



# PHILADELPHIA BAR ASSOCIATION

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February 20, 2013

Everett A. Gillison, Deputy Mayor for Public Safety  
City of Philadelphia  
City Hall  
Philadelphia, PA 19107

RE: **Conflicts Counsel**

Dear Mr. Gillison:

We appreciate the opportunity to discuss with you the City's proposed reforms in the system of providing legal representation for indigent defendants, children, parents and others in the Courts of Common Pleas and its other judicial venues. The Philadelphia Bar Association has been committed to ensuring the provision of quality representation for indigent defendants and other litigants for decades. I have appointed a special Task Force of experienced practitioners to advise me in this important work, and we look forward to engaging you and your colleagues in the coming weeks. As explained below, we urge the City to delay implementation in order to more thoroughly consider possible structural models and alternatives.

## Conflicts RFP

As we expressed in our recent meeting, we have concern that the Request for Proposals titled "Opportunity 21121129102316" ("RFP") and the public funding that has been envisioned to support this work fails to adequately provide for sufficient legal representation of the needy and vulnerable clients whom the project seeks to serve.

On November 30, 2012 the City issued the Conflicts RFP through its ECONTRACT system seeking "proposals from qualified firms or entities for the purpose of providing legal representation for indigent criminal defendants, and other litigants, in the City of Philadelphia where the Defender Association of Philadelphia is prohibited from providing such representation due to the existence of a conflict of interest."

We are pleased that the RFP requires "the provision of investigative, expert consultation, social services and other ancillary services as the chosen provider, in its professional judgment deems necessary in order to provide effective assistance of counsel and to protect

the legal rights of their client.” As well, the City’s stated objectives for the project, summarized below, provide an appropriate framework for the new model:

- High quality, professional legal representation.
- Cost efficient.
- Attorneys need to be readily available and proceed in such a manner as to not cause needless and unnecessary delays in litigation.
- Modern and efficient case management system capable of integrating with the Courts and other City entities.

We are concerned, however, that as with the current system, too low a level of funding will prevent the achievement of these goals. We do not believe that high quality legal representation services augmented by necessary ancillary services can be provided with the amount of funds envisioned, which averages out to about \$450 per case per year (assuming \$10 million and 22,000 cases). Respectfully, this and other flaws in the RFP call into question whether the submissions will be adequate to satisfy the right to counsel and due process of law.

### Best Practice Models

We urge you to pursue “best practice” models of representation, training and support as you seek to evaluate and implement new service models and contracts, and we discuss these below. Any acceptable program must assure the provision of high-quality legal practice, sufficient social services, investigative support, professional training, supervision, and reasonable caseloads and compensation that allow and encourage best practice service. It is critically important that contracts not be awarded where these standards cannot be met.

Thus we request that you do not accept proposals and enter into contracts with any providers who have not yet explained concretely how their work will comply with best practices standards. In addition, to ensure accountability, we request that you require that any contractor report back periodically (and prior to amendment to extend the contract) with details as to how it has met these standards through staffing, practices and procedures. This is the practice with non-profit legal services funder contracts such as the Pennsylvania Legal Assistance Network and the national Legal Services Corporation in distributing government funds to providers. If you would like our assistance in drafting a questionnaire for providers addressing their approach to best practice standards, we are willing to assist.

The profession offers dozens of resources to guide the development of practice standards, caseload limits and models of compensation, and a number of jurisdictions have implemented best practice models with success, some even with long term cost savings. These resources and existing programs should be consulted as the City builds its new model of conflicts appointments. We set forth several key references below to assist City officials in their understanding of the demanding and complex task of representation of indigent clients in dependency, juvenile and criminal practice.

### Dependency Representation

Both parents and children who are subjects of dependency proceedings have a statutory right to court-appointed counsel; for parents, the appointment of counsel is tied to the ability to pay.<sup>1</sup> The American Bar Association has developed “Standards of Practice” for attorneys representing children, parents and agencies in child welfare cases. Many states include in the contract for services a provision that attorneys will adhere to the Standards. The ABA Standards can be found at:

<http://apps.americanbar.org/child/rcj/repstandwhole.pdf> (Child Attorney Standards) and <http://apps.americanbar.org/child/clp/ParentStds.pdf> (Parent Attorney Standards).

Sadly, these issues have been a continuing concern in dependency proceedings for decades. In 1997, and emulating recommendations set forth in the ABA Standards, The Board of Governors urged the First Judicial District to implement “a system of appointment and compensation of court-appointed private counsel for parties to dependency and adoption proceedings which:

- Limits eligible lawyers to those who are qualified to represent such parties, in accordance with standards of practice which reflect the American Bar Association *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* and other similar national and local guidelines, and which representation at a minimum requires: appearance at, preparation for and participation in all court hearings and conferences; attendance by the attorney (or a qualified representative) at Family Service Plan meetings and other service planning sessions; and fieldwork for investigations, client interviews and service provider contacts;
- Sets caseload limits not to exceed 110 cases per lawyer;
- Assigns lawyers and makes appointments on a fair, impartial and sequential basis;
- Compensates attorneys for representation services throughout the term of appointment, at levels which reflect the numbers of sibling children involved in and the complexity of the case, and includes both in-court service and out-of-court preparation, participation in case reviews and post-dispositional hearings and involvement in appeals, at a rate not less than \$500 per case per year.”

Philadelphia Bar Association, “Resolution on Appointment of Counsel in Dependency Proceedings”, adopted March 27, 1997. Unfortunately compensation for court-appointed dependency practitioners remains dreadfully below the threshold we recommended in 1997, and questions about the quality of practice that is supported by the fee system are widespread and troubling.<sup>2</sup>

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<sup>1</sup> 42 Pa.C.S.A. §§ 6311 (“Guardian ad litem for child in court proceedings”) and 6337 (“Right to counsel”).

<sup>2</sup> Individual dependency lawyers in conflicts appointments are currently paid \$250/hearing to a maximum of \$500 in first year of a case, \$150/hearing to a maximum of \$300 in second year of case, and \$60/hearing to a maximum of \$120/year for third and all subsequent years. Children’s lawyers are paid per family of children, rather than per child, regardless of the number of children. All court-appointed counsel must participate in an initial full-day training to be included on the appointment “wheel”. There is no caseload limit or standard imposed by the court.

Attorneys in dependency have the difficult role of providing in-depth, ongoing counsel and representation to Philadelphia's most vulnerable children and families at a time of serious crisis. Dependency cases are dynamic and require counsel to remain actively engaged in the case, gathering information to present to the court assessing the evolving circumstances and changing needs of the child and parent. What happens in these cases has a life-altering impact on children and families involved as decisions about whether to preserve, or reunite families or find another permanent home for a child and even to permanently terminate the parent-child relationship are made in these proceedings.

Many children and parents have experienced significant personal trauma and poverty, among other issues like housing instability, mental health and substance abuse issues. To be effective, attorneys must understand their client's family dynamics and changing concerns and advocacy needs, and thus must develop a trusting relationship. For example, effective attorneys for parents can help parents acknowledge hard truths and connect them with appropriate treatment or substantive help for issues that cause their family to be vulnerable. Yet there is no time for delay; the Adoption and Safe Families Act (ASFA) significantly shortened the time frame within which parents have to remedy the problems that caused their children to be unsafe and that prevents reunification. If a child has been in placement for 15 out of the last 22 months, DHS must file to permanently terminate parental rights, unless there is a compelling reason.

Given the complexity of issues and tight ASFA timeframes, dependency attorneys have an equally critical role outside of court hearings, a role that is greatly enhanced by having social work support staff. Much of the decision-making and advocacy occurs in between court dates, i.e. during case conferences, service planning meetings and communications with caseworkers, evaluators, treatment providers, teachers, therapists and other counsel. Lawyers and their social work staff must have a functional understanding of the problems families face, what resources are available, how to access them, as well as how to advocate for what families need even when these resources are not readily available.

Furthermore, the work of parent and child attorneys has increased dramatically in the last year due to the courts' decision to decrease the time between hearings to a 90-day hearing cycle, thus almost doubling the number of hearings. This was instituted as part of a state-wide reform effort and is widely considered a best practice that helps families, but nevertheless, it adds to the work and number of court appearances of counsel. DHS also will be implementing its "Improving Outcomes for Children" initiative (IOC), which will shift child welfare practice to a single case management system by providers that are geographically situated in different communities. This practice change will increase work for counsel as it entails an increase in the number of important out of court meetings that will occur in each case as well as adds to the potential locations and travel distances of those meetings.

### Juvenile Delinquency Conflicts Representation

Representation of youth in juvenile justice proceedings bears many of the hallmarks of dependency practice presented by trauma history, competency, family dynamics, and treatment needs, and of course complicated by the due process demands of a criminal

justice defense practice with expansive constitutional content and the heavy implications of a delinquency adjudication. Many of the delinquent cases are as serious if not more so than the adult criminal cases, with the additional pressure to get cases ready for hearings in 10 days if the client is in detention.

The “Pennsylvania Performance Guidelines for Quality and Effective Juvenile Delinquency Representation” ([http://www.jdap.info/file/juvenile\\_performance\\_guidelines.pdf](http://www.jdap.info/file/juvenile_performance_guidelines.pdf)) were adopted by the Interbranch Commission on Juvenile Justice, which was tasked with making recommendations for reform in Pennsylvania’s juvenile justice system to ensure that the scandal in Luzerne County would not be repeated. The Interbranch Commission recommended that the Pennsylvania Supreme Court adopt the Performance Guidelines. The Pennsylvania Commission on Crime and Delinquency has endorsed the Performance Guidelines through its Model Juvenile Unit Initiative which provides funding to public defender offices that are working to meet the Performance Guidelines.

The Performance Guidelines incorporate the national standards and best practices with the requirements of the Pennsylvania Juvenile Act and the Supreme Court Rules of Juvenile Court Procedure. These guidelines have been adopted and implemented by the Board of Directors of the Defender Association of Philadelphia and the Juvenile Defenders Association of Pennsylvania.

The Performance Guidelines incorporate the American Council of Chief Defenders’ caseload recommendations that attorneys with a mixed caseload of misdemeanors and felonies handle no more than 200 cases per year. Caseloads should be considerably lower for attorneys who handle more complex matters such as sexual assault cases, direct file cases, juvenile cases that the District Attorney seeks to transfer to the adult system and cases involving complex dispositional issues such as mental health concerns.

The Pennsylvania Performance Guidelines are supported by national standards including the “Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems” (National Juvenile Defender Center, National Legal Aid and Defender Association, ([http://www.njdc.info/pdf/10\\_Core\\_Principles\\_2008.pdf](http://www.njdc.info/pdf/10_Core_Principles_2008.pdf))). The National Juvenile Defender Center and the MacArthur Foundation Models for Change, Juvenile Indigent Defense Action Network have recently completed National Juvenile Defense Standards (2012) (<http://www.njdc.info/pdf/NationalJuvenileDefenseStandards2013.pdf>), a comprehensive guide to the standards are required for effective delinquency representation.<sup>3</sup>

Lawyering for youth involved with the delinquency courts is a special craft, as the negative implications of juvenile justice involvement are more profound than ever. The well-documented phenomenon of the “school-to-prison pipeline” suggests that school discipline

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<sup>3</sup> See also *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2002) (<http://www.njdc.info/pdf/cjfjfull.pdf>); and *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003) (<http://www.jlc.org/resources/publications/pa-assessment-access-counsel-and-quality-representation-delinquency-proceedin>).

issues and their frequent referral to juvenile court have become an important point of intervention for advocacy. The recently-implemented Sexual Offenders Registration and Notification Act (SORNA) results in some youth being labeled and tracked for their entire lifetimes.

More positively, an increased use of “cross-over” jurisdiction of delinquent and dependent court proceedings offers alternatives to delinquency adjudication. Post-disposition right to counsel and attorney advocacy are unique Philadelphia and Pennsylvania features of our juvenile justice system that must be preserved and advanced.

### Criminal Representation

On the issue of criminal representation, any new system of providing defense services in conflict cases must take into account standards that have been adopted by criminal justice experts, including the ABA, National Association of Criminal Defense Lawyers, and the Philadelphia and Pennsylvania Bar Associations. These standards were adopted to ensure that the defense service system will provide effective assistance of counsel, and set forth minimum mandates regarding the training, supervision and effectiveness of defense counsel in a public defense system. See “Ten Principles of a Public Defense Delivery System” (February, 2002) ( [http://www.nlada.net/library/article/na\\_abatenprinciples](http://www.nlada.net/library/article/na_abatenprinciples) ) and the American Council of Chief Defenders “Statement on Caseloads and Workloads” (National Legal Aid and Defender Association, 2009)( [www.nlada.org/DMS/Documents/1189179200.71/](http://www.nlada.org/DMS/Documents/1189179200.71/) ).

Of special significance for the RFP are the mandates regarding caseloads, counsel’s experience and training, and a system for reviewing performance for quality and efficiency. More specifically, the standards recommend that any individual *full-time* lawyer not be assigned more than 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 non-capital appeals. The standards also recommend that the caseloads be lowered where the felony cases are more complicated and require more investigation or legal research, including capital cases and sexually violent offender cases (both trial and commitments matters). Thus, capital cases require the appointment of two lawyers, and the expectation is that these cases will take anywhere from 100 to 2000 hours of preparation and trial time.

Applying these standards to the conflict pool of cases in Philadelphia, there are different means of providing effective representation. For example, an office designed along the lines of the current Defender Association, where efficiency is obtained by assignment of lawyers by zone and courtroom (horizontal representation except in major and homicide cases) to cover approximately 15-20% of the cases in the system (conflict cases) would by our best estimates require 36 lawyers, 3 social workers, and 3 investigators to cover representation for juvenile, misdemeanor (MC cases), felony and appeal cases. We discuss homicide case representation below.

As an alternative, an office comprised of part-time experienced criminal defense lawyers with each lawyer handling her own caseload, would have to include a sufficient number of lawyers to handle the conflict pool of cases. In 2010-2011, based on information provided

in the RFP, there were 2400 juvenile appointments, 3260 felony appointments, 2350 MC appointments, and 525 post-conviction cases. Beyond those groupings, there are homicide appointments (80% of the total of these cases), appeals, PCRA, probation and parole violation hearings, and mental health matters. At a minimum, a review of a proposal structured along these lines must carefully assess the resulting caseloads per lawyer.

A third model would be similar to the federal CJA approach, where lawyers are certified to represent defendants in criminal cases by the Defender Association and experienced private criminal defense lawyers are paid on an hourly basis for their services.

Homicide appointments pose separate and even more difficult issues. For capital cases, Judge Benjamin Lerner recently submitted a formal recommendation to the Pennsylvania Supreme Court, that all appointed capital lawyers be paid at a rate of \$90/hour. Judge Lerner estimated that such a fee schedule would require approximately \$560,000 annually *if* the District Attorney holds to his agreement to limit capital designations to approximately 25 cases per year. Further, capital cases are only a small part of the homicide pool (about 10% of all cases) and even non-capital cases can require an enormous amount of preparation and trial time.

For comparison purposes, the Defender Association has an annual budget of approximately \$2 million to cover only 20% of all homicide cases in Philadelphia. We are not suggesting that an additional \$8 million is necessary, but any proposal must come to grips with this very costly part of an urban criminal justice defense system. As a recent RAND study has shown, Defender representation, which has become a national model for capital cases, provides far more effective representation than privately appointed lawyers in Philadelphia in capital cases. This cannot be done without the financial and other resources that are necessary in these specialized, highly contested, and often protracted cases.

### Further Study

It should also be noted that the Task Force has significant concerns about the framework of a for-profit model and the inherent conflicts to which it will inevitably lead. As currently constructed, the RFP anticipates a comprehensive funding scheme for the new entity. Thus from a fixed pool of money, in addition to attorney salaries, the new entity would have to fund social workers, expert witnesses, support staff, office space, malpractice insurance, investigation as well all other costs associated with the running of a law office. If the city employs a for-profit model, it will create a tension pitting the needs of the individual indigent client with the desires and goals of the entity to make a profit.

A review of the homicide cases, for which the new entity would presumably assume nearly 70-80% of the current case load, underscores the dangers of such a model. Currently, the Defender Association allocates nearly two million dollars to fund 20% of the homicide cases to which it is appointed. Funds are used to hire expert witnesses such as independent medical examiners, or pay for mitigation experts. The Defender Association has no pecuniary interest to not spend monies it deems required to zealously and effectively advocate for its clients. A for-profit entity, on the other hand, would. Should that entity choose not to hire needed experts, the windfall it would receive would go to its bottom line

and permit the payment of bonuses or other ancillary benefits that have nothing to do with the effective representation of its clients. Thus there exists a real and foreseeable consequence where the entity would prioritize its financial desires/needs over the needs of its clients. The Task Force foresees this issue not just in homicide cases, but in all cases where funding would be needed to serve the best interests of the client where the expenditure of funds for experts and or investigation is crucial.

In light of the concerns raised in this letter, we appreciate and accept the offer extended by City Solicitor Shelley Smith for the Philadelphia Bar Association to provide assistance when proposals are reviewed by the City, so that we may offer our expertise and guidance. Please contact me with regard to how we can accomplish this objective.

However, given the gravity of the rights at stake and the costs of fixing a failed reform effort, we urge the City to delay implementation in order to more thoroughly consider possible structural models and alternatives. We would work with the City to bring in an expert and appoint a task force to review the research, best practices and already-successful cost-effective models being employed in New York City and other comparable jurisdictions, in order to recommend a course of action for Philadelphia.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kathleen D. Wilkinson". The signature is fluid and cursive, with the first name being the most prominent.

Kathleen D. Wilkinson, Esq.  
Chancellor  
Philadelphia Bar Association