



**MASSBAR**  
A S S O C I A T I O N

# Doing Right by Those Who Labor for Justice

*Fair and Equitable Compensation for Attorneys  
Serving the Commonwealth in its Criminal Courts*



A Report of the Massachusetts Bar Association  
Commission on Criminal Justice Attorney Compensation

May 2014

## INTRODUCTION

In December 2013, Massachusetts Bar Association (MBA) President Douglas K. Sheff created the Massachusetts Bar Association Blue Ribbon Commission on Criminal Justice Attorney Compensation (“the Commission”) in response to his frustration and concern over the declining economic status of lawyers working in the commonwealth’s criminal justice system due to the confluence of extraordinary personal debt from higher education loans and declining compensation in real terms, when adjusted for inflation. The Commission examined the salary structure of prosecutors (assistant district attorneys and assistant attorneys general) and public defenders (full-time staff attorneys employed by the Committee for Public Counsel Services (CPCS), and private attorneys working through the bar advocate programs or appointed directly by the courts).

The Commission examined and compared the salaries of Massachusetts criminal justice attorneys to those of attorneys performing the same functions in comparative jurisdictions, to publicly employed attorneys not involved in the criminal justice system and to attorneys in private practice.

The Commission was chaired by Richard P. Campbell of Boston, MBA past president (2011–2102) and Fellow of the American College of Trial Lawyers. Commission members included Hon. Suzanne DeVecchio, former chief justice of the Superior Court (ret.); Hon. Charles Johnson, past chief justice of the Boston Municipal Court; Hon. William Delahunt, past member of Congress and former district attorney for Norfolk County; Gerry Leone of Boston, former district attorney for Middlesex County; Denise Squillante of Fall River, MBA past president (2010–2011); Rick Lord of Boston, Associated Industries of Massachusetts; Randy Chapman of Chelsea, MACDL past president (2007–2009); and Martin Kane of Boston, past president of the Middlesex County Bar Association and former assistant district attorney for

Middlesex County.

Commission counsel was Martin W. Healy, MBA chief legal counsel and chief operating officer. Additional support was provided by Lee Constantine, MBA director of policy and operations.

### ACKNOWLEDGMENTS

The Blue Ribbon Commission on Criminal Justice Compensation stands on the shoulders of renowned members of the bench and bar who responded to MBA President Michael Mone's December 1993 call for an evaluation of compensation for lawyers in the criminal justice system. In December 1994, the Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation ("Callahan Commission") issued its report, *Striking a Balance: Adequate Compensation – Effective Representation Fair Compensation for Criminal Justice Attorneys*. It was chaired by John M. Callahan of Northampton, MBA past president and former district attorney for the Northwestern District. The Callahan Commission's members included Frances Burns, professor of law at Boston University; Anthony Fugate, criminal defense attorney; Ira A. Jackson, senior vice president for Bank of Boston and former commissioner, Massachusetts Department of Revenue; David H. Locke, former minority leader of the Massachusetts Senate and practicing attorney; Lillian Miranda, justice of the Juvenile Court and former MBA vice president and staff attorney for the Hampshire County Bar Advocate Program; and J. Owen Todd, practicing attorney and former Superior Court justice. Commission counsel was Martin W. Healy, then MBA assistant general counsel. The work of the Callahan Commission was extraordinary and invaluable to our Blue Ribbon Commission. We make full use of our predecessor's work product in this report. Indeed, it is a cornerstone of our report.

We also wish to thank the following individuals who provided information and data that helped to conduct its study in a thorough and analytical manner:

Hon. Paula M. Carey  
Chief Justice  
Trial Court  
John Adams Courthouse  
One Pemberton Square  
Boston, MA 02108

Hon. Paul Dawley  
Chief Justice  
District Court Department  
24 New Chardon Street  
Boston MA 02114

Hon. Jonathan Blodgett,  
President of the Massachusetts District Attorneys Association  
Essex County District Attorney  
Ten Federal Street  
Salem, MA 01970  
(also submitted written testimony given to the Joint House and Senate  
Committee on Ways & Means, March 7, 2014)

Hon. David Sullivan  
Northwestern District Attorney  
One Gleason Plaza  
Northampton MA 01060

Hon. Daniel Conley  
Suffolk County District Attorney  
One Bulfinch Place  
Boston, MA 02114  
(also submitted written statement)

Hon. Timothy Cruz  
Plymouth County District Attorney  
32 Belmont Street  
Brockton, MA 02303

Hon. Michael O'Keefe  
Cape and Islands District Attorney  
3231 Main Street  
Barnstable, MA 02630

Anthony Benedetti, Esq.  
Chief Counsel  
Committee for Public Counsel Services  
44 Bromfield Street  
Boston, MA 02108-4909  
(also submitted written testimony given to the Joint House and Senate

Committee on Ways & Means, February 11, 2014 and supplemental written statement to the Commission at hearing )

Edward Bedrosian, Esq.  
First Assistant Attorney General  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

Jennifer Franco, Esq, acting executive director, Massachusetts District Attorneys Association

Elizabeth A. Lunt, President, Massachusetts Association of Criminal Defense Lawyers

Guy Larock, Esq., President, Massachusetts Association of Court Appointed Attorneys

Michele Rioux, Esq., Treasurer, Massachusetts Association of Court Appointed Attorneys

Rachel Stroup, Esq., Massachusetts Employment Lawyers Association,

Chauncey Wood, Esq., Suffolk Lawyers for Justice

David Hoose, Esq., Sasson Turnbull Ryan & Hoose, Northampton, counsel for plaintiff, *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004)

Michael Hussey, Esq., Worcester, Committee for Public Counsel Services, Fellow of the American College of Trial Lawyers

Jennifer Sunderland, Esq., Committee for Public Counsel Services

D'Andre Fernandez, Esq., formerly of Committee for Public Counsel Services

Kelly Cusack, Esq., Committee for Public Counsel Services

David Grimaldi, Committee for Public Counsel Services

Chris Dearborn, Esq., Committee for Public Counsel Services

Anuj Khetarpal, Esq., Committee for Public Counsel Services

Cara Matern, Esq., Committee for Public Counsel Services

Michelle Yee, Esq., Committee for Public Counsel Services

Amanda Moran, Esq., Committee for Public Counsel Services

Celeste Laramie, Esq., Committee for Public Counsel Services

Matthew Gilbertson, Esq., Committee for Public Counsel Services

Jodi Rich, Esq., Bar Advocate

Maureen Booker, Esq., Bar Advocate

Victoria Ranieri, Esq., Committee for Public Counsel Services

Kari Cincotta, Esq., Committee for Public Counsel Services

La Mer Kyle-Griffiths, Esq., Committee for Public Counsel Services

Written statements were sent to the MBA's Blue Ribbon Commission by the following individuals:

Brian D. Fleming, Esq.

Laurie Caswell, Foster Parent Caring for Child Through CPCS

Debra Beard-Bader, Esq., Committee for Public Counsel Services

Laura Grimes, Esq., Bar Advocate, New Bedford

Cathy Tolson, Real Estate Agent, Northborough

Lynn Turcotte, Esq., Bar Advocate, Worcester

Joe Visone, Esq., Criminal Defense Attorney, Connecticut

Shelli Hamer, Esq., President, Bar Advocates of Worcester County

Edward Sheridan, Esq., Bar Advocate, Clinton

James Yates, Esq., Bar Advocate, Leominster

Sarah De Oliveira, Esq., Bar Advocate, Framingham

Norma Wassel, LISW, Director, Social Service Advocates, Committee for Public Counsel Services

Joshua Hanye, Esq., Committee for Public Counsel Services.

Written statements delivered to the Commission were also reviewed and considered:

Gabrielle Gurley, article entitled, “Public Defender Blues: The taxpayer tab for indigent defense keeps rising, but the lawyers who do the work are among the lowest paid in the country.” *CommonWealth Magazine*, Winter 2014.

Committee for Public Counsel Services Exhibits and Statements given to Representative Brian Dempsey, Chairman, House Committee on Ways & Means, February 6, 2014.

Committee for Public Counsel Services Letter to His Excellency Governor Deval Patrick (with attachments) regarding “Committee for Public Counsel Services FY 2015 General Appropriations (Budget) Request, dated December 3, 2013.

The Commission paid particular attention to comparisons of the compensation paid in states with populations, economies and jurisdictional units analogous to Massachusetts. The Commission also considered compensation levels afforded attorneys employed by the commonwealth’s governmental agencies that are not directly involved in the criminal justice system, and to the salaries of attorneys working in private practice.

### EXECUTIVE SUMMARY

The most fundamental role of government is the protection of its citizens’ lives and livelihood, property, freedom, and well being. Life, liberty, and the pursuit of happiness is America’s promise to each and every one of us. The rule of law, the right to trial by jury, open courtrooms, an independent and properly funded judiciary, and accountable public officials are cornerstones of our democracy. Some years ago, the American Bar Association (ABA) found the words to make the point effectively: “Freedom, justice, and equality — without lawyers they’re just words.”

The criminal justice system is, of course, central to the government’s commitment to protect our life, liberty, and the pursuit of happiness. Whether resulting from poverty, mental illness, inadequate education, lack of opportunity, or innate evil, crime is simply a fact of life that can directly impact any citizen, and that concerns every citizen emotionally and spiritually. In

many areas of Massachusetts, particularly our “Gateway Cities,” crime threatens to destroy the very fabric of family and community life. To meet its commitment to us and to protect our lives, property, and basic liberties, the government must operate a criminal justice system that is transparent, competent, swift, efficient, and fair. Skilled, motivated, and experienced professionals responsible for each aspect of the criminal justice system are essential if the government is to meet our expectations and needs.

Scholarly, experienced, and hard-working judges are critically important. But they cannot run the system alone. They need qualified, experienced, properly compensated (and thereby dedicated) clerks, court officers, and probation officers in the courts with them.

Judges also need talented, experienced, and dedicated assistant district attorneys and assistant attorneys general to prosecute vigorously those who commit murder, rape, and other crimes. And judges need (and the U.S. and Massachusetts constitutions mandate) competent, experienced, and dedicated defense attorneys to defend the criminally charged. Absent prosecutors and criminal defense lawyers there is no “system” in criminal justice; indeed, there is likely only crime and vigilante punishment.

We, the citizens of the Commonwealth of Massachusetts, are entitled to a properly functioning criminal justice system and demand nothing less from our government. Unfortunately, the government has, over the past decade, faced catastrophic financial times resulting in the erosion of our criminal justice system to the point of dysfunctionality because it has been drained of necessary funding.

Assistant district attorneys, assistant attorneys general, public defenders, and bar advocates (lawyers appointed to defend indigents) are grossly underpaid, earning far less than their counterparts in comparative jurisdictions across the country. They are paid less than lawyers of comparable experience employed by the state in non-criminal justice positions. They



are paid substantially less than criminal justice attorneys working for the federal government. And they are paid far less than their colleagues working in private practice in small, medium, and large private law firms in Massachusetts.

The Commission fully appreciates that public service is a noble undertaking that entails long hours, hard work, and personal sacrifice. All prosecutors and criminal defense lawyers willingly signed on to that proposition when they selected their profession. Obviously, they have not pursued their careers to get rich. They do expect, and reasonably so, that their chosen career would compensate them sufficiently, such that they could pay off college and law school loans, afford to live away from their parents' homes, get married, buy a house, and raise a family. The present salaries paid to attorneys working in our criminal justice system are so inadequate that they cannot meet the financial obligations attendant to everyday, normal living. The unvarnished truth is the compensation is so poor that it drives these lawyers away from the criminal justice system or into the ranks of the working poor. The evidence collected by the Commission overwhelmingly supports this most unfortunate conclusion. Massachusetts prides itself as a national leader in most fields, including the law. But in compensation of criminal justice lawyers, it ranks dead last.

The present rates of compensation paid to assistant district attorneys, assistant attorneys general, public defenders, and bar advocates are unfair and unjust to the women and men performing this essential and invaluable public service, and to the citizens of the commonwealth who need and deserve a justice system that works properly as our forbearers intended.

Our courts were in crisis for years and the MBA has stepped up to *lead* the long but necessary effort to begin restoring appropriate funding. The MBA now turns to fair and equitable compensation for those attorneys responsible for making the criminal justice system work. The need to act is obvious, and the time to act is now.

Accordingly, this commission recommends that:

- Starting salaries for assistant district attorneys, assistant attorneys general and full-time public defenders (attorneys in the Public Counsel Division of CPCS) be raised immediately to \$55,000, which must be fully funded with commensurate increases for more experienced lawyers, as detailed below.
- Budget line items applicable to compensation of lawyers employed by District Attorneys offices, the Office of the Attorney General, and CPCS be increased sufficiently in the aggregate so as to allow for a 20% increase in salaries.
- Steps should be taken to keep the levels of compensation of full-time criminal justice attorneys at least equal to that of other public sector attorneys. Salaries must be indexed to cost-of-living increases.
- Rules and practices of CPCS applicable to bar advocates that treat these lawyers differently than and more inferior to full-time public defenders should be eliminated. Specifically, the following rules and practices should be eliminated:
  - The cap on the number of hours that may be charged annually by a bar advocate;
  - The cap on the number of hours that may be charged daily by a bar advocate;
  - The cap on the number of hours recorded in a calendar year that prohibits a bar advocate from taking new assignments;
  - The cap on the number of hours that may be charged by a bar advocate for wait time *imposed* by a court;
  - The prohibition (or limitation) on charging time for reasonable travel;
  - Reimbursement for travel and other expenses at rates lower than extant federal income tax approved rates;
  - Mandating CLE courses for bar advocates without reimbursing them for costs of the courses and without compensating them for the time to attend such courses; and
  - Mandating that bar advocates maintain private law offices the costs attendant to running such office is reimbursed by CPCS.
- The following critical areas should be addressed:
  - Compensation for bar advocate programs should be fair and reasonable and meet prevailing standards in the relevant communities. CPCS should adopt as a standard a minimum

adjusted gross income commensurate with a moderate standard of living for bar advocates and then set its schedule of fees so as to assure that bar advocates can live to that standard. The Commission believes that average starting salaries for new law graduates at private law firms (\$75,000 per year) and the average annual recorded hours demanded by most private law firms from employed lawyers (2,000 hours per year) are appropriate standards. Hourly rates that allow bar advocates to achieve this adjusted gross income (i.e., after paying fixed expenses in the relevant community) are the only rates that are fair and reasonable. Rates that are lower are financially abusive to bar advocates and assure compensation that cannot sustain a moderate standard of living. Appointed counsel rates in non-capital federal criminal cases (\$125 per hour) should be used as a guide.

- Hourly rates for bar advocates must be structured such that serious felony cases in Superior Court attract participants (i.e., the hourly rate differential between Superior Court and District Court must be sufficiently higher to entice bar advocates to seek out the assignment).
- Hourly rates for bar advocates should be reviewed whenever a substantial change in the cost of living is experienced (e.g., in periods of high inflation) and on a regular biennial period.

## ASSISTANT DISTRICT ATTORNEYS

**“Our prosecutors are the lowest paid professionals in the courtroom, the lowest paid starting attorneys in the commonwealth, and the lowest paid prosecutors in the country. Repeatedly, we have explained our alarming attrition problems, particularly with retaining mid-level prosecutors.”**

Testimony of District Attorney Jonathan W. Blodgett, Essex County District Attorney and President of the Massachusetts District Attorneys Association, to the Joint Ways & Means Committee, March 7, 2014.

Referring to assistant district attorneys leaving for substantial pay increases in other state agencies:

**“It is not an understatement when I tell you that my office is a revolving door of prosecutors. We expend scarce resources in this constant cycle of recruitment, hiring, and training, and once prosecutors become experienced and really good at their jobs they are forced to leave the job they truly love. This is not just financially wasteful and inefficient but clearly detrimental to the best interests of justice.”**

Testimony of District Attorney Daniel Conley, Suffolk County District Attorney, to the Commission on March 27, 2014.

### Responsibilities

The 11 district attorney offices in Massachusetts operate from 115 different work sites, employ 714 prosecutors and 249 advocates, and prosecute more than 300,000 cases annually.

The average prosecutor carries a staggering caseload of 420 cases. Historically, the District Attorneys (1) represent the commonwealth in criminal matters in the Superior Court, and in the six-person jury and bench sessions in all district courts, and Juvenile Courts; (2) prosecute appeals in the Appeals Court and the Supreme Judicial Court; (3) handle probation surrenders, parole hearings, and sexually dangerous person proceedings; (4) investigate the circumstances of all suspicious deaths and prosecute when there is evidence of criminal conduct; (5) investigate and prosecute

cases of child abuse and investigate and prosecute cases of neglect that are referred to the district attorney by the Department Children and Families; (6) investigate and prosecute cases of neglect and abuse (economic and otherwise) against the elderly that are referred to the district attorney by the Department of Elder Services; (7) investigate and prosecute cases of abuse or neglect against the physically and/or mentally handicapped, including mental health commitments; (8) provide technical and legal support to law enforcement; and (9) conduct juvenile diversions.

Over the past few decades, district attorneys have created specialized teams that focus on particular categories of crimes. These units include: crime prevention and control units of state police officers assigned to district attorney offices who conduct investigations into major crimes; white collar crime units that investigate and prosecute economic and other white collar crimes; repeat and serious offender units that “fast track,” or speedily prosecute, certain cases with the intention of removing dangerous criminals from our communities; units that investigate all types of sexual and physical abuse of children, as well as provide support services for the victims and their families; civil rights units that combat civil rights violations, including hate crimes; elder abuse investigation and prosecution units; domestic violence units; drug task forces; and victim witness programs which were instituted in order to guide victims through the criminal justice system.

Assistant district attorneys with 0-2 years experience carry a caseload consisting of various district court matters, such as felonies and serious misdemeanors, including domestic violence cases, motor vehicle offenses (such as operating to endanger), drunk driving offenses, assault and battery with a dangerous weapon, larcenies, receiving stolen property, breaking and entering a building in the nighttime, malicious damage of personal property, possession with intent to distribute drugs, and indecent assault and battery. Ideally, assistant district attorneys with two to three years experience will handle district court jury trials. However, in recent years,

due to difficulty retaining more experienced prosecutors, many jury trials are now handled by relatively new assistant district attorneys, or sometimes even student prosecutors.

Assistant district attorneys with approximately three to five years experience are assigned to a great variety of tasks. Some are assigned to the Superior Court and begin with entry level Superior Court cases, e.g., non-violent felonies with little or no serious personal injury. These lawyers progress to more serious felonies, including crimes of violence. They may be assigned to supervisory responsibilities in the District Court. Some lawyers are assigned to specialized units, e.g., child abuse, domestic violence, or special investigations. Others do appellate work, handle open meeting law issues and render other legal opinions. Most participate in a rotation assignment where they are available 24 hours a day to assist with search warrants and other emergency legal matters. Many prepare and present training programs for law enforcement personnel as well as engage in other educational and informational programs within the community. By the fourth and fifth years, many assistant district attorneys have progressed to key positions. Most have become experienced and highly competent trial lawyers who have handled a number of significant criminal trials.

Assistant district attorneys with five to 15 years experience usually handle the most serious and complex matters in their particular areas of expertise. They are normally either at supervisory levels in the District Court, office administrators or trying felonies in the Superior Court. The most able trial lawyers are assigned to handle a wide variety of the most serious and violent cases including homicide, aggravated rape, armed home invasions, elderly abuse, career criminal prosecutions, and those cases involving particularly challenging legal or evidentiary issues.

### Compensation of Assistant District Attorneys

The starting salary of an assistant district attorney in Massachusetts is \$37,500. Thereafter, the salary will depend upon experience, work load, difficulty of work load, and performance. However, starting salaries for government agency lawyers (“Counsel I”) range between \$54,946 and \$79,659. Starting salaries in the “Counsel II” grade range between \$62,978 and \$80,000. In addition, the union contract for these agency lawyers mandates an *annual salary increase* of an additional 5%. The salary differential is inexplicable and patently unfair. The “revolving door of prosecutors” described by District Attorney Conley and its attendant waste of resources can only be fixed by achieving parity in starting salary among all government agencies.

The failure of the Executive and Legislative branches to increase the starting salaries at the bottom of the criminal justice system has had a direct effect upon the progress of salary schedules for assistant district attorneys. There have been some additional assistants appointed and some improvement in some assistants’ salaries. However, the salary paid assistant district attorneys over the last 10 years has lagged far behind increases in the cost of living, and the struggle of assistant district attorneys to meet their expenses and support themselves and their families has become even more difficult.

## PUBLIC DEFENSE COUNSEL

**I graduated from Boston College Law School in 2007. After six and a half years as a public defender, my salary is roughly \$53,600 a year. I, like my colleagues, realize many people in Massachusetts are paid less than public defenders. Every single day I work with poor people who don't have a dime to their name. And I know many people struggle, stay in the middle class, with less than my salary. But \$53,600 a year is far too low of a salary to allow me to stay with CPCS. I have over \$120,000 in student loans. I have a 2003 Toyota Corolla with 128,000 miles on it. I live in a modest apartment that I share, perhaps tellingly, with another public defender from my office just to make the ends meet. I had a part-time job for five years as a public defender selling wine and liquor at a wine shop until about a year ago when I really had to leave because my social life was nonexistent and I really needed extra time to work on my cases. I live no better than I did when I was a first-year law student at BC. In fact, I probably live less well. I have no savings. I can't save anything for retirement, and there is no end in sight.**

Testimony of CPCS Attorney David Grimaldi, Esq., given to the Commission on March 27, 2014.

### Responsibilities

Massachusetts General Laws Chapter 211D, section 9(a), mandates that Public Counsel Division attorneys provide, “Vertical or continuous representation at pretrial and trial stages by the attorney assigned or appointed, whenever possible.” This provision fundamentally shapes the responsibilities of the Public Counsel Division attorney staff.

Historically, in the Public Counsel Division, every lawyer is a Superior Court litigator. Recently, the Executive and Legislative branches have placed a greater emphasis on establishing full time District Court and Juvenile Court public defenders. However, regardless of whether the full time public defender is assigned to the Juvenile, District or Superior Court, every newly hired lawyer receives a rigorous, month-long training program that includes intensive practice exercises. Upon completion of the program and assignment to a local office, the attorney is supervised and receives ongoing additional training. Indeed, the first case assigned to a new



public defender may be a Superior Court felony. The need to attract and retain a staff composed, in large part, of Superior Court specialists is the most serious challenge facing the Public Counsel Division.

Chapter 211D mandates for the division of cases between the Public and Private Counsel divisions. The Public Counsel Division is directed to handle Superior Court cases and probable cause felony cases in the District Court, except when there are codefendants in the case or a conflict of interest with another client. The staff attorneys are salaried employees. The Private Counsel Division is made up of attorneys in private practice. These attorneys are either members of a bar advocate program or are certified to take cases and are selected from a list provided to the court by CPCS.

Private attorneys handle the majority of criminal cases over which the Juvenile and District courts have final jurisdiction, as well as many cases assigned by the Probate and Family Court and the Housing Court. Private counsel are compensated through an hourly fee structure that is stratified by court and case type. The current rates have not been increased in *10 years*.

CPCS is also responsible for the establishment of standards for counsel. It is required to “establish standards for the public and private counsel divisions which shall include (a) vertical representation, (b) required training, (c) caseload limitation, (d) investigative service, (e) social service, (f) expert witness availability, (g) support service and (h) adequate supervision.” Finally, CPCS must monitor and evaluate compliance with the standards and the performance of counsel to ensure competent representation.

CPCS is also responsible for the development of training programs for both the Public and Private Counsel divisions, for the appointment of counsel in murder cases and all appellate cases, and for compensating attorneys who receive appointments under the auspices of the private counsel division, a task previously handled by the Trial Court. In addition, CPCS has the

responsibility to establish rates of compensation payable to private attorneys, but only after holding public hearings and subject to appropriation.

CPCS treats private defense lawyers as “independent contractors,” who are responsible for their own expenses, including malpractice and health insurance. However, this practice appears highly questionable. The Legislature has enacted very strict laws governing the financial relationships between employers and employees intended to protect its workers from abusive employment schemes that (1) deprive workers of benefits, (2) lay off employers’ ordinary business expenses on to workers, and (3) evade proper wages by misclassifying them as “independent contractors.” Massachusetts law measures the real relationship between worker and employer by means of a three-part conjunctive test with the burden of proof on the employer. In other words, the worker will be deemed an employee if the employer fails to establish all three parts of the test. Failure to meet any one of the prongs of the test is fatal to the employer. The three prongs of the test are:

- The worker must be free from control and direction in performing the service;
- The service performed by the worker must be outside of the usual course of business of the employer; and
- The worker must be engaged in an independently established trade, occupation, profession, or business as the service provided. G. L. c. 149 § 148B.

It is likely that CPCS may be governed by the independent contractor laws of the commonwealth. If so, it is patently clear that CPCS would fail the three prong test under the independent contractor statute if applied to it. CPCS exercises significant dominion and control over its panel of private counsel (i.e., the bar advocates). It dictates hours, mandates offices, insurance, and CLE requirements, and closely supervises the day-to-day work of bar advocates.

Bar advocates are hardly free from CPCS' control and direction in the performance of services provided to it. It is also crystal clear that the services provided by bar advocates fits entirely in the wheelhouse of CPCS' core business: providing a defense to indigent people charged with crimes. Even if CPCS were to get a free enforcement pass for this important employment law, the implications of its application to bar advocates manifest the gross unfairness of the compensation paid to them — retirement benefits; health, dental, and life insurance; vacation and disability pay; office and secretarial expenses; travel costs; wait time; compensation for hours not worked; and so on. Bar advocates routinely work evenings, weekends, and even the month of July *pro bono* due to unfair work rules imposed by the government through CPCS rules and practices. Fair compensation, meaning fair hourly rates for work performed, must include the fair value of these expenses and work time. Otherwise, the government is treating the bar advocates in ways it declares illegal for all other Massachusetts employers.

#### Compensation of Public Counsel

CPCS public defender salaries in Massachusetts lag far behind the salaries offered by the *federal* public defender in Boston and every other public defender office in the nation. The salaries are pathetic and drive lawyers from this otherwise noble practice to the detriment of the state and the impoverished clients they are required to represent.

PRIVATE COUNSEL DIVISION COMPENSATION (BAR ADVOCATES)

**“Making a comparison to just the district attorney’s office, a district attorney, with 25 years of experience is getting health insurance and a pension that we are not getting, is getting a secretary, an office, is getting all their office supplies paid for, and I know that the district attorneys with 25 years experience are well over \$100,000. I’m not anywhere near there. ...**

**I know for certain that there are bar advocates out there who, after they do their Schedule C, the money that they are making, they would be eligible for free health care. As I look at the MassHealth connector, many bar advocates, particularly those with families, would be eligible for MassHealth. Most of them don’t want to do that. Most of them don’t want to put themselves on the dole once again of the state. I know there was a time when I was eligible for MassHealth, but I took 14 hours a month, and that’s what it is costing me right now. Fourteen hours a month is what I have to work just to pay for my health insurance.”**

Testimony of Michele Rioux, Esq., bar advocate and Treasurer of Massachusetts Association of Court Appointed Attorneys, to the Commission on March 27, 2014.

Section 11 of Chapter 211D requires the CPCS to “establish rates of compensation payable to appointed or assigned counsel in the private counsel division, and to review such rates at least every two years.” The statute provides that such rates are “subject to appropriation” of the necessary funds. The existing rates were established in 2005 following recommendations made by the “Commission to Study the Provisions of Counsel to Indigent Persons in Massachusetts,” also known as the Rogers Commission. The current hourly rates have not been changed in many years. And the bar advocates are being driven to financial ruin as a result.

The Commission believes that the present rates of compensation are confiscatory and adversely impact an indigent client’s right to counsel.

As demonstrated by the ABA’s August 1993 publication, *The Indigent Defense Crisis*, inadequate funding of assigned counsel services leads directly to ineffective representation:

**“Even the most diligent and dedicated attorney, when inadequately compensated, might have to forgo necessary case preparation and consultation with expert witnesses and critical witnesses may be overlooked without proper investigative resources.”**

*The Indigent Defense Crisis*, at 6.

Standard 5-2.4 Compensation of the ABA Standards on Providing Defense Services

states: “Assigned counsel should be compensated for time and service performed. The objective should be to provide reasonable compensation in accordance with prevailing standards.” The commentary following the standard states:

**“This standard thus rejects the view that lawyers are required to provide pro bono legal services in criminal cases. ...[t]he President’s Crime Commission also rejected the notion that members of the bar should be required to provide defense representation without adequate payments for their time and efforts.”**

The President’s Commission on Law Enforcement and Administration of Justice in its 1967 *Task Force Report: The Courts* reported:

**“Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services. Most presently proposed standards for compensation of assigned counsel call for a fee which is less than could be commanded in private practice. It has been argued that these standards are sufficient because it is part of a lawyer’s obligation as a member of the bar to contribute his services to the defense of the poor. But these standards unavoidably impose a stigma of inferiority on the defense of the accused.... It is undesirable to perpetuate a system in which representation for the poor seems to be obtained at a discount.”**

*Task Force Report: The Courts*, at 61.

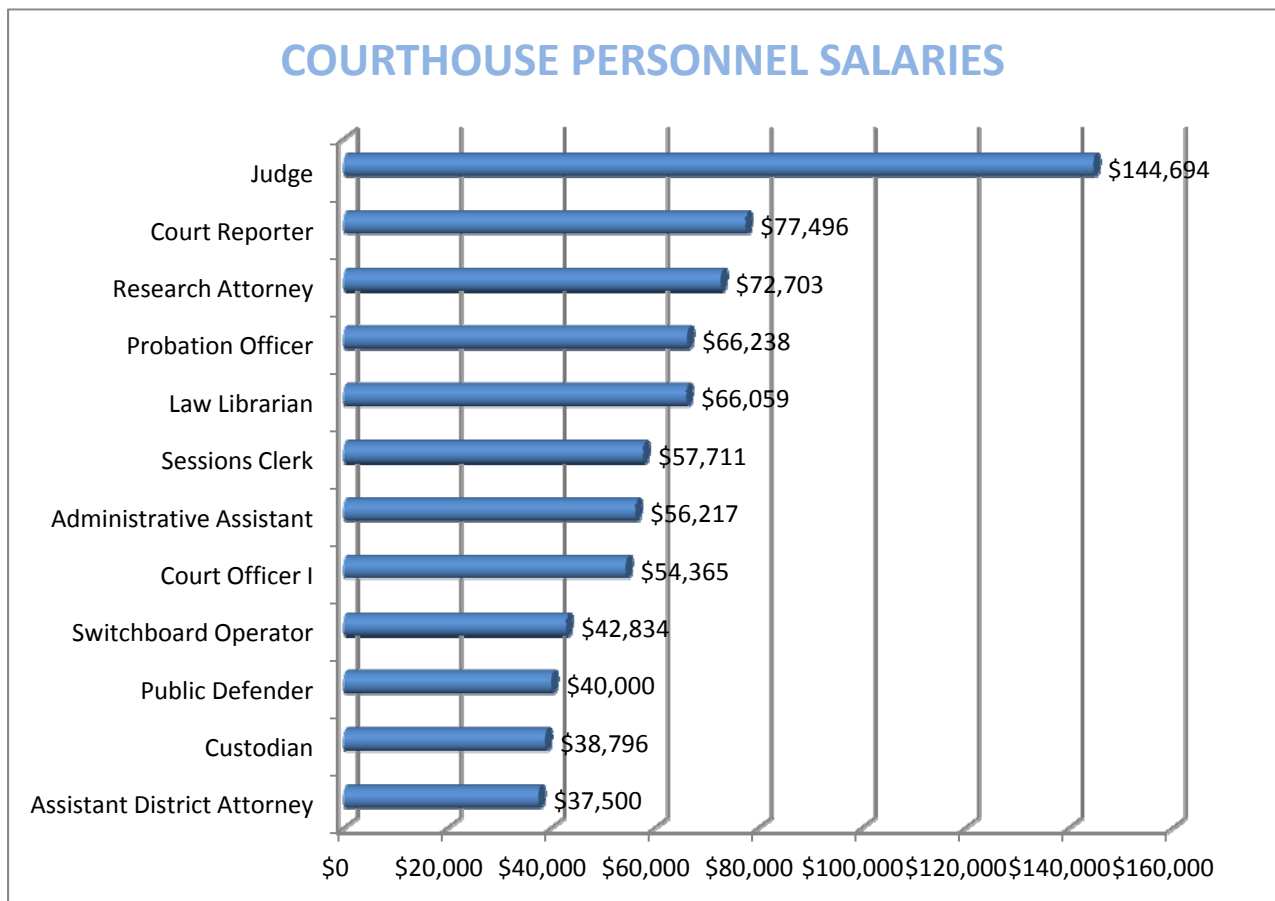
In private law firms, hourly rates are established, in part, by determining the desired adjusted gross income the lawyers controlling the business wish to earn, the amount of work that must be performed to achieve the desired gross revenues, and the costs of doing business to get to the end result. Bar advocates operate under the same set of economic rules. They have to work a number of hours at certain rates in order to produce gross revenues that, after expenses, lead to a desired end result. What is missing in this context is a generally accepted adjusted gross income for public defenders operating outside the zone of protection provided to direct employees by CPCS. The government and bar advocates should identify the adjusted gross

income that would provide a modest but acceptable standard of living and from that figure determine the hourly rates that will drive them to the appropriate end result. The Commission believes that the average starting salary for newly hired lawyers in private law firms (currently \$75,000) and the average mandated work load for those lawyers (typically 2,000 hours) are excellent starting points in determining appropriate hourly rates. In the absence of an accepted process as described herein, the Commission believes that the appropriate hourly rate for bar advocates going forward is the non-capital case rate used for appointed federal defenders (\$125).

In addition, CPCS rules and practices that end up forcing bar advocates to work without compensation should immediately change. Specifically, caps on annual hours, hours at which new assignments cannot be taken, daily hours, wait time hours, and the like appear to be born out of an erroneous belief that bar advocates are cheaters gaming the system and that oppressive oversight is a good business practice. These rules and practices are counterproductive and unnecessary.

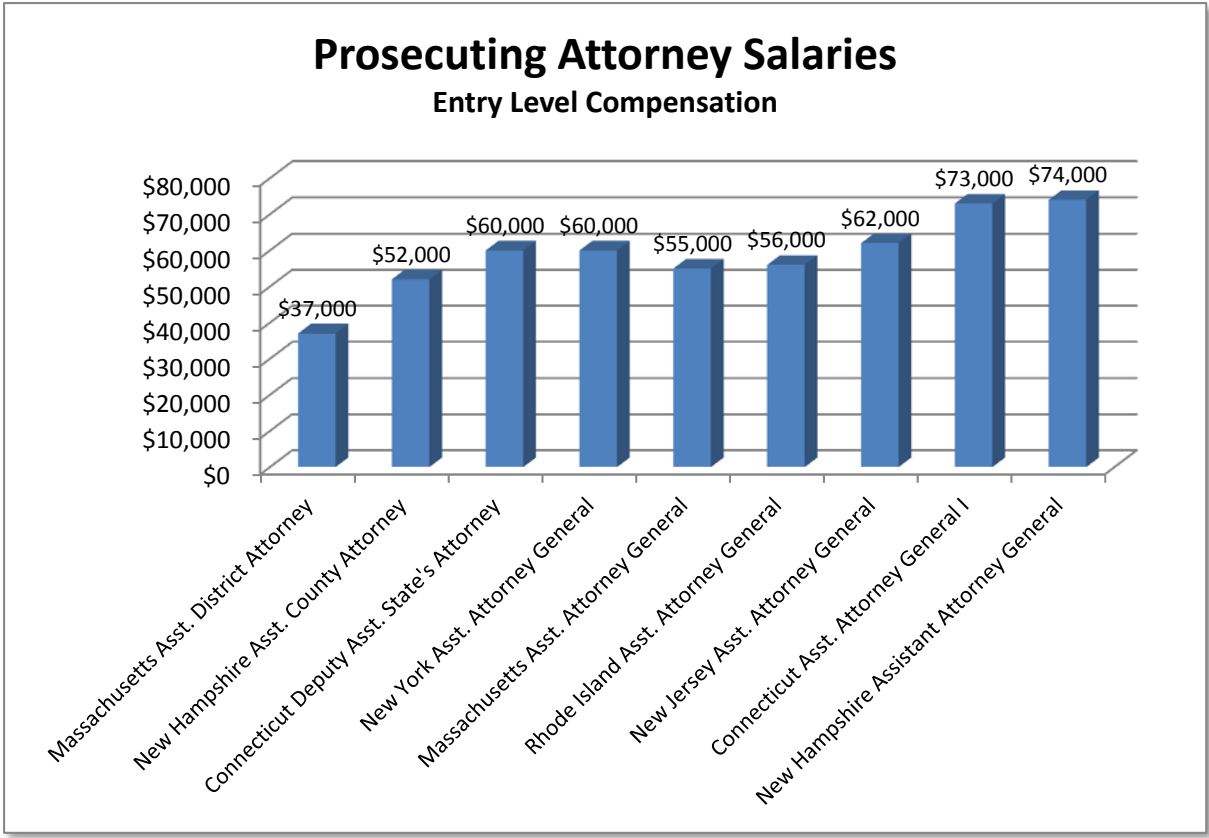
COMPARABLE SALARIES: MASSACHUSETTS IS AT THE BOTTOM AND RANKS LOWER THAN ARKANSAS AND MISSISSIPPI

Sadly, the lowest paid person in a Massachusetts courtroom is a newly minted assistant district attorney. Working up from the bottom, the next lowest paid employee in the courthouse is the custodian. And the third lowest paid person in the courtroom is the public defender. The comparative compensation of courtroom personnel speaks volumes about the stark lack of fairness:



Compensation unfairness to assistant district attorneys and public defenders is also demonstrated by pay levels in other jurisdictions.

Prosecutorial





Public Defenders

PD OFFICES USA					
State	Entry Salary	Rank	COLA Factor	Adjusted Salary	Adjusted rank
California (San Francisco)	\$98,514.00	1	124.3	\$79,255.03	1
Nevada (Clark County Las Vegas)	\$65,500.00	3	96.4	\$67,946.06	2
Wyoming	\$61,054.00	8	95.8	\$63,730.69	3
Nebraska (Lancaster County)	\$57,120.00	14	90.3	\$63,255.81	4
Utah (Salt Lake County)	\$56,000.00	16	91.1	\$61,470.91	5
Washington (Thurston County)	\$62,184.99	6	102.0	\$60,965.68	6
Texas (El Paso)	\$55,541.00	19	91.6	\$60,634.28	7
Arizona (Maricopa County)	\$61,485.00	7	101.7	\$60,457.23	8
Washington (Seattle)	\$59,019.00	12	102.0	\$57,861.76	9
Delaware	\$60,000.00	10	104.8	\$57,251.91	10
Colorado	\$56,700.00	15	99.8	\$56,813.63	11
Virginia	\$54,049.00	21	95.9	\$56,359.75	12
Oregon (Portland)	\$58,000.00	13	106.4	\$54,511.28	13
Idaho (Appeals Public Defender)	\$49,500.00	27	91.1	\$54,335.89	14
Minnesota	\$54,000.00	23	101.6	\$53,149.61	15
South Dakota (Minnehaha County)	\$52,603.00	25	99.5	\$52,867.34	16
Iowa	\$48,505.60	29	91.8	\$52,838.34	17
Alaska	\$68,000.00	2	131.5	\$51,711.03	18
Wisconsin	\$49,429.00	28	97.3	\$50,800.62	19
Tennessee	\$45,348.00	33	89.8	\$50,498.89	20
North Dakota	\$51,252.00	26	101.9	\$50,296.37	21
Arkansas	\$45,377.00	32	91.5	\$49,592.35	22
South Carolina (Charleston)	\$46,000.00	30	94.4	\$48,728.81	23
Connecticut	\$63,758.00	4	131.4	\$48,522.07	24
Ohio (Franklin County)	\$44,000.00	37	92.0	\$47,826.09	25
Maryland	\$55,630.00	18	116.8	\$47,628.42	26
New Jersey	\$60,721.58	9	127.9	\$47,475.82	27
New Mexico	\$43,534.00	38	92.2	\$47,216.92	28
Florida (Pinellas and Pasco)	\$44,400.00	35	97.3	\$45,632.07	29
North Carolina	\$44,000.00	36	96.7	\$45,501.55	30
California (LA County)	\$56,000.00	17	124.3	\$45,052.29	31
Rhode Island	\$55,000.00	20	123.3	\$44,606.65	32
Louisiana (New Orleans)	\$42,000.00	39	95.0	\$44,210.53	33
District of Columbia	\$62,467.00	5	141.6	\$44,115.11	34
Kentucky	\$38,770.00	43	89.0	\$43,561.80	35
Montana	\$41,515.00	40	98.4	\$42,190.04	36
Georgia	\$38,124.00	44	92.3	\$41,304.44	37
Missouri	\$38,040.00	45	92.7	\$41,035.60	38
Indiana (Marion County)	\$35,888.04	46	90.1	\$39,831.34	39
New York Bronx Defenders	\$54,000.00	22	136.1	\$39,676.71	40
Pennsylvania (Allegheny County)	\$39,372.72	42	100.8	\$39,060.24	41
New York (Monroe County)	\$53,000.00	24	136.1	\$38,941.95	42
Alabama (Birmingham)	\$35,000.00	47	92.3	\$37,919.83	43
Vermont	\$45,510.00	31	120.1	\$37,893.42	44
New Hampshire	\$44,998.00	34	120.0	\$37,498.33	45
Hawaii	\$59,352.00	11	158.3	\$37,493.37	46
Michigan (Detroit)	\$35,000.00	48	94.0	\$37,234.04	47
Ohio (Akron)	\$32,500.00	50	91.8	\$35,403.05	48
West Virginia (Wheeling)	\$33,400.00	49	96.6	\$34,575.57	49
<b>Massachusetts</b>	<b>\$40,000.00</b>	<b>41</b>	<b>122.0</b>	<b>\$32,786.89</b>	<b>50</b>
<b>National Average Entry Level</b>	<b>\$51,023.24</b>			<b>\$48,790.55</b>	

**Notes:**

This list contains reports from all states with state-wide public defender systems and selected counties/municipalities from states with county/municipality systems

Maine does not have full-time staffed public defender offices

The Cost-of-living Index is taken from the 2013 3rd Quarter figures from the Council of Community and Economic Research - C2ER, the most widely accepted U.S. source of cost-of-living indices, with nearly 400 reporting jurisdictions across America

## COLLEGE AND LAW SCHOOL LOANS

“My name is Cara Matern. I am a staff attorney with the Children and Family Law Division. So I represent children and parents in child abuse and neglect cases, which I would define as multi-party, complex litigation that can pretty much last years, very specific law, very, very unique rules of evidence. I explain it that way to show just how vital it is for our clients that the attorneys are well trained and experienced in child abuse and neglect. Personally, I attended Loyola University in Chicago as a child law fellow and I focused on child abuse and neglect. ...

But I know we are here to discuss salary. So I will give you a little breakdown of my stressful financial situation. My 2013 adjusted gross income was \$41,254. When I last checked on Monday, I owe \$177,493.57 in student loans. I will give you a little breakdown of two weeks in my life. February 28th I was paid about \$1,400. I had expenses that pay period, including rent, totaling \$1,215. That leaves a little under \$200. Then I was paid March 13, \$1,371. That pay period I had expenses totaling \$1,264. That’s a little more than \$100 left. I obviously have to rely on my parents a lot to supplement. And, to your point, Chairman Campbell, my dad is a retired post office worker and my mom is an RN. ... I work with traumatized clients. I, myself, have been traumatized at this work, and then I go home and I worry about and have anxiety about my financial situation. ...

I work the extra hours that I don’t get any compensation for. I do miles of driving. I put wear and tear on my car. I’m not always sure I can even keep up with the regular upkeep for my car. Certainly if there was any sort of major repair needed, I would have to rely on my parents for that. Note on travel. I do submit a travel voucher each month, but I get 30 cents per mile. The IRS Federal rate for business travel is 56 cents per mile. I did have a second job for a little bit, but I didn’t really have time for myself, my friends, my family. ...

I have increased work hours and increased stress but my salary keeps the same. It is also the same as a result of where I am in my life because I can’t save any money. So I don’t know if I could afford a wedding. I definitely couldn’t start a family or buy a home. ... So I don’t know if I will ever be able to afford those things. I wanted to work with families and child protection since college. I spent a lot of years and a lot of money preparing and dedicating myself for this. And it is sad, due to a lack of funding and a lack of salary, I might not be able to do this long term.

I was hired in a class of 35 dedicated individuals in August of 2011. Everyone there was ready to impact the system, impact the families. Now there is only 17 of us left. And I know for a fact that that number is going to dwindle. I think it is really at the expense of our clients at the end.”

Testimony of CPCS Attorney, Cara Matern, Esq., given to the Commission on March 27, 2014.

When evaluating the salaries paid to prosecutors and public defenders in the criminal justice system, the immensely burdensome costs of college and law school education must be considered, as well as the fact that many law school graduates, by the time their education is completed, have amassed substantial educational loan debts. CPCS published data from its “student loan debt survey.” The results are staggering when one considers the meager wages paid to CPCS full-time lawyers.

Average Student Loan Debt	\$140,000
Attorneys with Debt Between \$100,000 and \$360,000	67%
Attorneys with Outstanding Student Loan Debt	74%
Attorneys Working a Second Job	37%
Attorneys Financially Supported By Family	73%

The CPCS lawyer pro forma (\$40,000 salary):

Gross Biweekly Pay	\$1,538.46
Deductions (taxes, retirement, health and dental insurance)	\$450.69
Take Home Pay	\$1,087.77
Average Monthly Payment on Student Debt	\$504.00
Net Disposable Income (for Everything Else)	\$1,852.84

A one bedroom apartment in Quincy or Malden and a rundown, second-hand car would handily wipe out that above net disposable income. Sustenance is another matter altogether.

Prosecutors and defense attorneys need to eat. And they need a life beyond the workplace. The government cannot expect young, capable lawyers to remain in jobs that cripple them financially and leave them with no time for their families and no means to pursue interests and activities outside of their work.

## CONCLUSION

The Commission finds that present levels of compensation paid to attorneys who work in the commonwealth's criminal justice system are inadequate and inequitable.

The Commission has heard from many prosecutors and defense attorneys of the personal and family burdens caused by the present inadequate compensation they receive for performing their important and essential public roles. We thank all the attorneys and other concerned individuals who took the time to share their personal experiences and recommendations. These dedicated individuals accept that public service necessitates some degree of financial sacrifice. However, a commitment by attorneys to serve society with integrity and competence in our criminal justice system must be recognized by fair compensation. It is our obligation to pay adequately those whom we constitutionally charge with making our system of justice work.

Embarrassingly, other states put a higher premium on the services of their criminal justice work force than does Massachusetts. By comparing the salaries of federal government attorneys and state attorneys, a wide salary gap is revealed.

The inadequacy of public criminal justice attorneys' salaries makes it extraordinarily difficult to retain lawyers of skill, experience, and talent. Many exceptional attorneys are leaving for better paying positions (often in other government agencies). The responsibilities and accomplishments of our criminal justice attorneys deserve and demand better treatment. The citizens of Massachusetts who are the victims of crime deserve the most competent prosecutors, and the poor who are accused by the state of criminal behavior have a right to effective assistance of counsel.

The people of Massachusetts and the Executive and Legislative branches must give real meaning to the fundamental constitutional rights of fair and speedy trial and of effective

assistance of counsel. For unless these rights are protected and given sustenance through a commitment of adequate funding, our constitutional mandates will be no more than false promises and the hopes and needs of our citizens will be ignored.

Respectfully submitted,

Richard P. Campbell, Chair  
Hon. Suzanne DelVecchio  
Hon. Charles Johnson  
Hon. William Delahunt  
Gerry Leone  
Denise Squillante  
Rick Lord  
Randy Chapman  
Martin Kane

Martin W. Healy, Counsel