



## Comments on Report and Recommendations of the Judiciary Working Group on Attorney Pro Bono Assignments

Lowenstein Sandler LLP (the “Firm”) thanks the Court for the opportunity to provide comments on the *Report and Recommendations of the Judiciary Working Group on Attorney Pro Bono Assignments* (2023) (“Report”). For the reasons stated below, the Firm agrees with the Judiciary Working Group’s finding that “the state has the primary obligation to provide effective counsel in matters affecting fundamental rights” and supports the Working Group’s recommendations: (1) to “replace [the current system] with a publicly funded system authorizing the Office of the Public Defender or Legal Services of New Jersey and its affiliated organizations to handle case types currently assigned under Madden”; and (2) to enact modifications to the current Madden system until such time that a “system of publicly funded compensated counsel is operational.” Report at 2, 3.

The Court’s current system of assigning mandatory pro bono cases pursuant to Madden v. Delran, 126 N.J. 591 (1992), has a significant impact on the Firm and its approximately 230 attorneys who are licensed in New Jersey. Having handled scores of Madden assignments and created a robust pro bono practice outside the Madden system, the Firm and its lawyers can offer a unique and informed view on the proposed Recommendations. In just the four years since 2019, dozens of Firm attorneys have received court-appointed Madden assignments. As reflected in Appendix C to the Report, most assignments were in domestic violence contempt and parole revocation matters. Many of the lawyers who received Madden assignments were either corporate and transactional attorneys who have little or no prior litigation/courtroom experience, or they were newly barred and inexperienced attorneys. A significant percentage of our other lawyers—approximately 30–35 percent of our NJ-licensed lawyers since 2019—have been able to claim Madden exemption 88 by virtue of completing 25 or more qualifying pro bono hours in conjunction with a certified pro bono provider.<sup>1</sup>

In our experience, the written and recorded training materials made available to individuals with Madden assignments did not adequately prepare them to represent their clients. The Firm was able to supplement these materials with access to Firm lawyers who have developed an expertise in these subject matters and could therefore provide supervision and mentorship. We recognize that we were in a unique position to do so given the Firm’s size and resources, including full-time lawyers devoted to the pro bono practice—resources that are not available to many NJ-licensed lawyers. Even with these additional resources, however, our corporate lawyers often sought to co-counsel with or transfer their Madden assignments to our litigators.

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<sup>1</sup> In recent years, on average, an additional 14% of the Firm’s NJ-licensed attorneys volunteered at least 25 hours annually to providing pro bono legal services but were unable to claim exemption 88 because they worked on matters that were not referred by providers on the Court’s list of qualifying pro bono organizations. See list of qualified organizations at <https://www.njcourts.gov/pbosprod/Chart>.

As the Court recognized in Madden, “[t]he victim in the present system is not the bar, but the poor.” 126 N.J. at 615. Unfortunately, this remains true 31 years later, as the stop-gap measures that have become the current Madden system continue to deprive indigent individuals of competent and effective counsel. The Madden system “is simply not effective in matching willing and skilled attorneys with economically disadvantaged clients facing consequences of magnitude.” New Jersey State Bar Association Report, *Achieving Effective Representation in Right to Counsel Matters*, 17 (April 2021) (“NJSBA Report”). It is through this client-focused lens that we provide our comments to the Recommendations in the Report.

**A. Recommendations One–Three: The Current *Madden* System Should Be Replaced with a Publicly Funded System That Provides Effective Representation to Indigent People in All Cases Where There Is a Right to Counsel.**<sup>2</sup>

The Firm agrees that the current Madden system “falls short of providing equal access to justice when it randomly assigns attorneys to handle complicated legal matters without ensuring that the assigned attorney has any familiarity with the type of matter.” Report at 9. In our experience, pro bono attorneys are capable of effectively representing indigent clients in matters of great consequence when there is a legal services or public interest organization that screens the matter and provides adequate training, sample materials, and ongoing mentorship/supervision to the volunteer lawyers—all of which are lacking in the current Madden system. The many systemic problems and failures of the Madden system are laid out in detail in the NJSBA Report at 15–16.

Through legislative and court action, New Jersey has provided more expansive rights to appointed counsel than federal law.<sup>3</sup> Indeed, the Court has repeatedly recognized that the rights to due process of law and fundamental fairness enshrined in the state constitution demand a right to appointed counsel in matters of great consequence. *See e.g., Pasqua v. Council*, 186 N.J. 127, 147 n.5 (2006). But that right is illusory without the resources necessary to ensure that indigent litigants are receiving *effective* counsel.

As acknowledged by the NJSBA and the Judicial Working Group: “The state has the primary obligation to provide effective counsel in matters affecting fundamental rights[, as] established through the federal and state constitutions, case law, and in some cases, statutory law.” Report at 7 (quoting NJSBA Report at 2). No other jurisdiction relies on mandatory, court-appointed pro bono assignments to satisfy its obligation to provide indigent litigants with their constitutional and/or statutory right to counsel. While the Court created the Madden system in 1992 as a stop-

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<sup>2</sup> The numbering in the Summary of Recommendations at pages 4–5 of the Report does not always correspond to the more fulsome discussion of the Recommendations at pages 6–17. Our comments are organized according to the eight Recommendations in the Summary.

<sup>3</sup> New Jersey has recognized or enacted a right to counsel in the following types of cases for which there is currently no government-compensated counsel: “municipal court appeals; representation of parents in termination of parental rights in private adoption; representation of persons facing parole revocation; representation of defendants in domestic violence contempt matters; violation of probation related to domestic violence; representation of persons in need of guardianship (except for clients of DDD for whom guardianship only of the person is sought); and paternity proceedings.” NJSBA Report at 15.

gap measure for providing access to counsel at no cost until the Legislature dedicated funding to right-to-counsel cases, more than 30 years have passed with this ineffective system in place. New Jersey should abandon this system once and for all. It is time to ensure that indigent litigants have equal access to justice through the appointment of qualified and experienced attorneys with expertise in their assigned area of representation. This can only be accomplished through government funding of “effective representation to indigent people in all cases where there is a right to counsel.” Report at 4.

Although it has been hesitant to do so, the Court has the authority to order the Legislature to provide the funding necessary to comply with the constitutionally mandated right to counsel. See, e.g., Abbott v. Burke, 119 N.J. 287, 384–85 (1990) (holding that inadequate financial resources deprived students in the poorest urban districts of their constitutional right to a thorough and efficient education and issuing remedial orders in subsequent Abbott cases to ensure the education funding and services required to redress the constitutional deprivation); Right to Choose v. Byrne, 91 N.J. 287, 312 (1982) (holding that state constitution required the government to fund “those abortions medically necessary to preserve the life or health of the woman”); cf. Plyler v. Doe, 457 U.S. 202 (1982) (holding that equal protection clause required the state of Texas to fund the education of children who were not “legally admitted” into the United States).

For these reasons, the Firm supports Recommendations 1 and 2(a): “Legislation should be enacted to expand the charge of the OPD [Office of the Public Defender] to handle domestic violence contempt hearings; parole revocation hearings; guardianship cases for people receiving NJ Division of Developmental Disability (DDD) services; Division of Child Protection and Permanency (DCPP) administrative matters; and civil commitments,” and “the Legislature should be called upon to fund” this mandate. Report at 4. The OPD has indicated its willingness to take on these additional matters, which comprise at least 93% of Madden assignments. The OPD is already representing individuals in criminal proceedings arising from the same incidents that led to a DV contempt matter, and it would be more efficient for the attorneys and the clients if the OPD were funded to handle both the civil and criminal adjudications. Likewise, OPD attorneys are best positioned to represent individuals facing reincarceration in parole revocation proceedings. The OPD’s statutory mandate and funding has previously been expanded to take on additional matters that would benefit from the expertise of its lawyers (see NJSBA Report at 9–10), and the Legislature should make this modest, additional expansion.

The Firm also supports Recommendation 2(b): funding should be provided to LSNJ for “specialty case types that fall under Madden, such as contested adoptions.”<sup>4</sup> Report at 4. These specialty cases comprise approximately 8% of Madden assignments and require specialized knowledge that LSNJ and its regional programs already have within their practice areas.

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<sup>4</sup> The Judicial Working Group Report states at p. 10 that LSNJ would also take responsibility for guardianship cases. It is unclear whether this includes guardianship cases for people receiving DDD services, which the Report previously stated should fall within the ambit of the OPD. The Firm takes no position on which entity (OPD or LSNJ) should be responsible for cases involving individuals with DDD services, but this should be clarified in any subsequent action the Court takes on these Recommendations.

Recommendation 3 calls upon county governments to provide funding, particularly for domestic violence contempt hearings. The Firm supports governmental funding of all right-to-counsel matters and takes no position on whether the funding comes from the state or the counties.

We note that the Judicial Working Group also considered whether the Madden system should be subsidized by the New Jersey bar through increased yearly assessments. The Firm concurs with the Judicial Working Group's unanimous conclusion that "the state's obligation cannot be made the obligation of New Jersey's licensed attorney population." Report at 15. The Firm could not locate any other jurisdiction that relies on a financial assessment on the bar to pay for a right to appointed counsel.<sup>5</sup>

In his January 10, 2022, letter to Judge Grant, Judge Telsey inquired whether certain categories of exempt attorneys should be allowed to satisfy their Madden obligations through financial payments or whether any attorney should be provided "the option to pay into the fund in lieu of performing the work." Report, Exhibit A at 7. The Judicial Working Group implicitly and correctly rejected these options when it unanimously concluded that members of the bar should not bear financial responsibility for the appointment of counsel beyond what every New Jersey resident bears through the payment of taxes.

**B. Recommendations Four–Eight: Proposed Recommendations to Make the *Madden* System More Effective and Equitable Until a Publicly Funded System Is in Place.**

The remaining Recommendations address interim changes to the current Madden system to make it more equitable and manageable until it can be replaced by a fully funded system. The Firm supports these Recommendations for the reasons stated in the Report with a few additional comments below.

Recommendations 4 and 5 address the vicinage where the assignment originates. As laid out in Judge Telsey's January 10, 2022, letter, the Judicial Working Group was tasked with considering whether assignments should be made regionally rather than by county to "alleviate the disproportionate impact placed on attorneys who practice in small counties with fewer eligible attorneys on the list." NJSBA Report at 4. Parole revocations currently account for 16.4% of Madden assignments and can be conducted remotely. The Working Group's Recommendation to permanently "allow assignment based on county of commitment, rather than county of detention" will alleviate some of the disproportionate impact on attorneys in counties of detention, and the Firm accordingly supports this recommendation. Id.

The Judicial Working Group considered the proposal to regionalize assignment pools and ultimately concluded that, "with the exception of parole revocation hearings, the current system of

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<sup>5</sup> The Firm reviewed caselaw and certain state's court rules, but it did not conduct an exhaustive nationwide survey on how each jurisdiction pays for counsel for indigent litigants. We note, however, that the NJSBA and Judicial Working Group have extensively studied best practices for providing a right to counsel in forming their Recommendations, and no group has identified any other jurisdiction where the state's obligation to provide counsel is placed on the private bar, either through mandatory assignments or assessments.

assigning cases by vicinages [should] remain.” Id. Considering the proposed changes through the lens of what is best for the indigent litigants (and not the attorneys), we agree with the Judicial Working Group’s conclusion. Domestic violence contempt proceedings, which account for most Madden assignments, are typically resolved through pleas or in-person trials. In our experience, it is critical for pro bono attorneys to be able to meet with their clients prior to the trial date. Assigning local attorneys to these matters will help ensure that clients get more in-person access to their lawyers.

Recognizing that a county-based system will still lead to a disproportionate impact based on the number of matters and attorneys in a particular county, we recommend that the Court order each county to consider how it can make the assignment process more equitable within the county. For example, in counties with a high number of registered attorneys, random assignments may be fairer than proceeding down an alphabetical list. In counties with a smaller number of registered attorneys, consideration of prior Madden assignments and/or the length of an assignment may be appropriate before making subsequent appointments in a given calendar year.

Recommendation 6 calls for better tracking and analysis of case types. The Firm agrees with this Recommendation and provides no additional comments.

Recommendation 7 would reduce the number of exemptions in the Madden system.<sup>6</sup> We agree that exemptions 86, 87, 88, and 89 should remain.<sup>7</sup> We also recommend providing an exemption for attorneys and judges who are prohibited by statute, rule, administrative directive, Executive Order, or published Ethics Code or Opinion from performing the duties that are necessary to complete their Madden assignments (current exemptions #81 and #82).

The Firm agrees with all the improvements to the Madden system set forth in Recommendation 8. See Report at 8, 11–12. Allowing attorneys to specify areas of expertise and interest during their annual registration will equip courts to make more informed Madden appointments and help ensure that indigent litigants are better matched with appointed counsel. We also whole-heartedly support and recommend that additional resources be dedicated to training and mentorship of attorneys who receive Madden assignments. The current training materials are inadequate and improperly focused on plea arrangements, as opposed to trial preparation—a clear detriment to the clients who are served by this system. Better training materials and ongoing access to mentoring attorneys for the duration of the assignment will help support attorneys who receive mandatory assignments.

For all the above reasons, the Firm supports the Judicial Working Group’s Recommendations with the few additions noted above. We once again thank the Court for an opportunity to provide input on the Report and its Recommendations.

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<sup>6</sup> If the current Madden system is replaced with a fully funded system, there will be no need for any exemptions. Accordingly, we interpret this Recommendation to call for a reduction in the available exemptions until such time as there is no longer a Madden system.

<sup>7</sup> The summary of Recommendation 7 at page 5 of the Report enumerates these four exemptions as those that should remain in effect. Footnote 5 at page 15 of the Report omits exemption 86. We assume this was a mistake.

Respectfully submitted,

**Gary Wingens**

Chair and Managing Partner  
Lowenstein Sandler LLP  
[gwingens@lowenstein.com](mailto:gwingens@lowenstein.com)

**Jennifer Fiorica Delgado**

Lowenstein Sandler Pro Bono Committee  
[jdelgado@lowenstein.com](mailto:jdelgado@lowenstein.com)

**Christina Holder**

Corporate Public Interest Counsel  
[cholder@lowenstein.com](mailto:cholder@lowenstein.com)

**Mark Kesslen**

Lowenstein Sandler Pro Bono Committee  
[mkesslen@lowenstein.com](mailto:mkesslen@lowenstein.com)

**Benjamin A. Kimes**

Lowenstein Sandler Pro Bono Committee  
[bkimes@lowenstein.com](mailto:bkimes@lowenstein.com)

**Natalie J. Kraner**

Senior Public Interest Counsel  
Member of Judicial Working Group  
[nkraner@lowenstein.com](mailto:nkraner@lowenstein.com)

**David Leit**

Lowenstein Sandler Pro Bono Committee  
[dleit@lowenstein.com](mailto:dleit@lowenstein.com)

**Kimberly Lomot**

Lowenstein Sandler Pro Bono Committee  
[klomot@lowenstein.com](mailto:klomot@lowenstein.com)

**Catherine Weiss**

Partner and Chair,  
Lowenstein Center for the Public Interest  
[cweiss@lowenstein.com](mailto:cweiss@lowenstein.com)

**Anthony Raymundo**

Lowenstein Sandler Pro Bono Committee  
[araymundo@lowenstein.com](mailto:araymundo@lowenstein.com)

**Thomas E. Redburn**

Lowenstein Sandler Pro Bono Committee  
[tredburn@lowenstein.com](mailto:tredburn@lowenstein.com)

**Jeffrey M. Shapiro**

Lowenstein Sandler Pro Bono Committee  
[jshapiro@lowenstein.com](mailto:jshapiro@lowenstein.com)

**Peter Slocum**

Lowenstein Sandler Pro Bono Committee  
[pslocum@lowenstein.com](mailto:pslocum@lowenstein.com)

**Kristin Taylor**

Lowenstein Sandler Pro Bono Committee  
[ktaylor@lowenstein.com](mailto:ktaylor@lowenstein.com)

**Rossie Turman**

Lowenstein Sandler Pro Bono Committee  
[rturman@lowenstein.com](mailto:rturman@lowenstein.com)

**David Wissert**

Lowenstein Sandler Pro Bono Committee  
[dwissert@lowenstein.com](mailto:dwissert@lowenstein.com)