

NOV 07 2012

FILED

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8002

**ORDER SETTING HEARING DATE AND DEADLINE
FOR SUBMITTING WRITTEN COMMENTS ON THE
PETITION OF THE BOARD OF PUBLIC DEFENSE
TO EXTEND THE PUBLIC DEFENDER PORTION OF
THE LAWYER REGISTRATION FEE TO JUNE 30,
2015**

The Minnesota Board of Public Defense has filed a petition requesting the court to extend until June 30, 2015 the temporary Lawyer Registration fee increase authorized by our order filed November 4, 2009, and renewed by our order filed March 2, 2011. A copy of the petition is annexed to this order.

IT IS HEREBY ORDERED THAT:

1. A hearing will be held before this court to consider the petition of the Board of Public Defense to extend the public defender portion of the lawyer registration fee to June 30, 2015. The hearing will take place in Courtroom 300, Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King Boulevard, St. Paul, Minnesota, on January 15, 2013, commencing at 2:00 p.m.

2. Any person or organization desiring to make an oral presentation at the hearing in support of or in opposition to the petition of the Board of Public Defense shall file a request to make an oral presentation, along with fourteen copies of the material to be presented, with Bridget C. Gernander, Acting Clerk of Appellate Courts, 25 Rev. Dr.

Martin Luther King Jr. Boulevard, St. Paul, Minnesota 55155. The request and written materials must be received by 4:30 p.m. on January 7, 2013.

3. Any person or organization desiring to provide only written comments in support of or in opposition to the petition shall file fourteen copies with Bridget C. Gernander, Acting Clerk of Appellate Courts, 25 Rev. Dr. Martin Luther King Jr. Boulevard, St. Paul, Minnesota 55155. Written comments must be received by 4:30 p.m. on January 7, 2013.

Dated: November 7, 2012

BY THE COURT:



Lori S. Gildea
Chief Justice

OFFICE OF
APPELLATE COURTS

OCT 31 2012

FILED

No. ADM10-8002

**STATE OF MINNESOTA
IN SUPREME COURT**

In Re:

**Petition to Extend the Public Defender Portion of the
Attorney Registration Fee until June 30, 2015 So
Public Defenders Can Develop Technology Needed to
Perform Essential Functions**

PETITION OF MINNESOTA BOARD OF PUBLIC DEFENSE

Board of Public Defense
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No. ADM10-8002

**STATE OF MINNESOTA
IN SUPREME COURT**

In Re:

**Petition to Extend the Public Defender Portion of the
Attorney Registration Fee until June 30, 2015 So
Public Defenders Can Develop Technology Needed to
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PETITION OF MINNESOTA BOARD OF PUBLIC DEFENSE

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Public defense continues to find itself in a precarious position. Despite the efforts of the Board of Public Defense, the Minnesota State Bar Association, the Governor, the Legislature, and this Court:

- caseloads continue to exceed 170% of national and state standards;
- employer portions of health insurance will continue to increase;
- employee compensation has remained static; and,
- the Board does not have the technological resources needed to keep pace with prosecutors' rapid transition to all-electronic disclosure.

The Board shares the Court's concerns expressed in its decisions providing \$1.9 million per year from the Attorney Registration Fee to fund 23 staff attorney positions. The Board accepts that the Court and the lawyers of Minnesota should not have to use Registration Fee funds to provide services required by the Constitution. The Board is prepared to seek the resources it needs for staff attorneys from the executive and legislative branches, through the budget process.

Nevertheless, the Board does not expect to be able to get an appropriation sufficient to absorb the loss of staff funded by the Registration Fee, impending compensation cost increases, and the costs of accommodating prosecutors' move to electronic disclosure. Most importantly, the Board needs funding if it is to take advantage of the efficiencies that eCourt will make available.

eCourt will greatly augment the effectiveness and efficiency of the criminal justice system over the next decade and beyond. The Board fully supports the creation of eCourt. However, as explained here, the Board will not have the resources to follow the courts' and prosecutors' lead to a paperless justice system. Public defense is already overburdened and a source of delay in the courts. With its mix of full-time and part-time attorneys, its miniscule support staff, and its mandate to provide services in 87 counties, the Board needs assistance to provide the software, programming, and hardware to convert from paper to an electronic case file system. That is the purpose of this Petition.

I. Public Defense – The Continuing Crisis:

As the 50th anniversary of the landmark Gideon decision¹ approaches, Minnesota's justice system illustrates an urgent national problem: excessive public defender caseloads due to inadequate funding.²

In recent years, Supreme Courts around the country have variously granted relief to public defender systems, or have permitted litigation over excessive caseloads to move ahead.

Missouri and Iowa courts have granted systemic relief to public defenders.³ Systemic caseload

¹ Gideon. v. Wainwright, 372 U.S. 335 (1963).

² See generally The Constitution Project, *Justice Denied: America's Continued Neglect of Our Constitutional Right to Counsel* (2009), at <http://www.constitutionproject.org/pdf/139.pdf> (last visited August 17, 2012) and Justice Policy Institute, *System Overload: the Costs of Under-Resourcing Public Defense* (2011), at http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf.

³ State ex rel. Missouri Pub. Defender Comm'n v. Waters, SC91150, 2012 WL 3104427 (Mo. July 31, 2012)

litigation is moving forward in Michigan,⁴ Florida,⁵ and New York.⁶ In short, Minnesota is not unique in suffering a prolonged public defender underfunding emergency.

A. Minnesota public defenders' caseloads are too high.

The Board of Public Defense has set caseload standards in compliance with state statute.⁷ Following a weighted caseload study in 1991, the Board determined that the agency would adhere to caseload standards recognized by the American Bar Association (A.B.A.) since 1975, limiting one year's work for an attorney to:

- 150 felony cases, or
- 275 gross misdemeanor cases, or
- 400 misdemeanor cases, or
- 175 juvenile delinquency cases, or
- 80 CHIPS/TPR cases, or
- 200 other cases, or
- some proportional combined number of cases of these types.

To achieve proportionality the Board designed a case weighting system. Misdemeanors were given a single "case unit" weight while more severe felony cases were given a case unit weight of 2.66. In 2011 the Board re-evaluated its system of case unit multipliers, compared it to other statewide public defender systems, and found that the system is still a valid measurement of

(sustaining caseload caps) and *Simmons v. State Pub. Defender*, 791 N.W.2d 69 (Iowa 2010) (invalidating fee limits).

⁴ *Duncan v. State*, 488 Mich. 1011, 791 N.W.2d 713 (2010).

⁵ *State v. Pub. Defender, Eleventh Judicial Circuit*, 12 So. 3d 798 (Fla. Dist. Ct. App. 2009), *disapproved of by Johnson v. State*, 78 So. 3d 1305 (Fla. 2012)

⁶ *Hurrell-Harring v. State*, 905 N.Y.S.2d 334 (N.Y. App. Div. 2010).

⁷ Minn. Stat. 611.215, subd. 2(c)(2)(2012).

effort. For internal resource allocation, the Board in 2011 added the ability to weight more heavily the most severe felonies and to add weight to cases requiring extensive travel.

However, the State of Minnesota has not been able to fund the Board at a level anywhere close to the A.B.A. Standards. In FY 09, a budget shortfall led to the loss of 53 public defender positions, 15% of the statewide attorney staff. In FY 10 the budget shortfall led to the loss of 15 more attorney positions.

In the 2011 legislative session, state funding was partially restored so that 20 full-time equivalent (FTE) lawyer positions could be filled. The Board received temporary help from this Court, through the Attorney Fee Registration process, over a period of 4 years. The Board also received temporary funding through a federal Byrne grant—now exhausted—which funded 9 FTE attorney positions.

Still, based on 2011 calendar year data, Minnesota Public Defense operates on only 57% of the attorney staff component recommended by state and national standards. In June 2013, the Attorney Registration Fee revenue is due to stop, potentially causing the loss of 23 of the state's 367 assistant public defender positions.

B. Minnesota's public defense support staff component is too small.

To keep public defender workloads manageable, the U.S. Department of Justice has long recommended staff-to-attorney ratios based on support staff type and charge severity.⁸ Minnesota's staff support for public defenders falls well short of the DOJ guidelines and our own internal standards, as shown in Table 1:

⁸ U.S. Department of Justice, Bureau of Justice Assistance, Office of Justice Programs, *Keeping Defender Workloads Manageable 10* (2001) at <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf> (last visited August 18, 2012).

Staff-to-Attorney Ratios:

	DOJ recommended standard	Minnesota standard	Minnesota actual
• Paralegal	Felony	1:4	1:7
	Misdemeanor	1:5	1:7
	Juvenile	1:4	1:7
• Investigator	Felony	1:4	1:6
	Misdemeanor	1:6	1:6
	Juvenile	1:6	1:6
• Secretary	Felony	1:4	1:4
	Misdemeanor	1:6	1:4
	Juvenile	1:5	1:4

Table 1.

This understaffing will bottleneck public defenders' ability to participate in the otherwise efficient flow of information envisioned for eCourt. For example, eCourt planners describe one of the system's great advances as the ability "to view and work with the most up-to-date case documents from anywhere, even when someone else is viewing the case file"⁹ – an advantage lost if everyone in court has to wait for the public defender's already-overburdened staff to print out documents and make paper files.

Courtrooms grind to a halt when public defenders are unable to keep pace with the rest of the justice system. Court staff sit idle and taxpayer resources are wasted. Judge John Rodenberg in 2009 described this effect in his courtroom:

⁹ "Washington County District Court Prepares for Move to eFiling and eService for Civil and Family Cases", Minnesota Judicial Branch News Item, <http://www.mncourts.gov/default.aspx?page=NewsItemDisplay&item=56239&printFriendly=true> (last visited October 3, 2012).

“I and many others in the system just sit until a PD is available. We’re drawing pay and doing little or nothing. Whatever funds are being ‘saved’ by not paying an extra public defender are being wasted many times over on others in the system who depend upon PD availability in order to do their jobs.”¹⁰

eCourt’s accelerating effects and enhanced efficiencies can be fully realized if public defenders can keep pace. Public defenders will be unable to keep pace if they have to wait for their understaffed offices to create paper files while the rest of the system moves more rapidly with electronic disclosure.

C. Criminal litigation has become more complex and demands more time per case.

In the past 5 years, there have been large-scale salutary changes in the practice requirements for criminal defense attorneys. The U.S. Supreme Court has repeatedly enhanced the requirements for “effective assistance of counsel,” in Padilla,¹¹ Lafler,¹² and Frye.¹³ The National Academy of Science’s detailed report¹⁴ identifies dozens of areas where a responsible defense lawyer must take a harder look at “scientific” evidence.

Case preparation has increasingly required watching, or listening to, evidence in audio or video formats that formerly would have been reduced to writing. In addition to the interrogation tapes, advancing technology is causing a proliferation of victim interview videos, surveillance camera videos, and squad car videos.

All these developments undoubtedly make for a better quality of justice and more reliable fact-finding by the trial courts; but they are labor-intensive for the lawyers who are preparing the cases.

¹⁰ Email to Robert Sykora from Hon. John Rodenberg, June 16, 2009 (on file with authors)

¹¹ Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

¹² Lafler v. Cooper, 132 S. Ct. 1376 (2012).

¹³ Missouri v. Frye, 132 S. Ct. 1399 (2012).

¹⁴ Nat’l Research Council, *Strengthening Forensic Science in The United States: A Path Forward* (2009), at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> (last visited August 18, 2012).

II. Public Defense – Resources for Electronic Case Content Management System

A. Digital technologies are rapidly changing the practice of law for public defenders; these changes impact courtrooms

New technologies are dramatically changing the way public defenders practice law. Video, audio and digital photographic case material has become so ubiquitous that a client file no longer consists of a pile of papers; rather, it is a collection of electronic files, many needing specialized software to be played or viewed. Our lawyers need easy and rapid access to digital audio from police interrogations, digital video from squad car dashboard cameras, and countless varieties of retail and private security video. Providing an electronic case content management system will provide such access and, by integrating with eCourt, will leverage the justice system's upcoming investment in an all-electronic way of doing business.

The benefit to the entire criminal justice system has the potential to be enormous because the numbers are enormous. Every judge knows that Minnesota's criminal courtrooms are filled – overwhelmingly – with indigent people. Public defenders are appointed in 85 to 90 percent of all felony, gross misdemeanor and juvenile cases, and about sixty percent of all misdemeanors. These lawyers are integral to the effective administration of justice. Even small changes in the way they practice law can affect the entire system, beneficially or detrimentally. All criminal justice system partners will benefit when public defenders have the resources to be full participants in eCourt.

Electronic filing and serving of documents will provide greater efficiency and cost savings for the court. These benefits have already been realized in civil practice. The State Court Administrator's Office reports that the transition has been smooth for the civil bar over the past

year or so. However, several factors have and will keep public defense from realizing efficiencies brought on by electronic disclosure and e-court:

- **Chronic underfunding.** Public Defense has an established history of being both understaffed and overloaded.
- **Volume of cases opened.** Minnesota's public defenders opened well over three-quarters of a million cases over the past five calendar years; only about half that many cases were filed by civil practitioners during the same period.¹⁵
- **Staffing ratios.** Traditionally in private law firms in civil practice, multiple support staff people serve each lawyer; in public defense on average, a single support staff position serves many lawyers (see Table 1). A single computer Help Desk person struggles to meet the needs of everyone in the entire agency statewide.
- **Decentralization.** Public Defense must serve every courthouse. To meet this requirement, the agency's workforce consists of a decentralized patchwork of full- and part-time lawyers geographically distributed across the state. Though the agency is the state's largest provider of legal services (487 lawyers), its lawyers' offices are in literally hundreds of locations (26 full time defender offices and 100 part time offices).
- **Non-portable computer hardware.** The Board has provided its full-time lawyers and staff mostly with desktop computers, not the more costly mobile devices needed to effectively use electronic disclosure while in the courthouse.
- **Limited internet bandwidth in offices and courthouses.** A public defense law practice is heavily based in courthouses where wireless internet access is currently unavailable.

¹⁵ Public defenders opened 813,292 cases in calendar years 2007 through 2011. Major civil and major family court cases opened during that time numbered 438,236. See "Annual Reports of the Minnesota Judicial Branch", 2007 - 2011, viewed online at <http://www.mncourts.gov/?page=519>

While all of the Board's offices have internet connections, the connection speeds are designed for email and web browsing, not bulk file transfer.

- **Clients in poverty.** Public defender clients generally do not have access to computer equipment on which to privately view their case's electronic file material. This requires printing material, or using Board-owned computer equipment to show evidence in digital form.
- **Clients in jail.** Many public defender clients reside in jail. Jailers prohibit CD and DVD disks as contraband. What is at stake is the accused's ability to understand the charges being brought against him: to protect this fundamental right the Board must dedicate attorney and staff time and agency-owned equipment to provide clients with the ability to review electronic file materials.

The Minnesota judicial system's Odyssey File & Serve ("OFS") component of eCourt has deployed successfully in highly centralized, well-funded and well-staffed civil practice law firms. The Board now has the opportunity to make the same transition, but in the radically different environment of public defense. To become a fully functioning partner in eCourt, the Board must create an electronic case content management system that integrates with OFS. To do so, the Board needs funding assistance from this Court.

B. The Board seeks to work as a business partner with Minnesota's court system.

The Board seeks to integrate its criminal justice information system with OFS so that eCourt's full efficiencies can be realized. Until we create such integration, *ad hoc* exchange of material using OFS requires a sequence of repetitious manual steps.¹⁷ Such *ad hoc* use would have two significant problems for criminal law practitioners:

¹⁷ See Minnesota Judicial Branch, *Odyssey File and Serve Tips for Successful E-filing* at <https://tfs.tylerhost.net/Content/Docs/swf/Odyssey%20File%20and%20Serve%20II.swf> (last visited August 18,

1. **Efficiencies unrealized.** Sending or receiving a file only requires 6 or 7 on-screen steps each; however, with 150,000 public defense cases a year this requires about a million steps to send and another million steps to receive each collection of documents, converting a labor-intensive paper process into a labor-intensive electronic one; and
2. **File material lost.** Paper files are difficult to manage in a highly decentralized business like public defense, but at least they are physical objects. Electronic client files, without centralized management, can disappear in the blink of an eye. Missing and disaggregated client file content would reduce the quality of client representation and cause delays in both substitution of counsel and preparation for appeal.

If the Board has sufficient funding to build an electronic case content management system integrated with eCourt, it will streamline the work of public defenders by reducing manual processes and maintaining complete client files:

1. **Efficiencies realized.** When the Board builds its electronic case content management system and integrates it with eCourt, case material will be transferred and stored without case-by-case human intervention.¹⁸ Public defenders will access their system and pull up a case to view online all relevant documents.
2. **File material secured.** By storing all filed and served documents in one place -- the electronic case content management system -- the Board will be able to maintain contiguous client files.

2012) and Minnesota Judicial Branch, *E-file User Guide* at https://minnesota.tylerhost.net/docs/OFS_UserGuide_3116.pdf (last visited August 18, 2012).

¹⁸ Integrated solutions are available for prosecutors as well, though their multijurisdictional nature (87 county attorneys, about 300 city attorneys) makes design and funding of such an integration project more complicated.

3. **File material shared.** When multiple members of the defense team can view file contents whether or not they are in the same room, same building or the same city, the amount of time spent searching for a physical file will be eliminated and the efficiencies of team defense enhanced.

Within a week of learning that OFS was available and will become mandatory for electronic filing and serving in criminal cases, the Board posted a Request for Information on the State of Minnesota contract solicitation web site. The Board's goal is to locate a software vendor who can provide both integration with OFS and the transition to all-online client files for public defenders.

C. The Board Plans to Develop Technology to Perform Essential Functions in an Electronic Criminal Justice System.

The Board is hoping that by developing this system it can take full advantage of electronic disclosure and the potential that eCourt will provide. Investment in an all-online system will require infrastructure and human resources enhancements in the areas outlined below.

1. **Increase internet access bandwidth.** With our agency's prolonged funding crisis, we have been careful only to pay for what we need. When purchasing internet bandwidth for our offices, we have accordingly sized those connections to meet the needs of those who use email, Westlaw, and web access. For our 26 full-time offices, we must increase bandwidth to allow electronic disclosure. We will add wireless networks to our offices, allowing both full and part time lawyers greater ability to collaborate, utilize staff resources and participate in training. These improvements will result in both one-time and ongoing costs.
2. **Automatically retrieve and retain filed and served material.** *Ad hoc* retrieval of electronically filed and served case material results in *ad hoc* decisions about where to

store it; this causes disaggregated file contents, confusion, legal errors and delays.

Automated retrieval and storage by an electronic case content management system is the only effective solution. Volume will be great: based on the Board's recent work with the Olmsted County Attorney to measure the volume of electronic disclosure, the Board projects 500 gigabytes of new disclosure monthly statewide, with retention adding up to 12 terabytes of retained and backed-up file material within two years. Management of such significant volume of data requires an electronic case content management system.

3. Case content management system that can accommodate all-online file materials.

The Board in 2008 developed a database that counts cases and clients. The database is called Gideon; it is used in nine districts statewide. Gideon allows managers to balance the case workload between lawyers, and helps them keep the numbers of assigned lawyer FTEs proportional with caseloads between counties and between districts. It allows office staff fielding phone calls to tell clients and court staff which lawyer is assigned to which case. However, Gideon is only a counting system, correspondence generator and case-pointer tool; it is not an all-online case content management tool. The District 4 public defense office is using a new, all-online content management system. We will determine whether the Hennepin County system can be modified to pull content from courts and exchange electronic disclosure with prosecutors, or whether another third-party vendor's system is better, or if it makes more sense to modify Gideon to serve as an all-electronic content management system.

4. Mobile devices that will allow attorneys on-the-go to view client file contents.

To stretch our limited dollars, the Board to-date has invested mostly in less-expensive and easier-to-maintain desktop computers. These desktop devices are useless for the highly

mobile lawyer in the courthouse or jail who needs to view the electronic disclosure-created electronic file. Mobile devices like iPads and Ultrabooks may meet the need.

5. **Easy method to remotely connect to secured databases like MNCIS and the Board's own case & file management system.** Both full time and part time public defenders with mobile devices need a solid and reliable way to connect to their client's online material. We will deploy new "virtual desktop" technology to give mobile users the same set of resources that have long been available on desktop computers.
6. **Software and hardware development and expansion.** The Board will retain services to develop, install and configure the technology to participate effectively in a criminal justice system that is rapidly moving toward a paperless, electronic way of doing business.
7. **Training over 700 employees statewide in use of the new technologies.** While the court provides training for the manual, *ad hoc* process of e-filing and e-serving, public defenders statewide will need customized training to learn how to use the all-electronic case and file system, mobile devices, and virtual desktop technology.

III. Conclusion: the Board must transition to an all-electronic case content management system without sacrificing the staff it needs to cover the courts

The Court has the power to direct Attorney Fee Registration revenue to enable the Board of Public Defense to develop a case content management system that will leverage all of the investments made by prosecutors and the court with the e-court initiative. The Court should use this power to ensure that public defense can increase its technological capacity without incurring disastrous staff losses.

In Order Temporarily Increasing Lawyer Registration Fees (C-1-81-1206, filed November 4, 2009) the Court determined that a fee increase to alleviate the “suffering” of “the court system as a whole” caused by Minnesota’s under-funding of public defense, was within the inherent authority of the Supreme Court. The Court stated that “fees like these are sometimes ‘necessary to maintain the integrity and efficiency of the judicial system.’”

The transition to an all-electronic way of doing business is a watershed moment in the history of Minnesota’s system of justice. In dozens of ways this transition will make the courts more cost-effective. Delay will be reduced. Transmission and storage of millions of documents a year will be simpler and cheaper. Parties will be able to share information more easily than ever before.

To make this vision a reality, public defense — the largest user of Minnesota’s courts — has to be able to get on board. Public defenders have to be able to come to court with their e-files in mobile devices, have to be able to send and receive discovery electronically, have to be able to share information not only with judges and lawyers, but with their clients. The conversion of hundreds of public attorneys and staff from desk-top to mobile systems, with the necessary training and tech support, will greatly benefit Minnesota’s conversion to eCourt. The whole justice system will benefit if the Board of Public Defense can be a full participant. If, however, the Board is forced to sacrifice attorney positions to achieve this enormous upgrade of technology, the outcome will be problematic. Minnesota’s Office of the Legislative Auditor in its most recent evaluation highlighted the problems caused by an under-resourced public defense

system, including in that evaluation the observations of District Court judges.²⁰ The judges told the Auditors that:

- 2002-09 public defender workload has become “Somewhat or much higher: 85%” (77% of county prosecutors agreed.)²¹
- Public defenders do not spend enough time with their clients: 60%.²²
- Public defenders are a moderate or significant cause of delay: 73%.²³

The number of public defenders the Board must put in the courtroom to get the work done is no different whether those lawyers are carrying paper files or accessing electronic ones. A defender who has to cover 3 or 4 “wifi courtrooms” with a laptop is no less a problem than a defender covering 3 or 4 courtrooms with a briefcase full of paper files. The Board needs staffing and technology.

With high caseloads, a small support staff, and inadequate employee compensation, Minnesota’s public defense system just barely has its nose above water. The Board will vigorously advocate at the Capitol for the staff positions now funded by the Attorney Registration Fee. The Board agrees that this fee should not be the permanent source of its daily operating budget—the Governor and the Legislature should be responsible for that. Similarly the Board will vigorously advocate at the Capitol for the appropriate resources for its salary and health insurance costs.

However, the Board will not be able to meet these needs and also absorb the cost of creating a paperless system during the next biennium. The Board needs the revenue from the Attorney

²⁰ State of Minnesota, Office of the Legislative Auditor, Program Evaluation Division, *Evaluation Report: Public Defender System* (2010), at <http://www.auditor.leg.state.mn.us/ped/pedrep/pubdef.pdf> (last visited August 18, 2012).

²¹ *Id.* at 37.

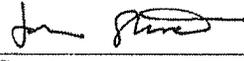
²² *Id.* at 43.

²³ *Id.* at 48.

Registration Fee during these next two years so it can carry out its Constitutional functions while also keeping pace with prosecutors and courts as they move to an all-electronic way of doing business. The Board respectfully asks this Court to extend the temporary Attorney Registration Fee increase for two more years to enable this successful transition.

Respectfully submitted,
BOARD OF PUBLIC DEFENSE

Dated: October 31, 2012

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