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December 9, 2024

Honorable Diane T. Capehart
Senator
Chairperson Committee on Rules and Judiciary
Legislature of the Virgin Islands
Capitol Building
P.O. Box 1690
St. Thomas, VI 00804

Via Email: dcapohart@legvi.org

Re: Testimony on Bill No. 35-0336 - *Office of Conflict Counsel*
9:30 am, Thursday, December 12, 2024

Dear Honorable Senator Capehart:

I am writing on behalf of the Office of the Territorial Public Defender (OTPD) to express our position on Bill No. 35-0336 (the “Bill”). The Bill, amends Title 5, Virgin Islands Code, Subtitle 3, Part I to establish the Office of Conflict Counsel, grant personal immunity to those providing legal services to indigent defendants *and non-indigent peace officers*, and appropriates funds for the establishment of the Office of Conflict Counsel. **Bill Number 35-0336** is entitled: An Act amending title 5 Virgin Islands Code, subtitle 3, part I by establishing the Office of Conflict Counsel, granting personal immunity to individuals providing

legal representation or services to indigent defendants, and making an appropriation to establish the Office of Conflict Counsel.

Testimony Regarding Bill No. 35-0336

Chairperson, **Members of the Committee on Rules and Judiciary**, and distinguished guests, thank you for the opportunity to submit this testimony on BILL No. 35-0336, which proposes amendments to Title 5 of the Virgin Islands Code. These amendments create and fund the Office of Conflict Counsel, as well as providing immunity for attorneys and staff defending the indigent.

The Office of the Territorial Public Defender (OTPD) has reviewed Bill No. 35-0336 and maintains a neutral position on some of the suggested changes. This bill proposes amendments to Title 5 of the Virgin Islands Code and aims to establish the Office of Conflict Counsel to provide legal representation in cases where OTPD faces a conflict of interest. Additionally, the bill includes provisions granting personal immunity to attorneys and staff offering legal services to indigent defendants and for those attorneys personally “selected” by peace officers involved in line-of-duty offenses.

The Bill addresses the growing need for competent, impartial legal counsel for individuals charged with crimes, ensuring they receive fair representation when the OTPD cannot act due to such conflicts.

The Office of Conflict Counsel will provide legal representation for indigent defendants in cases where the Office of the Territorial Public Defender (OTPD) faces a conflict of interest. OTPD attorneys – like all attorneys in the Territory – are bound by the V.I. Rules of Professional Conduct, as propounded by our Supreme Court. The V.I. Rules of Professional Conduct require attorneys to withdraw from representation when there is a disabling conflict of interest.

It has been the custom and practice in the Superior Court to distribute OTPD conflict cases to private attorneys on the indigent appointment panel. With the creation and funding of the Office of Conflict Counsel, most of these conflicted matters will now go to one office. This type of conflict office is successfully used in many jurisdictions across the US, and the Bill addresses a growing need for competent, impartial legal counsel for individuals charged with crimes, ensuring they receive fair representation when the OTPD cannot act due to conflicts.

A. Creation Of The Office Of Conflict Counsel

The Office of Conflict Counsel was initiated in 2022 by order of the Virgin Islands Supreme Court (SCT-Prom-2022-0002) to assist in providing quality representation to indigent adults and juveniles who qualify for appointed counsel under the Sixth Amendment to the United States Constitution, the Revised Organic Act of 1954, and Virgin Islands law.

B. Process for Appointment of Conflict Counsel

While the Office of the Territorial Public Defender initially represents every individual at their advice of rights hearing (unless the person has private counsel who appears with them), the Office of Conflict Counsel is appointed when there is a conflict of interest involving a current or former client, a witness, or in cases involving one or more co-defendants. For example, a conflict of interest may arise when the Office of the Territorial Public Defender has previously represented a client and then is appointed to represent another client in what initially appears to be an unrelated matter. If the evidence reveals that the former client is a witness in the second client's case and has made a statement directly implicating the second client, a conflict of interest exists.

Specifically, Rule 211.1.7 of the Virgin Islands Rules of Professional Conduct regarding current clients and conflicts of interests. Rule 211.1.7 states in relevant part that:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to

another client, a former client or a third person or by a personal interest of the lawyer.

[V.I.S. Ct. R. Rule 211.1.7](#)

Importantly, the duties of loyalty and confidentiality to the former client continue even after the representation of the former client has ended. *See* Virgin Islands Rules of Professional Conduct Rule 211.1.9(c), which provides, as follows:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[V.I.S. Ct. R. Rule 211.1.9](#)

In other words, if the Office of the Territorial Public Defender previously represented Client A and is now appointed to represent Client B, OTPD cannot use information acquired during its representation of Client A to Client A's disadvantage and to the benefit of Client B, or reveal information acquired during its representation of Client A unless the use or revelation of the information is permitted or required by the Virgin Islands Rules of Professional Conduct or

unless the use of the information is authorized because the information has become generally known.

Although it may seem that the Office of the Territorial Public Defender and the Office of Conflict Counsel are inherently at odds with each other, this is not the case. It is anticipated that will OCC will provide quality zealous representation for the persons appointed to their Office.

The creation of the Office of Conflict Counsel does not affect the work of the OTPD nor the caseload. The Office of Conflict Counsel will only be assigned to cases when the Court determines that OTPD is conflicted, as happens presently. Currently, the **OTPD handles ninety percent (90%) of indigent criminal cases.**

C. Needless Redundancy of Section 3503a(b)(3)(c)

Section 3503a(b)(3)(c) of Bill 35-0336 seeks to amend chapter 302, supchapter I, Title 5 section 3524 by adding subsections (b) through (e). The proposed language of 3503a(b)(3)(c) lays out a process for how OTPD attorneys should file their conflict motions – even making requirements for the contents of such motions. These matters are already governed by the Rules of Professional Conduct. The current rules already provide clear guidelines for attorneys to follow when filing conflict motions, including the procedures and necessary content.

Therefore, the proposed legislative intervention appears unnecessary, as it duplicates existing legal protocols. The judiciary, as the body responsible for overseeing such matters, already has mechanisms in place to address conflicts of interest in a manner consistent with professional ethics and legal standards. As such, the bill's provision in **Section 3503a(b)(3)(c)** represents an overreach into the judiciary's domain and could potentially complicate an otherwise efficient process.

D. Immunity for Attorneys Defending Indigent Clients

A critical aspect of Bill No. 35-0336 is its proposal to grant immunity to attorneys who defend indigent clients in the Virgin Islands. This immunity is similar to provisions found in other U.S. jurisdictions, where public defenders and court-appointed attorneys are granted statutory or judicial immunity for actions taken within the scope of their duties. Such protections allow these attorneys to focus on providing competent legal representation without the fear of personal liability for professional negligence or malpractice.

Indeed, many states have enacted statutory or judicial immunity provisions for public defenders and court-appointed attorneys defending indigent clients in criminal matters. Fifteen (15) U.S. jurisdictions (fourteen (14) states and the

federal system) that have granted immunity to public defenders or court-appointed attorneys:¹

This bill is a positive step in ensuring competent legal representation for indigent defendants when conflicts of interest arise, however, there are provisions of the bill as stated that the OTPD disagrees with. The ultimate goal should be to create a fair and efficient system for indigent defense, free from unnecessary


¹ Here are 15 U.S. jurisdictions (14 states and the federal system) that have granted immunity to public defenders or court-appointed attorneys: 1. **Federal System** – Absolute immunity for public defenders in criminal cases (*Imbler v. Pachtman*, 424 U.S. 409, 1976). 2. **California** – **Cal. Gov't Code § 821.6** provides statutory immunity for public defenders in the course of performing their official duties. 3. **Florida** – *Knight v. Merhige*, 824 F. Supp. 941 (M.D. Fla. 1993) holds that public defenders are immune from civil liability in performing their legal duties. 4. **New York** – *Griffin v. Strong*, 983 F.2d 771 (2d Cir. 1992) and *Bernard v. United States*, 25 F.3d 98 (2d Cir. 1994) grant judicial immunity to public defenders. 5. **Texas** – **Tex. Gov't Code § 71.051** grants immunity to public defenders. 6. **Pennsylvania** – **42 Pa.C.S. § 8532** provides immunity for public employees, including public defenders. 7. **Michigan** – Judicial immunity for public defenders in *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982). 8. **Ohio** – **Ohio Rev. Code Ann. § 2744.03** grants immunity to public defenders and other public employees. 9. **Massachusetts** – Judicial immunity for public defenders in *Gagne v. Gagne*, 220 F. Supp. 2d 6 (D. Mass. 2002). 10. **Georgia** – Public defenders in Georgia are granted immunity in *Barnes v. Tesar*, 893 F.2d 1071 (11th Cir. 1990). 11. **Colorado** – **Colo. Rev. Stat. § 13-21-116** provides statutory immunity for public defenders. 12. **Oregon** – *Fey v. Greenberg*, 298 Or. 785 (1985) grants judicial immunity to court-appointed attorneys. 13. **Louisiana** – Judicial immunity for public defenders in *Schaefer v. Stevens*, 52 F.3d 457 (5th Cir. 1995). 14. **Washington** – **Wash. Rev. Code § 4.92.070** provides statutory immunity for public defenders. 15. **Virgin Islands** – Bill No. 35-0336 proposes immunity for attorneys providing legal services under the statute.

delays or conflicts. This can be achieved through ongoing transparency and a strong commitment to ethical standards.

Thank you for the opportunity to provide this testimony. We remain committed to collaborating on revisions that ensure the Bill best serves indigent defendants while maintaining legal integrity.

Should you require further clarification or have any questions, please feel free to contact me.

Thank you kindly.



Julie Smith Todman, Esq.
Chief Territorial Public Defender