

SALEM COUNTY BAR ASSOCIATION

RESOLUTION

**APPROVAL AND ADOPTION OF COMMENTS
ON THE REPORT AND RECOMMENDATIONS OF
THE WORKING GROUP ON ATTORNEY PRO BONO ASSIGNMENTS**

WHEREAS, on May 8, 2023, Judge Glenn A. Grant, Administrative Director of the Courts, issued a Notice to the Bar inviting written comments by Monday, June 19, 2023, on the report entitled “Working Group on Attorney Pro Bono Assignments Report and Recommendations” that sets out recommendations regarding the *Madden* mandatory pro bono system, including proposed long-range reforms that would require Executive Branch action and Legislative funding, and interim strategies that could be undertaken by the Judiciary in coordination with the bar; and

WHEREAS, the Salem County Bar Association has, by Resolution dated January 24, 2023, expressed the Salem County Bar Association’s opposition to the *Madden* mandatory pro bono system; adopted all of the findings, conclusions, and recommendations presented in the New Jersey State Bar Association’s Right to Counsel Committee’s Report entitled “Achieving Effective Representation in Right to Counsel Matters” dated April 6, 2021 (on which some of the Working Group’s recommendations are based); and joined the New Jersey State Bar Association in the NJSBA’s opposition to the *Madden* mandatory pro bono system, including the NJSBA’s calls for abolition of the mandatory pro bono system, and proper public funding for effective legal representation of indigent persons; and

WHEREAS, the Salem County Bar Association members have reviewed the comments set forth below and have determined that the comments should be approved and adopted by the Salem County Bar Association for submission to Judge Grant before the June 19, 2023 deadline, and that the comments should also be distributed to other persons and organizations as directed below;

NOW, THEREFORE, BE IT RESOLVED, by the Salem County Bar Association, that the Salem County Bar Association hereby approves and adopts, in furtherance of its official policy in opposition to the *Madden* mandatory pro bono system, the following comments on the report entitled “Working Group on Attorney Pro Bono Assignments Report and Recommendations,” and hereby directs the Executive Committee of the Salem County Bar Association to send a copy of this Resolution to Judge Glenn A. Grant, Administrative Director of the Courts, at the mailing address and/or email address designated in his May 8, 2023 Notice to the Bar, before the June 19, 2023 deadline:

Comment 1:

Until the Legislature adequately funds effective representation for all indigent persons facing consequences of magnitude, the *Madden* mandatory pro bono system of forced labor should be replaced by a mandatory fee to be paid annually to the Court by each of New Jersey’s approximately 95,000 active licensed attorneys. The annual fee should be calculated to cover the cost of paying qualified attorneys (through the Office of the Public Defender, Legal Services of New Jersey, county governments and, as necessary, a roster of private sector volunteers) to represent defendants in all 100% of the case type categories discussed in Sections I, II and III on pages 9 and 10 of the Report. By doing this the Court would ensure that the “burden of the bar” is shared *equally*, as intended by *Madden*; that all indigent defendants who face consequences of magnitude will receive the *effective* representation to which they are constitutionally entitled; and that qualified attorneys will be *paid* for performing valuable *voluntary* work.

An additional benefit of this fee-based proposal, when viewed in the context of a long-term strategy to compel proper legislative funding for indigent representation is that, after a few years

of such a fee-based system's implementation, the Court will be able to appropriately "quantify" (*Madden's* word) the legislative shortfall in a manner that can be presented to the Legislature in support of the Court's request (or command) for adequate public funding. If, from year to year, the Legislature approves only partial additional funding, the attorney assessments can remain in effect but reduced accordingly. In this way, the decreased remaining burden will continue to be borne equally by all attorneys; indigent persons will be properly represented; volunteer attorneys will be paid; and ongoing, precisely-calculated funding requests can be presented to the Legislature in subsequent years.

According to Section I on page 9 of the Report, the OPD has preliminarily determined that it could handle all parole revocation hearings (16% of annually assigned *Madden* cases) for \$1,000,000 per year. Presuming that the cost of handling the other 84% of cases categorized on pages 9 and 10 is consistent with the OPD's preliminary determination for parole revocations, it can be reasonably estimated that all 100% of the case types discussed on pages 9 and 10 could be handled for \$6,250,000 per year.¹ If spread across New Jersey's 95,000 attorneys, this cost could be covered with an annual assessment of only \$65.79, perhaps rounded up to \$70 per attorney per year. That amounts to just \$5.83 per month, about the cost of an expensive drink from Starbucks. This is a very small price to pay for every one of the state's indigent defendants to be effectively represented (and in some cases avoid undeserved incarceration and other serious penalties), and for the qualified attorneys who represent them to be paid for their voluntary work.

One serious consequence of continuing to force *Madden* attorneys to represent indigent defendants for free is that the system continues to conceal the Legislature's funding shortfall, to everyone's detriment. But most critically, indigent defendants will continue to face the risk of

¹ \$1,000,000 for parole revocation hearings (16%); \$437,500 for "specialty cases" such as guardianship matters and private adoptions (7%); and \$4,812,500 for domestic violence contempt hearings (77%).

being represented by unqualified counsel who, in some cases lack the training and experience of the State’s prosecutors, and the defense attorneys who are hired by non-indigents. We must bear in mind that, even if only one in a hundred indigent persons is *ineffectively* represented, the unconstitutionality of the *Madden* system is the same as if all of them were, because the analysis of adverse unconstitutional impacts “does not end with the one percent who are impacted, it begins there.”² Finally, by continuing the *Madden* system the Court perpetuates the indignity of involuntary servitude; the implicit professional denigration that attends the Court’s apparent presumption that attorneys’ services are sufficiently fungible to be distributed randomly; and the hypocrisy of a Court system that foists randomly-selected counsel upon indigent persons in a manner that no member of the judiciary would ever recommend to a family member or friend facing consequences of magnitude.

Comment 2:

The Report is inappropriately vague in Section 6 on page 5 where it recommends “Current tracking methods for case types that are presently handled under *Madden* should allow for proper statistical analysis.” This statement should be revised and clarified as follows:

The *Madden* system has, through an ongoing lack of judicial record keeping, effectively concealed the Legislature’s funding shortfall for thirty years. If the Court is sincere in its intention to implement the *Madden* mandatory pro bono system only as a temporary “stop-gap” measure, and if the Court is truly concerned that the system is “clearly inefficient, historically unfair, and potentially unconstitutional,”³ then the Court must immediately begin to maintain comprehensive publicly-accessible records on cases assigned and

² See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 894 (1992).

³ *Madden v. Delran*, 126 N.J. 591, 595-96 (1992).

attorney work performed (without confidential details) in order to ascertain the true cost and value of those services for purposes of the “quantification” the *Madden* Court pointedly criticized the *Madden* plaintiffs for not providing. Indeed, if the Legislature is to be requested to pay for indigent legal representation, it is reasonable to expect the Legislature to ask how much such representation will cost, and that question can only be answered honestly and accurately if proper records are kept to show the market value of the services attorneys are currently being forced to provide for free to meet the need. For these reasons the Court must reign in its natural administrative inclination to treat mandatory attorney labor as an unlimited free resource that can be exploited and dispensed carelessly and without consequence, and instead handle and account for such labor responsibly, as a thing of value, with the same care that would be required if it were other people’s money.

Comment 3:

The *Madden* Court decided to continue the mandatory *pro bono* assignment system “only because we believe that the damage done to the judiciary, and to the relationship among the branches of government, would far exceed the damage done by this relatively inefficient system.”⁴ The Report, however, is silent as to any inquiry into the actual nature and extent of this “damage” to the Court and governmental “relationships,” and whether and how such damage might exceed the damage that the *Madden* system routinely inflicts, constitutionally and personally, upon indigent defendants who face consequences of magnitude. The Working Group should reconvene to study this, and the Court should furnish information to the Working Group in support of the Court’s fears. Once the “damage” cited in *Madden* has been effectively identified, explained, and

⁴ *Id.* at 608.

yes, “quantified,” the Working Group should conduct a balancing test to recommend whether the Court’s fears are reasonably justified.

Comment 4:

The Court should direct the Administrative Director and all Assignment Judges to provide whatever information and other assistance may be needed by the OPD and LSNJ to complete their respective budgetary estimates as described on page 10 of the Report. Once the estimates are provided, the Working Group should reconvene to complete its analysis of the total statewide cost to fund indigent representation in ALL case types (i.e., beyond the estimated \$1M for parole revocation hearings that constitute just 16% of the state’s unfunded entitlement) for purposes of implementing the fee-based alternative to the *Madden* system described in Comment 1, above.

Comment 5:

It is not enough for the Working Group to say, in items 1 and 2 of the Report’s page 4 summary, that “legislation should be enacted” and “the Legislature should be called upon” to expand the OPD’s charge and otherwise fund effective representation for indigent persons. After the estimates discussed in Comment 4, above, have been provided and properly analyzed, the Working Group should, with input from OPD and LSNJ, *write the proposed legislation in full detail, with supporting data*. Any request for legislative amendment must be clear, persuasive, and to the point, and the best way to accomplish this is to write it exactly as it should be enacted. The Working Group is well-qualified and well-positioned to do this.

Additionally, the Report is unclear as to *who* should present the requested legislation to the Legislature. The Supreme Court? The OPD and LSNJ? The Working Group? This is a critical

strategic decision that should be considered by the Working Group early on as a fundamental part of any legislative initiative, as well as how and to which legislative representative(s) the request should be presented.

Comment 6:

As with the concerns expressed in Comment 5, above, it is not enough for the Working Group to say, in item 3 of the Report's page 4 summary, that "county government should be called upon to fund payment of public defenders in areas the Legislature fails to fund" (including domestic violence contempt hearings which comprise nearly 77% of all *Madden* cases). Accordingly, after the estimates discussed in Comment 4, above, have been provided and properly analyzed, the Working Group should, with input from OPD and LSNJ, *write the request for county funding in full detail with supporting data*. Any request for county funding must be clear, persuasive, and to the point, and the best way to accomplish this is to write it exactly as it should be implemented. The Working Group is well-qualified and well-positioned to do this.

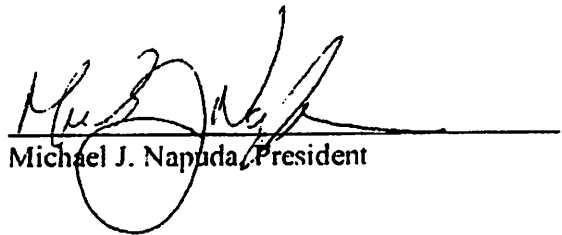
Additionally, the Report is unclear as to how and by whom funding requests should be presented to the counties. The Supreme Court? The Assignment Judges? The OPD and LSNJ? The Working Group? This is a critical strategic decision that should be considered by the Working Group early on as a fundamental part of any county funding initiative.

NOW, THEREFORE, BE IT RESOLVED, by the Salem County Bar Association, that the Salem County Bar Association hereby approves and adopts, in furtherance of its official policy in opposition to the *Madden* mandatory pro bono system, the attached comments entitled "Salem County Bar Association Comments on Working Group on Attorney Pro Bono Assignments Report

and Recommendations” and hereby directs the Executive Committee of the Salem County Bar Association to send a copy of this Resolution and the attached comments to Judge Glenn A. Grant, Administrative Director of the Courts, at the mailing address and/or email address designated in his May 8, 2023 Notice to the Bar, before the June 19, 2023 deadline.

BE IT FURTHER RESOLVED, that the Salem County Bar Association hereby directs the Executive Committee of the Salem County Bar Association to send copies of this Resolution to Chief Justice Stuart Rabner and all New Jersey Assignment Judges; the New Jersey State Bar Association and all other New Jersey bar associations; the *New Jersey Law Journal*; and any members of the New Jersey Legislature and Judiciary, and such other persons or organizations as may be deemed appropriate by the Executive Committee, for the purpose of publicizing the Salem County Bar Association’s comments as set forth above and the Salem County Bar Association’s ongoing opposition to the *Madden* mandatory pro bono system.

The undersigned President of the Salem County Bar Association hereby certifies that the above is a true copy of a resolution adopted by the Salem County Bar Association to memorialize its action taken on June 8, 2023.


Michael J. Napuda, President