

Department of Legislative Services
 Maryland General Assembly
 2015 Session

FISCAL AND POLICY NOTE

House Bill 596 (Delegate Dumais)
 Judiciary

Criminal Procedure - Maryland Appointed Attorneys Program Corporation

This bill establishes the Maryland Appointed Attorneys Program Corporation (“the corporation”). The purpose of the corporation is to provide legal representation to indigent criminal defendants at initial appearances before District Court commissioners as required by the Court of Appeals in *DeWolfe v. Richmond*, 434 Md. 444 (2013). The corporation is not a unit or instrumentality of the State, and corporation employees are not State employees.

The bill terminates June 30, 2019.

Fiscal Summary

State Effect: General fund expenditures increase by \$323,900 for expenses related to administration of the Maryland Appointed Attorneys Program. Special fund revenues and expenditures increase by a corresponding amount. This estimate does not include costs for payments to program attorneys for legal representation, as that is an obligation under current law that is assumed to continue absent this bill. Future year estimates are annualized and adjusted for inflation and reflect the bill’s June 30, 2019 termination date. General fund revenues increase minimally from investment earnings of the new fund.

| (in dollars) | FY 2016 | FY 2017 | FY 2018 | FY 2019 | FY 2020 |
|----------------|-------------|-------------|-------------|-------------|---------|
| GF Revenue | - | - | - | - | \$0 |
| SF Revenue | \$323,900 | \$399,800 | \$419,400 | \$440,000 | \$0 |
| GF Expenditure | \$323,900 | \$399,800 | \$419,400 | \$440,000 | \$0 |
| SF Expenditure | \$323,900 | \$399,800 | \$419,400 | \$440,000 | \$0 |
| Net Effect | (\$323,900) | (\$399,800) | (\$419,400) | (\$440,000) | \$0 |

Note: () = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: The bill (1) establishes the corporation's board of directors ("the board"); (2) specifies the composition of the board and the election of board members; (3) creates the Maryland Appointed Attorneys Corporation Fund ("the fund"); (4) specifies the composition and purpose of the fund; (5) requires the Governor's Office of Crime Control and Prevention (GOCCP) to administer the fund; (6) establishes procedures for expenditures from the fund; and (7) specifies additional required duties of the corporation and the corporation's executive director. The corporation must maintain its principal office in the State and a designated agent to accept service of process.

The Board: The board consists of 10 members, as specified in the bill. The board must select a chair each year from among its voting members, and must appoint a secretary, a treasurer, and other officers from among its members. Board members may not receive compensation, but are entitled to reimbursement for necessary expenses incurred in conjunction with their service as provided in the corporation's budget. The board must meet at least four times each year, and board meetings are generally open to the public.

Executive Director: The board must appoint an executive director of the corporation, who also serves as the corporation's chief executive officer. The executive director has the authority and responsibility for administering the affairs of the corporation, appointing and removing employees and independent contractors as necessary to carry out the purposes of the bill, preparing schedules of professional fees and expenses for appointed attorneys, and other specified duties. The executive director is entitled to a salary as provided in the corporation's budget and may be removed by a majority of the board.

The Fund: The bill establishes the Maryland Appointed Attorneys Corporation Fund. The purpose of the special fund is to finance the provision of legal representation to indigent criminal defendants at initial appearances. Expenditures from the fund must be made in accordance with an appropriation requested by the Judicial Branch of the State Government and approved by the General Assembly in the State budget or by the budget amendment procedure.

Appointed Attorneys and Legal Representation: The executive director must maintain a confidential list of private attorneys available to serve as appointed attorneys for indigent individuals eligible for representation. Each attorney on the list must be admitted to practice law in the State. The executive director must schedule appointed attorneys as needed to represent indigent individuals at initial appearances statewide.

The primary duty of an appointed attorney is to vigorously represent the indigent individual with the same effect and purpose as though privately engaged by that individual and without regard to the use of public funds to provide the service.

An appointed attorney must report to the corporation as required under the policies and rules of the corporation. The corporation must authorize the payment of fees and expenses from the fund according to the schedule of fees prepared by the executive director. An appointed attorney may not receive a fee for services in addition to these fees. The corporation must provide staff and technical assistance to an attorney appointed to represent an indigent individual.

The corporation must seek to ensure that an appointed attorney providing legal assistance to eligible clients (1) maintains the highest quality of service and professional standards; (2) preserves attorney-client relationships; and (3) protects the integrity of the adversary process from any impairment. Representation of an indigent individual by an appointed attorney must terminate at the conclusion of the initial appearance.

Clients, Application, and Eligibility for Services: An individual may apply for corporation services as an indigent individual if the individual states in writing under oath or affirmation that the individual, without undue financial hardship, cannot provide the full payment of an attorney and all other necessary expenses of representation in an initial appearance before a District Court commissioner.

Eligibility for corporation services may be determined without a needs assessment if the applicant has assets and net annual income that are less than 100% of the federal poverty guidelines. For individuals whose assets and net annual income exceed 100% of the federal poverty guidelines, eligibility for corporation services must be determined by the need of the applicant. Need must be measured according to the financial eligibility of the applicant to engage and compensate a competent private attorney and to provide all other necessary expenses of representation. Financial ability must be determined by (1) the nature, extent, and liquidity of assets; (2) the disposable net income of the applicant; (3) the nature of the offense; (4) the length and complexity of the proceedings; (5) the effort and skill required to gather pertinent information; and (6) any other foreseeable expense.

The corporation is required to investigate the financial status of an applicant when the circumstances warrant. The corporation is authorized to (1) require an applicant to execute and deliver written requests or authorizations that are necessary under law to provide the corporation with access to confidential records of public or private sources that are needed to evaluate eligibility and (2) on request, obtain information without charge from a public record office or other unit of the State, county, or municipality.

The corporation is also authorized to submit requests to the Department of Labor, Licensing, and Regulation (DLLR) and the Comptroller for information regarding the employment status and income of applicants. Each request must be accompanied by an authorization for release of information that is (1) in a form acceptable to the agency to which the request is submitted and (2) signed by the applicant. DLLR and the Comptroller must comply with requests made by the corporation.

Information subject to the attorney-client privilege is confidential and may not be disclosed to any person unless the privilege is waived by the client or a court orders the disclosure.

Reporting Requirements and Budget Information: The corporation must publish an annual report containing a description of the services provided and submit the report each year to the Governor and the General Assembly. The corporation must also prepare an annual budget for informational purposes. The corporation must submit its budget to the General Assembly by November 1 of each year in conjunction with GOCCP's budget request.

The informational budget must contain three years of data (the most recently completed fiscal year, the current fiscal year, and the estimate for the next fiscal year), including (1) a summary of total expenditures and the sources of revenue that support that spending; (2) line item expenditure detail for personnel and operating expenses; (3) narrative explanations of all revenue and spending changes between the current fiscal year and the next fiscal year; (4) performance measurement data that details the use of funds; and (5) detail on the corporation's reserve fund, including actual and estimated end of fiscal year balances, transfers to and from the reserve fund, and the policies governing the reserve fund.

Prohibited Acts: The corporation is prohibited from (1) participating in litigation, unless the corporation is a party; (2) interfering with a lawyer's professional responsibilities to clients under the Maryland Rules of Professional Conduct; (3) contributing or making available the corporation's funds or services to a political party or association or the campaign of a candidate for public or party office; (4) engaging in propaganda or otherwise attempting to influence legislation or participate or intervene in a political campaign on behalf of a candidate for public office, including publishing or distributing statements; and (5) conducting or carrying on activities not authorized for an organization qualified under § 501(c)(3) of the Internal Revenue Code or to which contributions are deductible under § 170(c)(2) of the Internal Revenue Code.

Background/Current Law: In *DeWolfe v. Richmond*, 434 Md. 403(2012), the Maryland Court of Appeals held on January 4, 2012, that under the then-effective version of the Maryland Public Defender Act, no bail determination may be made by a District Court commissioner concerning an indigent defendant without the presence of counsel, unless representation by counsel is waived ("*Richmond I*").

The plaintiffs in the case represented a class of indigent criminal defendants who were arrested, detained at the Central Booking and Intake Facility in Baltimore City (CBIF), brought before a commissioner for initial bail hearings, and requested and were denied representation by counsel at the initial bail hearings. The facts were undisputed that the initial appearances of criminal defendants in Baltimore City were not conducted in a courtroom, open to the public, or recorded. The initial appearances occurred at CBIF, in a small room, with the defendant and the commissioner on opposite sides of a plexiglass window talking through a speaker system. Evidence was presented that the commissioner's initial bail decision often was not disturbed by the District Court judge on bail review.

The *Richmond I* opinion was based on the then-effective wording of the Maryland Public Defender Act, including language that the Office of the Public Defender (OPD) must represent an indigent defendant "in all stages" of a criminal proceeding. The court did not address the plaintiffs' federal and State constitutional claims of a right to representation. However, the Circuit Court for Baltimore City had previously held, based on *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), that indigent arrestees have a federal and State constitutional right to be appointed counsel at initial appearance.

Activity During 2012 Legislative Session

Richmond I sparked a heated debate during the 2012 session of the General Assembly. There was much concern about how the State would fund the obligation of OPD to begin representing people at the initial appearance phase. It was estimated that the cost to OPD alone (aside from costs that would be incurred by the Judiciary, the Department of Public Safety and Correctional Services, State's Attorneys' offices, law enforcement agencies, and local correctional facilities) would exceed \$27 million annually. On the other hand, serious questions were raised about whether people do possess a constitutional right to legal representation at initial appearance, regardless of cost. A number of bills were introduced to attempt to counteract or mitigate the effect of *Richmond I*.

Ultimately, the General Assembly passed Chapters 504 and 505 of 2012, which (1) amended the Maryland Public Defender Act to specify that OPD is required to provide legal representation to an indigent defendant at a bail hearing before a District Court or circuit court judge, but is not required to represent an indigent criminal defendant at an initial appearance before a District Court commissioner; (2) prohibited a statement made during an initial appearance before a District Court commissioner from being used as evidence against the defendant in a criminal or juvenile proceeding; (3) codified the rule that a defendant who is denied pretrial release by a District Court commissioner or who remains in custody after a District Court commissioner has determined conditions of release must be presented to a District Court judge immediately if the court is in session or, if the court is not in session, at the next session of the court; (4) required a police officer

to charge by citation for specified offenses if certain conditions are met; (5) authorized a District Court commissioner to issue an arrest warrant based on an application for a statement of charges filed by an individual only if specified criteria are met; (6) established the Task Force to Study the Laws and Policies Relating to Representation of Indigent Criminal Defendants by OPD; and (7) required specified entities to develop a format and procedures to record specified citation data and required the Maryland Statistical Analysis Center within GOCCP to analyze citation data for five years beginning January 1, 2013.

2012-2013 Developments

Subsequently, the Court of Appeals was asked to decide whether there was a federal or State constitutional right to State-furnished counsel for indigent defendants at their initial appearance before a District Court commissioner. On September 25, 2013, the Court of Appeals issued an opinion (434 Md. 444 (2013)) in the *Richmond* case holding that, under the Due Process component of Article 24 of the Maryland Declaration of Rights, an indigent defendant has a right to State-furnished counsel at an initial appearance before a District Court commissioner (“*Richmond II*”). The Court of Appeals issued a temporary stay of implementation of the *Richmond II* decision pending legislative action.

The task force created by Chapters 504 and 505 met several times during 2012 and 2013 and submitted a final report containing 16 recommendations, including elimination of the money bond system; implementation of a statewide pretrial services agency that utilizes risk and need-based supervision, referral, and treatment options in all Maryland counties; and adoption of an objective, validated risk assessment tool for use by pretrial services agents.

2014 Developments

Several bills were introduced during the 2014 session to specifically address the *Richmond II* decision. Proposals considered involved establishing a statewide pretrial release services program, requiring that release decisions be based on risk assessments, limiting the authority of District Court commissioners, altering procedures relating to the initial appearance process and the filing of criminal charges by police officers, expanding the hours of operation of the District Court, establishing a task force on pretrial risk assessment, and amending the State constitution to establish that the Maryland Declaration of Rights may not be construed to require OPD to represent a defendant at an initial appearance before a District Court commissioner. Additional funding for OPD was also a major topic of discussion for the budget committees.

Although no bills specifically addressing the *Richmond II* decision passed, the fiscal 2015 budget restricts \$10,000,000 of the Judiciary’s general fund appropriation to be used only for the purpose of providing attorneys for required representation at initial appearances

before District Court commissioners, consistent with the *Richmond II* decision. Any funds not expended for this purpose must revert to the general fund. The Budget Reconciliation and Financing Act of 2014 (BRFA) specifies that authorization of State funds in the fiscal 2015 State budget for this purpose represents a one-time allocation and provides no authority for additional State expenditures or commitment of funds without separate authorization in the State budget as passed by the General Assembly.

The BRFA also requires that, in implementing the holding of the Court of Appeals in *DeWolfe v. Richmond*, if attorneys are appointed in a county to provide legal representation at an initial appearance before a District Court commissioner in fiscal 2015, the cost of compensating the attorneys beyond the amount restricted for that purpose in the State budget must be billed by the appointing authority to the county in which the representation is provided and must be paid by that county.

On May 27 and 28, 2014:

- the Court of Appeals adopted changes to the Maryland Rules to implement *Richmond II*'s requirement that indigent defendants be provided counsel at initial appearances and lifted the stay of *Richmond II* effective July 1, 2014;
- the Judiciary created the District Court of Maryland Appointed Attorneys Program to provide attorney representation to indigent criminal defendants during initial appearances; and
- the Governor issued an executive order establishing the Governor's Commission to Reform Maryland's Pretrial System to look at best practices from around the country and recommend how an objective-validated risk assessment tool could be used in Maryland to help determine who should be detained and who should be released before trial. The executive order directed the 23-member panel to identify ways to reduce detainment times, assist and advise the State on issues arising from the ongoing implementation on a pilot basis of a risk assessment tool in one or more counties, and develop and issue legislative recommendations.

To be eligible to participate in the District Court of Maryland Appointed Attorneys Program, an attorney must be licensed to practice law in the State of Maryland and be in good standing and not subject to any pending disciplinary proceedings; attend an in-person training session or a webinar and certify that the rules on initial appearances have been reviewed; and agree to compensation of \$50 an hour for services rendered (or receive *pro bono* credit). From July 2014 through December 2014, 73,708 initial appearances were conducted statewide. The Appointed Attorneys Program represented defendants in approximately 34% of those proceedings, while the defendant waived counsel in

approximately 64% of the proceedings. Preliminary determinations of release and private counsel representation accounted for the remaining 2% of initial appearances.

The Governor's Commission to Reform Maryland's Pretrial System met several times during 2014. Three subcommittees were established at the second meeting: (1) the Managing Public Safety through Risk-based Decision Making Subcommittee; (2) the Pretrial System Improvement Subcommittee; and (3) the Individual Rights and Collateral Consequences Subcommittee. The subcommittees worked independently and kept the full task force abreast of their progress. The commission submitted its final report in December 2014.

State Fiscal Effect:

Maryland Appointed Attorneys Corporation Fund: General fund expenditures increase by \$323,905 for funds needed to capitalize the new special fund for the administrative functions of the corporation. Special fund revenues for the Maryland Appointed Attorneys Corporation Fund increase by a corresponding amount. Special fund expenditures increase by \$323,905 in fiscal 2016, which accounts for the bill's October 1, 2015 effective date. This estimate reflects the cost of hiring an executive director, one accounting supervisor, three accounting clerks, and four clerks/support staff employees to administer the Appointed Attorneys Program and perform the other functions required under the bill. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. The estimate does not include any costs to rent office space; thus, expenditures are likely higher.

| | |
|----------------------------------|------------------|
| Positions | 9 |
| Salaries | \$287,551 |
| Operating Expenses | <u>36,354</u> |
| FY 2016 Fund Expenditures | \$323,905 |

This analysis assumes similar benefit costs as would apply to State employees. Future year expenditures reflect full salaries with annual increases and assume employee turnover as well as annual increases in ongoing operating expenses.

Currently, the Judiciary is absorbing administrative costs associated with this program using Judiciary personnel who have been reassigned to this task or have been asked to perform additional duties. The Judiciary advises that in order to properly administer the program, it requires the following positions: three accounting clerks, one accounting supervisor, one manager, and four clerks/support staff employees. Given that the bill requires an executive director for the corporation, this estimate includes the aforementioned employees except for the manager.

As previously stated, the Judiciary projects to spend \$8.5 million in fiscal 2015 for payments to attorneys for representation of indigent defendants at initial appearances. This estimate assumes that this is an ongoing financial obligation under current law and continues absent this bill. As such, this estimate does not include funding for attorney compensation, which would be included in the fund established under this bill. Thus, special fund revenues and expenditures increase significantly further reflecting the flow of these payments through the new special fund.

Although the bill indicates that investment earnings of the new special fund remain in the fund, the bill does not amend § 6-226 of the State Finance and Procurement Article to exempt the fund from existing law that requires all investment earnings and interest from special funds to accrue to the general fund. Thus, general fund revenues increase minimally from interest earned on the new special fund from fiscal 2016 through 2019.

GOCCP can administer the fund using existing budgeted resources.

The Office of Legislative Audits advises that it can comply with the bill's audit provisions using existing personnel and resources during its regular fiscal compliance audits of GOCCP and the Judiciary.

Additional Positions: The bill requires the corporation to "...provide staff and technical assistance to an attorney appointed to represent an indigent individual." However, the bill does not elaborate on what this staffing requirement entails.

Appointed attorneys are not supervised in the current program. Also, the program itself does not have intake workers; rather, attorneys work with court staff on duty for some of the paperwork-related and administrative functions. If the bill is interpreted as requiring this type of personnel, additional expenditures are incurred. *For illustrative purposes only*, the costs associated with an additional attorney supervisor in OPD beginning October 1, 2015 are \$98,516 in fiscal 2016 and at least \$128,000 annually thereafter.

Income/Employment Inquiries to DLLR and Comptroller: The bill authorizes the corporation to submit requests to DLLR for information regarding the employment status and income of applicants.

While the bill does not require that the corporation make these requests, DLLR advises that the authorization for requests presents some issues. According to the Unemployment Insurance Division of DLLR, the division is prohibited from granting online access to private entities. Because the corporation is not a unit or instrumentality of the State, it is a private entity.

Also, the bill states that the corporation may "...on request, obtain information without charge from a public record office or other unit of the State, county, or municipal corporation." DLLR advises that if this provision implies that DLLR cannot charge a fee to cover its expenses, then a federal compliance issue may arise. The division is completely federally funded through the U.S. Department of Labor. Federal law prohibits the use of federal funds for purposes other than administration of the State's unemployment insurance program. Noncompliance may result in the loss of administrative funds (\$60 million annually) and employers could lose approximately \$800 million in federal unemployment tax credits. Also, the division's system is unavailable from 6:00 p.m. until 6:00 a.m., Monday through Saturday, in order to process unemployment insurance benefits and tax operations.

To the extent that DLLR is even able to provide information, the cost of the manual system involved may be significant, but depends on the volume of requests received. Using OPD's annual client volume as a basis of the expected number of requests (approximately 140,000 to 160,000 clients annually), DLLR estimates that a manual system may cost approximately \$276,200 in fiscal 2016. However, the Department of Legislative Services advises that it should be noted that not every potential client under the program will warrant the need for a DLLR inquiry, and due to the 24/7 nature of initial appearances, such a request may be impractical in a significant number of cases. Also, given current waiver rates, the number of program clients may be significantly lower than DLLR's estimate.

Similar concerns may also apply to the Comptroller's Office.

Additional Comments: It is unclear how the budgetary provisions of the bill will be implemented, since GOCCP is the administrator of the new special fund, but the Judiciary must request an appropriation for the special fund.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): State Department of Assessments and Taxation; Governor's Office of Crime Control and Prevention; Comptroller's Office; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Maryland Association of Counties; Office of the Public Defender; State's Attorneys' Association; Department of Legislative Services

Fiscal Note History: First Reader - March 2, 2015
mel/kdm

Analysis by: Amy A. Devadas

Direct Inquiries to:
(410) 946-5510
(301) 970-5510