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June 15, 2023

Via Mail and Comments.Mailbox@njcourts.gov

Hon. Glenn A. Grant
Administrative Director of the Courts
Richard J. Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

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

Dear Judge Grant:

Thank you for forming the Working Group on Attorney Pro Bono Assignments (“Working Group” or “WG”) and affording us the opportunity to submit comments. We also thank you and the New Jersey Supreme Court for the unwavering leadership with respect to and support of pro bono in New Jersey.

We commend the Working Group, Assignment Judge Telsey and the Cumberland/Gloucester/Salem Vicinage Committee, and the Right to Counsel Committee of the New Jersey State Bar Association (“NJSBA”) for their significant efforts and thoughtful commentaries and recommendations. Our comments here are addressed to the Working Group’s Report and not the recommendations in Assignment Judge Telsey’s memo (Appendix A to the WG Report) or the NJSBA’s Report (Appendix B), unless otherwise noted.

Who We Are

Pro Bono Partnership (<https://www.probonopartner.org>) provides free transactional legal services to small 501(c)(3) public charities that serve economically disadvantaged and traditionally underrepresented populations, enabling them to more effectively feed the hungry, house the homeless, protect the civil rights of individuals, promote the arts, protect the environment, and provide essential programs to, among others, children, the elderly, individuals with disabilities, the unemployed, survivors of domestic or sexual abuse, immigrants, and veterans.



Volunteer Lawyers Strengthening Nonprofits & Our Communities

Pro Bono Partnership likely is unique among the 132 approved pro bono providers listed at <https://www.njcourts.gov/supreme/apps/pbos/probonoorganization/Chart> in that we focus on assisting nonprofits with business-related transactional legal services. We do not provide direct legal services to economically disadvantaged defendants in litigation who face consequences of magnitude and/or the loss of fundamental rights and who are the focus of the Working Group's Report, Judge Telsey's memo, and the NJSBA's Report. However, nearly all of our clients in New Jersey, including numerous legal services organizations, provide services to New Jersey residents who are economically disadvantaged.

Working Group's Recommendation to Reduce the Number of Madden Exemptions

We agree with the Working Group's recommendation that the following four exemption categories should be retained:

- **Exemption 86**, for attorneys who are not currently practicing law at all.
- **Exemption 87**, for attorneys who work full-time for a legal services organization.
- **Exemption 88**, for attorneys who have provided a minimum of 25 qualifying pro bono hours in lieu of a Madden-assigned matter.¹
- **Exemption 89**, for attorneys who serve as members of a District Ethics Committee, a Fee Arbitration Committee, or serve on other specified Committees and Boards approved by the Court.

WG Report at 5. However, the Working Group also recommends that "if the Madden system were funded through an assessment on attorneys, which the Working Group strongly discourages," then Exemption 86 should be eliminated. WG Report at 5, n.5.²

1 We would like to note that Judge Telsey's memo, at pages 5 to 7, accidentally conflates the 11 Madden Exemptions into one when it treats them as all being authorized by R. 1:21-12 (*Madden-Exemption Based on Voluntary Qualifying Pro Bono Service*), at <https://www.njcourts.gov/attorneys/rules-of-court>. Rule 1:21-12 principally pertains just to Exemption 88. Using the 2022 data in Appendix D (Pro Bono Exemption Report by Category) of the Working Group Report, 39,156 attorneys claimed entitlement to one of the 11 Madden Exemptions. Of those exemptions, just 897 (2.3%) related to Exemption 88.

2 Based on a difference between the wording of Recommendation 7 on page 5 of the Working Group Report and the wording in footnote 5 on page 15 of the Working Group Report, it is possible that the elimination of Exemption 86 was not intended by the Working Group and resulted from an oversight in the editing of its report.

It is unclear to us whether the second recommendation with respect to Exemption 86 includes “retired” attorneys, who by definition are not practicing law. See *Definitions and Explanations for Attorney Status*, at <https://www.njcourts.gov/host/attyapps/GoodStandingStatusDefinitions.pdf>.

If the Court is inclined to adopt the Working Group’s recommendation to eliminate Exemption 86, we respectfully recommend that Exemption 86 be retained for retired attorneys for the policy reasons set forth by the Court in its 2020 Notice and Order that encourages attorneys to volunteer while retired. See *Notice and Order – Retired Attorneys – Permission to Provide Pro Bono Services; Exemptions from Annual Assessment Fee and Continuing Legal Education Requirements – Amendments to Rule 1:28-2 and CLE Reg. 202:1* (Dec. 10, 2020), at <https://www.njcourts.gov/notices/notice-and-order-retired-attorneys-permission-provide-pro-bono-services-exemptions-annual>.

Achieving the Goal of Full Public Funding of Legal Services for Economically Disadvantaged Defendants

The common goal of the Working Group’s Report, Judge Telsey’s memo, and the NJSBA’s Report is full public funding of legal services for economically disadvantaged defendants in litigation who face consequences of magnitude and/or the loss of fundamental rights, thereby eliminating the need for Madden assignments (hereinafter the “Goal”). We heartily endorse the achievement of the Goal and encourage the Legislature and Governor, as well as county governments if necessary, to take the steps required to provide full public funding.

The Working Group recommended against imposing an annual fee on attorneys as a way to partially fund court-appointed attorneys. WG Report, at 15. While we agree with that recommendation, it is possible that the Court might consider imposing a modest annual “Madden fee” on attorneys as part of its dialogue with legislative and county leaders and the Governor in order to encourage them to come up with a comprehensive solution to the Madden court-appointment system. Judge Telsey’s memo, at 6-8, offers a reasonable starting point for further discussion of this proposition.³

Judge Telsey provides the example of attorneys claiming Exemption 90 (attorneys who practice law out of state and not in New Jersey) as a group that isn’t supporting pro

3 As an additional incentive for state and county governments to contribute their fair share toward the costs of providing free legal services for economically disadvantaged defendants in litigation who face consequences of magnitude and/or the loss of fundamental rights, Judge Telsey’s memo, at 7-8, also suggested consideration of establishing in each Vicinage, or perhaps on a state-wide basis, a list of attorneys who are willing to volunteer to handle each Madden case at a reduced fee.

bono efforts in New Jersey. These attorneys constitute 48% of the attorneys who listed a Madden Exemption in 2022 (see Working Group Report Appendix D).

A somewhat similarly situated group is composed of attorneys who are not currently practicing law and fall within Exemption 86 (which includes attorneys who are not practicing law, attorneys who are completely retired, and certain other attorneys). Attorneys within Exemption 86 constitute 25% of the attorneys who listed a Madden Exemption in 2022. Although we don't know what portion of this group consists of attorneys who are not practicing law, we do know that they retain a significant benefit by being able to represent that they are active members of the New Jersey bar without having to undertake any Madden-assigned representations in New Jersey.

In addition, and regardless of whether the Court were to consider requiring an annual Madden fee on attorneys, we respectfully suggest that the Court consider revising the annual attorney registration process now to include the ability for attorneys to make a voluntary financial contribution to a dedicated fund for the provision of paid attorneys to provide effective representation of economically disadvantaged defendants in litigation who face consequences of magnitude and/or the loss of fundamental rights. If the Court were to require an annual Madden fee, an attorney should still have the ability to make an additional, voluntary financial contribution to the fund.

The Court would need to consider whether paying a mandatory fee and/or voluntary fee would satisfy an attorney's obligations under Rule of Professional Conduct 6.1 (*Voluntary Public Interest Legal Service*), at <https://www.njcourts.gov/attorneys/rules-of-court/rules-professional-conduct>.

We respectfully offer a few observations for the Court's consideration once the goal of full public funding is achieved:

- The Court should reiterate to attorneys admitted in New Jersey that their obligations under RPC 6.1 remain in place. The Court should consider including in RPC 6.1 an aspirational goal of at least 25 hours of pro bono legal service, which would comport with Exemption 88.⁴
- In view of RPC 6.1, the Court should encourage attorneys to continue to volunteer through the legal services or public interest organizations and law

4 In 2022, the editorial board of the *New Jersey Law Journal* recommended that the Court "should mandate 50 hours of pro bono legal work (as defined in the model rule and by the Pro Bono Institute) a year, with appropriate exemptions as determined by the court." *Pro Bono Service Should be Mandatory*, 228 N.J.L.J. 2974 (Nov. 21, 2022), at <https://www.law.com/njlawjournal/2022/11/20/pro-bono-service-should-be-mandatory>.

school clinical or pro bono programs that have been certified by the Court pursuant to R. 1:21-11 (*Definitions and Certifications Regarding Pro Bono Practice*), at <https://www.njcourts.gov/attorneys/rules-of-court>, and are listed as Approved Organizations at <https://www.njcourts.gov/supreme/apps/pbos/probonoorganization/Chart>.

- The New Jersey Court's "Pro Bono" home page, at <https://www.njcourts.gov/attorneys/pro-bono>, will need to be revised to reflect this new path for voluntary pro bono in New Jersey.

Working Group's Recommendation to Change to the Annual Attorney Registration System

The Working Group Report, at page 17, recommends that:

A hyperlink should be added to the [annual attorney] registration system to link approved/certified pro bono organizations applicable for exemption 88. The registrant can then accurately report volunteer work done in the prior year and will be informed of the existence of pro bono volunteer opportunities they might prefer.

Note that some attorneys volunteer with more than one legal services organization during a calendar year. For example, some of our volunteers contribute their skills and time not only to our nonprofit clients but also to the clients of other organizations, such as Legal Services of New Jersey and Volunteer Lawyers for Justice. Currently, there are 132 approved organizations listed at <https://www.njcourts.gov/supreme/apps/pbos/probonoorganization/Chart>.

Thus, if the Working Group's recommendation is adopted, there will need to be a way for attorneys to check off each of the pro bono organizations with which they volunteered during the prior calendar year.

NJSBA's Recommendation Relating to Office of the Public Defender Pool Attorneys

We strongly endorse Recommendation 12 in the Report of the NJSBA's Right to Counsel Committee, at pages 39-40, that "[t]he hourly compensation rate for [pool attorneys participating in the Office of the Public Defender program] should be raised to \$175 per hour, with an annual adjustment based on an index such as COLA. All time expended, including travel time, shall be reimbursable, subject to reasonableness."

Judge Grant, if you need any further information from us, please contact Christine Michelle Duffy at (973) 240-6955 x303 or Nancy Eberhardt at (973) 240-6955 x324.

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Thank you for your consideration of our comments.

Respectfully yours,

Handwritten signature of Nancy Eberhardt in cursive.

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