

The Virginia Indigent Defense Commission

Commission Meeting
1604 Santa Rosa Road, Suite 200
Richmond VA 23229
June 11, 2015

Chair, Judge Rosenblatt called the meeting to order at 11:15 am. Other Commission members present were Judge Hanson, Steve Benjamin, Karl Hade, Guy Horsley, David Walker, Carmen Williams, Delegate Minchew, and Kristen Howard. Members not present were Kristi Wooten, Tom Chaffe, Professor Douglass, and Senator Stuart. Administrative staff in attendance included Executive Director, David Johnson; Deputy Director, Maria Jankowski; and Administrative Assistant, Diane Pearson.

Quorum requirements have been met.

Judge Rosenblatt welcomed Guy Horsley who is our newest Commission member. We have another new member who is not here today, Senator Stuart who was a member of the Commission previously and is now the designee for Senator Obenshain who is an appointment of the Senate Courts Committee.

The first order of business is to approve the agenda and minutes.

Mr. Benjamin made a motion approving the agenda and minutes. Judge Hanson seconded the motion. The motion carried.

Judge Rosenblatt recognized John Cobb who is the Public Defender in Petersburg and will be retiring the end of this month.

Mr. Johnson presented Mr. Cobb with a plaque for his twenty six years of service with twenty years as a public defender. The Petersburg office has had the lowest turnover of employees in our system for the last couple decades. Mr. Johnson thanked Mr. Cobb for his dedicated service with the Indigent Defense Commission.

The next item on the agenda is committee assignments.

Judge Hanson said the Executive Committee met this morning to consider the Chair, Vice Chair and Committee assignments for the next fiscal year.

The Committee was advised that Judge Rosenblatt was willing to continue to serve as Chair. Judge Hanson nominated Judge Rosenblatt as Chair of the Virginia Indigent Commission and asked if there were any other nominations for Chair. There were none. Mr. Walker seconded the motion. The motion carried.

Judge Hanson said the Committee was also advised that Professor John Douglass is willing to serve as Vice Chair. He nominated John Douglass as Vice Chair and asked if there were any other nominations. There were none. Mr. Walker seconded the motion. The motion carried.

Finally, the Executive Committee reviewed the proposed slate of Committee assignments and Chairs. Judge Hanson moved that the Commission approve the Committee assignments and Chairs as outlined in the meeting materials. Mr. Walker seconded the motion. The motion carried.

The next item on the agenda is a position reallocation.

Mr. Johnson said the position is one that our Norfolk office had frozen and we would now like to move it effective July 1st to the Richmond office. Both Public Defenders are on board with it. It would just require Commission approval to reallocate the position.

Judge Hanson made a motion to reallocate the Norfolk position to the Richmond office. Mr. Hade seconded the motion. The motion carried.

The next order of business is the budget.

Delegate Minchew arrived.

Ms. Jankowski said the proposed FY16 budget is in the meeting materials. There are several items that have been reviewed by the Budget Committee. The Budget Committee voted to recommend those items to the full Commission. The first is the CMS Audit and is \$66,184. This is our case management system audit and is a VITA mandate we are required to pay.

The next item is three part-time sentencing advocate positions. We have three offices that do not have a sentencing advocate. The cost associated with hiring a part time sentencing advocate in the remaining three offices is \$75,855. Those offices are Bedford, Petersburg, and Pulaski.

For those of you who do not know what a sentencing advocate does, they are a valuable resource, a conduit in the community and offer all types of services for our clients.

There was discussion regarding sentencing advocates.

The next item is the two percent increase for the permanent part-time employees. We have eighteen part-time employees. When the appropriation act passed and the state gave raises to state employees they specifically excluded part-time employees. The cost to extend the two percent raise to them is \$10,587.

Ms. Jankowski said that she and Mr. Johnson met with DPB (Department of Planning and Budget). They are fully supportive of all of these budgetary items.

The last item is to reclassify the Petersburg Investigator I position to an Investigator II. The Petersburg office currently has one investigator and the largest lawyer to investigator ratio for an Investigator I. The cost for this is \$6,664.

These are recommendations from the Budget Committee.

Mr. Walker moved to accept the Budget Committee recommendations to the FY16 budget; the CMS Audit, the Part-Time Sentencing Advocate positions in Bedford, Petersburg, and Pulaski, the reclassification of the Investigator I to II in Petersburg, and the two percent increase for permanent Part-Time employees. Mr. Horsley seconded the motion. The motion carried.

The next proposed addition to the FY16 budget is to reclassify seven senior public defenders to deputies.

Mr. Johnson said that some of you might recall a few years ago we had secretaries in several offices that functioned as office managers but were not compensated for it. The Commission corrected that by paying them for what they do. Of our twenty nine public defender offices all have deputies except for seven offices. They have a senior assistant. They function as deputies but are not compensated as deputies.

Ms. Jankowski said it would be an ongoing cost of \$70,907. She clarified that this is not adding a new position to any of these offices. This is taking the senior position and reclassifying it as a deputy position. For these seven positions, to move up to that next salary range is approximately \$10,000 per position.

The seven offices are: Bedford, Danville, Franklin, Martinsville, Petersburg, Pulaski, and Suffolk.

There was discussion regarding the seven offices and the necessity of having a deputy in every office.

Ms. Howard made a motion to reclassify the senior public defender positions to deputy public defender positions in the seven offices. Ms. Williams seconded the motion. The motion carried with one nay vote.

The next item in the budget is prepayment of rent.

Mr. Johnson said that it is a little different this year. In the beginning of the year the concern was that state revenues would be low, the message was this could be a really bad year. At that time we did some things to try to be proactive, we froze some positions and were conservative with spending. To our surprise state revenues came in higher so we moved forward on a number of overdue items. We have some IT projects we have put off and some badly needed furniture. Virginia Correctional Enterprises is over loaded with orders from several state agencies and our furniture might not be delivered until the beginning of the new fiscal year which means we cannot pay for it with FY15 monies.

We have built into the budget the prepayment of rent every year. We would like the flexibility that if we cannot pay for the furniture or the IT items by the end of the year, we would prepay additional rent. That will help us going into next year when we will have to pay for these things.

Ms. Jankowski said that the FY15 end of the year projections has a line item for prepaying five months of rent but it could be greater.

Complicating this, the cutoff for FY15 is June 26th now that we have moved to the new cardinal system as opposed to the July date.

There was discussion regarding prepaying rent.

Mr. Benjamin moved that the Executive Director be authorized to advance such amounts of rent that are reasonable as he feels appropriate. Mr. Walker seconded the motion. The motion carried.

Judge Hanson made a motion to approve the FY16 budget with the addition of the deputies. Mr. Horsley seconded the motion. The motion carried.

Ms. Jankowski said that the deficit acknowledgment form in the meeting materials must be signed by the Executive Director every year and it is our obligation to give each member of the Commission a copy. This form states that we do not carry any debt.

The next item on the agenda is the two percent raise.

Ms. Jankowski said that when the Appropriation Act passed it was determined that the state was going to give employees a two percent raise. The Appropriation Act comes with a caveat for independent agencies with supervisory boards; the board must certify to the Department of Human Resources that the employees of the agency meet expectations on their performance evaluation. Everyone in our agency who did not meet expectations is either no longer with us or we have documentation that they have improved to the level of meets expectations.

Pursuant to review by the Human Resources Director all of the employees in the Indigent Defense Commission, including Mr. Johnson if the Commission agrees, meet expectations.

Mr. Johnson added that we have preached to the public defenders that when the annual performance evaluations come up there should be no surprises. If at that time there are people who are not performing, they should no longer be with the agency.

There was discussion regarding performance evaluations.

Judge Hanson moved that the Commission certifies to the Department of Human Resources Management that all employees of the Virginia Indigent Defense Commission are performing at the level of at least meets expectations. This rating is comparable to that of contributor. Mr. Horsley seconded the motion. The motion carried.

The next item on the agenda is the discovery rules comment.

Ms. Jankowski said there is a draft letter in the meeting materials that was emailed on Monday for your review. We provided the Commission with the full report to the Supreme Court at the last meeting. It was understood that it was the Commission's opinion that the public comment be from the Commission not from staff or Mr. Johnson.

She indicated that the draft was put together by staff with the assistance of Bonnie Hoffman who served on the committee, Doug Ramseur who also served on the committee and Professor John Douglass who served both on the committee and as you know, also serves on the Commission.

Kristi Wooten could not be here today but responded via email and attached an article that articulates her position. The article generally supports the changes but points out some of the items of concern.

Ms. Jankowski noted that Professor Douglass was very helpful and added the part that referenced the security of witnesses and sensitive information.

Ms. Jankowski added that based on her conversations with Bonnie Hoffman in our Leesburg office and Doug Ramseur our Central Capital Defender that while they appreciate some of the concerns raised in the article that Ms. Wooten forwarded, they feel strongly that we are not going to see changes unless we see it as a collective change.

Mr. Benjamin noted first that there must always be compromise and acknowledged that nothing will ever be perfect and that he agreed we should all be unified in the final product.

Secondly, he stated that we all know that the criminal justice system is not perfect, it has made mistakes, it has convicted innocent people, it has missed the opportunity to apprehend and convict guilty people and as much as we improve the system there will always be flaws. The system is driven by humans and there will always be human error. There will always be prosecutorial misconduct, police misconduct, forensic fraud, mistakes, we will always have that. The defense lawyer is the final, safety net so to speak. Often that burden falls squarely on the shoulders of the public defenders. It is the defense lawyer who is the final safety net against human error that could cause an innocent person to be convicted. And so the problem with Virginia's limited discovery rules is that it has never provided defense lawyers access to the information that is essential for an accurate determination of the facts. A witness just by virtue of being called by the prosecution is not necessarily a truthful witness or an accurate witness. The prosecution will believe that witness but will not necessarily have the opportunity to thoroughly investigate that witness nor are they particularly motivated to do so because a witness promotes their prosecution. Instead the system places that burden on the defense attorney. The defense attorney's job is to scrutinize all of the evidence introduced against their client. Presently they do not have the means to do this because they are not entitled to the identity of the witnesses, they are not provided with and are not entitled to the prior statements that the witness has given, and there is nothing they can investigate. At trial it is too late. Because I have done it a long time, I have volumes of anecdotal information about prosecution witnesses getting on the stand and just outright lying. But by then you cannot correct when you are confronted with it for the first time at trial, and you have no way of investigating.

He continued: At present the best you can do is to ask for a recess, get on the phone or use our precious twenty one days to investigate. Going back and asking for a new trial on newly discovered evidence is another difficult situation. All of this is a way of saying that the system benefits by anything that provides information, facts don't belong to one side or the other, they belong to us all. We should all be able to get the facts on the table so we can argue about what they mean, what inferences should be drawn to the jury. I'd like to add a sentence to our letter here. The reason that we care so much about better access to information is so we can better ensure accurate results. That's the reason, that's what it is all about, to better ensure accurate results.

Mr. Benjamin suggested to add at the beginning of the second paragraph, our theme, and it would be something like this. "Nowhere in the justice system does the accurate determination of the facts matter more than where a person's life or liberty is at risk or at jeopardy." And then you can speak of the limitations. And I would say "presently in the Commonwealth of Virginia a person accused of a crime has only limited access to the information that will be submitted to the ultimate trier of fact." This is in the second paragraph in the current first sentence. I would have it read. "Presently in the Commonwealth of Virginia a person accused of a crime has only limited access to the information that will be submitted to the trier of facts." That could be improved but that's my suggestion. You can keep the rest of it I just wanted to keep the goal and principle out front.

The second page and this is just nitpicking, fine tuning. On the second line of the first full paragraph after the word and, I would insert inaccuracies, risks, and the inefficiencies created.

Same paragraph, the last sentence, to better criminal investigations, I don't know if you need the word criminal. I would say to better investigations of the facts, better advocacy, because the adversarial system is a fact finding mechanism that's why I keep emphasizing determination of the facts, investigation of the facts.

There was discussion regarding the fact that there is virtually no discovery for criminal defense.

Mr. Johnson said the Commission could vote to approve this in principal; we will make the changes and send it out. It must be replied to individually, do not reply all.

Mr. Benjamin moved to approve in principal what has been presented with whatever amendments are voted on regarding the comment on criminal discovery report. Mr. Walker seconded the motion. The motion carried with Mr. Hade and Ms. Howard abstaining.

There was further discussion regarding discovery.

The next item on the agenda is the training update.

Mr. Johnson said we have three new training initiatives. Next week we are hosting the Initial Capital Certification Training at the UVA Law School. This was the product of the yearlong study with us, the State Bar, and the Supreme Court. This is a two day training and we have 150 lawyers signed up. We are getting it professionally recorded so we can have a replay in August and we already have people signed up.

In January we did an appellate training here. We were not sure if anyone would show up and it was full within minutes of posting it. We are going to do it again but this time to increase the scale we have secured space in the Law School at the University of Richmond in July. We will be able to train ninety more lawyers from the private bar. Three appellate court judges are involved. There is a waiting list for this too so we will end up doing it again.

As part of the new capital certification process, there is also a capital habeas piece which is extremely specialized. There are only a few people who handle this type of work. We will have mandatory training for them July 31st. People have already registered.

In November we are planning a two-day advanced trial skills training for some people who have been in our system a while. Each of our offices will send one lawyer. This is an advanced version of our trial skills boot camp.

In the meeting materials is a letter from the CAIR Coalition. Immigration is a big issue for us and a big challenge. The CAIR Coalition has recognized that and has partnered specifically with our Fairfax office. They praised our efforts for continuing to partner with them with training. They will be coming to our annual conference and will do a late day lecture that will be available to the private bar. Normally our late day lectures are an hour; this will be three hours on immigration for the private bar. This is an ongoing partnership and an ongoing training challenge.

There was discussion regarding CAIR Coalition and their trainings.

In the meeting materials is an excellent article on the death penalty in Virginia written by Professor Douglass.

Also, in the meeting materials is the General Assembly wrap up.

The next item on the agenda is teleconference policy.

Mr. Johnson said there has been a change in FOIA requirements for teleconferencing and Delegate Minchew is the person who sponsored the change.

Delegate Minchew said that if you create a neutral policy and make applicable to everyone, you do not have to as a governing body vote on each individual request.

Mr. Johnson said that it actually would benefit us and this policy would allow, under certain circumstances, for a Commission member to participate via teleconference, it would not count towards quorum, and would only be allowed once a year. This allows for the member's input in the meeting. A member can vote via teleconference.

Ms. Jankowski added that what is in the meeting materials came from FOIA counsel as a template and we worked off of that. The actual statute is also in the meeting materials. It is for use in an emergency or a personal matter. Staff will need to keep track if a member uses it one time they will not be able to use it again. We also have to include in the record the reason for the member participating remotely.

Judge Hanson made a motion adopting the teleconference policy. Mr. Walker seconded the motion. The motion carried.

There was no further business.

Mr. Walker made a motion to adjourn. Ms. Howard seconded the motion. The motion carried.

The meeting adjourned at 12:55pm.

Respectfully Submitted:

Approved By:

Diane Z. Pearson, Administrative Assistant

David J. Johnson, Executive Director