



ACHIEVING EFFECTIVE REPRESENTATION IN RIGHT TO COUNSEL MATTERS

A Report of the New Jersey State Bar Association's Right to Counsel Committee

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NEW JERSEY STATE BAR ASSOCIATION
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Executive Summary

Introduction

The state has the primary obligation to provide effective counsel in matters implicating consequences of magnitude. That obligation is established through the federal and state constitutions, case law and, in some cases, statutory law. While the Court has an obligation to provide equal access to justice and the judicial system, the Court does not have the power of the purse and is limited to stop-gap measures such as the random assignment system developed pursuant to Madden v. Twp. of Delran, 126 N.J. 591 (1992) (Madden assignments or system). Appointment of unqualified, inexperienced attorneys in matters involving fundamental rights does little to promote the public's confidence in the independence, integrity and impartiality of the Judiciary. Attorneys, too, have a role in providing public interest legal service however the bar cannot, on its own, fulfill the right to counsel in matters affecting fundamental rights.

The New Jersey State Bar Association (NJSBA) formed the Right to Counsel Committee (Committee) in September 2019 to examine the history of the right to counsel in New Jersey; how the right was established and how the right to counsel was fulfilled in each area of law; the effectiveness of assigned counsel under the Madden system and to make recommendations aimed at ensuring effective legal assistance in matters of fundamental rights in which a right to counsel exists in New Jersey.

The Right to Counsel Committee presented its report to the NSJBA Board of Trustees in January 2021. The Board accepted the report and sent the report to county and affinity bar associations with an invitation to comment. The Board also offered to have a representative of the Board or the Committee participate in meetings of the county and affinity bar associations to explain the report and receive feedback from the associations.

Several county bar associations and other groups heard presentations. The NJSBA Pro Bono Committee, Hispanic Bar Association of New Jersey and 18 county bar associations provided feedback and suggestions. The Right to Counsel Committee reconvened and made revisions to several recommendations based on the input of our colleagues.

Historical Context

A person's right to counsel in matters affecting fundamental rights is enshrined in the federal and state constitutions. Effective counsel is a prerequisite to the assertion of nearly every other right. As the U.S. Supreme Court observed, "it is through counsel that all other rights of the accused are protected: 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have.'" Penson v. Ohio, 488 U.S. 75, 84 (1988) (internal citations omitted). New Jersey law has provided more expansive rights to appointed counsel for indigent litigants than federal law. Time and again, the Court has found that the right to due process of law is implicit in Article I, Paragraph 2 of the state Constitution. Pasqua v. Council, 186 N.J. 127, 147 n.5 (2006).

Funding for representation of indigent defendants has been debated in New Jersey for the past 50 years. In 1992, the Court held that indigent defendants are entitled to representation and urged the

Legislature to take action, but it stopped short of ordering such action. Madden, 126 N.J. at 595. The Court created the current Madden system providing a random appointment of counsel to represent litigants at no cost as a stop-gap measure until the Legislature acted. Although New Jersey now has a funded municipal court public defender system, the rationale of Madden has been used repeatedly to solve the issue of inaction by the Legislature to fund representation in a multitude of right to counsel matters.

Over the years, the Court has continued to expand the right to counsel, recognizing that fundamental rights are meaningless without access to justice and due process. Despite its serious limitations, the Madden system has been the default mechanism for random assignments regardless of counsel's expertise in many types of right to counsel matters that has created a separate and critical issue in the consideration of due process. While the current system provides representation, it does not provide people who are indigent with equal access to justice. Principles of fundamental fairness dictate that if representation is constitutionally mandated, that representation must be effective. Implementation of these recommendations will ensure that the promise of equal justice and due process in matters of fundamental rights is no longer illusory for people in need.

Recommendations

The NJSBA Right to Counsel Committee makes the following recommendations:

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.

In addition to the general recommendations, the Committee is making specific recommendations in several areas of law in which a right to counsel exists:

- Private adoption;
- Contempt of domestic violence restraining orders;
- Guardianship of DDD clients
- General guardianships and conservatorships;
- Parole revocation;
- Child welfare; and
- Civil Commitments

Section I:

Development of Right to Counsel in New Jersey

A person's right to counsel in matters affecting fundamental rights is enshrined in the federal and state constitutions. In Gideon v. Wainwright, 372 U.S. 335 (1963), the U.S. Supreme Court held that the Sixth Amendment's guarantee of counsel is a fundamental right essential to a fair trial and applies to the states through the Due Process Clause of the 14th Amendment. Justice Hugo Black, writing for a unanimous court, said "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Id. at 344. He further wrote that the "noble ideal" of "fair trials before impartial tribunals in which every defendant stands equal before the law . . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." Id.

Effective counsel is a prerequisite to the assertion of nearly every other fundamental right. As the Supreme Court observed, "it is through counsel that all other rights of the accused are protected: 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have'" Penson, 488 U.S. at 84 (internal citations omitted).

New Jersey case law has focused on due process concerns in different ways. The state has generally provided more expansive rights to appointed counsel for indigent litigants than federal law. Pasqua, 186 N.J. at 147 n.5 (citations omitted). Those principles derive from Article I, Paragraph 1 of the New Jersey Constitution, which provides that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." Time and again, the New Jersey Supreme Court has found that the right to due process of law is implicit in those words. See, e.g., Jamgochian v. N.J. State Parole Bd., 196 N.J. 222, 239-240 (2008); Pasqua, 186 N.J. at 147; Doe v. Poritz, 142 N.J. 1, 99 (1995); Greenberg v. Kimmelman, 99 N.J. 552, 567-68 (1985); In the Matter of the Adoption of a Child by J.E.V. & D.G.V., 226 N.J. 90 (2016).

The Appellate Division in N.J. Dep't of Children & Families v. L.O., 460 N.J. Super. 1, 9-10 (App. Div. 2019), provided a comprehensive review of the right to counsel in New Jersey:

New Jersey has a long and proud tradition of recognizing and vindicating the right to counsel in criminal proceedings dating back to the State's 1776 Constitution. In 1971, the Supreme Court noted that the right to appointed counsel in petty criminal matters had not previously been recognized but concluded "no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost." Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971) (emphasis added).

Rodriguez's "consequence of magnitude" requirement has since informed our courts when considering whether the right to counsel in noncriminal settings is constitutionally required. In Pasqua v. Council, 186 N.J. 127, 149 (2006), the Court

held that an indigent defendant must be assigned counsel in civil matters when incarceration may be a consequence of the defendant's willful failure to pay child support. The right to counsel also attaches to: Megan's Law tier classification matters, Doe v. Poritz, 142 N.J. 1, 31 (1995); involuntary civil commitment proceedings, In re S.L., 94 N.J. 128, 142 (1983); contempt proceedings alleging a violation of a restraining order, State v. Ashford, 374 N.J. Super. 332, 337 (App. Div. 2004); motor vehicle matters when license suspension is at issue, State v. Moran, 202 N.J. 311, 325 (2010); and matters in which a significant fine may be imposed, State v. Hermanns, 278 N.J. Super. 19, 30 (App. Div. 1994).

In family matters, the Supreme Court recognizes an indigent parent or guardian's right to appointed counsel in actions seeking the termination of parental rights, N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 306-07 (2007), and in private adoption proceedings, In re Adoption of J.E.V., 226 N.J. 90, 107-08 (2016). We have also recognized that an indigent parent or guardian is entitled to appointed counsel when a court contemplates a temporary change of custody, Crist v. N.J. Div. of Youth & Family Servs., 128 N.J. Super. 402 (Law Div. 1974), *aff'd in part, rev'd in part*, 135 N.J. Super. 573 (App. Div. 1975), because a temporary-custody proceeding "is frequently a prelude to a petition to terminate parental rights," 128 N.J. Super. at 416.

...

By enacting N.J.S.A. 9:6-8.43, the Legislature declared not only that courts in Title Nine cases "shall advise" parents and guardians of their "right to have an adjournment to retain . . . and consult with [counsel]" but that those courts must also advise indigent parents and guardians of their right to "apply for an attorney through the Office of the Public Defender." Although the right to counsel in Title Nine matters is often described in broad terms, *see, e.g.,* N.J. Div. of Child Prot. & Permanency v. G.S., 447 N.J. Super. 539, 555 (App. Div. 2016), it arises from the self-evident fact that the "right to custody of one's children and the protection of the integrity of the family from arbitrary governmental action is a fundamental constitutional right," N.J. Div. of Youth & Family Servs. v. L.M., 430 N.J. Super. 428, 447 (App. Div. 2013) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)). *See generally* Fall & Romanowski, *Child Custody, Protection & Support* § 31:1-2(e) (2019 ed.).

Office of the Public Defender

Following Gideon, New Jersey recognized the unjust burden on private attorneys of appointments and created the Office of the Public Defender (OPD) to provide legal assistance at no cost to indigent New Jerseyans.

Though the idea of a centralized OPD to cover the entire state had been bandied about for years, the concept picked up steam when in 1963, the U.S. Supreme Court ruled in the landmark case Gideon v. Wainwright that a state had the obligation to provide an attorney for every indigent criminal defendant, a decision that placed an increasingly heavy burden on private attorneys.

The first centralized system of its kind in the country, New Jersey's OPD was founded on July 1, 1967 to fulfill the traditional role of providing legal counsel to indigent defendants charged with indictable offenses. The statutory authority for the OPD and history of its evolution may be found at [N.J.S.A. 2A:158A-1](#), *et seq.*

The primary mission of the office, as set forth by the Legislature, has been to ensure that the constitutional guarantees of counsel in criminal cases are met. It provides for an established system by which no innocent person will be convicted because of an inability to afford an attorney and where the guilty will be convicted only after a fair trial. A secondary goal of the statewide system has been to spare county and local property-taxpayers the expense of legal representation for indigent defendants.¹

The authorizing statute defines an "indigent defendant" as a person who does not have the present financial ability to secure competent legal representation ... and to provide all other necessary expenses of representation. [N.J.S.A. 2A:158A-2](#).

The statute goes on to clarify that services will be provided while financial eligibility is being assessed and that the possibility that the indigent person may have or expects to obtain the means to pay for some or all of the services will "not affect or reduce the rendering of the services to him." [N.J.S.A. 2A:158A-14](#); [N.J.S.A. 2A:158A-16](#). The OPD may place a lien on the property of the defendant for the reasonable value of the services rendered and take action to collect the money due, including through arrangements with other state agencies to utilize their enforcement programs. The defendant may contest the value of the services and the OPD is authorized to settle and compromise its claims for services rendered. [N.J.S.A. 2A: 158A-14](#), -19, -20.

Once its services to a litigant have concluded, the OPD "must collect to the extent possible an extremely low cost and reasonable fee for those services in criminal, juvenile, Drug Court, Intensive Supervision Program, Special Hearings Unit and Title 9 and Title 30 cases. This is accomplished through a system that requires payment within 60 days of case disposition if possible, after which the fee owed is reduced to a judgment (lien)."²

Those who receive services from the OPD are asked to sign a reimbursement agreement, but the obligation to remit payment exists whether or not the reimbursement agreement is signed. State law also requires that the OPD place a lien on a client's current or future property, if any, to meet unpaid bills larger than \$150, which may be collected by withholding of any state income tax returns and/or Homestead rebates that would otherwise have been sent to the litigant. *Id.*

Over the years, the charge of the agency has expanded, with the OPD now being funded for and handling:

- Criminal defense (trial level)
- Criminal appeals
- Post-Conviction relief (Conviction Integrity Unit)

¹ This information was obtained from the State of New Jersey, Office of the Public Defender, [website](#).

² This information was obtained from the State of New Jersey, Office of the Public Defender, [website](#).

- Juvenile delinquency defense
- Law Guardian for children in Division of Child Protection and Permanency (DCPP) proceedings-Title 9 and Title 30
- Parental representation in DCPP proceedings-Title 9 and Title 30
- Megan’s Law tier determinations (Special Hearings Unit)
- Admission to and terminations from Intensive Supervision Program
- Representation in Drug Court
- Civil commitments (children in all counties and adults in 16 counties)
- Representation of adults in Division of Developmental Disabilities (DDD) initiated guardianship proceedings for guardian of the person only (not guardian of property or person and property)
- Involuntary commitments of persons under Sexually Violent Predator Law
- Detention hearings under bail reform

Development of Assignment of Uncompensated Counsel

Assignment of counsel to provide representation to indigent litigants dates back to New Jersey’s first Constitution of 1776. State v. Rush, 46 N.J. 399, 403 (1966). Article XVI of the New Jersey Constitution of 1776 provides “[t]hat all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to.” Id. The right for an accused who is indigent to have counsel assigned without charge was recognized by statute on March 6, 1795 Id. (citing to State v. Horton, 34 N.J. 518, 522-23; Paterson, Laws 162 (1800)).

The New Jersey Supreme Court first raised the issue of whether attorneys should be compensated when providing constitutionally required representation of indigent defendants in Rush, *supra.*, where the Court determined attorneys should be compensated for representing criminal defendants, but deferred to the Legislature to decide the best way to accomplish that. In Rodriguez, *supra.*, the Court determined that municipal court judges could assign “free counsel” to defendants facing “consequences of magnitude” in municipal courts.

By 1990, the notion of assigning uncompensated counsel had expanded to the Family Division in termination of parental rights cases, yet the Court declined to order that compensation be paid to attorneys, stating that “[t]he weighing of those policy considerations is not for this Court but for the legislature. It is to that body that a burdened bar, which devotes countless hours to a broad range of frequently-unheralded pro bono endeavors, must address any petition to relieve an apparent inequity.” N.J. Div. of Youth and Family Serv. v. D.C., 118 N.J. 388, 403 (1990).

In 1992, the Madden system of random assignments was created as a stop-gap measure to represent defendants in municipal courts until the Legislature acts.³

³ In 1994, the Court declined to consider an Appellate Division ruling requiring assigned counsel for parole revocation hearings. Bolyard v. Berman, 274 N.J. Super. 565 (App. Div.), cert. denied, 138 N.J. 272 (1994).

The Court in Madden recognized that the system in place at the time did not meet the standards to which our state holds itself.

Our current system is unworthy of the traditions of this state. We note that legislation proposed by the Law Revision Commission would require every municipality to provide a public defender for the municipal courts. New Jersey Law Revision Report & Recommendations Relating to Municipal Courts, (November 1991) at 14 (proposed N.J.S.A. 2B:12-27). We have no doubt that that is the ideal system, not ideal in the sense of unrealistic but ideal in the sense of the best system to meet the constitutional requirement. It is the most efficient, the fairest, the most likely to achieve equal and effective representation of indigent defendants at the least cost. It is a system that should be instituted by other branches of government. We urge them to act and trust they will. The victim in the present system is not the bar, but the poor.

Madden, 126 N.J. at 614-15 (citations in original).

The Madden Court did not answer the question of whether it had the power to order that assigned counsel in municipal court matters be compensated because by the time the case reached the court, the number of municipalities with paid municipal defender systems almost doubled to 307 municipalities. The Court had a reasonable expectation that the branches of government would continue to work cooperatively.

The courts have recognized that although the bar has the obligation to provide pro bono service, that obligation is not unlimited and may not be overly burdensome or applied unfairly. The institution of the Madden system was intended to replace the system under the Court Rules, however, in practice, it was applied with some inconsistency, particularly in two counties in South Jersey. Id. at 604.

In recognition of the inadequacy of the Madden system for indigent people facing consequences of magnitude and the burden the system placed on attorneys, the NJSBA worked cooperatively with relevant stakeholders, to get legislation adopted that would fund municipal public defenders and expand responsibility of the OPD to provide representation in termination of parental rights cases to both parents and children.

Municipal Court Public Defender System

Effective January 1998, each municipality was required to engage a municipal public defender. See N.J.S.A. 2B:24-7. The municipal public defender is statutorily tasked with representing “indigent defendant[s] charged in municipal court with a crime” as identified by statute or if, in the opinion of the municipal court, there is a likelihood that the defendant may be convicted of an offense that results in “imprisonment or other consequence of magnitude.” Id.

The Municipal Court Opening Statement found on the Judiciary website clarifies what is meant by a consequence of magnitude:

You have the right to a court appointed attorney if you cannot afford to hire your own attorney and if (a) you face a jail term; (b) a loss of driving privileges; or (c) penalties in excess of \$800.00; and you qualify financially.

See [NJ Judiciary, Municipal Court Opening Statement](#), para. 6.

A municipality is also statutorily required to pay for ancillary services, which includes “both expert and lay investigation and testimony as well as other preparations...” The court is charged with making a final determination “as to the necessity for services required...” N.J.S.A. 2B:24-6.

The municipality may require an application fee of up to \$200 and may place a lien on the property of a defendant provided representation by the municipal public defender. This fee can be waived at the discretion of the court “upon a clear and convincing showing by the applicant that the application fee represents an unreasonable burden on the person seeking representation.” N.J.S.A. 2B:24-17.

Representation of Parents and Children

N.J.S.A. 30:4C-15.4(a), passed in 1999, removed the mandate that randomly assigned counsel under the Madden system to provide representation to parents in termination of parental rights hearings and transferred that responsibility to the OPD. The OPD had been responsible for handling abuse and neglect hearings under Title 9 and providing representation to children through the Office of the Law Guardian for many years.

The legislation contemplated the use of pool attorneys for this work and set standards for counsel in the enabling legislation. These attorneys are to be selected by OPD with consideration of “the nature, complexity and other characteristics of the bases, the service performed, the status of the matters, the attorney’s pertinent trial and other legal experience and other relevant factors.” N.J.S.A. 30:4C-15.4(c)(1).

As noted above, the ad hoc method of appointing attorneys familiar with family law to provide representation in private adoptions has become accepted practice, however, the Committee could not pinpoint a requirement that experienced attorneys be appointed.

Expanding Assignments of Uncompensated Counsel

In 2006 in Pasqua, *supra.*, the New Jersey Supreme Court appeared to back away from the mandatory appointment of counsel, holding that although child support obligors facing potential incarceration are entitled to counsel, “[w]e will not use our authority to impress lawyers into service without promise of payment to remedy the constitutional defect in our system.” Pasqua, 186 N.J. at 153. Instead, the Court determined that unless there is a funding source for the provision of counsel, coercive incarceration will not be an available sanction.

The pendulum appears to be swinging back, however, to allow for the appointment of counsel in the absence of appropriate state funding. In 2016, the court in In re Adoption of J.E.V., *supra.*, found indigent parents facing termination of parental rights as a result of adoption proceedings are constitutionally entitled to representation. In its *amicus* filing, the NJSBA agreed with that

conclusion, but urged that such representation be provided through the OPD’s Office of Parental Representation, which provides representation in termination of parental rights cases brought by the DCPD. The argument centered on the idea that adoption agencies were acting as a quasi-state agency in pursuing termination of rights when there was evidence of abuse and neglect. Although the Court agreed that the Office of Parental Representation has developed expertise in this area, it concluded that it could not direct the Office to handle additional cases under the Adoption Act, N.J.S.A. 9:3-37, et seq. It noted that the Legislature had acted “responsibly” in the past and provided counsel when the Constitution so required and trusted that the Legislature would act to address this issue.

Shortly after the J.E.V. decision, a bill was introduced in the Legislature to authorize the OPD to provide counsel to indigent parents in adoption proceedings (S3229/A4628, 218th Legislature). The OPD, having handled a few private adoption cases as a test, objected to the imposition of responsibility on the OPD and the legislation stalled.

In N.J. Div. of Child Prot. & Permanency v. L.O., 460 N.J. Super. 1 (App. Div. 2019), the court addressed the issue of whether, as a matter of fundamental fairness, counsel should be appointed for indigents in administrative child abuse proceedings at the administrative and appellate levels. There, the OPD’s Office of Parental Representation declined to participate, but noted:

Both due process and fundamental fairness suggest appointed counsel is the equitable outcome for indigent parents faced with State investigatory findings that may alter their livelihoods, reputation, or aspects of custody and visitation of their children now, or future born. Unfortunately, until the [L]egislature acts to fund this representation through the Office of the Public Defender, this office is unable to ease the burden to those parents in these situations.

Id. at 8.

Under a pilot program, the OPD currently provides representation in cases before the Office of Administrative Law for indigent clients where the DCPD findings have been substantiated.

In L.O., the Appellate Division ultimately concluded there was a right to representation. Quoting significantly from the J.E.V. decision, the L.O. court concluded that, absent legislative or other voluntary action, counsel for indigent parents and guardians facing child abuse and neglect charges at the administrative and appellate levels should be assigned from the Madden list. Id. at 9. The Court noted that, “. . . the number of appointments necessary in this area pales in comparison to others where the right to counsel was acknowledged notwithstanding a significant impact on the Bar.” Id. at 21.

Finally, in the trial courts, the Hon. Mary C. Jacobson, A.J.S.C. held in Kavadas v. Martinez (Docket No. MER-L-1004-15, Law Div. 2018), that due process and fundamental fairness require that counsel be appointed for indigent child support obligors when faced with automatic suspension of their driver’s license. Judge Jacobson concluded that courts remain free to deny counsel to indigent obligors at child support hearings, but, as in Pasqua, they may not impose driver’s license suspensions unless the right to appointed counsel has been offered. The decision noted:

Without the services of the Office of the Public Defender, if counsel for indigent parties is required by court precedent, the Assignment Judge of each vicinage must assign pro bono counsel using a list of licensed attorneys known as the Madden List. Madden v. Delran, 126 N.J. 591 (1992). See also In re Adoption of J.E.V., 226 N.J. 90, 113. Although this practice ‘is not an ideal’ solution because it often assigns attorneys to cases not in their area of expertise, it does satisfy due process requirements.

Kavadas, at 178.

There have been a few cases where the Court has declined to find a right to representation. In D.N. v. K.M., 216 N.J. 587 (2014), the Supreme Court denied certification in a case where the Appellate Division had concluded there was no right to counsel for indigents presenting or defending a private party's civil domestic violence action. Justice Barry T. Albin, at the conclusion of a passionate response to the majority's decision to deny certification, commented, “it is difficult to imagine a case presenting a more compelling issue for review: the right of indigent defendants, who are facing calamity, to a fair shake in our civil justice system.” Id. at 595.

The Legislature is currently considering amendments to the conservatorship statute to require counsel for the proposed conservatee in all conservatorship matters and for the term of the conservatorship if one is established. See A4615/S2877, 219th Legislature. The bill requires the Court to appoint counsel if the conservatee is unable to afford counsel. Id. Under current law, the appointment of counsel is discretionary if the court believes counsel is necessary to protect the interests of the conservatee. N.J.S.A. 3B:13A-3.

Not only would A4615/S2877 create a new right to counsel, but it also places significant burdens on the appointed counsel that could last for years. There is no provision in the legislation for securing counsel, which would inevitably mean that the Madden system would be, once again, the default mechanism for appointing counsel.

The Legislature is also considering expanding the duties of appointed counsel in guardianship matters. See A4618/S2876, 219th Legislature. This proposal, too, would place significant burdens on the appointed counsel as well as the OPD that could last for years. Currently, the OPD handles representation of Alleged Incapacitated Persons (AIP) in matters in which only guardianship of the person is sought and the client is a client of the DDD.

Section II:

Madden Assignment System

The stop-gap Madden system of assignments has been in existence since 1992. Currently, there is a right to counsel in the following types of cases that are not handled by the OPD or other counsel compensated by the responsible governmental entity (*i.e.*, municipal public defenders and attorneys paid by counties to represent individuals in certain civil commitment hearings):

- 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;
- 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.

Over the years, the Court expanded the right to counsel, recognizing that fundamental rights are meaningless without access to justice and due process. Despite its serious limitations, the Madden system has been the default mechanism for providing counsel. For example, when bail reform was enacted, the Madden system was initially utilized to provide counsel at detention hearings. Attorneys with little or no experience in criminal law were appointed to handle detention hearings in an area of law which was brand new in New Jersey. Within a short period of time, the OPD took over representation in these critical hearings.

The Court found a right to assigned counsel in matters involving failure to pay child support where incarceration or loss of driver's license is possible. However, rather than make Madden assignments for these matters, the courts no longer use incarceration or loss of driver's privileges as a contempt mechanism, leaving custodial parents with less access to tools to enforce child support obligations and children without necessary support.

Recognizing the inadequacies of the Madden system, courts in some vicinages have created special, ad hoc lists of attorneys with relative experience for use in some matters, *e.g.*, representation of persons in need of guardianship. The AOC notes in the listing for the Representing the Birth Parent in a Private Contested Adoption Manual that "this type of case is not assigned through the Madden v. Delran list."⁴ Anecdotally, the Committee understands that the presiding family judges may utilize an ad hoc list of experienced family law attorneys to determine assignments in these matters.

⁴ A full copy of Representing a Birth Parent in a Private Contested Adoption Case Manual may be found [here](#).

Due Process and Equal Protection Considerations

The Court has determined that due process and equal protection require that a litigant in matters affecting fundamental right be represented by an attorney, but the state has not funded the provision of such representation. Principles of fundamental fairness dictate that if representation is constitutionally mandated, that representation must be effective.

The examples of the OPD and the Legal Services system in New Jersey, consisting of Legal Services of New Jersey and the five regional Legal Services programs, illustrates that effective counsel is made possible by a sufficiently funded entity staffed by well-trained, career attorneys and support personnel.⁵ Such a system is, in fact, the only method of representation that assures effective counsel.

A study funded by the U.S. Department of Justice, [Measuring the Effect of Defense Counsel on Homicide Case Outcomes](#), James M. Anderson and Paul Heaton (December 2012), measured the differences in outcomes for those represented by the Defender Association and appointed counsel in Philadelphia. Anderson, James M. & Heaton, Paul, [Measuring the Effect of Defense Counsel on Homicide Case Outcomes](#) (December 2012) (Philadelphia Study)⁶. In a study of more than 2,400 defendants, the authors found striking differences in outcomes depending on the representation received. The authors opined that had all defendants been represented by experienced, knowledgeable counsel through the Defender Association, 270 defendants who were convicted of murder would have been entirely acquitted of this charge, 396 individuals who received life sentences would have been spared a life sentence and in aggregate the time served by the 2,459 defendants would have decreased by 6,400 years. Id. at 43.

In addition to the statistical analysis, the authors conducted numerous interviews to determine the cause of the outcome differences. They found appointed attorneys have comparatively few resources, face more complex incentives, and are more isolated than public defenders. Id. at 29. These are all issues for attorneys appointed under our Madden system.

Our experience with the provision of counsel in civil matters reinforces the conclusion. In New Jersey, the Legal Services system functions as a concerted, coherent, closely coordinated legal assistance delivery system with the goal to ensure full access to equal justice for all economically disadvantaged people. In addition to the Legal Services system, there are several other non-profit organizations that provide legal assistance to people in need.⁷

Many of these organizations use volunteers to provide legal assistance. What separates this type of volunteer work from the Madden system is the training and supervision that is fundamental to the operation of these volunteer programs. See, e.g., Pro Bono NJ (probononj.org), Volunteer Lawyers for Justice (volunteerlawyersnj.org), Partners for Women and Justice (pfbwj.org) and Pro Bono Partnership (probonopartner.org) for some examples of organizations that have comprehensive systems for providing effective pro bono counsel.

⁵ Information on the Legal Services system can be found [here](#).

⁶ A full copy of this study can be found on the National Institute of Justice website [here](#).

⁷ A list of non-profit organizations that provide legal assistance to people in need can be found [here](#).

Provision of effective counsel through these types of organizations makes a critical difference in outcomes. Rebecca L. Sandefur, a McArthur Fellow, who has dedicated her research to the issue of equal justice, reviewed the literature in 2010 on the effect of representation on outcomes in civil matters. She found that in all types of cases, represented litigants are more likely to win – from 19% in simple matters to three to four times in somewhat procedurally complicated matters, to an astonishing 14 times more likely to prevail in complicated matters. Sandefur, Rebeca, The Impact of Counsel: An Analysis of Empirical Evidence, Seattle Journal for Social Justice, Volume 9, Issue 1, Fall/Winter 2010⁸.

In a study that randomly assigned representation to tenants, those tenants facing eviction for nonpayment of rent who were represented by legal aid lawyers were more than 4.4 times more likely to retain possession of their apartments than similar tenants who were not represented. Seron, Carroll, *et als.*, The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment, 35 Law & Soc'y Rev. 419 (2001).⁹

The assignment system in place under Madden does not meet the criteria needed in order to provide the type of effective counsel that makes such a difference in outcomes. While the Sandefur and Seron studies show that representation is crucial, the Philadelphia Study illustrates that, a patchwork system of random appointments is far less effective than an organized system of competent, qualified attorneys retained to provide representation in an area of law in which they have familiarity. The experience of the volunteer pro bono organizations shows that access to training and supervision are key components of pro bono programs seeking to prepare counsel to handle matters outside of their areas of expertise.

The current Madden system is perceived to be unfair by the New Jersey bar, including a significant portion of New Jersey attorneys who practice as solo practitioners or in small firms. Many, if not most, of these attorneys simply do not have the resources, both in time and finances, to fulfill the Madden assignments, especially when the assignments may be in legal areas which they are completely unfamiliar. Also, because of the population differences from rural to suburban to urban New Jersey counties, some attorneys are frequently called upon for Madden assignments, and others are called rarely, with many attorneys falling in the middle.

Appointed attorneys face unresolvable conflicts between the attorney's financial well-being and the needs of the client. In many cases, the appointed attorney is an isolated advocate without access to the team approach used by effective providers of legal assistance. All litigants appointed Madden counsel are facing issues that involve fundamental rights and consequences of magnitude and require assistance of qualified, competent counsel. The needs of indigent people in our community who are facing loss of fundamental rights are not being met by the Madden system of assignments.

To be clear, although the Madden system has been in use for almost three decades, the system is simply not effective in matching willing and skilled attorneys with economically disadvantaged clients facing consequences of magnitude.

⁸ A full copy of this article can be found [here](#).

⁹ A full copy of this article can be found [here](#).

Section III:

Responsibility for Effective Counsel in Matters Affecting Fundamental Rights

The state has the primary obligation to provide effective counsel in these matters. That obligation is established by the federal and state constitution, case law and, in some cases, statutory law. History and research have shown that the only method of providing effective counsel is through adequate funding of counsel by the Legislature. One only need to look at New Jersey's OPD to see that adequate funding of a professional system of counsel is the underpinning for justice for litigants who cannot afford to retain counsel. All other methods, such as Madden assignments, are inadequate in comparison.

The Court has recognized its role in the provision of effective counsel in matters in which there is a right to counsel:

We shall continue to encourage the other branches of government to lessen that burden and perhaps eliminate it. And in any event, we shall, by this decision, assure that the burden is more equally distributed among members of the bar. We shall do both not for the purpose of diminishing the traditional role of the bar in serving the public pro bono, for the bar seeks no such relief indeed, its service to the public without pay today is probably greater than at any time. We shall do both only because this form of pro bono service representing indigent defendants in municipal court matters is inevitably not only inefficient but unfair to indigent defendants who suffer with unequal justice.

Madden, 126 N.J. at 596.

While the Court has an obligation to provide equal access to justice and the judicial system, the Court does not have the power of the purse and is limited to stop-gap measures such as the Madden system. That system, although providing representation, 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, is given adequate training to prepare for the matter, is provided adequate funding for the expenses associated with the matter, and has adequate supervision in place in case issues arise.

Appointment of unqualified, inexperienced attorneys in matters involving fundamental rights, particularly in matters in which opposing counsel is an experienced prosecutor or private attorney, does little to promote the public's confidence in the independence, integrity and impartiality of the judiciary. Furthermore, the right to be heard, however, is not assured for litigants who are represented by inadequate or inexperienced counsel without access to resources necessary to provide robust representation.

Attorneys have a role in providing public interest legal service however the bar cannot be singularly responsible for fulfilling the right to counsel in matters affecting fundamental rights. The Rules of Professional Conduct state that "[e]very lawyer has a professional responsibility to render public

interest legal service.” RPC 6.1. Attorneys meet this responsibility “by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations” and also by providing financial support to these organizations. Id.

This responsibility comes with the obligation to comply with RPC 1.1, which prohibits an attorney from handling or neglecting a matter entrusted to the lawyer that results in gross negligence. The RPCs impose an affirmative obligation on an attorney to decline or terminate representation if “the representation will result in violation of the Rules of Professional Conduct or other law.” RPC 1.16(a)(1).

The Madden system of random assignments not only affects the public’s perception of the judiciary, but also results in the view that the bar, too, is failing to meet its obligation to promote justice.

The right to counsel is a right to effective counsel. The Madden system in its present form cannot guarantee effective counsel and thus leaves people who are indigent without equal access to justice. Unlike those who are able to fund experienced and competent counsel of their own choosing, an indigent litigant does not have the right to select an attorney, but is also not assured of an attorney who is qualified, and therefore effective counsel. While in some cases they may receive excellent representation from an experienced attorney with expertise in the matter, they are just as likely, if not more likely, to be assigned to an attorney who is not familiar with the subject matter and may never have litigated a case before, let alone in the area of the law necessary for the assignment.

Ironically, indigent people in New Jersey who have civil legal problems in which there is no right to counsel may have access to legal assistance provided at no cost by well-qualified, trained and supervised counsel – a right not assured under Madden. The Legal Services system is the largest provider of free legal assistance in civil matters in New Jersey. It is not able to provide representation to all economically disadvantaged people in all civil legal matters that arise, therefore each of the providers of free legal assistance sets priorities for case acceptance. In addition to the Legal Services system, there are a variety of other non-profit providers of legal assistance. What each of these providers has in common is a commitment to quality and effectiveness. Staff attorneys are well trained and supervised. If pro bono attorneys are utilized, they, too are trained and experienced in the area of law in which they accept cases.

Because the Madden system does not assign counsel by area of practice or level of experience, the Madden system overall is an inadequate method to provide effective counsel. Each type of case now subject to random assignment raises additional issues of effectiveness of counsel. For example, a parent who may lose their parental rights in a contested adoption has the right to counsel. In re Adoption of J.E.V., 226 N.J. at 94. In this particular case, the Court has recognized that private adoptions are extremely complex. Id. at 109.

The Appellate Division made a similar pronouncement. “The very reasons that call for a lawyer to be appointed also favor the appointment of attorneys with the experience to handle these matters.” In the Matter of an Adoption of a Child by C.J., 463 N.J. Super. 254, 258 (App. Div. Apr. 28, 2020). Although the court called for appointment of experienced attorneys, it noted that the attorney in C.J. was appointed off of the Madden list by the clerk. The court went on to laud the expertise of the OPD in the area, but noted it could not compel the OPD to provide representation without funding:

The Office of Parental Representation in the OPD has developed expertise in this area from its fine work in state-initiated termination of parental rights cases. Without a funding source, we cannot direct the office to take on an additional assignment and handle contested cases under the Adoption Act. See [Crist v. N.J. Div. of Youth & Family Servs., 135 N.J. Super. 573, 575-76 (App. Div. 1975)].

Id. at 258-259 (citations in original).

Prior to the decision in C.J., the OPD established a pilot program to provide representation in private adoption cases. The OPD declined to continue the program, stating that it did not have the expertise to provide representation in private adoptions. The only available alternative, without a funding source, was to use the Madden system to provide representation in private adoptions where the parent and child face the loss of their relationship. There is anecdotal evidence that judges of the Family Division, recognizing the lack of due process in use of the Madden list, elected to seek representation from experienced members of the family bar.¹⁰ These honorable attorneys have accepted the appointments however, this ad hoc solution cannot be how New Jersey fulfills its responsibility.

Many Madden assignments, such as domestic violence contempt hearings, have a quick turnaround time. This leaves an attorney with no experience in the area of the law little time to become competent in the area, secure substitute counsel, or request that the court relieve the attorney of the assignment and appoint other counsel.

Of great concern is the ethical bind in which an attorney is placed when receiving a random Madden assignment. Many questions are raised: How does an inexperienced attorney without expertise advise the client whether to proceed to trial or accept a plea or agree to a settlement when the attorney has concerns about the attorney's competence to litigate the matter successfully? How does an appointed attorney, who may have limited resources, insure that the client has access to services needed, to wit:

- Interpretation for client interview, trial preparation, settlement negotiations for people with limited English proficiency;
- American Sign Language interpretation for client interview, trial preparation, settlement negotiations for people with hearing impairments;
- Translation of documents necessary for court into and from English;
- Costs of discovery (depositions, document requests);
- Experts – testimony and reports; and
- Transcript costs.

In addition, the assigned counsel may be faced with the realities of representing a client living in poverty who may not have access to technology (especially now in the time of the pandemic) or transportation for court and attorney meetings.

¹⁰ This practice is noted in the link to the training manual for private adoptions located [here](#).

The attorney has an ethical responsibility to provide competent legal representation or to decline representation. The Committee has anecdotal evidence that requests to be relieved as counsel due to lack of competence are routinely denied.

In C.J., the Appellate Division chastised counsel for providing incompetent and ineffective counsel, noting that the attorney should have hired another attorney to provide representation.

We write to emphasize that an attorney has an obligation to inform the court if he or she is not able to handle an assigned matter professionally due to a lack of expertise and inability to obtain sufficient knowledge to represent the client effectively, and is also unable to retain a substitute attorney knowledgeable in the area.

C.J., 463 N.J. Super. at 257. Citing Madden, the Court went on to explain that the primary responsibility to retain (and pay) substitute counsel lies with the appointed attorney. Id. at 260. Only if the attorney is financially unable to retain substitute counsel should the Court appoint another attorney:

...however, if the municipal court judge concludes that defendant will not receive effective assistance of counsel, the judge's obligation will be to select other counsel. No such selection shall occur, however, until the court concludes that that counsel is unable to obtain a substitute. In almost all cases that will depend upon his or her financial ability to do so.

Id. (citing Madden, 126 N.J. at 608).

In an effort to assist attorneys who may be appointed in areas with which they have no familiarity, the Court has developed a series of training videos and manuals. The manuals, however, feature the following disclaimer:

Note: This document is provided as a reference tool for attorneys who are appointed via the Madden v. Delran list. It is current through the date of publication. It does not replace the attorney's own research and evaluation of the legal and procedural issues involved. An attorney has an ongoing duty to be informed of current statutes, cases, and Court Rules.

Members of the Committee, have reviewed (and in some cases, helped develop) the resources. While the manuals and videos may be helpful to an experienced trial attorney who is familiar with the particular practice area of the assignment, they are less useful to an inexperienced attorney. Some areas of law, are extraordinarily complex, *e.g.*, adoption, and the nuances of the law. The adoption statute itself has two different inconsistent, standards for termination of parental rights. The particular practice area cannot be fully absorbed and internalized through review of the manual. A manual or video cannot substitute for the knowledge and skills that arise from years of litigation experience and mentoring that litigation attorneys receive through their firms, bar associations and continuing legal education.

The payment of costs remains unclear within the Madden system and again poses an ethical dilemma. An appointed attorney, particularly one without the resources available to someone a large

firm that is willing to cover costs, is left in the untenable position of knowingly providing inadequate representation or incurring what may be substantial costs.

Costs are addressed in a variety of places and not in one centralized location:

- The New Jersey Courts Online Appellate Process webpage contains a [Pro Se Kit](#) that mention transcript costs for appeals, but no direction for other costs, such as translators and interpreters for out-of-court communications, experts, depositions, discovery costs, and the like.
- While the manual on private adoptions has several pages on how to obtain filing fee waiver, the only mention of expert fees is a recitation of R. 5:3-3.
- With regard to transcript costs for appeals involving an indigent parent, the manual on private adoptions contains a footnote clarifying that the cost of transcripts are the OPD's responsibility. However, in these cases, the Court "encourage[s] courts to restrict the required portions of a transcript to the minimum necessary for that review, thereby minimizing the impact on the public fisc." In re Adoption of a Child by J.D.S., 176 N.J. 154, 158-159 (2003).

Rule 5:3-3 does not provide for payment of an expert engaged by the appointed attorney. Furthermore, the footnote recites the J.D.S. opinion, which makes the astonishing suggestion that the transcript for indigent litigants as opposed to litigants with resources, be truncated to minimize the costs to the public fisc. J.D.S., 176 N.J. at 158-59.

The state and the courts should not continue to shift the sole responsibility for providing representation in matters not handled by the OPD to the private bar. Doing so abdicates their primary responsibility and fails to fulfill their obligations to the citizens of New Jersey.

Section IV:

Right to Counsel Committee Recommendations

- 1: The Madden system of random assignments to uncompensated counsel should be abolished and replaced with publicly funded system 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.**

New Jersey has been a leader in right to counsel for decades. Following the Gideon decision in 1963, New Jersey created the first centralized system of its kind in the United States on July 1, 1967, to fulfill the traditional role of providing legal counsel to indigent defendants charged with indictable offenses. N.J.S.A. 2A:158A-1. The Legislature recognized that due process requires that the right to counsel include ancillary services. N.J.S.A. 2A:158A-5.

In creating and funding the OPD within four years of the Gideon decision, New Jersey recognized its obligation to provide counsel in criminal cases in order to realize the constitutional guarantees afforded all New Jerseyans. Following the Madden decision in 1992, the Legislature again responded by creating the municipal public defender model in 1997.

As our collective understanding of equal justice has matured, the Courts have recognized fundamental rights in additional types of cases. However, the Legislature has failed to provide the resources for effective counsel in these matters, leaving the most vulnerable without true access to justice.

The Committee understands the realities of the state's fiscal constraints, particularly now, and the considerable support provided by the state for the provision of counsel in both criminal and civil matters. We urge the state to expand its commitment to equal justice through funding a compensated counsel system for cases that are currently subject to assignments of uncompensated counsel while at the same time, continuing, if not expanding, its level of funding of the OPD and its support to non-profit providers of legal assistance, particularly Legal Services of New Jersey (LSNJ) and the regional Legal Services providers.

- 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.**

The New Jersey Judiciary is a leader in the pursuit of equal justice. Just this summer, the Court renewed its commitment to eradicating systemic barriers to equality and promised to do more to ensure that our courts administer justice. The Court reported that it had engaged in frank conversations “about discrimination against Black people and others, focusing on how systemic racism continues to contribute to disparate court experiences and outcomes for children and adults of color.” See New Jersey Judiciary -- Commitment to Eliminating Barriers to Equal Justice: Immediate Action Items and Ongoing Efforts, July 16, 2020.¹¹

¹¹ A full copy of this report can be found [here](#).

The Judiciary pledged to “confront those challenges and continue to engage in critical self-analysis and collaborative discussion as one part of identifying and eliminating individual and institutional bias.” As one step, the Court expanded internal training and awareness programs for judges and staff. It acknowledged that the Supreme Court’s One-Year Action Plan has not yet identified all areas of disparity in our justice system and committed to “redoubling our efforts to uncover those obstacles to equality while at the same time taking steps to address known barriers to access and justice.” Id.

The failure of New Jersey to provide compensated counsel in matters of fundamental rights, instead relying on a system of random assignments of counsel, is a barrier to access and justice for indigent members of our community. The results of that system fall disproportionately on people of color. New Jersey’s poverty rate is 9.2%. The poverty rate in New Jersey for Black residents is 15.6% and for Hispanic/Latinx residents is 15.8%. Only 5.6% of White non-Hispanic residents, are living under the Federal Poverty Level (FPL).¹²

We know that the measure for the FPL does not adequately reveal true poverty in New Jersey. LSNJ, in its report measuring deprivation in New Jersey, found that nearly one-half of Black and Hispanic New Jerseyans did not have enough resources in 2012 to make ends meet. (54.6% of Latinx residents and 49% of Black residents had incomes below 250% of the FPL). [Legal Services of New Jersey, What Is Poverty? Measuring Deprivation in New Jersey, September 2014](#). In the era of the public health emergency, the situation has become much worse.

What this means for our communities is that at least three times as many people of color who face legal matters affecting their fundamental rights are shunted to the Madden system of random assignments than are white non-Hispanic New Jerseyans. Using the true poverty level in New Jersey, approximately one-half of all people of color, for whom due process requires the provision of effective counsel, are relegated to the Madden system of assignments.

We urge the Court to study how it can assist in replacing the Madden system or random assignments with a system of compensated counsel. Recommendations below urge the Court to encourage pro bono service and establish an office in the AOC to oversee the provision of counsel in right to counsel matters, however, none of these recommendations in and of themselves can solve the inadequacies of the Madden assignment system. The Madden system of random assignments must end.

¹² Data was obtained from the American Community Survey, United States Census (2019).

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 DCPD administrative matters.
- Authorize through legislation and provide additional funding for the OPD, 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.

The Committee consulted with New Jersey Public Defender Joseph E. Krakora, during the development of these recommendations. Public Defender Krakora supports the recommendations of the Committee. Specifically, Public Defender Krakora agrees that the OPD is best positioned to provide effective counsel in the three areas (contempt of domestic violence, parole revocation and provision of counsel in DDD guardianship cases in which a guardian of property is sought) for which the Committee recommends authorizing legislation and additional funding for the OPD. Public Defender Krakora recognizes that there are logistical hurdles to overcome, particularly for contempt of domestic violence hearings, which are held in family court, however, those obstacles are far outweighed by the amelioration of the due process and equal protection issues that exist in the current system.

Through its Office of the Public Defender Parole Project, the OPD examined the issue of effective representation in parole matters, including parole revocation, and issued a thorough report on October 13, 2020. Recommendation #2 of the report states:

The OPD Legislative Committee should advocate for legislation expanding the OPD enabling statute so the OPD may reinstate the former Parole Revocation Unit. This will ensure that indigent parolees are represented by competent and experienced counsel, not inexperienced counsel assigned from the Madden list. In the interim, OPD staff attorneys, with Deputy approval, should assist clients in the parole revocation process where the subject of the parole violation is a new charge in which the OPD currently represents the defendant.

Public Defender Krakora strongly believes that the OPD handle all civil commitments and is, therefore, supportive of the committee's recommendation. The OPD already handles the vast majority of the civil commitment matters throughout the State and has the expertise to provide effective and efficient representation for this particularly vulnerable population. The Public Defender understands the necessity of having a guardian in DDD cases being able to handle issues of the property, albeit generally property of limited financial value, of the person in need of guardianship and welcomes the opportunity to provide more comprehensive services to this population in need. Finally, Public Defender Krakora advises that the pilot program through which the OPD is providing representation in DCCP administrative matters is working well and should be made permanent.

As the constitutional responsibility for the provision of representation in matters in which there is a right to counsel lies with the state, the funding for the compensated counsel system must therefore lie with the state as well. User fees, such as filing fees, are not an appropriate vehicle for funding this system.

The Madden system was ostensibly a temporary fix almost 30 years ago. The state must move with a sense of urgency to implement funding of the OPD, non-profit providers, and the compensated counsel system. The state may determine that it is best to fund counsel in different types of cases sequentially in order to test the system. If so, the most pressing need in terms of sheer numbers is funding for the OPD to provide representation in contempt of domestic violence matters, followed by parole revocation matters. The replacement of the Madden system of random assignments must be fully functional within four years. We owe the people in our community seeking justice no less.

The charge of the Right to Counsel Committee is to make recommendations aimed at ensuring effective legal assistance in matters of fundamental rights in which a right to counsel exists in New Jersey. The Committee is mindful, however, of the vast unmet need for free legal assistance in other matters of great import for which the right to counsel has not yet been recognized. The funding sought herein must not affect the funding of the non-profit providers of legal assistance to people in need in our community.

4: The state should operate the compensated counsel system within the Department of the Treasury or other department of state government to provide representation in all matters in which there is a constitutional or statutory right to counsel, including any matters in which there is determined in the future that a right to counsel exists.

The Committee considered several options for the administration of the compensated counsel system.

- Administrative Office of the Courts: Assignments under Madden are now handled by the Judiciary, with the Administrative Office of the Courts developing the assignment lists from the attorney annual registration information and the assignment judge of each vicinage being responsible for overseeing the assignment of individual cases. Staff of the AOC and the vicinage court staff fill various roles in the assignment system. However, the system does not include a mechanism for payment of assigned counsel because it currently does not provide compensation
- The Office of the Public Defender has a system in place for acceptance of invoices from and payment to pool attorneys, however, the OPD is limited to handling cases, and therefore administration of pool attorneys, for which authority is provided in its enabling statute.
- County Bar Associations or the NJSBA: Many county bar associations manage a Lawyer Referral Service (LRS) that share several important features: attorneys who wish to participate in LRS are vetted by the county bar association; attorneys must have demonstrated competence in an area in order to enroll in the LRS for that area of law; the systems have the capacity to link people seeking representation with an attorney who practices in the area of law; enrollment in the system is voluntary. Therefore, people seeking representation will be linked with an attorney with competence in the area of law and the interest and ability to provide representation under the terms of the engagement. Furthermore, the systems have the capacity to distribute the cases fairly among the panel members.

Together with one of the county bar associations, the NJSBA is poised to beta test Legal Edge. This is software that provides an online portal through which people seeking an attorney can be directed to legal services, a reduced fee panel, or the full fee LRS, depending on their financial circumstances. The aim is to provide all county bar associations with Legal Edge. Whether a bar association utilizes Legal Edge or its own software, the systems can easily be updated to include the compensated counsel option for right to counsel cases.

The bar associations that responded to the request for comments raised several issues with housing the administration of the compensated counsel system in the bar associations:

- Concerns that the bar association will not be fairly compensated by the state for its administration of the system, including increased audit and other costs that may arise.
- Capacity to handle the substantial administrative work and accounting requirements that the compensated counsel system entails.
- Requirement that the bar association monitor the activities of attorneys who are not members of the association.
- Liability for negligent referral; immunity and indemnification issues.

The Committee has concluded after careful consideration of the feedback from the county and affinity bar associations that the state should create an Office of Compensated Counsel to administer the compensated counsel system. The system for invoicing and payment should mirror the established pool attorney system operated by the OPD. Use of the pool attorney reimbursement rate and the other standards of the OPD pool attorney system will provide consistency throughout the state.

Under the contemplated system, the AOC will be responsible for setting standards for enrollment as compensated counsel, and vetting and approving attorneys who wish to participate in the compensated counsel system. The enrollment for the compensated counsel system could be part of the annual attorney registration. Attorneys may enroll to accept cases from one or more vicinages. As now, the AOC will provide the lists of eligible attorneys to the vicinages.

The Committee proposes that the office of the trial court administrator (TCA) be responsible for contacting the next attorney on the list for the type of case at hand to determine availability. If that attorney is not available, the TCA office will contact the next attorney and so on. As all attorneys who are on the list to handle the particular type of case have been deemed competent to handle the case, there will be no need for the assignment judge to make special assignments as sometimes is the case in the current system.

Currently, there is no requirement that assigned counsel maintain professional liability insurance, leaving indigent litigants who received ineffective counsel in matters affecting their fundamental rights with limited recourse.¹³ While there is no requirement in New Jersey for an attorney to maintain professional liability insurance, most private practitioners do so. Wealthy litigants have the option of selecting counsel that maintains such insurance. Poor litigants do not.

Many attorneys who do not maintain private practices are still subject to the Madden system, including corporate counsel, most of whom are not covered by corporate professional liability policies for Madden assignments. Clients who are assigned to corporate counsel not only risk having an attorney represent them who has no experience or competence in the matter, but also are left with little or no recourse if the attorney commits malpractice in their case. The attorney, too, is left in a situation not of their own making in which they must provide representation in an area in which they have no experience and have no realistic ability to obtain professional liability coverage for this work or to pay for substituted counsel.

¹³ See the [NJ Courts Pro Bono FAQs](#) for information on requirements for assigned counsel.

The Committee recommends that the AOC require that attorneys who wish to participate in the compensated counsel system, must maintain a certain level of professional liability insurance. Many, if not all, of the county bar associations that operate a LRS require participants to maintain coverage. The OPD covers its pool attorneys within its own coverage. It is the Committee's understanding that most, if not all, non-profit providers that provide legal assistance to low-income clients maintain coverage as well. The Committee does not intend that the requirement for professional liability insurance for participation in the compensated counsel system be misinterpreted to mean support of mandatory professional liability coverage for all attorneys, but only for those that enroll in the compensated counsel system. The general public may consider whether an attorney has coverage in making the decision to hire that attorney, the litigants represented by attorneys in the compensated counsel system do not have that option.

While the provision of representation in matters in which there is no right to counsel is outside the charge of this Committee, we understand that there are many people who do not meet the financial standards for provision of counsel, but yet cannot afford counsel on their own. Implementation of this expansion of the LRS to provide a reduced-fee panel for these litigants will assist these litigants and the Committee encourages the county bar associations to consider the option of a reduced fee panel.

5: The right to counsel must be fully accessible, transparent and consistent.

To inform the work of the Committee, the NJSBA requested data from the AOC on Madden assignments by type of case and county of assignment as well as information about the number of attorneys practicing and subject to Madden assignments by county. That information has not been made available. It is clear to the Committee that the availability of such data and information is crucial to maintaining a system that is fully accessible, transparent and consistent.

(a): The Court should establish an office to provide transparency and consistency in right to counsel matter and assignments.

The Madden system appears to operate differently in different counties. Some counties use a special list for assignment of counsel in some types of matters, *e.g.*, guardianship. Some do not. It appears that an attorney's request to be relieved of an assignment is left to the discretion of the assignment judge, with inconsistent results across the vicinages. Municipal courts, too, appear to operate differently in their granting or denying of applications for the municipal public defender and in handling requests for waiver of application fees. As with other recommendations affecting the operation of the Madden assignment system, implementation of this recommendation should not in any way substitute for urgent action to end the Madden assignment system and replace the system with the recommendations of this report.

(b): The AOC should provide publicly accessible information.

The following information should be made available:

- Each type of case for which there is a right to counsel.

- Instructions on how to access counsel.
- Clear standards for eligibility for counsel.¹⁴
- Clear standards for avoiding conflicts and appearances of impropriety when different entities within the state represent adverse parties in proceeding.
- Clear standards for appointment of Madden counsel for so long as the list is utilized.
- Clear standards for appointment of non-Madden counsel in fee-generating matters that promote equity in appointments.

(c): The AOC should publish comprehensive data on right to counsel matters and assignments.

- Data on right to counsel cases by type of case, county, how counsel is secured (*e.g.*, the Madden system, compensated counsel system, OPD).
- For so long as the Madden assignment system exists, data on number of attorneys on the Madden list, number of assignments and type of assignment by county, data on substitute counsel.
- Data on number of applications for the municipal public defender made and granted by municipality.
- Data on number of applications for waiver of application fees for the municipal public defender made and granted by municipality.

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 in the types of cases in which there are assigned counsel so long as the rights of the litigants are fully preserved.**

On behalf of the Committee, the NJSBA requested data from the AOC on Madden assignments by type of case and county of assignment. The Committee also requested information about the number of attorneys practicing and subject to Madden assignment by county. The information was not forthcoming, therefore, the information on inconsistencies among the counties obtained by the Committee is based on other data and anecdotal accounts. The Cumberland County Bar

¹⁴ The OPD requires the completion of the [Uniform Defendant Intake Form](#), which contains some guidelines.

Association, in cooperation with the vicinage TCA, provided some data for 2019, which showed that the total number of Madden assignments reported that year was 1,648, including 1,219 contempt of domestic violence matters and 330 parole revocation matters. There may be additional “informal” assignments, particularly in the family and surrogate courts that are not included in the formal Madden assignment statistics.

In its information on Madden assignments (called pro bono service by the Court), the AOC states that attorneys are “not required to do a certain number of hours per year” however they “are required to complete an assigned pro bono case, no matter how many hours they require.”¹⁵

Anecdotally, it is the Committee’s understanding that in some smaller counties, a private practitioner may receive five or more assignments every year, while attorneys practicing in a larger county may go a year or more without an assignment.

On December 23, 2020, the Court instituted a one-year pilot program intended to correct the uneven assignment of parole revocation hearings, which are currently assigned to attorneys practicing in the county in which the person facing parole revocation is detained. Most of New Jersey’s prisons are located in Cumberland and Mercer counties, resulting in attorneys in those counties receiving frequent parole revocation assignments. Effective January 1, 2021, the assignments will be made to attorneys practicing in the county of commitment, *i.e.*, where the underlying offense occurred. The Court noted that parole revocation hearings are being held virtually and that assigned attorneys may participate in the hearings from the courthouse in the county of commitment, or the Parole Board’s local district office or the central office in Mercer County.

The Committee applauds this effort to provide more equitable assignment of parole revocation cases. However, this pilot program is intended to even the assignments in parole revocation matters only and does not resolve the larger issue leaves the issue of inequitable assignments and lack of expertise in the Madden system as a whole.

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

As with the other recommendations in this report that deal with the operation of the Madden system, this recommendation is intended to be used on the short-term to acknowledge the current inequitable application of the Madden provision. It is the expectation of the Committee that the Legislature will act quickly to implement the recommendation for funding of the OPD, non-profit providers and the Office of Compensated Counsel, thereby abolishing the Madden system. This recommendation is in no way intended to relieve the Legislature of its responsibility.

¹⁵ See the [NJ Courts Pro Bono FAQs](#) for information on requirements for assigned counsel.

There are many exemptions for Madden assignments.¹⁶ The exemptions seem to fall within categories:

- Attorneys who are prohibited from the private practice of law:
 - #81. Attorneys who work full time for any local, county, State or Federal agency or authority and who, by statute, rule, administrative directive, Executive Order, published Ethics Code or Opinion, are prohibited from the private practice of law, are exempt.
 - #82. All Supreme Court Justices, all Superior Court and Tax Court Judges, all Federal Court Judges, all Workers' Compensation Judges, all Administrative Law Judges, all retired Justices and Judges, all Surrogates and Deputy Surrogates, all Child Support/Domestic Violence Hearing Officers or Juvenile Referees, and all Full-time Municipal Court Judges are exempt.
- Attorneys who work in certain public sector or public interest fields.
 - #83. All attorneys working full time for the Administrative Office of the Courts or on the staff of any State or Federal Judge or any vicinage of the Superior Court or any Municipal Court, County Clerk, or Surrogate are exempt. Attorneys serving as part-time municipal court directors, administrators, deputy administrators and violations bureau clerks are also exempt.
 - #84. All County and full-time Municipal Prosecutors and Assistant Prosecutors, all attorneys working in the Office of Counsel to the Governor, the Attorney General and Deputy Attorney Generals, the Public Defender and Deputy Public Defenders, full-time Municipal Public Defenders, the Public Advocate and Deputy Public Advocates are exempt. Part-time Municipal Public Defenders and Public Defender Pool Attorneys are not exempt.
 - #85. All attorneys who work full time for criminal law enforcement or investigative agencies, such as but not limited to, police forces, the Federal Bureau of Investigation, County Sheriff, Federal Marshals, Casino Control Commission, or the Internal Revenue Service are exempt.
 - #91. Attorneys who serve as part-time Municipal Prosecutors are exempt from all criminal and quasi-criminal pro bono cases. However, they may still be assigned civil pro bono cases.
 - #87. Attorneys employed full time by a Legal Assistance Organization, as described in R. 1:21-1 (e), or by a Legal Aid Society are exempt.
- Attorneys who are not eligible to practice law in New Jersey.

¹⁶ Review the Memorandum to Members of the Bar on Pro Bono Exemption Categories [here](#).

#86. Attorneys who are not currently practicing law, and those who are completely retired, are exempt. Attorneys are considered not practicing law or retired if the following applies: the attorney's employment is not related to the practice of law, the attorney does not have to be an attorney to hold his or her position, the attorney does not review legal documents, the attorney does not render legal assistance or advice on the law, the attorney does not teach law, and the attorney does not serve in the judiciary in any capacity, in any jurisdiction.

Attorneys who are ineligible to practice law in New Jersey under statute, Rule of Court, or court order are also exempt. An attorney who appears *pro se* or *pro hac vice* or as the guardian of a party in interest may still claim this exemption if those are the only legal services performed in New Jersey. Attorneys who serve as in-house counsel in New Jersey are not exempt.

#90. Attorneys who practice law out of state, who do not practice in New Jersey in the calendar year (2020), are exempt. An attorney who appears *pro se* or *pro hac vice* or as the guardian of a party in interest may still claim this exemption if those are the only legal services performed in New Jersey.

➤ Attorneys who perform qualified pro bono service.

#88. Attorneys who certify that they have performed at least twenty-five (25) hours of qualifying pro bono service in New Jersey for a certified pro bono organization or for a pro bono organization approved by the Supreme Court, in the year ending December 31, 2019, are exempt under this category. See R. 1:21-11 and 12. Additionally, attorneys who satisfy the same twenty-five (25) hour requirement by serving as a court-appointed attorney-trustee pursuant to R. 1:20-19 or who volunteer to handle Termination of Parental Rights Appeals as compensated Public Defender Pool Attorneys are also exempt under this category.

➤ Attorneys who perform certain volunteer activities.

#89. Attorneys who are members of a District Ethics Committee, a Fee Arbitration Committee, the Disciplinary Review Board, the Disciplinary Oversight Committee, the Board of Trustees for the New Jersey Lawyers' Fund for Client Protection, the Supreme Court Committee on the Unauthorized Practice of Law, the Supreme Court Committee on Attorney Advertising, the Advisory Committee on Professional Ethics, the Committee on Character or the Advisory Committee on Judicial Conduct and attorneys who are employed as peer counselors for the Judge Assistance Program are exempt.

Recently, the Court has added to the annual Madden exemption list through Notice and Order to include attorneys who provide 25 hours or more of pro bono service in:

➤ Landlord Tenant matters: Attorneys providing service to residential tenants and/or residential landlords (individuals, sole proprietors, or general partners) who have been

determined to meet the criteria for legal representation by a qualifying pro bono organization pursuant to R. 1:21-11. See [Order dated October 20, 2020](#).

- Adult Guardianship matters: Attorneys appointed by the court to serve as attorney for the alleged incapacitated person; Guardian Ad Litem in a guardianship matter; temporary pendente lite guardian; permanent guardian of an adjudicated incapacitated person; or special medical guardian. See [Order dated March 1, 2021](#).

The Committee had several robust discussions about the Madden exemptions. There was significant concern among the Committee members that the exclusion of thousands of attorneys from the Madden list unfairly casts the full burden of providing representation on a smaller pool of attorneys. According to data provided to the Committee by the Cumberland County Bar Association for 2019, of the 71,049 registered attorneys, 28% of them (19,786) qualified for exemptions.

The weight of assignments falls disproportionately on solo practitioners and members of small firms. Large firms are more likely to have the resources and personnel to handle assignments without casting an undue burden on the firm or the individual partner or associate. As the burden of Madden assignments falls most heavily on a limited number of attorneys, there is limited impetus to apply the random assignment system under Madden more fairly and consistently throughout the state.

Having a broader base of attorneys, combined with the recommendation below that attorneys be provided an opportunity to indicate areas in which they have knowledge and experience could improve the effectiveness of counsel for the people living in poverty in our communities. That would yield a net gain for indigent people who face loss of fundamental rights. Expansion of the attorney pool could also increase voluntary pro bono as some of these attorneys will seek to provide voluntary pro bono services in areas of interest in lieu of an assignment.

The Committee is concerned that the exemptions have evolved somewhat haphazardly and the reasoning behind each is unclear. For example, while an exemption for judges and attorneys who are prohibited from the private practice of law or are ineligible to practice in New Jersey is self-explanatory, the same cannot be said of the exemptions for others, such as all classes of government attorneys, including all those who work for the AOC.

The Committee recognizes the good work that attorneys do through work on the District Ethics Committee, Disciplinary Review Board, Fee Arbitration Committee and Boards and other Committees that are currently exempt from Madden assignments. The great volunteer work done by attorneys throughout the state, however, is not limited to the current exemptions. The current list does not include a number of other similarly situated committees, such as the Early Settlement Panels, the Supreme Court Committee on Diversity, Inclusion, and Community Engagement, or other court committees. Nor does it include other volunteer work for the courts, such as mediations in civil court or the Early Settlement Panel in family court. When there is a death or disability of a practitioner, attorneys volunteer to maintain the practice and protect the clients. These attorneys are not included in the current Madden exemptions.

In the alternative, should the Court determine that it is appropriate to continue the exemption for committee and other volunteer service not directly related to the provision of qualifying pro bono

service under the Court Rules, the Court should establish clear criteria for which committees established by the courts or other governmental entities will qualify for the exemption. This alternative is recommended until such time as the Madden system is no longer in place.

In exempting pool attorneys who volunteer to handle termination of parental rights appeals as compensated OPD pool attorneys, the Court appears to recognize that pool attorney service is undercompensated and therefore these attorneys should not be requested to provide uncompensated service under Madden. However, the exclusion applies only to a very limited group of pool attorneys - those who handle termination of parental rights appeals - and leave other pool attorneys subject to Madden assignments.

The Court Rules governing Madden exemptions for voluntary pro bono service were revised in July 2014, and became effective in January 1, 2015. The rules limit fulfillment of the Madden requirement to pro bono service consisting of:

- (i) legal assistance to low-income persons;
- (ii) legal assistance to nonprofit charitable, religious, civic, community, or educational organizations or governmental entities in matters that are designed primarily to address the needs of low-income persons;
- (iii) legal assistance to individuals, groups, or organizations seeking to secure, protect, or advance civil rights, civil liberties, or other rights of great public importance; or
- (iv) legal assistance to nonprofit charitable, religious, civic, community, or educational organizations or governmental entities in matters in furtherance of their purposes, where payment of standard legal fees would significantly deplete the organization's or entity's economic resources or would otherwise be inappropriate.

R. 1:21-11.

It makes sense that Madden exemptions for pro bono and volunteer work should reflect that Court Rules governing Madden exemptions. To include some volunteer efforts on behalf of the court, the bar and the community, while excluding other similar volunteer efforts, discounts the value of the good works done by the bar in the excluded activities.

The Committee debated at some length Madden exemptions as they apply to attorneys in public service or public interest. While there are strong arguments for limiting Madden exemptions to provide fairness to attorneys overall and to expand the pool of uncompensated counsel, there are also strong arguments to exempting those who dedicate their careers to public service or public interest. These honorable attorneys work for government or non-profit entities whose very existence is premised on securing access to justice. Many have devoted their legal careers to providing access to justice for particular populations in need, *e.g.*, victims of domestic violence. For these attorneys, an assignment to provide representation in a contempt of domestic violence matter raises philosophical conflicts, conflicts of interest and ethical considerations. The same issue arises for public interest attorneys whose organizations represent other vulnerable populations, *e.g.*, children and seniors, when they must argue against the interest of people in these groups as part of the zealous representation in an assigned case.

Many organizations and governmental entities have restrictions on the outside practice of law. (Private firms may have these restrictions as well, but as their attorneys are subject to Madden assignments currently, it is likely that the restrictions recognize Madden requirements.) The current Madden exemptions recognize restrictions on outside practice of law when imposed by statute, rule, administrative directive, Executive Order, or published Ethics Code or Opinion, but does not recognize these same restrictions when imposed by employment contract, union contract, or policies of government entities or public interest organizations. There are questions about how to assure professional liability coverage for the “outside practice of law.” In most cases, public sector and public interest lawyers are not permitted to use office resources for the outside practice of law creating a significant burden as these lawyers do not have a law office infrastructure to utilize in assigned cases.

There may be no net gain to the community in having public interest attorneys take time from representing one group of indigent people to handle an assignment representing a different indigent person, perhaps resulting in the denial of services to a person in need seeking services from the legal services organization. Many attorneys working for public interest organizations do so under specific grants and would be prohibited from representation of persons who do not fall within these grant requirements. There is a certain irony for there being an exemption for attorneys who donate 25 hours of pro bono, and no exemption for public interest attorneys whose career is providing legal representation at no cost to people in need.

The Right to Counsel Committee sought input from the NJSBA Pro Bono Committee, as well as county bar associations on the Madden exemptions. The recommendation herein for revision of the Madden exemptions is based largely on the input from these groups, particularly the NJSBA Pro Bono Committee.

We recommend that the Madden exemptions be revised as follows:

- Judges, Surrogates, Hearing Officers, and Juvenile Referees:
 - Supreme Court Justices, Superior Court and Tax Court Judges,
 - Federal Court Judges,
 - Workers' Compensation Judges,
 - Administrative Law Judges,
 - Retired Justices and Judges,
 - Surrogates and Deputy Surrogates,
 - Judicial Hearing Officers and Referees, and
 - Municipal Court Judges

- Attorneys who are employed full-time in the public sector, including attorneys employed full-time with:
 - A local, county, state or federal government entity, agency, or authority, *e.g.*:
 - Criminal law enforcement or investigative agency;
 - Office of the Attorney General, Office of Counsel to the Governor, Prosecutor's Office, Office of the Public Defender, including attorneys

whose full-time practice is as an OPD pool attorney, Municipal Court system as a Municipal Prosecutor or Municipal Public Defender; and

- Administrative Office of the Courts, State or Federal Judge, court vicinage, Surrogate's Office, County Clerk's Office or Municipal Court or Violations Bureau.
- Attorneys who are not permitted or are ineligible to practice law in New Jersey.
 - Retired attorneys, including retired attorneys who provide pro bono legal services for a certified organization.
 - Attorneys who did not practice law in the State of New Jersey pursuant to R. 1:21-1(a) in the calendar year prior to registration. An attorney who appears pro se or pro hac vice or as the guardian of a party in interest may still claim this exemption if those are the only practice of law in New Jersey.
 - Attorneys who are employed full-time with an organization that is certified under R. 1:21-11 as a legal services provider, public interest organization, or law school clinical or pro bono program.
 - Attorneys who have performed at least 25 hours of qualifying pro bono service in the calendar year prior to registration:
 - for an organization that is certified under R. 1:21-11 as a legal services provider, public interest organization, or law school clinical or pro bono program;
 - pursuant to the request of a federal, state, or other court to provide pro bono services in a particular matter not including assignments made by the court under the Madden system; or
 - other legal assistance approved by the Court as qualifying pro bono service.

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.

Attorneys who volunteer to accept assignment in these often complex and time-consuming matters should not also be included on the list for general assignments.

The cases currently subject to Madden assignments are all matters of fundamental rights and consequences of magnitude. All the litigants facing loss of liberty and rights in these cases are entitled to representation by effective counsel. The Committee recognizes it will take time to implement the publicly funded compensation counsel system recommended herein. In the meantime, there are several recommendations for particular types of cases that could be

implemented. There are several areas of the law in which there are immediate steps that can be taken to provide effective counsel to litigants. See Section V, *infra.*, for discussion of these areas of the law.

- Private adoption;
- Guardianship and conservatorship;
- Domestic violence contempt; and
- Parole revocation.

The Court has already noted that representation of parents in private adoption cases should not be assigned off the regular Madden list. But see In the Matter of Adoption of a Child by C.J., 463 N.J. Super. 254 (App. Div. Apr. 28, 2020), in which counsel in a private adoption matter was assigned off of the Madden list.

9: Until the Madden system of random assignments is replaced, the state should provide adequate support for the attorneys providing legal assistance.

- (a): Provide these attorneys with access to services through the Office of the Public Defender (OPD) or create other clear procedures and access to ancillary services required in the litigation;**

Public Defender Krakora noted that the OPD already has a system in place for determining whether the OPD will provide ancillary services when a criminal defendant has private counsel. The OPD determines whether the litigant is financially eligible for OPD services (which would presumably be so for all litigants provided with a Madden attorney). The OPD uses the same criteria for determining ancillary services for litigants represented by private counsel as it does for its staff and pool attorneys. There is a concern, however, that if the ancillary services, *e.g.*, an expert in a field not currently within the purview of the OPD, the OPD might not have the systems in place with which to judge the necessity of or fair reimbursement rate for the ancillary service.

- (b): Waive all court filing fees in these matters for litigants with court-appointed counsel.**

For example, waiver of filing fees payable to the Surrogates' Courts for adoptions and guardianships may be an issue.

- (c): Provide for automatic e-filing upon assignment of all cases that commence as *pro se* cases.**

This procedure will facilitate representation and alleviate the costs for assigned counsel that accompany paper filings. The order determining indigency status and appointing counsel could include a provision posting the case to eCourts.

- (d) Through the AOC, provide for regular updating of training materials.**

10: Attorneys who do not have the competence to handle an assignment should not be required to hire substitute counsel.

As noted above, in the recent case of C.J., *supra.*, the court chastised counsel for providing incompetent and ineffective representation, noting that the attorney should have hired another attorney to provide representation and that the primary responsibility to retain (and pay) substitute counsel lies with the appointed attorney. While the Court opined that this obligation lies only if the attorney is financially able to retain substitute counsel, it is unclear how a determination of inability to afford this burden is made.

Such a requirement imposes an unjust burden on an attorney. It is the state's responsibility to provide counsel in these matters. The Legislature has ignored this responsibility for decades. The solution cannot be to not only require an attorney to provide services, but to expend what could be considerable funds to hire substitute counsel.

11: The Court and the NSJBA 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, including.**
 - Publishing names of attorneys who handle 25 hours or more in pro bono cases for Legal Services and approved programs and self-certified for exemptions.
 - Permitting attorneys to claim an exemption if that attorney has provided 25 hours or more of service in the registration year.
 - Considering whether to provide additional year(s) for attorneys who provide more than 25 hours of pro bono service in a year, *i.e.*, carry-over some pro bono hours to the next year, similar to the carry-over in the CLE system.

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.

The OPD has an excellent reputation. Its attorneys are well-trained and closely supervised, resulting in quality representation for indigent defendants. The OPD utilizes pool attorneys in approximately nine percent of its cases overall – approximately 7,000 cases in court year ending 2019. Pool attorneys are private attorneys not employed by the OPD but have agreed to accept cases for representation on a contract basis.

The OPD provides and requires training for its pool attorneys. For example, all pool attorneys accepting Title 9 or Title 30 DCPP parental representation or Law Guardian cases must complete an

orientation and accept initial and annual training from the OPD. Similar training requirements exist for other areas of law in which pool attorneys are used.

Pool attorneys are currently paid \$60 per hour for in-court work and \$50 per hour for out-of-court work. That rate was established more than 15 years ago. While there has been legislation introduced to raise the hourly rate, none has passed. New Jersey Public Defender Joseph E. Krakora, recognizes the inadequacy of the pool attorney reimbursement rate and supports the recommendation of the Committee to raise the compensation rate to \$175 per hour.

Pool attorneys must justify any time spent. The OPD is responsible for reviewing fee applications of pool attorneys. Pool attorneys do not receive any funding for administrative or paralegal help.¹⁷

Realistically, if these attorneys are to make a living wage, they either need to handle other types of cases or carry a large caseload. With inadequate compensation the pool attorneys are placed in the same ethical bind referred to in the Philadelphia Study where the interests of the client and the interests of the attorney may not be consistent. The inadequate compensation lacks fairness to the attorneys who undertake this critically important work.

The reimbursement rate is woefully inadequate. In Rush, *supra.*, the Court noted that at that time, “the overhead of the average law office probably runs about 40% of gross income.” In order to meet the overhead and provide some compensation for the attorney’s time, the court suggested compensation at “60% of the fee a client of ordinary means would pay an attorney of modest financial success.” Rush, 46 N.J. 399 at 413.

In 2017, the average hourly billing rate for New Jersey lawyers was \$288 per hour. [See Cohen, Lydia, N.J. Lawyers’ Billing Rates Among Nation’s Highest, Research Finds, ROI-NJ.com, Oct. 12, 2017.](#) Sixty percent of that figure is \$172.80. It is the Committee’s understanding that experts in the very cases that pool attorneys handle are paid an hourly rate of at least \$225.

Attorneys appointed as pool attorneys under the Federal Criminal Justice Act are paid \$148 per hour in non-capital cases and up to \$190 per hour in capital cases. Although there are case caps, the judge may waive the cap upon application of the CJA attorney. [See United States Courts, Defender Services](#)

Outside counsel that provides representation to the state is paid significantly more than pool attorneys who represent indigent people who live in our state. It is the Committee’s understanding that typical rates for outside counsel are \$200 per hour for partners and \$150 per hour for associates, with separate billing permitted for legal assistants and interns at \$125 per hour and paralegals at \$90 per hour. It is astonishing that a paralegal working on behalf of the state in an auto accident case is paid one and one-half times of the amount that paid to an attorney representing a parent facing termination of parental rights or a criminal defendant facing loss of liberty.

The guidelines for reimbursement of outside counsel are much more expansive than those for pool attorneys. [See NJ Office of the Attorney General, Department of Law, Outside Counsel Guidelines.](#)

¹⁷ Click [here](#) for a full listing of Billable Rates, located at Section IV.

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.

Assignment of municipal public defenders and waiver of application fees for the municipal public defender also seem to be inconsistent throughout the state. The Court publishes guidelines for appointment of a municipal public defender, which are set at 125% of the FPL. The same guidelines are utilized for waiver of the application fee for a municipal public defender. But it appears at least anecdotally, that municipal court judges use their discretion in determining eligibility and determining whether the application fee will be waived.

One former municipal judge reports routinely appointing the municipal public defender for people with incomes greater than 125% FPL for complex matters and waived the whole application fee as a matter of course for anyone with income of 125% of FPL or less. In another court, the judge will not waive the application fee, but would often reduce the application fee to \$100.

Because there appears to be no system in place for monitoring how municipalities handle applications for the municipal public defender or requests for waiver of the application fee, the state does not know whether justice is being meted out in municipal court in an accessible and consistent manner.

The Committee has recommended above that data be collected from municipal courts on applications for municipal public defenders and requests for waiver of application fees. The Committee requests that the Court, through its committees and working groups, review the data and develop a set of standards for waivers of application fees that recognize the reality of the cost of living in New Jersey and provides municipal public defenders for all who cannot afford counsel.

The municipal court matters for which a municipal public defender may be appointed are by definition matters with consequences of magnitude. Some may require expert testimony or cross-examination of expert witnesses for the prosecution. It would be naïve to expect an unrepresented defendant would have the knowledge or expertise to provide an adequate defense in these matters.

The guideline of 125% FPL may be used to deny representation to those who may have slightly more income, but still not have the resources to hire a private attorney, effectively denying representation to these litigants. So too, if the inability to pay an application fee acts as a barrier to obtaining representation (it is unclear whether it does or does not), these defendants, too, are denied representation.

Our Court may wish to look at the work in New York to inform the work of our Court in setting consistent standards for accessibility for municipal public defender services. As part of a settlement of a lawsuit, Hurrell-Harring v. The State of New York¹⁸, alleging that New York had systematically and structurally denied meaningful and effective representation to defendants entitled to publicly

¹⁸ A full copy of the Stipulation and Order of Settlement can be found [here](#).

funded representation, including through the use of incoherent or excessively restrictive client eligibility standards, the New York State Office of Indigent Legal Services (ILS) studied the issue and made recommendations, including:

- (1) eligibility determinations shall be made pursuant to written criteria;
- (2) confidentiality shall be maintained for all information submitted for purposes of assessing eligibility;
- (3) ability to post bond shall not be considered sufficient, standing alone, to deny eligibility;
- (4) eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged;
- (5) income needed to meet the reasonable living expenses of the applicant and any dependent minors within his or her immediate family, or dependent parent or spouse, should not be considered available for purposes of determining eligibility; and
- (6) ownership of an automobile should not be considered sufficient, standing alone, to deny eligibility where the automobile is necessary for the applicant to maintain his or her employment.

Other areas that the ILS intends to consider, but has not yet made recommendations include:

- (7) whether screening for eligibility should be performed by the primary provider of Mandated Representation in the county;
- (8) whether persons who receive public benefits, cannot post bond, reside in correctional or mental health facilities, or have incomes below a fixed multiple of [the] federal poverty guidelines should be deemed presumed eligible and be represented by public defense counsel until that representation is waived or a determination is made that they are able to afford private counsel;
- (9) whether (a) non-liquid assets and (b) income and assets of family members should be considered available for purposes of determining eligibility;
- (10) whether debts and other financial obligations should be considered in determining eligibility.

One thing that is crystal clear is that New Jersey's system offers little in the ways of standards and relies on the vagaries of a decentralized municipal court system lacks the accessibility, transparency and consistency necessary for justice.

Section V:

Specific Right to Counsel Areas of Law and Additional Recommendations

Private Adoption

The New Jersey Supreme Court's decision in In re Adoption of J.E.V., 226 N.J. 90 (2016), held that all indigent parents who objected to the adoption of their child were entitled to counsel appointed by the Court at no cost to the parent. J.E.V. focuses on private adoption, meaning adoptions that take place outside of the child welfare system. (The right to counsel for parents in child welfare cases is well-established.) The types of private adoptions which may generate litigation by an objecting parent include step-parent adoptions; agency placement where the birth mother has surrendered her rights to an agency and the birth father objects; and actions brought by persons who have been caring for children for long periods of time, such as grandparents, and where the birth parents are alleged to have abandoned their expected parental obligations as defined in the adoption statutes.

After J.E.V., the AOC determined to utilize the existing 5A Form, Uniform Defendant Intake Form, to determine eligibility for appointed counsel. Further the AOC convened a select committee to draft a manual to assist attorneys in representing parents in these matters if they were appointed off the Madden list with no prior adoption experience.

While it has been difficult to determine the number of Madden assignments to J.E.V. cases have been made since 2016, several anecdotal reports and one recent reported case make it clear that Madden assignments are not serving the public interest, not providing inexperienced counsel with proper support and, therefore, do not promote the constitutional right to counsel established in J.E.V.

Among the issues that have been reported or observed:

- Inexperienced appointed counsel seeking and paying out of their pockets for the assistance of experienced counsel to effectively represent a client;
- Appointed counsel having to pay out of their pockets for litigation expenses such as postage, copying, travel costs;
- Appointed counsel having to forego hiring expert witnesses and evaluations or being forced to join in an opposing party's engagement of experts, as the client is unable to pay and there are no resources available; and
- Adoption agencies, which are mandatorily non-profit organizations, being ordered to pay for or provide services to an indigent parent, even when the agency does not support the indigent parent's ability to parent a child in its guardianship.

Further, in the recently reported Appellate Division matter C.L., *supra.*, an indigent mother was appointed counsel to appeal her loss of parental rights in the trial court where she was represented by the OPD. The court appointed appellate counsel, apparently from the general Madden list. It was

clear to the court from the brief filed in the case that counsel was clearly neither competent in appellate practice or knowledgeable in adoption law.

Finally, the Court's [website](#) states that attorneys for parents in private adoptions are not appointed from the Madden list. There is no AOC directive establishing this change from the Madden system. It has been reported that experienced counsel have been asked by courts to accept appointments in distant counties from their practices in order to provide experienced counsel to indigent birth parents.

The Committee believes that substantial changes need to be made to provide indigent birth parents with effective representation in contested adoption matters. As the Supreme Court has long held that the termination of parental rights implicates the most fundamental of constitutional rights, this Committee makes the following recommendations:

- Prohibit the use of Madden list attorneys as appointed counsel in private adoptions matters, including appeals.
- Pursuant to Recommendations #3 and #4 above:
 - Fund non-profit legal services providers with expertise in private adoptions;
 - Create a publicly funded compensated counsel system, with reimbursement at the pool attorney rate, that engages qualified attorneys to provide representation in private adoptions.
- In the meantime, we recommend some alternative solutions, which while not optimal, would be an improvement over the status quo:
 - Create a special list of qualified attorneys from which to draw for appointment;
 - Provide these attorneys with access to services through contracted OPR experts or create other clear procedures and access to ancillary services, such as home studies, psychiatric, psychological and bonding evaluations that may be necessary in adoption litigation;
 - Examine parental ability to pay to create sliding scales of payment for those who cannot qualify for indigent status, but for whom hiring a private attorney would not be possible. This could allow a small pool of qualified attorneys to be assigned to multiple matters if they were being paid on a scale commensurate with the parent's ability to pay. The line between qualification for appointed counsel and the ability to hire private counsel in a matter of such importance as being worthy of an expansion of the right to counsel with a sliding scale of fees or the expansion of the limits on eligibility; and
 - Issuing an order confirming that all court filing fees in these matters for parents with court-appointed counsel are waived. As these filing fees are payable to the Surrogates' Courts, this has been an issue.

Contempt of Domestic Violence Restraining Orders

A person who violates the provisions of a Domestic Violence Restraining Order is subject to prosecution for contempt. N.J.S.A. 2C:29-9. The prosecution for a contempt charge almost always involves the domestic violence victim being contacted by the person subject to the order. Violation of the support provisions of a domestic violence restraining order does not result in a contempt prosecution. If the contempt does *not* involve commission of another offense, it is prosecuted as a disorderly persons offense. If the contempt *does* involve the commission of another offense, such as another assault or harassment, it is prosecuted as a fourth-degree crime.

Defending a person accused of contempt is complicated; so much so that a 55-page document is posted on the New Jersey Judiciary website describing the process.¹⁹ This document was drafted by the Working Group on *Pro Bono* Attorney Training Materials—Domestic Violence Contempt Matters, which includes judges, attorney and other court staffers. A 20-minute training video is also posted in the same space.

Successfully defending a domestic violence contempt matter involves knowledge and experience with the Prevention of Domestic Violence Act, the New Jersey Criminal Code and most or all the underlying offenses, such as assault, harassment and terroristic threats. A successful attorney will also have experience with evidence rules, discovery, police reports, and, most importantly, trying cases in the Family Division.

As the Judiciary website states in the page identified above, these matters are subject to the Madden system. The training manual states on page 5:

Attorneys are most frequently assigned from the mandatory pro bono list to represent defendants who have been charged with contempt of a domestic violence restraining order as defined in N.J.S.A. 2C:29-9(b), a disorderly persons offense. Although disorderly persons offenses are normally heard in municipal court, these contempt charges are heard in the Family Part of the Chancery Division of the Superior Court. N.J.S.A. 2C:25-30. Since the charge does not meet the legal criteria for the assignment of a public defender, assignment from the pro bono list is appropriate under Madden v. Delran.

Based on the serious ramifications for the contempt defendant, such as incarceration, fines, a permanent criminal record, and others, this Committee does not believe that the defense of indigent defendants should be foisted on attorneys who have no training or experience in this area. Per recommendation #3 above, the Committee believes that the OPD is best positioned to handle contempt of domestic violence hearings and should be fully funded to do so. However, the compensated counsel system we suggest in recommendations #1 and #4, if implemented, can also be used to supplement the work of the OPD for these cases, ensuring that contempt defendants are represented by competent counsel.

¹⁹ A full copy of “Defending a Domestic Violence Contempt Case – A Primer for Assigned Counsel” can be found [here](#).

Guardianships for Division of Developmental Disability (DDD) Clients

N.J.S.A. 30:4-165.14 provides that DDD has the responsibility for initiating guardianship proceedings. However, it is the Committee's understanding that DDD is not fully-funded to provide the service, resulting in a long waiting list for the institution of a guardianship. Although the Alleged Incapacitated Person (AIP) has a right to counsel once a guardianship is filed, there is no right to counsel prior to the filing. The result is that many DDD clients find themselves in "de facto" guardianships for long periods of time, with no determination by the court of the appropriateness of the person handling the DDD client's matters to be a guardian and no opportunity for the DDD client to consult with and be advised by an attorney.

The statute authorizing the OPD to provide representation once the guardianship proceeding is filed limits representation to cases in which the petition seeks only guardianship of the person, to the extent that funds are available for this purpose. If the OPD is unable to provide representation the statute authorizes the court to appoint an attorney without compensation. N.J.S.A. 30:4-165.14.

The Court Rules provide that the appointed attorney may, where appropriate, retain an independent expert to render an opinion respecting the incapacity of the alleged incapacitated person. R. 4:86-4. It is not clear from the Rule whether the OPD or the appointed attorney is responsible for paying the expert.

The Committee makes the following recommendations in connection with guardianship matters for DDD clients:

- Revise the public defender statute to provide that the OPD may represent AIPs in cases for both person and property guardianship in cases of indigency with limited assets;
- Until the statute is revised, per recommendation 3 above, utilize a special Madden list for general guardianships for DDD guardianships of AIP who require guardianship of person and property; and
- Provide sufficient funding to DDD to handle demand for guardianship cases for DDD clients so that DDD clients have timely access to an attorney.

General guardianships and conservatorships

Other guardianships and conservatorships are governed by N.J.S.A. 3B:12-24.1; N.J.S.A. 3B:13A and R. 4:86. Rule 4:86 includes the appointment by the court of counsel for the AIP (R. 4:86-1(a)), sets forth counsel's duties (R. 4:86-4(b)) and gives the court broad discretion regarding fees for the attorney for the AIP, guardian ad litem and counsel for the petitioner (R. 4:86-4(e)). Specifically, the rule governing compensation states:

Compensation. The compensation of the attorney for the party seeking guardianship, appointed counsel, and of the guardian ad litem, if any, may be fixed by the court to be paid out of the estate of the alleged incapacitated person or in such other manner as the court shall direct.

R. 4:86-4(e).

It appears that appointment of counsel and orders for fees are handled differently in each county. It seems that some counties utilize the Madden list. At least one county, and perhaps others, maintain a list of attorneys who have some expertise in guardianship matters and use this list for both paid and pro bono assignments.

It also appears that there is inconsistency in the award of fees. It seems that some counties routinely award fees, regardless of whether there are sufficient funds in the estate of the AIP. At least one county awards no fees if the neither the petitioner nor the AIP have sufficient funds. That county determines that any petitioner who obtains fee waiver due to indigency does not have sufficient funds. That county also caps the hourly rate and total fee for assigned counsel in which fees are to be awarded.

The Committee proposes the following recommendations for guardianship and conservatorship matters:

- Develop standards for chancery judges on methods for assignment, award of fees to promote consistency throughout the counties;
- Provide Madden credit for assigned counsel in guardianship, conservatorship and other probate matters;²⁰ and
- Provide for waiver of counsel fees when an indigent AIP is represented by assigned counsel and when the plaintiff was been approved for filing fee waiver.

Parole Revocation

Under New Jersey law, an inmate becomes eligible for parole consideration after serving one-third of the prison sentence, with the exception of cases in which the offender was sentenced to a period of parole ineligibility. Inmates appearing before the parole board have the right to consult legal counsel. N.J.S.A. 30:4-123.25. In Puchalski v. NJ State Parole Board, 104 NJ Super. 294 (App. Div. 1969), the plaintiff requested that the OPD provide him with limited representation allowed by N.J.S.A. 30:4-123.25 namely, consultation with counsel prior to parole hearing and submission by counsel of a brief or other legal argument on his behalf to the Parole Board. The OPD denied request on the grounds that “the statute establishing the Office of the Public Defender does not authorize representation of indigent defendants in connection with any proceedings involving the State Parole Board.” Puchalski, 104 N.J. Super. at 296. The Appellate Division recognized an impingement on an individual’s freedom, however, it determined that there was no right to counsel as “the hearing is still essentially an administrative hearing concerning the effective operation of the correctional system.” Id. at 299.

²⁰ By Order dated March 1, 2021, the Supreme Court has granted a Madden exemption for attorneys who provide 25 hours or more of pro bono service in the prior calendar year in adult guardianship matters: Attorneys appointed by the court to serve as attorney for the alleged incapacitated person; Guardian Ad Litem in a guardianship matter; temporary pendente lite guardian; permanent guardian of an adjudicated incapacitated person; or special medical guardian.

There is, however, a limited right to counsel in parole revocation matters. Bolyard v. Berman, 274 N.J. Super 565 (App. Div., certif. denied, 138 N.J. 272 (1994)). It appears that counsel who are assigned under Madden are required to provide representation in the appeal of an initial adverse decision to the full parole board and, if necessary, the Appellate Division. See Parole Revocation Hearings – A Primer for Assigned Counsel, p. 5.

Any parolee who has seriously or persistently violated conditions of parole may have parole revoked and may be returned to custody. N.J.S.A. 30:4-123.60. A parolee held in custody on a parole warrant is not entitled to release on bail. N.J.S.A. 30:4-123.62(a)(2). The hearing is generally conducted within 60 days after the parolee is taken custody. N.J.S.A. 30:4-123.63(a). Prior to the hearing, parolee receives written notice of hearing, the conditions of parole alleged to have been violated and the right at the hearing including the right to be represented by counsel. N.J.S.A. 30:4-123.63; Bolyard, *supra*.

As noted in Section IV, Recommendation #6, *supra*, the Court has implemented a pilot program to make assignments for parole revocation hearings more equitable. While this program will help relieve the burden on attorneys practicing in Cumberland and Mercer counties, where most of the persons facing parole revocation are detained, it will result in attorneys who have no familiarity with parole revocation hearings being assigned. This exacerbates the issue of inexperienced attorneys being assigned to provide representation in matters that determine whether an indigent person will be incarcerated or retain their freedom in the community.

The Committee proposes, pursuant to recommendation #3 above, that the OPD be authorized to provide representation in parole revocation hearings and appeals. Moreover, the compensated counsel system we suggest in recommendations #1 and #4, if implemented, can also be used to supplement the work of the OPD for these cases, ensuring that a parolee facing parole revocation are represented by competent counsel.

Child Welfare

In the recent case of D.C.P.P. v. L.O., *supra*, the Appellate Division decided that indigent litigants have a right to counsel in their appeal before an Administrative Law Judge of a Department of Children and Families (DCF) administrative finding of child abuse or neglect under N.J.S.A. 9:6-8.21. Should the accused prevail at the hearing, DCF may reverse the ALJ's decision. If the agency makes a finding of child abuse or neglect, the accused may then further appeal to the Superior Court, Appellate Division.

Although the L.O. case involved a mother and her relationship with her child was impacted by DCF's interventions in the family structure, parents are not the only litigants defending themselves against administrative findings in the Office of Administrative Law (OAL). The accused may be any adult who had care and control of the harmed child at the time of the injury as defined under Title 9. Daycare workers, teachers, foster parents, baby sitters, significant others, and relatives are among the types of litigants in these matters. Therefore, the L.O. decision expanded the right to counsel beyond protecting a fundamental right to parent. It expanded the right to individuals for whom a finding may or may not affect their job or future career, but for whom the fundamental right to parent is not affected.

Even when a respondent in an administrative law hearing is a parent, that respondent's parental rights will not be affected unless and until a further proceeding is brought by the state in Superior Court under Title 9 or Title 30, for which the right to counsel is well established. If L.O.'s case had been heard in Superior Court pursuant to N.J.S.A. 9:6-8.22, L.O. would have been afforded appointed counsel pursuant to N.J.S.A. 9:6-8.43. Instead of requiring DCF to proceed under Title 9 or Title 30, or transferring the case on its own motion, the Appellate Division expanded the right to counsel to the administrative hearings. Moreover, the child who has been abused or neglected is not afforded counsel in the administrative hearing under L.O. This child would have counsel through the Office of the Law Guardian under the OPD had the proceeding been held in the Superior Court.

It is ironic that the Court has expanded the right to counsel in child welfare matters beyond the protection of parental rights to include other persons who face administrative hearings on abuse and neglect while at the same time denying counsel to children affected by administrative proceedings.

Randomly assigning matters to attorneys not trained and not experienced in a particular practice area is a disservice to all involved. These matters can be costly and lengthy as well. (In the published opinion, DCF v. E.L., 454 N.J. Super. 10 (App. Div. 2018), the Appellate Division reversed the administrative finding and noted that the case carried on for nine years. E.L., 454 N.J. Super. at 14-20.) Although it appears that the OPD is currently handling these matters under a pilot program within OPR's Appellate Division, the L.O. decision has mandated that in the absence of sufficient funding, the Madden assignment system shall fulfill the need to right to counsel in these matters. It is unclear if the OPD is handling all the matters, utilizing pool attorneys contracted by the OPD if there is a conflict of interest or if Madden assignments are being made to fill the gap.

Under a pilot program, the OPD is providing representation in DCPD administrative hearings where there is a substantiated finding of child abuse or neglect. The Committee proposes that the pilot program become permanent and the OPD continue to provide representation in DCPD administrative hearings.

Cases arise in the child welfare area in which private custody disputes and governmental intervention are intermingled. The Appellate Division noted:

The court's technical designation of a hearing as FD or FN should not hamper the court's mission to safeguard the welfare of children. When unusual procedures are undertaken, however, it is crucial to ensure that the parents are represented by counsel. Counsel are statutorily appointed for indigent parents only in Children in Court cases. N.J.S.A. 9:6-8.43(a), 9:6-8.30(a), 30:4C-15.4(a). Designating a hearing as a combination FD/FN hearing would ensure the participation of defense counsel and the Law Guardian, and should have occurred here.

NJ Div. of Child Prot. & Permanency v. S.D., 453 N.J. Super. 511, 525 (App. Div. 2018).

There are different standards in FN (abuse and neglect under Title 9 or Title 30) cases and FD (non-dissolution family) cases, and the S.D. opinion has been interpreted to require assigned counsel on the FN docket to then also represent their client on the FD action in a combined matter. S.D. expands the right to counsel to private custody cases, and also permits governmental intervention in

private custody cases as, in at least some vicinages, the deputies Attorney General and Law Guardians are then recognized as designated parties or “interested parties.” There is debate among practitioners in the field about the meaning and requirements of the dicta in S.D. It should also be noted that FD matters can include the representation of non-parent litigants and that counsel can remain as the attorney of record until the child reaches the age of majority. While a pool attorney is covered by the professional liability coverage of the OPD in the FN matter, that coverage does not extend to representation in the FD matter.

The Committee recommends that the Court provide direction to the Family Division as to the interpretation of the dicta in S.D. to provide consistency among the vicinages. A determination of whether there is a right to counsel to certain FD matters is too important to be left to the vagaries of interpretation of case dicta.

Civil Commitments

A person subject to an involuntary commitment has the right to be represented by counsel or, if indigent, by appointed counsel. N.J.S.A. 30:4-27.14; see also R. 4:74-7. The public body “charged with the patient’s legal settlement” is responsible for the provision of counsel to the person in need of commitment. Legal settlement generally lies with the county of residence of the person being committed although the county where the person was detained may often be the county that furnishes counsel. The county is also responsible for presenting the case. This usually falls to the office of the county counsel.

While these matters fall within the Superior Court jurisdictions, most hearings are not handled by regular sitting Superior Court judges. Often the hearings are held by Superior Court judges on recall and by specially assigned municipal court judges. There is a brief handbook for the judges, prepared by a non-profit organization in Virginia.²¹

Counsel for the person in need of commitment has been handled a few different ways. Traditionally, the county awards a contract for professional services to a private firm or attorney. (In some counties, the contract is awarded to a non-profit provider.) One county (Morris) awards the contract through its not-for-profit grant process. Some years ago, the OPD’s Mental Health Unit, took on representation in a number of counties. As of a few years ago, the OPD became responsible for representing all children in need of commitment.

Currently, the OPD’s Mental Health Unit represents adults in all counties except Bergen, Middlesex, Morris where matters are handled by Legal Services of Northwest Jersey (LSNWJ), Passaic and Warren. The OPD provides the representation through its own budget. Although the counties are responsible for representation, including costs, the OPD does not receive reimbursement from the counties, therefore, the counties have been relieved of the financial responsibility for providing representation to people facing civil commitment.

²¹ A full copy of Judges’ Quick Reference Guide to the New Jersey Involuntary Commitment Code and Related Rule of Court can be found [here](#).

Except for Morris County, the counties who do not utilize OPD for civil commitments award the contracts through Professional Services Contracts to private attorneys. It is the Committee's understanding that some contracts are hourly contracts and some provide a flat fee per hearing. To the Committee's knowledge, none of the contracts provide reimbursement for ancillary services or cover appellate work.

The Morris County arrangement with LSNWJ is an hourly contract, awarded through the competitive not-for-profit grants process of the Morris County Department of Human Services.

The OPD provides vigorous representation to its clients at the hearing level and at the appellate level. Through its appellate work, the OPD has undertaken an effort to make systemic change benefiting people in need of commitment. LSNWJ also provides vigorous representation at the hearing level, but represents many fewer clients than the OPD.

People who no longer are in need of commitment are supposed to be discharged. But the reality is that many linger in commitment because of absence of an appropriate discharge options. This is especially true for undocumented immigrants who may not have access to services, *e.g.*, Medicaid, rental assistance, necessary for a successful discharge.

Both the OPD and LSNWJ provide legal assistance to clients who are Discharged Pending Placement (DPP), which may include requesting subpoenas for social work staff and others in charge of implementing a discharge plan. The Committee makes the following recommendations:

- Pursuant to recommendation #3, the OPD's Mental Health Unit should handle all civil commitments, both adults and children, throughout the state.;
- The Legislature should provide sufficient funding for representation and ancillary services; and
- As the counties are required by statute to provide this representation, all counties should utilize the funds they would have expended for representation in civil commitment proceedings for adults and children to other civil legal services that assist people with mental illness remaining in the community.

Conclusion

The Committee studied in depth the issues and challenges to providing effective representation in matters in which there is a right to counsel. In some areas, such as criminal defense, the state is doing well and the Committee's recommendations aim to improve a system that works. In other areas, particularly the use of the Madden system to provide representation, there is a crisis of due process and equal justice. The Committee's recommendations in this area, therefore, are to replace the Madden system of random assignments with a multi-pronged approach that will require the commitment of the legislature, judiciary and the bar in order to come to fruition. The Committee urges the NJSBA Board of Trustees to approve this report, distribute the report widely and with input of additional stakeholders, develop an action plan for its implementation.

Acknowledgements

The Right to Counsel Committee is comprised of the following members:

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²² Ms. Miller and, in her absence, **Claudine Langrin, Esq.**, Executive Vice President, are listed here solely as participants in the Committee meetings. The contents of this report and recommendations contained herein should not be considered as Legal Services of New Jersey’s views.

The Committee thanks the **NJSBA Pro Bono Committee**, and county and affinity bar associations that commented on the draft report and welcomed us to their meetings to hear the ideas of their members. The Committee is grateful for the overwhelming support provided by these associations for the work of the committee and their thoughtful suggestions for improvement. This is a better report because of their contribution.

The Committee recognizes and thanks **Public Defender Joseph E. Krakora** for his valuable input during a review of these issues and the drafting of this report.

The Committee thanks NJSBA Immediate Past President **Evelyn Padin** and NJSBA President **Kimberly A. Yonta** for recognizing the importance of the right to effective counsel and forming the Right To Counsel Committee to thoughtfully address long-standing concerns with fulfilling that right.

The Committee also wishes to recognize the tremendous work put into this project by **Lisa Chapland**. Her work behind the scenes makes us all look good.