistics Laboratory, Inc., TSG fielded an electronic survey to all of the court-appointed attorneys who had email addresses on file with CPCS. The survey inquired about the work performed by court-appointed counsel for CPCS, caseload, support staff, expenses, overhead and other information regarding their practice.

In November 2004, the SJC stayed the *Arianna* suit pending the report of the legislative commission. In July 2005, at the request of Holland & Knight, the SJC held a status conference to consider lifting the stay after more than half of the court-appointed attorneys in Middlesex and Suffolk Counties (the two most populous counties in Massachusetts) refused to sign contracts to provide representation to indigent defendants with the local bar advocate offices. A crisis situation ensued and hundreds of defendants throughout the state were without representation. The crisis received widespread coverage in the news media. With this chaotic situation as a backdrop, the single justice who was hearing *Arianna* asked the parties to brief him on the implications of extending the *Lavalle* remedy (of releasing defendants in Hampden County who were held without counsel for more than seven days or dismissing charges without prejudice against defendants who were charged and not in custody who were not appointed counsel after 45 days) to Middlesex and Suffolk counties.

At the status conference, the justice stated on numerous occasions that he was optimistic that the legislature would act to increase the rates of compensation for court-appointed counsel and that this would in turn prompt the bar advocates to start taking cases again. Three days later, on July 29<sup>th</sup>, the Legislature passed a bill increasing the rates of compensation, among other measures. The request to lift the stay on the *Arianna* proceedings was made after the 2005 legislative session ended without a pay increase for court-appointed counsel, but before the senate and house passed supplemental bills. It is likely that the legislature took note of the SJC's renewed attention in the case, as the legislature acted swiftly to address the growing crisis. The status of the *Arianna* case is unknown at this time and will likely depend on whether bar advocates respond favorably to the increased rates and begin to take court appointments again.

## **Conclusion**

Compensation rates for court-appointed lawyers in Massachusetts were unreasonably low for many years. However, legislators seemed to gamble that in a state with nine law schools, there would be no shortage of attorneys willing and able to take court-appointed cases. So it wasn't until such shortages of attorneys were documented in child welfare cases in western Massachusetts, then in criminal cases in Hampden County, and finally statewide in all cases, both civil and criminal, that the legislature took action to remedy the situation. The way in which reform in Massachusetts was achieved was a multi-pronged effort that took place over two and one-half years. Arguably, reform would not have occurred without the combined attention drawn by systemic litigation, professional studies, a legislative study commission's report, media coverage, and activism by the private bar, bar advocates, and the leadership of CPCS, including the Chief Counsel, General Counsel and its board.

Although it will be impossible to immediately evaluate the success of the reforms implemented, they bear the potential of being some of the most positive enacted around the country in recent years. The changes -- increased pay for court-appointed lawyers, reduced hours for which they may receive pay for court-appointed work, addition of more staff defender positions, and creation of a commission to review the possibility of decriminalizing certain misdemeanors -- lay a responsible framework for providing adequate resources for indigent defense services in the most cost effective way. Significant indigent defense reform cannot occur without additional expenditures. The state's appropriation for indigent defense will increase from approximately \$98 million in fiscal year 2004 to approximately \$154.4 million in fiscal year 2006, an increase of 58 percent over the two year period. Massachusetts' enacted legislation holds potential as a model that addresses the need to provide adequate resources while evaluating ways in which to contain costs. The path taken to achieve this result is a model of collaborative and complementary advocacy.