



NEW JERSEY STATE BAR ASSOCIATION

TIMOTHY F. MCGOUGHAN, PRESIDENT
Law Office of Timothy F. McGoughran, LLC
802 West Park Avenue, Suite 222
Ocean, NJ 07712
732-660-7115
tmcgoughran@mcgoughranlaw.com

June 19, 2023

Hon. Glenn A. Grant
Administrative Director of the Courts
Comments on Report and Recommendations of
Judiciary Working Group on Attorney Pro Bono Assignments
Hughes Justice Complex / P.O. Box 037
Trenton, NJ 08625-0037

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

Dear Judge Grant:

Thank you for the opportunity to comment on the report and recommendations of the Judiciary Working Group on Attorney Pro Bono Assignments (Working Group). The New Jersey State Bar Association (NJSBA) is pleased that the action recommended by the Working Group is, in many instances, aligned with the action previously recommended by the NJSBA. Those recommendations are contained in a report prepared by the NJSBA's Right to Counsel Committee and adopted by the NJSBA in April 2021, *Achieving Effective Representation in Right to Counsel Matters* (RTC Report). I have attached a summary of the recommendations contained in that report once again for the Judiciary's review and information.

The NJSBA has long advocated for the abolition of the *Madden* system of random pro bono assignments in favor of a publicly funded system to provide effective legal representation to those who are unable to afford counsel on their own. The NJSBA is joined in that advocacy by organized bar associations throughout the state. Indeed 17 county and affinity bar associations have adopted resolutions calling for the end of the *Madden* assignment system, as it presents an obstacle to equality, a barrier to justice and a disservice to all. It is unfair to litigants who are unable to afford their own counsel but are constitutionally entitled to effective representation, and places attorneys in the untenable position of potentially violating their professional obligation to provide competent counsel by forcing them to provide representation in matters outside the scope of their expertise.

Against that backdrop, we offer the following comments on each of the recommendations contained in the Working Group's report.

1. Legislation should be enacted to expand the charge of the Office of the Public Defender (OPD) 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.

NJSBA Comments: The NJSBA supports this recommendation as the OPD is best positioned with appropriate knowledge and expertise to provide representation in these areas.

2. The Legislature should be called upon to fund the provision of effective representation to indigent people in all cases where there is a right to counsel; specifically:

a. Funding should be provided to the OPD for its expanded mandate.

NJSBA Comments: The NJSBA supports this recommendation and urges that all necessary action be taken to ensure the OPD has the staff and resources it needs to effectively represent litigants under an expanded mandate as noted above.

b. Funding should also be provided to LSNJ so that it can handle specialty case types that fall under *Madden*, such as contested private adoptions.

NJSBA Comments: The NJSBA supports funding for legal service organizations to handle specialty case types, as they already have or can quickly develop the expertise to undertake specialty cases such as guardianships and/or contested private adoptions.

3. County government should be called upon to fund payment of public defenders in areas the Legislature fails to fund; more particularly to handle domestic violence contempt hearings.

NJSBA Comments: The NJSBA supports the overarching recommendation to publicly fund domestic violence contempt matters. We do not object to a shared funding arrangement between the county and the state, but we note that a statewide solution is the best way to ensure consistent and effective

representation is provided for all defendants who are unable to afford counsel.

4. The Working Group recommends permanent adoption of recent changes to the assignment of parole revocation hearings under *Madden* to allow assignment based upon the county of commitment, rather than the county of detention. The pilot project has alleviated the disproportionate impact upon attorneys practicing in the county of detention. Further, as all parole revocation hearings are conducted remotely, logistical problems for assigned counsel have been eliminated.

NJSBA Comments: The NJSBA supports this recommendation for the reasons expressed by the Working Group.

5. The Working Group rejects regionalization of assignment pools and recommends that, with the exception of parole revocation hearings, the current system of assigning cases by vicinage remain.

NJSBA Comments: The NJSBA accepts that the current vicinage-based system of pro bono appointments may need to continue as an interim solution until fully funded representation is established. The NJSBA recommends, though, that steps be taken to ensure that pro bono assignments are made in a fair, uniform and systematic manner so assignments are fairly allocated among all of the eligible attorneys in each vicinage.

6. Current tracking methods for case types that are presently handled under *Madden* should allow for proper statistical analysis.

NJSBA Comments: The NJSBA supports the recommendation that the AOC enhance data collection and availability in connection with *Madden* assignments as a step toward making the right to counsel fully accessible, transparent, and consistent.

7. Presuming the *Madden* system shifts from its current random compulsory assignment method to a fully funded system, the current available exemption categories, as listed within the Annual Memorandum of Exemptions, should be significantly reduced.

NJSBA Comments: On an interim basis and until representation is fully funded, the NJSBA supports the exemptions noted by the Working Group: (1) attorneys who are not currently practicing law at all; (2) attorneys who work full-time for a nonprofit legal services or public interest organization;

(3) attorneys who have provided a minimum of 25 qualifying pro bono hours in lieu of a *Madden*-assigned matter; and (4) 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. The NJSBA notes that the current exemptions have evolved somewhat haphazardly, the reasoning behind each is unclear, and a reduction in exemptions will ensure a broader base of attorneys available for representation.

8. Until the present *Madden* system can be replaced by a publicly funded system, the Judiciary should take the following actions in order to improve the current method of assigning pro bono counsel.

a. The attorney registration system should be updated to track an attorney's practice area, preference or expertise with an explanation that such information may be considered, but will not be determinative, of potential pro bono appointments.

NJSBA Comments: The NJSBA supports the notion that, as long as the *Madden* system exists, attorneys should have an opportunity to select the types of cases in which the attorney has competence, and the court should assign cases that require specific expertise to attorneys who indicate the ability and willingness to handle those cases. This should only be implemented as an interim measure, however, with additional action taken to move toward a fully publicly funded system. We also support the recommendation to provide a hyperlink on the online registration page to ease the process of attorneys reporting pro bono work and to allow them to be informed of the existence of pro bono opportunities they may prefer.

i. This information will allow each vicinage to the extent practicable to use attorneys in their experienced practice areas to better make assignments in specialty case type areas.

NJSBA Comments: The NJSBA supports this recommendation as an interim measure if the assignments are publicly funded with attorneys who are able to provide effective representation to these individuals. This should not, however, be a permanent solution in lieu of a fully funded publicly provided source of representation.

b. A pool of volunteer attorneys should be created to answer questions from *Madden* attorneys.

c. The Judiciary should develop in-depth training materials and provide additional resources to assist assigned counsel in *Madden* matters.

NJSBA Comments: While the NJSBA understands the rationale for these two recommendations, it is concerned that these steps will not lead to a suitable substitute for the provision of effective representation. Furthermore, creating a pool of “voluntary” attorneys to mentor *Madden*-assigned attorneys will simply shift the State’s responsibility to another group of unpaid attorneys.

In addition, while not listed in the Working Group’s recommendation, the NJSBA supports the position of the Working Group that fees imposed on attorneys should not be used to fund the provision of counsel. The constitutional obligation to provide effective counsel rests with the state and is not the responsibility of attorneys.

Finally, the NJSBA urges the Judiciary to consider the NJSBA’s other recommendations, including:

1. Funding should be provided to allow municipal public defenders to continue representation in municipal appeals and municipalities should be required to compensate the municipal public defenders for these appeals.
2. Until a system of publicly funded compensated counsel is operational, the Court should:
 - a. Provide attorneys with access to services through OPD or create other clear procedures and access to ancillary services required in the litigation.
 - b. Waive all court filing fees in these matters for litigants with court-appointed counsel.
 - c. Provide for automatic e-filing upon assignment of all cases that commence as *pro se* cases.
3. Attorneys who do not have the competence to handle an assignment should not be required to hire substitute counsel, as this puts the attorney in an unenviable position of either a) using personal assets to fulfill the state’s responsibility for providing competent counsel; or b) violating the Rules of Professional Conduct by litigating a case without the requisite knowledge and experience.

4. Pool attorneys must be adequately funded to provide reasonable compensation. The hourly compensation rate 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.
5. The municipal public defender system should be accessible, transparent, and consistent throughout the state. The NJSBA recommends that the Judiciary review accessibility for municipal public defender services and implement consistent statewide standards.

Again, the New Jersey State Bar Association thanks the Judiciary for the opportunity to comment on these recommendations. We appreciate the time and effort spent by the Working Group discussing and making these recommendations. We are pleased to have been able to provide our initial thoughts on these issues through our RTC Report, and we hope our additional comments provided above are helpful to the Judiciary's review.

We welcome any additional questions or comments and stand ready to assist the Judiciary to take the action noted above to ensure effective representation is provided to all litigants as required by the constitution. Implementation of these recommendations will benefit litigants who are unable to afford their own counsel, attorneys who are seeking to fulfill the obligations of the profession they have chosen, and the justice system as a whole.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tim McGoughran". The signature is stylized and cursive.

Timothy F. McGoughran, Esq.
President

cc: William H. Mergner Jr., Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director

NJSBA Right to Counsel Committee Recommendations Adopted by NJSBA on April 6, 2021

1. The Madden system of random assignments to uncompensated counsel should be abolished and replaced with publicly funded systems for the provision of effective representation. The Legislature should fully fund the provision of effective representation, including the costs associated with implementation and administration of the compensated counsel system, in all cases in which there is a right to counsel.
2. The Court should officially recognize that the Madden system is an obstacle to equality and take all necessary steps to address this barrier to access and justice.
3. The state should use a multi-pronged approach to funding the right to counsel to assure that the indigent people in our state have effective counsel. Within two years, it should:
 - Authorize through legislation and provide additional funding for the Office of the Public Defender (OPD) to handle the cases that are most aligned with their current work:
 - a. contempt of domestic violence matters;
 - b. parole revocation;
 - c. guardianship cases seeking guardianship of the property as well as the person for people receiving NJ Division of Developmental Disability (DDD) services; and
 - d. representation in Division of Child Protection and Permanency (DCPP) administrative matters.
 - Authorize through legislation and provide additional funding for the OPD's Mental Health Unit to handle all civil commitments, for both adults and children, throughout the state.
 - Fund non-profit providers with expertise in particular types of cases, e.g., representation of parents in private adoptions, representation of persons in need of guardianship, paternity cases. As there is no discretion in whether to provide counsel in a particular matter in which there is a right to counsel, funding for non-profit providers may not be limited by contractual ceilings and must provide for funding necessary to handle all the cases that are assigned.
 - Create a publicly funded compensated counsel system, with reimbursement to compensated counsel at the pool attorney rate, that engages qualified attorneys to provide representation in specific types of matters.
 - Until such time as the compensated counsel system is implemented, enact authorizing legislation for representation in municipal appeals by municipal public defenders and requiring the municipalities to compensate counsel on municipal appeals.
4. The state should operate the compensated counsel system within the Department of the Treasury or other department of state government.

5. The right to counsel must be fully accessible, transparent and consistent:
 - a. The Court should establish an office in the Administrative Office of the Courts (AOC) to provide transparency and consistency in right to counsel matters and assignments.
 - b. The AOC should provide publicly accessible information.
 - c. The AOC should publish comprehensive data on right to counsel matters and assignments.
6. Until the Madden system of random assignments is replaced, the assignment of Madden cases should be consistent throughout the state to alleviate the disproportionate impact placed on attorneys who practice in small counties with fewer eligible attorneys on the list:
 - a. The Court should consider regionalizing assignment pools rather than assigning attorneys by county.
 - b. The Court should explore permitting virtual appearances in matters involving assigned counsel so long as the rights of the litigants are fully preserved.
7. For so long as the random assignment of Madden exists, the Madden exemptions should be limited to attorneys who work in the public sector or public interest, attorneys who are not eligible to provide legal assistance in a Madden assignment due to limitations on their authorization to practice law in New Jersey and attorneys who provide 25 hours or more of pro bono service in the calendar year preceding registration
8. The Madden system, as long as it exists, should provide attorneys with an opportunity to select the types of cases in which the attorney has competence and should assign cases that require specific expertise to attorneys who indicate the ability and willingness to handle those cases.
9. Until a system of publicly funded compensated counsel is operational, the Court should:
 - a. Assign matters involving specialized or complex areas of the law to a special panel of attorneys with experience and competence.
 - b. Provide attorneys with access to services through the OPD or create other clear procedures and access to ancillary services required in the litigation.
 - c. Waive all court filing fees in these matters for litigants with court appointed counsel.
 - d. Provide for automatic e-filing upon assignment of all cases that commence as pro se cases.
10. Attorneys who do not have the competence to handle an assignment should not be required to hire substitute counsel.
11. The Court and the NJSBA should encourage voluntary pro bono services and involvement.
 - a. The NJSBA should refer the issue of how to encourage voluntary pro bono now and, when the Madden assignment system is no longer in use, to the NJSBA Pro Bono Committee.
 - b. The Court should develop a plan to encourage voluntary pro bono involvement now and when the Madden system is replaced.

12. The pool attorney system of the OPD must be adequately funded to provide reasonable compensation to pool attorneys. The hourly compensation rate 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.

13. The municipal public defender system should be accessible, transparent, and consistent throughout the state. The Committee recommends that the Court review accessibility for municipal public defender services and implement consistent statewide standards.