The Commonwealth of Massachusetts

Committee for Public Counsel Services

44 Bromfield Street, Boston, MA 02108-4909

TEL: (617) 482-6212
FAX: (617) 988-8495

ANTHONY J. BENEDETTI
CHIEF COUNSEL

FY 2016 Budget Testimony of the Committee for Public Counsel Services
Anthony J. Benedetti, Chief Counsel
Joint Committee on Ways and Means
March 25, 2015

The Committee for Public Counsel Services (CPCS) is the statewide agency that oversees representation to indigent persons in criminal cases, civil cases and administrative proceedings in which there is a right to counsel. This right to counsel is guaranteed by *Article 12 of the Massachusetts Constitution's Declaration of Rights*, the *U.S. Constitution's 6th and 14th Amendments*, and the U.S. Supreme Court landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). In Massachusetts, this right was reaffirmed by our Supreme Judicial Court in *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004).

CPCS trains, certifies, and oversees approximately 3,000 private attorneys who accept a majority of the court's indigent case appointments. The remaining cases are handled by approximately 500 staff attorneys who work directly for CPCS in 26 office locations across the Commonwealth. They provide representation to clients in Superior, District, Juvenile, and Probate and Family court cases, and in appeals of those cases through our Defender, Children and Family Law (CAFL), Youth Advocacy (YAD), and Mental Health Divisions.

Recent History – 25% Mandate Challenges – Justice Management Institute Findings

The FY 2012 budget shifted CPCS's delivery system from a model in which public counsel staff handled **10%** of the indigent cases and the private bar handled the balance, to a model that requires public counsel staff to handle **25%** of the cases, while the private bar is assigned to the rest. To effectuate this change, CPCS expanded from **40** to **59** offices throughout Massachusetts and more than doubled the overall staff. This rapid expansion, which occurred over a period of more than a year and a half, has taxed our agency, exacerbating our already existing problem with staff retention. Prior to the FY 2012 mandate, CPCS's ability to retain staff was already difficult because of our inability to offer competitive salaries. Since implementation of the mandate, the problem has grown considerably. See **Exhibit A.**

Our staff retention problem was confirmed in a report issued by the Justice Management Institute (JMI) in June 2014. JMI is the independent evaluator the Inspector General engaged in response to a FY 2013 budget provision to assess CPCS's effectiveness in implementing the 25% mandate and to examine the mandate's goals of increased cost-certainty and cost-efficiency. Not only

did JMI confirm that our retention rate is driven by low salaries and hinders our ability to meet and maintain the FY 2012 25% mandate, it also found that the new model did not succeed in saving the Commonwealth money. In fact, JMI found that the new model costs more because the cost per case for public counsel is higher and did not improve cost-certainty, since "analysis of costs on an accrual basis does not show evidence of significant variation in costs from year to year."[1] See **Exhibit B.**

Specifically, the JMI report concluded that:

- [W]hile it met its hiring targets CPCS had the challenge of making up for rapidly growing attrition and training entry-level attorneys year-round.[2]
- The prevailing challenge is a high and growing attrition rate among public counsel that appears to be driven significantly by CPCS' inability to offer competitive salaries that will retain qualified staff.[3]
- In terms of improving cost certainty and cost effectiveness, the expansion has produced a modest 3 percent decrease in average cost per case. However, cost per case for public counsel has been and continues to be higher than costs for private bar advocates.[4]
- Overall, JMI's evaluation does not find that the expansion achieved the longer term goals of cost certainty or cost efficiency. In fact, a conservative calculation of implementation costs was more than $5 million.[5]
- Based on the results of the evaluation, JMI would discourage another similar expansion effort in the near term, particularly in light of the significant cost implications associated with an expansion effort.[6]

See **Exhibit C**.

It is important that the CPCS's cost-certainty be fully explained. Each year, CPCS submits an estimated funding request built on prior year expenditures, growth, and caseload trends. Over the last several years we have been able to forecast our projected spending with more certainty. Despite this certainty, we have historically been underfunded at the beginning of each fiscal year. The account

[1] The Justice Management Institute, *"A Study of the Expansion of the Committee for Public Counsel Services' Representation of the Indigent"*, June 2014, p. 26.

[2] The Justice Management Institute, p. iii.

[3] The Justice Management Institute, p. iii.

[4] The Justice Management Institute, p. 26.

[5] The Justice Management Institute, p. 27.

[6] The Justice Management Institute, p. 27.

primarily impacted is 0321-1510, which provides payment to private assigned counsel. Throughout the year, CPCS monitors assignments closely and tracks the number of cases the court assigns to both our public staff attorneys and private assigned counsel. As the fiscal year draws to a close, and we have more precise data on what is needed to fund the payments necessary to pay the private attorneys for handling the year's caseload, we submit a request for a supplemental appropriation. A small percentage of the funds expended in any given fiscal year are for services provided in the prior fiscal year. A close look at actual spending on services provided for specific fiscal years illustrates the minimal growth in spending CPCS has experienced over the past five years. See **Exhibit D**. The factor that has the greatest impact on spending is annual caseload. It is the one variable that cannot be predicted with any true certainty. This is especially true when issues arise that affect caseload. Two recent examples are:

- The increase in state intervention and termination of parental rights cases (C&P's) being brought by the Department of Children and Families (DCF), which began last year when petitions rose by 38%.

- The recent Supreme Judicial Court (SJC) decision in *Guardianship of V.V.*, 470 Mass. 590 (2015), which held that indigent parents have a constitutional right to counsel in private guardianship-of-a-minor proceedings.

CPCS has been dealing with the increase in DCF cases since last year and it has had an impact on our caseload and our budget. It has also created a crisis in the number of attorneys available for assignment to these cases (the pending supplemental budget has language that would allow CPCS some flexibility to appoint attorneys who have already reached their maximum annual billing cap to allow them to take C&P cases).

As for the impact of *Guardianship of V.V.,* CPCS is awaiting interpretation from the court as to whether the decision includes all guardianships or only those that are contested. The court's interpretation will mean that CPCS can either expect approximately 450 contested guardianships each year, which would lead to approximately 500-1000 new appointments for children and indigent parents, or CPCS can expect approximately 5,000 cases a year if the court decides that the decision includes all guardianship cases. This could result in as many at 5,000 to 10,000 assignments for children and indigent parents.

Staff Challenges

As mentioned earlier, the JMI report supports CPCS's assertion that one of our greatest challenges is a growing attrition rate, which is directly related to our "inability to offer competitive salaries." Many of the staff we recruit, hire, train, mentor, and eventually lose to better paying positions, are young men and women who are dedicated to justice and to aiding the Commonwealth's indigent. However, not long into their CPCS career these same dedicated individuals soon realize that the extremely low salaries that CPCS is able to pay them are far too insufficient to meet day-to-day expenses, pay student loans that total anywhere from $100,000 to $140,000, keep up with increasing rental housing costs, or begin thinking about a personal future. Even those who take second jobs eventually find that leaving CPCS and moving on to other positions, even entry-level ones, makes far more financial sense. Attorneys have left CPCS for employment in other Massachusetts state agencies, non-profits and other state public defender agencies.

Our agency invests significant time and effort in training, mentoring, and nurturing staff. It is not only disheartening to lose so many just as they are ready to handle a full complement of cases and provide us with independent, quality work, it is also an extremely poor business model, and costs CPCS and the Commonwealth far more than if we were able to maintain staff and stem our growing attrition rate.

It is completely illogical, extremely expensive, and undeniably wasteful to hire, train, and mentor new staff year-round. Our position is supported by a report issued by Florida TaxWatch, an independent, nonpartisan, nonprofit taxpayer research institute and government watchdog. The report, *"When It Costs More to Pay Less"* (March 2014) determined that "the taxpayers' cost to replace attorneys resigning due to inadequate pay was a higher amount than would be required to increase starting salaries."[7] It emphasizes how loss of staff "creates major gaps in office coverage, [which in turn] creates a number of 'Organizational Problems'."[8] TaxWatch developed a list of these 'Organizational Problems' after examining the starting salaries of Florida's assistant state attorneys and assistant public defenders who are paid slightly higher salaries than those provided to the Commonwealth's assistant district attorneys and CPCS public counsel staff. See **Exhibit E** and **Exhibit F**.

FY 2016 Budget Request

House 1

CPCS is grateful that the Governor funds our private counsel compensation account (0321-1510) by **$34.7M** more than in the FY 2015 General Appropriations Act (GAA). This account pays the private attorneys who are assigned indigent cases and receive payment through CPCS. We are also grateful that the Governor's proposal funds all of CPCS by **$33.8M** above our total FY 2015 GAA appropriation. **However**, since CPCS does not require full funding at the beginning of any fiscal year and is, instead, historically funded over the course of the year through supplemental appropriations, the Governor's proposal is, in fact, approximately **$11.6M** less than our projected spending for FY 2015.

Furthermore, CPCS would be severely impacted by the Governor's proposal in our Operations and Administration account (0321-1500), which is **$571,463** less than our FY 2015 GAA appropriation. This account is the line-item through which CPCS manages all functions of the agency including: our regional network of offices, our administrative staff and non-trial attorneys, the training staff, and the staff who audit the performance and billing of the private attorneys and the vendors. The Governor's proposal does the same to our Indigent Court Fees and Cost account (0321-1520), underfunding it by **$322,194** less than last fiscal year's GAA appropriation. This account pays the vendors who are court approved to provide expert services in our cases. These accounts and their appropriate funding are vital to our agency's ability to function properly. It is critical that the Legislature is aware of this underfunding and understands the devastating effect the Governor's proposal would have on our ability to effectively and efficiently provide quality counsel to the Commonwealth's indigent, continue to afford training and oversight to staff and the private bar, and continue to maintain a system that has an adequate number of trained attorneys and staff to attain and sustain the FY 2012 mandate.

[7] Florida TaxWatch, "When It Costs More to Pay Less", March 2104, p. 2.

[8] Florida TaxWatch, p. 10.

Total Request

CPCS's **Total FY 2016 budget** request, which represents our *Maintenance* budget and funding for four proposed *Initiatives*, is **$246,808,652**. This request reflects a funding level that would allow CPCS to continue our commitment to our statutory and constitutional responsibilities of providing effective and quality representation to the Commonwealth's indigent. It would also help us dramatically reduce our high attrition rate by providing equity to our staff through salaries that are in line with those of the Executive branch, and increase our staff's productivity, which would eventually result in significant savings to the Commonwealth by reducing funds now being used for the constant hiring and training of new staff. See **Exhibit G.**

Maintenance Request

We are requesting a *Maintenance* funding level of **$218,193,168**. This will allow us to maintain our current year services. It covers the cost of annualizing all positions filled during the current fiscal year, and the cost of annualizing certain office leases. It also provides a modest **3 percent** cost-of-living adjustment for all positions, excluding the chief counsel, and funds our projected private counsel expenditures and indigent court costs.

Essentially, this amount would provide CPCS with sufficient funding for:

- Our *Administration and* Operations account, **0321-1500**, which is for the overall operation of CPCS and its regional network of offices. It includes all administrative staff and non-trial attorney staff, as well as all personnel who are responsible for hiring, training, supporting and overseeing approximately 800 full-time staff, approximately 3,000 private attorneys who are assigned indigent cases and 2,000 vendors who provide services through our 0321-1520 account, such as investigators, social workers, and experts.

- Our *Public Defenders, Attorneys-in-Charge, and Appeals Attorneys Payroll* account, **0321-1504**, which funds our case-taking staff attorney payroll and payroll related expenses.

[Within the above two accounts all other non-payroll spending remains flat.]

- Our *Private Counsel Compensation* account, **0321-1510**, which pays for the approximately 3,000 private attorney (private counsel) costs billed directly to CPCS.

- Our *Indigent Fees and Court Costs* account, **0321-1520**, which funds court related costs and court experts that result from a formal court order issued by a justice of the Appeals or Trial Court.

Proposed Initiatives Request

CPCS requests funding for **four** *Initiatives* to address ongoing challenges, especially those related to our escalating problem with staff retention. An additional **$28,615,484** above our maintenance request would provide funding for the following **four** initiatives:

- *Compensation Relief for CPCS Staff*. This would allow CPCS to increase the salary of all staff to afford them parity with their counterparts in the Executive branch.

  Currently, CPCS staff attorneys are paid an annual entry-level salary of **$40,000**. The funding we seek would raise this entry-level compensation to **$55,000** annually. The increase is supported by reports issued by two recent Commissions, the *Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation* (May 2014) and former Governor Patrick's *Commission to Study Compensation of Assistant District Attorneys and Staff Attorneys of the Committee for Public Counsel Services* (December 2014), both of which recommended parity with staff salaries at the Executive branch. See **Exhibit H**, and **Exhibit I.** This request for an increase in compensation is further supported by attached **Exhibit J**.

  For all other non-attorney professional and administrative staff, a similar calculation was applied to estimate the appropriate salary using a comparable entry level Executive branch position. While the average increase varies by position category, salaries for non-attorneys would increase by an average of about **$10,365**.

The estimated annual cost of this request is **$14,175,586**. [This does not include the **3 percent** cost-of-living adjustment contained in our *Maintenance* budget request.]

- *Increase in the Hourly Rate Paid to Private Assigned Counsel*. The current hourly rates paid to private assigned counsel were established by *Chapter 54 of the Acts of 2005* and are set by statute in *G.L. c. 211D, § 11*. At the time of the last rate adjustment, the Legislature was responding, in part, to the recommendations of the *Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts*, which was convened in response to the SJC decision in *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004). The Commission recommended that the hourly rates paid to private attorneys be increased over three years, from FY 2006 to FY 2008. Today, **ten** years later, only the first increase has been implemented. CPCS is asking that the rates that were recommended to be implemented by 2008 be enacted now. Murder, other Superior Court cases, Care and Protection, and Mental Health cases would be increased **$10/hour**. Cases in District Court and Children Requiring Assistance (CRA) cases would be increased **$5/hour.** See **Exhibit K.**

The estimated annual cost of this request is **$18,296,260**.

- *Increase in Mileage Reimbursement for Staff*. We are requesting additional funding to increase from **.30/mile** to **.45/mile** the mileage reimbursement we offer our attorneys and staff for work-related travel. The current rate of .30/mile was set internally by CPCS Committee policy in January 2009. Since that time, the Executive branch and the Judiciary have increased their rate for staff to .45/mile. Increasing the rate to .45/mile would provide parity to our staff with the staff of the Executive branch and the Judiciary.

The estimated annual cost of this request is **$275,000**.

- *Additional CAFL Staff Attorneys to Address Growing DCF Related Caseload*. The number of state intervention and termination of parental rights cases brought by DCF remains at a historically high level, after having increased by **38%** in FY 2014, from **2,655** in FY 2013 to **3,663** in FY 2014. Because such cases typically necessitate the assignment of three or more attorneys to avoid issues of conflict, the increase in petitions has caused a significant increase in the number of attorney assignments needed from CPCS's CAFL Division. The increase in some areas of the Commonwealth has been so significant that even our present CAFL staff is not large enough to deal with the increase in cases. In response, we are proposing that CPCS add **ten** new staff attorneys to our CAFL division to help deal with the growing number of DCF filings. These additional positions, which, in addition to current staffing levels and the filling of existing vacancies, would allow assignments to staff to mirror pre-growth levels.

The estimated annual cost of this request is **$550,000**.

Cost-Saving Measure

For many years, CPCS has asked that the Legislature reclassify a number of low-level misdemeanors as civil infractions as a cost saving measure that would also serve the best interests of justice and not affect public safety negatively. The cases generated by these low-level offenses are dealt with in District Court, where most of our cases occur. Even if a small portion of these cases were reclassified to civil infractions, which means offenders would not face any jail time, the need for counsel would be eliminated and the number of cases assigned to CPCS and the related costs would markedly decrease. See **Exhibit L**.

In the FY 2010 budget, the Legislature downgraded three offenses recommended by the 2005 *Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts*. Two were 1st offense motor vehicle violations related to compulsory insurance coverage and operating after suspension. The third was a 1st offense for disorderly persons and disturbers of the peace. Once decriminalized these three offenses saved CPCS millions of dollars.

The FY 2011 budget established the *Commission on Criminal Justice*, of which I, then CPCS General Counsel, was a member, to examine additional offenses that could be reclassified as civil infractions. Although a final report was never issued, the Commission worked diligently to arrive at a consensus that would eventually downgrade a number of offenses and provide savings to the Commonwealth.

In 2012, the *House Post Audit and Oversight Bureau*, chaired by State Representative David Linsky (D-Natick), issued a report, "*Fair and Cost Effective – Ensuring an Adequate Defense while Protecting the Taxpayers; Review of the Indigent Defense Counsel Program"*, in which it "determined that there were a great number of cases that were being appointed public counsel for single misdemeanor charges, where no jail time was either sought by the prosecution or imposed by the court."[9] It concluded that "**41** misdemeanors should no longer presume incarceration"[10] based on its

[9] Massachusetts House Post Audit and Oversight Bureau, *"Fair and Cost Effective – Ensuring an Adequate Defense while Protecting the Taxpayers; Review of the Indigent Defense Counsel Program"*, p. ii.

review of "43,757 misdemeanor crimes charged [in FY 2011] in which the defendant was being arraigned on a single misdemeanor."[11] Although this would not completely remove CPCS from being involved in such cases, it would limit our participation and could result in savings.

CPCS has advocated in numerous forums in favor of modifying the penalty for many of these offenses and downgrading them to civil infractions to save the Commonwealth money by cutting expenses, not only incurred by CPCS, but by the court, probation, and the prosecution. Since a vast majority of these cases are resolved by the payment of a fine and not incarceration, it makes fiscal and judicial sense to deal with them as civil infractions so that the need for the appointment of counsel is eliminated and the considerable burden placed on the resources of our judicial system is alleviated. **However**, in addition to assuring that no incarceration be sought, thereby eliminating the need for counsel, any changes to our laws should ensure that no collateral consequences occur as a result of any convictions resulting from such changes. In removing one's right to counsel because the threat to one's freedom no longer exists, we should be cautious not to expose our citizenry to collateral consequences, which can include loss of housing, loss of employment, loss of custody of one's children, and deportation. A conviction of even a low-level offense can have a negative effect on an individual's life. In the balance between cost-saving measures and justice, justice should never be compromised.

The continued examination of this issue is a step in the right direction; further legislative change is necessary to achieve actual savings. There are far too many low-level, nonviolent violations for which offenders are not being sentenced to a term of incarceration. If they were downgraded to civil infractions with increased fines for penalties, CPCS would save millions of dollars, substantial savings would be realized by the court and the prosecution, and thousands of individuals would be spared a conviction on their criminal record for a low-level non violent offense.

Conclusion

Thank you for your consideration of CPCS's FY 2016 General Appropriation request. We are mindful that the Commonwealth remains in a challenging fiscal position, and that you will have a number of difficult decisions to make in the weeks and months ahead. We ask that in making these decisions you consider our ongoing challenges, our concerns with the Governor's proposal, the savings that could be realized if further action is taken to reclassify additional low-level, nonviolent misdemeanors as civil infractions, and JMI's findings on the impact that the FY 2012 mandate has had on our agency. If you have any questions or if there is any additional information that you or your staff require, please do not hesitate to contact me.

[10] Massachusetts House Post Audit and Oversight Bureau, p. iii.

[11] Massachusetts House Post Audit and Oversight Bureau, p. iii.