



CUYAHOGA COUNTY OFFICE OF THE PUBLIC DEFENDER
Chief Public Defender – Cullen Sweeney

September 13, 2022

Hon. Thomas F. O'Malley
Administrative Judge
Cuyahoga County Juvenile Court
9300 Quincy Avenue
Cleveland, Ohio 44106

Sent via email

Dear Judge O'Malley:

I know that Sam has discussed attorney assignments with the Court over the years and so I am sure you are acquainted with some of our concerns. Our primary concerns have been and continue to be the disparities from courtroom to courtroom on how counsel is assigned in Juvenile Court and the very low number of delinquency assignments we receive overall in Juvenile Court.

Our office is continually reviewing ways to improve the representation of indigent clients in Juvenile Court as a whole and to provide the best legal representation to our clients that we possibly can. And we feel there are several opportunities for improvement in the assignment process. Additionally, we believe now is a good time to address these issues given that two new judges will be taking the bench next year and given that the cost of privately-assigned counsel for the Court will substantially increase as a result of changes to the assigned counsel fee structure.

With this letter, I would like to outline the issues that we see with the current assignment system in Juvenile Court and offer a starting point for addressing some of these issues. I have attached a rough draft of proposed changes to Local Rule 14 for consideration.

1. The current assignment results in a relatively small number of children being appointed an attorney from the Public Defender's Office.

The Public Defender's Office is ideally situated to represent children in the Juvenile Justice System. We have 28 attorneys (including our division supervisor, juvenile supervising attorney, and vertical defender) as well as a dedicated staff including investigators, social workers, and trial paralegals. Our Office is located in the Juvenile

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Municipal
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Office: (216) 443-3743
Fax: (216) 698-3233

Juvenile
9300 Quincy Ave., Suite 500
Cleveland, Ohio 44106
Office: (216) 443-7295
Fax: (216) 443-3094

Appeals
310 W. Lakeside Ave., Suite 200
Cleveland, Ohio 44113
Office: (216) 443-7583
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<http://publicdefender.cuyahogacounty.us>



Justice Center so we can easily and consistently visit any children being held at the Detention Center. We also have a budget for experts that allows us to best present amenability arguments and to investigate and present a strong defense on behalf of the child.

Despite these substantial resources and expertise, our Juvenile Division is unfortunately underutilized. In 2021, we only received roughly 30% of the delinquency appointments in Cuyahoga County Juvenile Court. According to statistics provided by the Court, there were 1,971 delinquency assignments in 2021.¹ Our internal case management system indicates that we handled only 590 of those cases (excluding cases we were only on for purposes of arraignment or prior to the appointment of private counsel). This percentage of cases is substantially lower than the percentage of adult felony cases our Office receives and, as discussed further below, varies wildly depending on the judge.

To address this issue and ensure that we receive a consistent number of appointments, our **proposed rule** provides that:

- The Public Defender’s Office would receive, at a minimum, all delinquency cases that end in the digits 1, 3, 5, 7, or 9, absent a conflict.
- 2. **The current assignment system results in enormous disparities with respect to the number of cases assigned to our Office by individual jurists.**

Compounding the issue of our Office’s small number of total appointments, is the fact that the number of appointments are wildly inconsistent depending on the jurist. For instance, a single Judge appointed us to more cases than four of the other Judges on the bench combined. In three courtrooms, we received less than 20% of the appointed cases. This disparity extends to the Magistrates as well, with one Magistrate appointing us to twice as many cases as any other Magistrate.

This problem is also addressed by our **proposed rule** which provides that we receive a random assignment of cases based on the ending digit of the particular case. While a Judge may choose to exceed that number to the extent that he or she felt it prudent to do so, the rule would ensure some minimum level of consistency.

- 3. **The current assignment system does not ensure continuity of representation.**

Although there is a downside to the lack of a central arraignment system akin to the one that the General Division has, there is also a benefit as well – it is much easier to

¹ According to the Ohio Supreme Court’s dashboard, however, Cuyahoga County Juvenile Court opened 2,850 new delinquency cases in 2021. The Supreme Court does not, however, track numbers of cases in which the juvenile received appointed counsel or a public defender.

ensure that the same attorney continuously represents a juvenile throughout his entire case from arraignment to disposition or arraignment through bindover proceedings to the resolution of the criminal case in the General Division. Consistent representation by the same attorney is one of the “ABA ten principles of a public defense delivery system.”

Unfortunately, the current system of assignment practices in Juvenile Court do not ensure continuity of representation, in at least two particular ways. First, some jurists remove our Office after arraignment and appoint different attorneys to handle the remainder of the case. Our **proposed rule** would address that issue by providing that, if our Office handles the arraignment, we will remain on the case regardless of the case number, absent a conflict. So, in other words, for even numbered cases, the Court could appoint private counsel but, if it wants to do so, private counsel should handle the arraignment as well, ensuring continuity of representation.

There is a second component to continuous representation which we feel should be addressed; namely, ensuring that the same attorney continues to represent a child even if the child is bound over to the adult system. It is costly, inefficient, and fundamentally unfair to the child to change representation, often after months of representation in the Juvenile Court, merely because a child is transferred to the adult system. Our Office has addressed that issue internally by creating a vertical defender position that ensures this continuity of representation. Unfortunately, many of the privately assigned attorneys in Juvenile Court do not follow the case when it is transferred downtown. This change in counsel necessarily means longer stays for the juvenile in the Detention Center as new counsel needs to get up to speed and did not handle probable cause or amenability hearings. It is also unfair to the child because they now have to start at square one with a new attorney. Often the attorney in Juvenile Court has made decisions that have consequences downtown that the newly assigned attorney is saddled with (i.e. waiving probable cause and/or not presenting an adequate case in defense of amenability).

Our **proposed rule** addresses this issue by including the following provision:

- “No private counsel shall be assigned to a case involving the possibility of a bindover to the General Division unless counsel is qualified and willing to continue as assigned counsel through the duration of the case in either the Juvenile or General Divisions.”
- 4. The current assignment system does not ensure the appointment of our Office to cases where we already have attorney-client relationships.**

There have been incidences where our Office has been actively involved in the representation of a child but then, when the child receives a new case, the court appoints the child different counsel. Indeed, in some instances, the Court removes us entirely from any representation of the child, even on cases in which we are currently representing the child. Just last week, we were removed from two cases where we were representing a child and replaced in those cases by privately appointed counsel. I do not believe that the Court has the authority to remove us from representation of a child, absent a conflict, but, even if

the Court did, it is not fair to the child to have to build a new attorney-client relationship and it is not efficient use of indigent-defense resources.

Our **proposed rule** addresses this situation by providing that:

- The Public Defender’s Office will be assigned any new cases filed against a child for whom we are actively involved in representation.
- We will not be removed as counsel in a pending case absent a conflict or a request by our Office.

5. The current assignment system does not comply with Ohio Administrative Code 120-1-10(A)(2)

The Ohio Public Defender has adopted administrative rules that must be followed in order to qualify for reimbursement of expenditures on indigent representation from the State of Ohio. Although there are several rules in this Code provision, there are two particularly relevant here:

[C]ourts must adopt a local rule for the appointment of counsel that ensures the equitable distribution of appointments among persons on each list.

OAC 120-1-10(A).

And, any assignment system must:

Ensure that appointments are distributed as widely as possible among members of the bar who qualify to be on an assignment list, by utilizing a rotary system designed to pair the seriousness and complexity of a case with attorneys who meet qualifications in this rule for appointment to such a case. On rare occasion it may be in the interest of justice for a court to select an individual attorney whose expertise or experience is particularly well-suited to a given case or client.

OAC 120-1-10(A)(2).

Based upon records obtained from the Ohio Public Defender for the months of May 2021 through April 2022, the existing system does not appear to ensure a wide or equitable distribution of cases. While we are happy to share all the data for your review, our review showed substantial inequities in private attorney assignments. For instance, there were three attorneys who each filed over 100 separate fee bills for delinquency cases, and together received over 30% of all delinquency cases during that time period. And the seven most frequently appointed attorneys received over 50% of all delinquency cases and more delinquency appointments than our entire Office of 28 attorneys.

The equitable distribution of private attorney assignments is admittedly more difficult to ensure without a central arraignment process; however, there are ways to improve it even under the existing system where individual jurists make the appointments.

Our **proposed rule** addresses this issue in two ways:

- It increases appointments to our Office which will help reduce the overreliance on just a handful of private attorneys;
- It incorporates the explicit language used in OAC 120-1-10(A)(2) that emphasizes the rarity of deviations from selecting the “next available individual from the qualified assigned counsel list,” which is already part of this Court’s Local Rule.

6. The current assignment system does not ensure compliance with the attorney qualification requirements of Ohio Administrative Code 120-1-10

Although the Juvenile Court’s existing local rule requires that all assigned attorneys have the “required training and experience outlined in Ohio Administrative Code section 120-1-10,” Loc. R. 14(B), the current assignment system does not ensure that those requirements are met. This is particularly true with respect to assignments in juvenile bindover and SYO cases which carry the requirement that the attorney assigned in juvenile court have sufficient recent *adult felony jury trial* experience that they could handle the case in adult court (or have co-counsel appointed with that experience). Many of the attorneys appointed most frequently in juvenile court do not have the requisite adult felony jury trial experience.

For example, in a murder case with a bindover motion pending, private-appointed counsel would need to have **all of the following qualifications:**

- At least three years experience as an attorney practicing in the area of juvenile delinquency law; *and,*
- Within the last ten years, prior experience as lead trial counsel in at least four bench trials in juvenile court, at least three of which involved a felony-level charge (or three bench trials as lead and three bench trials as co-counsel); *and,*
- At least five years experience as an attorney practicing in the area of criminal law; *and,*
- Within the last ten years, prior jury trial experience as lead counsel in five felony jury trials, at least three of which were felonies of the first or second degree (or three jury trials as lead and five jury trials as co-counsel)

OAC 120-1-10(H), (J), (K)(6) and (7). The rule does permit the appointment of two attorneys as co-counsel – one with the requisite juvenile experience and one with the requisite adult experience.

Our **proposed rule** addresses the difficulty of finding private-appointed counsel who meet these qualifications by appointing our Office to handle a greater share of these cases. Given the size of our Office, we have the benefit of having numerous attorneys with substantial experience in both juvenile and adult court. Moreover full-time public

defenders are “exempted from the qualification requirements of this rule.” So when our Office is assigned, the Court is automatically in compliance with the Administrative Code.

Conclusion

We look forward to discussing our concerns and the proposed amendments to Local Rule 14 with the Court in more detail. I know that we all share the same goal of ensuring a robust and effective system of indigent defense for youth charged with delinquent acts. I offer the proposals attendant to this letter as an impetus for discussion as I am sure there are many other excellent ideas to improve the juvenile indigent defense system in Cuyahoga County.

Please let me know if there is any additional information you need from me and whether there would be an opportunity to meet to discuss our ideas regarding potential amendments to Local Rule 14.

Sincerely,



Chief Public Defender

Cc: Judge Patrick F. Corrigan; Judge Alison L. Floyd; Judge Jennifer L. O'Malley; Judge Michael J. Ryan; Judge Kristin W. Sweeney; Ashley Stebbins, Cuyahoga County Deputy Chief Public Defender; Sam Amata, Juvenile Division Supervisor; and Jennifer Simmons, Juvenile Supervising Attorney

Rule 14. Assistance of Counsel

(A) When Appointed

The Court shall appoint counsel whenever the Court determines a child, the child's parent or custodian, or any other person *in loco parentis* of the child desires counsel, is determined to be indigent, and the Court is required to do so by statute. Pursuant to Ohio Administrative Code section 120-1-03(B)(4), a child is presumed indigent and entitled to the appointment of counsel at state expense, and the income of the child's parent, guardian, or custodian shall not be considered in determining eligibility for appointed counsel. The cost of assigned counsel appointed for a child may be assessed to the child's parent(s), guardian(s), or legal custodian(s) when appropriate. Upon arraignment or subsequent thereto, where it appears to the Court that a party desires to have counsel appointed for him/her, the Court, before doing so, shall require the party to execute an affidavit of indigency and a financial disclosure form and to pay a twenty-five dollar application fee unless the Court determines that it is an undue burden on the party to pay the application fee.

(B) Qualifications

Assigned counsel for all cases shall be currently licensed and in good standing with the Ohio Supreme Court as defined in Gov. Bar R. VI, Sec. 15. Assigned counsel for unruly and delinquency cases shall have the required training and experience outlined in Ohio Administrative Code section 120-1-10.

(C) How Appointed

(1) Appointment of Public Defender

(a) In abuse, neglect, and dependency cases, the Public Defender shall be appointed to represent a parent unless the Public Defender advises the Court there is conflict.

(b) Delinquency cases.

i. The Public Defender shall be assigned to represent any child held at the

Juvenile Detention Center unless the Public Defender advises the Court there is a conflict. In cases involving multiple alleged co-delinquents, the Public Defender will be assigned to represent one of the children and private counsel will be assigned to represent the remaining children.

ii. In all other delinquency cases, the Public Defender will be assigned, at a minimum, to all cases where the case number ends in the digits 1, 3, 5, 7, or 9. If the child is arraigned on multiple cases at the same time, the lowest case number assigned will be used to determine assignment.

iii. The Public Defender shall not be assigned to represent more than one child in any particular delinquency case. The Public Defender will not be assigned to a case where the Public Defender advises the court that the Public Defender has a conflict.

(c) If a Public Defender represents a child at a his or her arraignment, the Public Defender will represent the child until the conclusion of the case regardless of the case number, unless the Public Defender advises the Court there is a conflict.

(d) If the Public Defender enters an appearance or otherwise advises the court that the Public Defender has been actively involved in the representation of the child or parent, the case will be assigned to the Public Defender. "Actively involved in the representation", as used in this subsection, includes those situations where the Public Defender has established an attorney-client relationship with the child or parent. Absent a conflict or request by the Public Defender, the Public Defender shall not be removed as counsel in a pending case.

(2) Appointment of Private Attorney(s)

(a) When the Public Defender is not assigned, then private counsel shall be assigned. The court shall maintain an alphabetical listing of ~~qualified private attorneys who meet the~~ qualification requirements in Ohio Administrative Code 120-1-10. When a jurist appoints

~~an~~ private attorney, the jurist shall select the next available individual from the qualified assigned counsel list.

~~(b) When the assigning jurist determines that unique circumstances exist, or to facilitate the expeditious management of the docket, In rare cases, where private counsel is being appointed, the assigning judge may, in the interest of justice, appoint a specific qualified private counsel whose expertise or experience is particularly well suited to a given case or client. the jurist may appoint any individual from the assigned counsel list.~~

~~(c) No private counsel shall be assigned to a case involving the possibility of a bindover to the General Division unless counsel is qualified and willing to continue as assigned counsel through the duration of the case in either the Juvenile or General Divisions.~~

(D) Compensation

- (1) Assigned counsel shall be compensated in accordance with the Fee Bill Policy and Fee Schedule in effect at the time the attorney was appointed upon the filing of a Motion for Appointed Counsel Fees (Form OPD-206R and Form OPD- 1026R), and shall be compensated at the authorized rate for in-court and out- of-court time not to exceed the maximum fee cap in effect at the time of acceptance of the assignment.

Assigned counsel is entitled to one maximum fee when one proceeding is held for a single subject on multiple charges or counts arising out of a single incident of criminal conduct or a series of related incidents. On cases involving multiple charges in which one fee is payable, the maximum fee shall be set corresponding to the highest degree of offense charged.

- (2) It shall be the responsibility of the assigned counsel to file an itemized and signed Form OPD-206R and to meet all requirements of the Cuyahoga County Juvenile

Court Fee Bill Policy in effect at the time the fee bill is filed.

- (3) If an assigned counsel files a motion for extraordinary fees with the Clerk of Court, it shall be referred to the assigned judge for review and approval of payment.

(E) Periodic Review

The Court shall periodically review all assigned counsel appointments and assignment practices to ensure the equitable distribution of appointments among the attorneys for the list maintained by the court in section (C) of this rule.

(F) Quality Control of Private Assigned Counsel List.

The Court requires quality representation by members of the private bar who are appointed as assigned counsel. The Court may remove an assigned private counsel from the case assigned, in the interest of justice and for good cause shown as established at a hearing on the matter conducted on the record. From time to time, the Court may develop procedures for quality control for assigned counsel. The Court may remove assigned counsel from the approved assigned counsel list pursuant to the procedure in effect at the time of removal.

(G) Duration of Assignment

An attorney's role as assigned counsel shall terminate upon entry of a final appealable order or the expiration of the time for appeals in the matter for which the attorney is assigned except for the following:

- (1) When an attorney has been appointed counsel to represent a defendant in a support hearing when a Motion to Show Cause has been filed, the attorney will continue to represent the defendant through the Review of the Purge hearing.
- (2) When an attorney has been appointed to represent a party in an abuse, neglect, or

dependency case, the attorney will continue to represent the party until a final disposition is entered. For this purpose, a final disposition is: termination of Protective Supervision; termination of Temporary Custody without Protective Supervision; Termination of Planned Permanent Living Arrangement without Protective Supervision; Legal Custody without Protective Supervision; Permanent Custody; or any order which terminates the court case or Cuyahoga County Division of Children and Family Services involvement or the party's involvement in the case.

(H) Process: Notice

Absent a prohibiting disability, in conformity with Local Rule 39, an attorney assigned to represent a party before the Court shall provide a current email address to the Court's Clerk's Office. Unless the Court determines otherwise, notice of all upcoming hearings will be provided to counsel via the email address they have provided.