State of Connecticut

DIVISION OF PUBLIC DEFENDER SERVICES

OFFICE OF CHIEF PUBLIC DEFENDER
30 TRINITY STREET - 4th Floor
HARTFORD, CONNECTICUT 06106
(860) 509-6405 Telephone
(860) 509-6495 Fax

DEBORAH Del PRETE SULLIVAN
LEGAL COUNSEL/
EXECUTIVE ASSISTANT PUBLIC DEFENDER
deborah.d.sullivan@jud.ct.gov

Testimony of Deborah Del Prete Sullivan, Legal Counsel/Executive Assistant Public Defender Office of Chief Public Defender

Raised Bill No. 38
An Act Concerning the Freedom of Information Act and Division of Public Defender Services

Government, Administration and Elections Committee Public Hearing - March 7, 2011

The Office of Chief Public Defender supports passage of *Raised Bill No. 38, An Act Concerning the Freedom of Information Act and Division of Public Defender Services.* The proposal is made in light of a recent decision of the Freedom of Information Commission which would require that privileged correspondence between Division clients and the Office of Chief Public Defender in regard to a Special Public Defender be made public and provided to another Division client, currently incarcerated in Maine. The Division maintains as it did throughout the freedom of information proceedings that letters written by Division clients to the Office of Chief Public Defender are privileged and as such are not disclosable to the public. The Freedom of Information Commission determined that such letters were not privileged as the Division would not voluntarily disclose them to the FOI hearing officer. As a result, the Division took an administrative appeal to the New Britain Judicial District which is currently pending.

The bill clarifies existing statutes which clearly establish the Division of Public Defender Services as within the judicial branch of government. The bill would not exempt disclosure of information pertaining to the administrative function of the Division. It would clearly exempt disclosure of any information, including the contents of the attorney-client file, in regard to the legal representation of persons the Division is appointed to.

Currently, the Division of Criminal Justice enjoys a statutory exemption which provides for public disclosure only as to its administrative function. Pursuant to C.G.S. §1-201, the Division of Criminal Justice, which employs prosecutors, is deemed not to be a state agency except as to its administrative functions. A prosecutor's file in a case in which he/she either represents the state of Connecticut in a criminal proceeding or the Commissioner of Correction in a Habeas proceeding are not subject to public disclosure.

> *For the purposes of subdivision (1) of section 1-200, the Division of Criminal Justice shall not be deemed to be a public agency except in respect to its administrative functions.*

Sec. 1-201. Division of Criminal Justice deemed not to be public agency, when.

To assure the integrity of the process and compliance with existing privileges and caselaw, this same protection against public disclosure should exist for any private person who receives court appointed legal counsel. The mission of the Division is to provide legal representation to indigent persons accused of committing a criminal offense. This proposal would exempt from disclosure the contents of a client's attorney-client files from public disclosure. The attorney client privilege protects those communications, oral or written, between the attorney and his/her client. Any exemption for privilege should be consistent with the privilege as it exists for persons who are able to financially afford private counsel. The attorney-client privilege exists for all persons regardless of his/her financial circumstances. Only the client can waive the privilege.

The proposal would also exempt the contents of an attorney client file which would be confidential. Although the exemptions listed list "communications privileged by the attorney-client relationship", the statutes are silent on confidential records and documents such as might be contained within an attorney client file. See C.G.S. §1-210b(10). Attorneys admitted to the practice of law must adhere to the Connecticut Professional Rules of Conduct. Rule 1.6, Confidentiality, specifically requires that confidentiality must be maintained within an attorney-client relationship unless specific circumstances exist which would warrant an exception. No such exception exists pursuant to the Rules to permit or require public disclosure of the client letters in this case. Confidentiality protects against the disclosure of the contents of an attorney's investigation including the names and addresses of witnesses interviewed, medical or psychiatric professionals retained or interviewed and any other information obtained in order to prepare a defense for the case. Disclosure of such without the express authorization of the client would violate this Rule of Confidentiality and subject the

attorney to disciplinary action by way of a grievance or a civil action. In fact the Commentary to Rule 1.6 specifically provides:

> *"The confidentiality Rule, for example, applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source."*

Commentary - Rule 1.6, Confidentiality of Information, Rules of Professional Conduct.

The language is proposed in light of a freedom of information request made to the Division of Public Defender Services by Thomas May, a Connecticut inmate currently incarcerated in Maine. The current statutes provide an exemption from disclosure to the public for information considered to be privileged. However, in this case, Mr. May sought complaints against his court appointed counsel. The form of these complaints however, were in the form of correspondence written by other Division of Public Defender clients who were represented by a particular Special Public Defender. The correspondence from other clients were addressed to the Office of Chief Public Defender and usually answered by Deputy Chief Public Defender Brian Carlow. The correspondence is directly related to the cases which the Special Public Defender was appointed in. When responding, Attorney Carlow regarded and treated the Division clients' letters as privileged correspondence. He would respond to the Division client after discussion with the Special Public Defender and would share the letter received and the response with the Special Public Defender. Mr. May's request was denied because it sought attorney client correspondence from other clients which is privileged. Mr. May filed a complaint to the Freedom of Information Commission and a hearing was held. (FIC #2009-394)

At no time was the Division ordered to turn over these other client letters to the hearing officer. The decision however, determined that the Division did not establish that the letters were privileged and therefore determined that the letters were not privileged. The clients whose privileged letters are at issue are not parties and were never notified about the proceeding.

As a result of the decision, the Division has filed an administrative appeal to protect the contents of the attorney client files of the indigent clients it represents. (See *Dennis McDonough v. FOIC, et al, CV-10-6006196-S* and *Division of Public Defender, et al v. FOIC, et al, CV-10-6006148-S* pending at the New Britain Judicial District.)

The proposal would also add exempt disclosure of the personnel and medical files of employees of the Division of Public Defender Services as was adopted during the 2010 legislative session exempting such files of employees of the Department of Correction and the Department of Mental Health and Addiction Services.

Lastly, the proposal would exempt payment of any fee required pursuant to C.G.S. §1-212 for employees of the Division of Public Defender Services which are obtained in performance of their duties.

The Office of Chief Public Defender respectfully requests that this legislation be supported and thanks the Committee for raising this bill for a public hearing.