

Compliance Report #4—October 2014

EXHIBITS



A

Juvenile Court of Memphis and Shelby County

616 ADAMS AVENUE • MEMPHIS, TENNESSEE 38105

DAN H. MICHAEL
JUDGE

October 21, 2014

Ms. Winsome Gayle
Senior Trial Attorney
Special Litigation Unit
Civil Rights Division
U. S. Department of Justice
930 Pennsylvania Avenue, NW
Washington, DC 20530

Re: *MOA – DOJ and Juvenile Court of Memphis and Shelby County*

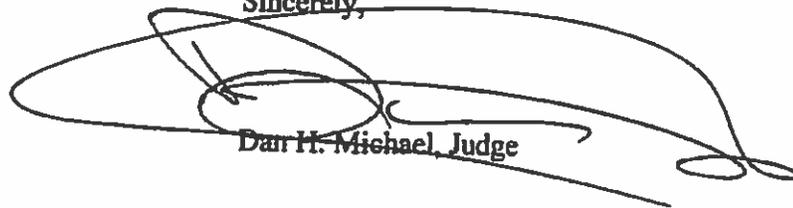
Dear Winsome:

MOA Section A. 1. (e)(ii)(b), page 15, concerns oversight of a juvenile defender panel by an independent body. I respectfully propose to establish an oversight entity with the structure and functions outlined in the enclosed *Plan Providing Representation for Indigent Children in Delinquency Cases. (The Plan)*

The Plan follows the general structure and operation of the federal Criminal Justice Act Panel (CJA Panel), 18 U.S.C. § 3006A, and is designed to fulfill the Juvenile Court's responsibilities under the above referenced MOA Section.

It is my intention to move forward immediately to implement the Plan. Please contact me if you have any questions or need more information.

Sincerely,



Dan H. Michael, Judge

Enclosure

cc: Hon. Mark H. Luttrell, Jr.
Mr. Stephen Bush, Esq.
Ms. Marilyn Hobbs, Esq.
Ms. Sandra Simkins, Esq.
Mr. Bill Powell, Settlement Agreement Coordinator
Jina Shoaf, Esq.

**PLAN FOR THE JUVENILE COURT OF MEMPHIS AND SHELBY
COUNTY, TENNESSEE, PROVIDING REPRESENTATION FOR
INDIGENT CHILDREN IN DELINQUENCY CASES**

PREAMBLE

The Judge of the Juvenile Court of Memphis and Shelby County, Tennessee, is required by Rule 13, Tennessee Supreme Court Rules, to maintain a roster of attorneys from which appointments will be made, and has adopted the following Plan for furnishing adequate representation to indigent children in delinquency cases.

Any child who is financially unable to obtain representation and eligible for appointed representation shall be provided counsel and related services pursuant to T.C.A. 37-1-126 and Rule 13 of the Tennessee Supreme Court Rules. Counsel furnishing representation shall be selected from the Office of the Shelby County Public Defender or from the Juvenile Defender Panel. Representation under this Plan shall include counsel and investigative/expert, and other services necessary for adequate representation which are available from the Administrative Office of the Courts.

1. Selection Process for Private Attorneys

A. Juvenile Defender Panel of Attorneys

All attorneys in active practice whose names appear on the rolls of this Court are eligible for admission to the Juvenile Defender Panel for the Juvenile Court of Memphis and Shelby County, Tennessee.

Applications for admission to the Panel shall be forwarded to the Clerk of Juvenile Court and shall be reviewed annually by the Panel Selection Committee. The Panel Selection Committee shall recommend and the Juvenile Court Judge shall appoint members of the bar to the Juvenile Defender Panel for a three (3) year term. The Committee shall meet each year in November to recommend additions or replacements to the Panel of the following calendar year. Attorneys who have completed their term may seek reappointment for an additional term.

The Juvenile Defender Panel shall contain no more than 20 attorneys. The Court may increase the number of panel members from time to time as workload necessitates. Any attorney named to the Juvenile Defender Panel shall reasonably expect to be appointed in approximately 3 to 10 cases per year.

B. Panel Selection Committee

The Juvenile Court Judge shall appoint the Panel Selection Committee to select the Juvenile Defender Panel members annually. The Panel Selection Committee will serve without compensation. One attorney from the Office of the Shelby County Public Defender shall be a voting member of the Selection Committee and serve as its permanent secretary. The remainder of the Committee shall consist of one Juvenile Court Magistrate, and at least three (3) members of the private bar who have engaged in an active criminal and juvenile delinquency practice for at least ten (10) years. The Committee may be expanded from time to time in the discretion of the Juvenile Court Judge. Panel Selection Committee members from the private bar shall serve terms of 3 years.

The Committee shall set standards for membership on the Panel and shall recommend panel members based on their proven experience and competence in the field of juvenile delinquency defense. In addition to applications, the Committee should also review recommendations from any interested citizen concerning the fitness of a particular applicant for admission to the Panel. Appointments to the Juvenile Defender Panel shall be made by the Juvenile Court Judge from recommendations submitted by the Panel Selection Committee.

C. Removal of Attorneys from the Juvenile Defender Panel

Each attorney appointed to the Panel will serve a term of three (3) years and may be removed for neglect of duty, malfeasance, or conduct in violation of the Tennessee Rules of Professional Conduct. The decision to remove an attorney from the Juvenile Defender Panel is solely that of the Juvenile Court Judge. The decision of the Juvenile Court Judge to remove a panel attorney is final with no appeal. A panel attorney may resign from the Panel upon giving notice to the secretary of the Juvenile Defender Panel Selection Committee. Upon giving such notice, the secretary of the Juvenile Defender Panel shall notify the Juvenile Court Judge who will remove the panel attorney prior to expiration of the attorney's term.

Any Juvenile Defender Panel member who does not accept at least one appointed juvenile delinquency case per calendar year shall be automatically removed from the Juvenile Defender Panel unless good cause can be shown.

D. Appointment of Panel Attorneys

In all cases in which a child qualifies for appointment of counsel pursuant to T.C.A. 37-1-126 and Rule 13, Tennessee Supreme Court Rules, Juvenile Court

personnel will immediately notify the appointed lawyer of the appointment and secure copies of all relevant available material concerning the appointment, the charge, the affidavit of complaint or petition, and any notices of future court appearances. Court personnel shall arrange for delivery of the materials to the appointed attorney.

Counsel appointed to represent a child shall make contact with that child as soon as possible after counsel is advised of the appointment. Counsel shall not accept the appointment if unable to expeditiously meet with a client in custody.

E. Training

Members of the panel will be expected to attend periodic JTIP training sessions arranged by the Shelby County Public Defender, as well as remaining current in CLE requirements. Failure to attend such training may constitute a basis for removal from the panel.

2. Qualifications for Appointed Counsel

A. Eligibility

Representation shall be provided for all financially eligible children described in T.C.A. 37-1-126 and Rule 13, Tennessee Supreme Court Rules.

The determination that a child is "financially eligible" for appointed counsel shall be made by the Juvenile Court, through the judicial officer hearing the case, from statements made under oath by the parents, legal custodians, or guardians of said child, in the presence of the judicial officer or by statements contained in an affidavit verified by any person empowered to administer oaths. However, if no parent,

legal custodian, or guardian of a child are present, counsel shall be appointed as a child is presumed to be indigent.

B. Person May Not Select Counsel

No person may select a lawyer from the Juvenile Defender Panel. The selection of counsel shall be the exclusive responsibility of the judicial officer.

C. Duration and Substitution of Counsel

A child for whom counsel is appointed shall be represented at every stage of the proceedings from the child's initial appearance before the judicial officer through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the judicial officer finds that the child is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize partial payments as the interests of justice may dictate. If partial payment by a child's parents, legal custodians, or guardians is required, those payments will be made to the Clerk who will periodically report to the Court the status of said payments. If at any stage of the proceedings, including an appeal, the judicial officer finds that the child is financially unable to pay retained counsel, counsel may be appointed and payment authorized, as the interests of justice may dictate, but the attorney previously retained will not necessarily be appointed in such circumstances. The judicial officer may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

D. Minimum Qualifications of Panel Attorneys on Major Crimes and Transfer Dockets

Any panel attorney handling cases assigned to the Major Crimes and Transfer Dockets shall have the following minimum qualifications:

- (1) Have participated in at least five (5) criminal jury trials, or have at least five (5) years of practice in the criminal courts;

(2) Have completed, prior to the appointment, all required JTIP training provided by the Shelby County Public Defender.

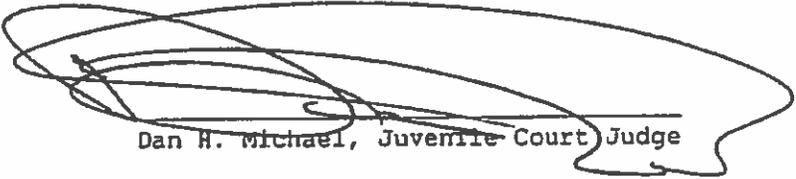
3. Payment for Representation

The attorney appointed pursuant to the provisions of this Plan shall be compensated pursuant to Rule 13, Tennessee Supreme Court Rules.

4. Appellate Representation

When a child wishes to appeal, the attorney appointed by the Court pursuant to the terms hereof is responsible for representing said child until relieved by the Criminal Court or Court of Appeals. If the attorney wishes to be relieved on appeal, the attorney shall comply with the applicable rules with regard to notice to the client and a motion to withdraw as attorney.

This Plan shall become effective immediately upon approval by the Juvenile Court Judge.


Dan H. Michael, Juvenile Court Judge

OCTOBER 21ST 2014
Date

Committee for Public Counsel Services



Youth Advocacy Division

Youth Advocacy Foundation

Director
Josh Dohan

Assistant Director
Priscilla Duffy

Administrative Assistants: (shared by all directors)
Theresa Elaherty, Christina Liwski, and Huong Vo

YAD Offices

Fall River - AIG, 3 Attorneys, SSA, AA

Hyannis - AIG, 1 Attorney, .5 SSA, .5 AA

Lowell - AIG, 3 Attorneys, SSA, AA

Quincy - AIG, 3 Attorneys, SSA, AA

Roxbury - AIG, 3 Attorneys, SSA, AA

Salem - AIG, 3 Attorneys, SSA, AA

Somerville - AIG, 3 Attorneys, SSA, AA

Springfield - AIG, 5 Attorneys, 2 SSA, AA

Worcester - AIG, 3 Attorneys, SSA, AA

Sparring Advocate - JRWOP

Director of Training
Wendy Wolf

Training Attorney
Holly Smith

Director of Education Advocacy
Mardis Spanjaard

Staff Attorney
Bryna Williams

Legal Fellow
Rachel Rosenberg

Legal Fellow
Michelle Scavongelli

Director of Juvenile Appeals
Barbara Kaban

Director of Social Work
Jessica Edwards

Trial Panel Director
Erica Cushna

Trial Panel Oversight
Helen Fremont

Revocation Advocacy Attorney
Mara Voukydis

600 Private Counsel

20 Revocation Counsel



B



C

U.S. Department of Justice
Civil Rights Division

JMS:WGG:RG:pjc
DJ 207-72-3

Special Litigation Section - PHB
950 Pennsylvania Ave, NW
Washington DC 20530

October 30, 2014

Via Electronic and U.S. Mail

The Honorable Dan H. Michael
Juvenile Court of Memphis and Shelby County
616 Adams Avenue
Memphis, TN 38105

Re: Proposal to Reform the Juvenile Defender Panel

Dear Judge Michael:

As promised, we are writing in response to Your Honor's October 21, 2014 letter and proposal for restructuring the panel attorney process. Your proposal seeks to address the terms of our Memorandum of Agreement ("Agreement") regarding our findings pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §14141. Based on our discussions with you, it is our understanding that this is an interim plan and that a final proposal will be submitted once you have conferred with local stakeholders. To assist in your review and revision of the proposal, we offer the following observations.

You should know that we share your desire to improve the panel attorney selection, appointment, and removal process in a manner that ensures that the children represented by panel attorneys receive the benefits of the zealous advocacy to which they are entitled. A main component of our Report of Findings (April 2012) concerned the "[m]isunderstandings about the role of defense counsel" and the panel defender office's lack of independence. *Id.* at 46, 50. Your sense of urgency and expressed need for focusing on this issue is very much appreciated and understood.

To frame our observations of your proposal, we would like to draw your attention to several key elements of the Agreement respecting the right to counsel. One foundational element is the requirement to establish an "independent, ethical, and zealous" defense function in the Shelby County Public Defender's Office and the appointed panel defender system.

See Agreement Section A.1.(e)(i) and (ii) at 14, 15. The independence of the defense function and individual defense counsel is necessary to the provision of ethical and zealous juvenile advocacy, a hallmark of a fair and reliable justice system, and essential to achieving substantial compliance with the Agreement. National standards recognize the imperative of maintaining an independent defender function. See e.g. Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Ten Principles of a Public Defense Delivery System ("ABA Ten Principles")* at 2 (2002) (Principle 1); ABA, *STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION* (1993)(Standard 5-1.3). "Independence" in this context means that the defense function is "independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel." *ABA Ten Principles*, Principle 1, Commentary.

Another foundational element of the Agreement is the requirement to maintain reasonable defender workloads. *Id.* Section A.1(e)(i)(c) and (ii)(b) at 15. You have expressed a commitment to ensuring that the individual attorneys assigned to the panel provide quality representation to their clients. We share this commitment. We also note that, as with independence, workload controls, which include the attorney's caseload adjusted by other factors such as the complexity of the cases and the attorney's other duties, promote quality representation. See *ABA Ten Principles* at 2 (Principle 5); Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Eight Guidelines of Public Defense Related to Excessive Workloads (ABA Eight Workload Guidelines)* (2009). See also ABA Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 06-441* (May 13, 2006)(Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation)¹.

The final foundational element of the Agreement that we would like to note regarding the panel system is that the panel be "overseen by an independent body." *Id.* Section A.1.(e)(ii)(b) at 15. We understand that Tennessee Supreme Court's Rule 13 requires the Court to maintain a roster of attorneys for appointments. However, Rule 13 does not prohibit the Court from authorizing an independent body to oversee the selection, qualification, supervision, and removal of the panel members. We recognize that your proposal seeks to place some authority in the Panel Selection Committee ("Committee"). However, the process that you have described for the selection and appointment of members to the Committee does not distance the Committee from the Court sufficiently to allow for actual and perceived independence, both of which are crucial to creating and maintaining the integrity of the panel.

¹ Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.outhchockdam.pdf

While your proposal seeks to address the elements of the Agreement, it falls short of this goal in several important ways. In particular, the proposal undercuts the independence of the appointed attorneys in (a) the manner in which the Committee is structured, (b) the Court's option to expand the Committee at will, and (c) by providing the Court with the sole authority to remove attorneys from the panel.

As currently proposed, the Committee will consist of several members who will be beholden directly to the Court for their position. While we do not endorse a particular system for selecting Committee members, a system that satisfies national standards is likely to require that a diverse array of appointing authorities contribute selections to the Committee. *See, e.g.*, Report of the National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (April 2009) at 185 (Recommendation 2 – "The members of the Board or Commission of the agency should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointments."). There are several systems where either the judiciary or the executive establishes an independent oversight body constituted of members selected by diverse authorities. *See e.g.* Kentucky's Public Advocacy Commission and Massachusetts' Committee for Public Counsel Services.²

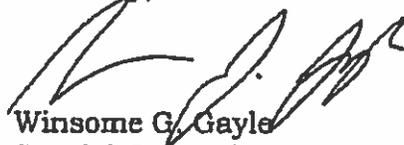
The proposal's removal provision also undercuts the independence of the panel. The proposal provides no mechanism for ensuring that attorneys are removed for the appropriate reasons. While you have assured us that you will abide by the limitations of focusing on neglect, malfeasance, or professional conduct violations, an appropriate structure that secures independence cannot be dependent on the passion and understanding that you personally embody, but must create a structure that ensures independence over time, without any of us knowing who, in the future will take the bench or what his or her sensitivities will be toward the right to zealous counsel for juveniles. In addition, even while we may accept Your Honor's good judgment on these matters, the Court's absolute power of removal sends the clear message to the private bar that their livelihood is dependent upon staying in the Court's favor, rather than aggressively advocating for their clients. One example of a more secure removal process would require the Committee to hear complaints against attorneys, find facts, and decide on a sanction, which the Court would have the authority to review and modify for good cause. As it stands, the Court's absolute authority to remove an attorney undermines the independence requirement.

² Although these are state systems, they can provide some insight into how members of such bodies are appointed.

Finally, the proposal creates serious workload concerns and is focused too heavily on criminal practice as opposed to the specialized practice of juvenile defense. The proposal's limited number of panel attorneys – twenty – will create an immediate workload crisis for both the panel and the public defender service. According to the court's most recent annual report (2012),³ the court handled 8,995 delinquency cases in 2012. The court's list of 2013 Top Ten Offenses,⁴ includes over 12,000 charges (the actual number of cases is unclear). Requiring twenty panel attorneys and eight public defenders (the current number of attorneys in the juvenile unit) to handle this many matters would immediately breach suggested caseload maximums and would create overwhelming and unmanageable workloads (which include factors other than the raw number of cases). See American Council of Chief Defenders Statement on Caseloads and Workloads (2007).⁵ Additionally, the proposal's focus on criminal experience as the basis for attorneys' qualifications to serve on the major offenses and transfer docket overlooks the importance of specialized juvenile training and practice. See e.g. National Juvenile Defense Standards, Standard 1.3, *Specialized Training Requirements for Juvenile Defense* (2013); National Juvenile Defender Center and National Legal Aid & Defender Association, *Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems*, Principle 7, Comment A ("The public defense delivery system recognizes juvenile delinquency defense as a specialty that requires continuous training in unique areas of the law.").

We hope that these observations will be helpful in your revision of the proposal. We appreciate and share your concern for improving the quality of the panel attorneys. We recommend that you work with others in the county to develop a panel system that is independent, ethical, and supports zealous advocacy on behalf of the children appearing on delinquency proceedings.

Sincerely,



Winsome G. Gayle
Special Counsel

cc: Mark H. Luttrell Jr.
Mayor of Shelby County
Vasco A. Smith, Jr. County Administration Building

³ Available at <http://www.shelbycountyttn.gov/index.aspx?nid=2526>.

⁴ Available at <http://www.shelbycountyttn.gov/index.aspx?NID=2884>.

⁵ Available at

http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCD_CASELOADSTATEMENTscpt6.pdf; *ABA Eight Workload Guidelines*.

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