

**The Virginia Indigent Defense Commission  
Commission Meeting  
1604 Santa Rosa Road, Suite 239  
Richmond, VA 23229  
December 3, 2009**

The meeting was called to order by chairman, Judge Alan Rosenblatt at 11:10 am. He welcomed everyone. Other Commission members in attendance were Maria Jankowski, John Douglass, Judge Edward Hanson, Jo-Ann Wallace, David Lett, Carmen Williams, Steve Benjamin, Kristen Howard, and Chris Anderson. Administrative staff included Executive Director, David Johnson; Deputy Director, DJ Geiger; Administrative Assistant, Diane Pearson; Training Director, Carlos Hopkins; and Human Resources Manager, Amy Williams.

Quorum requirements have been met.

Judge Rosenblatt welcomed Michael Jay who is the Fiscal Analyst for the House Appropriations Committee.

The first order of business is to approve the meeting agenda.

Mr. Benjamin made a motion to approve the agenda. Mr. Lett seconded the motion. The motion carried.

The next item on the agenda is to approve the September 10, 2009 meeting minutes.

Judge Hanson moved to approve the minutes. Mr. Anderson seconded the motion. The motion carried.

The next item on the agenda is the proposed meeting dates for 2010.

The meeting dates for 2010 are:

March 11<sup>th</sup>  
June 17<sup>th</sup>  
September 9<sup>th</sup>  
December 2<sup>nd</sup>

Mr. Johnson reported that there is about \$300,000 of carryforward money left from last year. As requested by the Department of Planning and Budget, we submitted a plan for the use of the money, with a portion of it being proposed to fund the annual conference.

Other proposed uses for the carryforward funds included, training room equipment improvements, tenant improvements not negotiable as part of new or renewing leases such as carpet, paint, etc., two office relocations with associated moving costs, IT security issues and related travel, including the costs for strike locks or counters with Plexiglas for security. The IT security standards now relate to physical security of personnel as well as for security of IT equipment.

The Continuity of Operations Plan (COOP) is utilized for disaster recovery, for example if one of our buildings burns down or a hurricane hits, we have a plan in place to get the office operational again as quickly as possible. Our recovery plan provides for an at-the-ready IT package that will get an office up and running. This package includes servers, switches, laptops, etc. One of the requirements of the IT Security

Standards is to audit the IT Security programs and all sensitive systems. We have three sensitive systems: 1) IDSS, the financial system, 2) CAPP, for our court appointed attorneys and access to the courts, and 3) PDCIS, which is the case management system.

These systems are sensitive for different reasons. IDSS is the money system that also holds social security numbers and employee numbers. The CAPP system is sensitive because it needs to be available to the court at all times and the case management system is sensitive because of the information it contains. We need to audit all three of these systems.

We have three options for auditing. One is the state contract, however that contract has expired. Another is to bring in a consultant; the third is to hire an internal auditor. We are proposing what we believe to be the most cost effective which is a one year internal auditor position. We sent out and received bids about a year ago from some of the companies that were on the state contract. At that time the bids received ranged any where from \$45,000 to \$93,000. The \$93,000 included travel expenses. The case management system would require field testing so they would need to go to the field offices to do that. That is no longer an option since the contract expired and we are not sure when the state is going to get another contract.

The second option is hiring a consultant; there is an hourly fee that is generally about \$100/hour. Not knowing how many hours it will take depending on the familiarity with our particular systems makes us a little nervous.

We asked our HR Manager and It Director to try to come up with what a job description for an internal auditor would look like, including the job skills, the amount of time it will take, and their job duties for a year. They came up with a job description. We were shocked at the salary level as we thought it would be much higher. The range is from \$55,000 to \$77,000, plus fringe benefits for a total of approximately \$74,000 to about \$103,000 for a year long position. We would require the certified internal auditor certification and strongly prefer the security auditor certification.

This person would focus on risk management, security systems, application control, access control, data protection, and personnel security. Basically this person would audit what our current systems are, what our current policies and procedures are, show us where the deficiencies are, and we would present a plan which this person would advise us as to whether that plan would bring us into full compliance.

Another thing that we would try to leverage this position for is to perform the audit required under ARMICS (Agency Risk Management Internal Controls System Standard). We have been bringing in a consultant to do this each year. We would then not need that person and could have the internal auditor do ARMICS for us as well. Any other business processes that come up with the Auditor of Public Accounts, we could use the Internal Auditor to review our corrective action plan and review our compliance with each of those processes as well.

For this first year we would like to hire an internal auditor and then assess the position to make sure we have kept this person busy enough, that the quality is there, and whether all of the requirements have been completed. We would determine at that time whether the state has a contract in place, how much use of the state contact would cost, and whether use of an internal auditor has been more successful We would revisit the hourly rates of the consultants and see if other agencies have a track record of the number of hours spent on the audits by the consultants. We should be able to determine the number of hours it took the internal person to do each system and what we need to do going forward.

Funding for this would come either from the \$300,000 carryforward money, if by some chance we are able to keep it, or based on the salary scale anticipated, we could utilize funds budgeted in the IT line item to cover that costs of an audit, which total \$79,000.

Mr. Johnson added that we are required to do this and that we think by doing it this way we will be doing it more efficiently.

There was discussion regarding hiring an internal auditor without fringe benefits.

Judge Hanson made a motion to proceed with pursuing the one year position of an internal auditor. Ms. Wallace seconded the motion. The motion carried.

The next item on the agenda is the budget update.

Ms. Geiger reported that there was a request from our analyst with the Department of Planning and Budget (DPB) in November regarding the implementation of a state-wide public defender system. We started by looking at the 2002 Crime Commission report, which recommended opening six new offices. At that time we opened Chesapeake, Newport News, and Hampton. We did not open offices in Prince William, Chesterfield and Henrico. Estimates were prepared for the possibility of opening offices in these jurisdictions. Chesterfield and Prince William are similar in size to Chesapeake and Newport News as far as the number of cases that are handled. Henrico was similar in size to Virginia Beach. Next we started to look at the judicial map the areas that we do not cover. We found that many of those jurisdictions are located in the geographically widespread judicial circuits. We ended up with a proposal for about twenty five new offices with about six to seven attorneys per office.

The overall rough estimates for the costs of coverage in the remaining jurisdictions are \$33 million for private attorneys and \$29 million for public defenders.

There was discussion about incorporating additional public defender offices.

Mr. Johnson said that we still do not know what further impact the budget issues are going to have on us. During the December 2009 meeting the Commission gave us the authority to deal with whatever is expected of us and at this point we are waiting to hear.

There was discussion regarding the budget.

The next item on the agenda is the report of the Policy and Procedure Committee.

Ms. Geiger said that the first substantive change is on Page 7, Paragraph E, which changes the language to "Employees shall properly identify themselves to any witness or potential witness if asked."

The next change is on Page 10, iii. The decision by the Commission is to send this back to the Policy and Procedure Committee.

Page 10, iv. This will also be tabled and sent back to the Policy and Procedure Committee for further discussion.

There was discussion regarding the policies and procedures and the standards of practice and whether the policies should include the standards. It was determined that there is sufficient language referencing the Standards of Practice in the Policies.

Pages 16-19. Hiring Policy. We have adopted a new policy for hiring employees. It starts with a request to fill a position when there is a vacancy, after the ninety day hiring delay, HR verifies the vacancy, and the job is then posted. There is an applicant screening provision; all applicants must be screened against the same criteria. We also have rules for interviewing, and will require reference checks and then an offer of employment can be made.

We are finding a larger applicant pool so this is a good time to introduce a more standardized, professional, and effective way of sifting through the applications to interview qualified people and then have a documented process of how the hiring decision is made.

Pages 20-22. Background Investigations. IT Security Standards require background checks for any employee that has access to sensitive systems. Ninety-nine percent of our positions have access to such sensitive systems. As a result, we are recommending background checks for all of our positions. Once the pool of applicants has been limited to an applicant the hiring manager wants to make an offer to, HR is contacted to do a background check. A contingent offer can be made, but it is based on getting the background report back. We have made an exception for law students who have just had the state bar's background check completed, as that is pretty thorough. Mr. Johnson can also provide an exception if a background check has been completed within ninety days.

Once the background check request is received, HR will send the request to the state police. Once that is returned, HR will send it to the hiring manager for review. We did not include any automatic disqualifiers. What we have proposed is contained in paragraph 4 on Page 22, which includes factors to consider such as:

- a) Recency of any charge or conviction
- b) Seriousness of any charge or conviction
- c) Age of applicant at the time of any charge or conviction
- d) Facts underlying any charge or conviction

Page 82. Determination of Grievability. Instead of having the Deputy Director determine whether a complaint is grievable, the HR Manager will make that determination. That determination will now be final, not appealable. If it is brought against the HR Manager then the Deputy Director will make that determination.

Page 83. Management Review. We clarified the processes followed when a complaint is within an office and when a complaint is against a Public Defender. If a complaint is within an office, for example; a secretary against an office manager, the Public Defender would be responsible for any investigation, and would try to get things worked out. The Public Defender would make a decision after the investigation and grant any remedial action that may need to be taken.

In the case of a grievance against a Public Defender, the Deputy Director would do the investigation and make a recommendation to the Executive Director who would then make a finding.

Neither of the decision makers can exceed their authority. In most cases, if it is within an office they would follow Chapter 8. For the Executive Director, it would limit his authority. If there is a complaint against the Executive Director, the HR Manager would determine grievability and provide that to the Deputy Director,

upon receipt, the Deputy Director would notify the chairman of the Commission. The chairman would then direct the Deputy to refer it to the Personnel Committee. The Chairman may direct the Deputy Director to investigate it and make recommendations to the chair of the Personnel Committee. The chair of the Personnel Committee would call a meeting for the purpose of three things, 1) receiving a referral, 2) receiving any written recommendation from the Deputy Director, and then 3) determining a procedure for handling that complaint.

Page 86. Procedural Compliance. The only change is that the HR Manager would address any questions of compliance. There are time lines for people to file reports and responses and the HR Manager would make sure that procedure is being followed.

Mr. Anderson made a motion to approve the proposed changes to the policies and procedures with the exception of items iii and iv on Page 10 that are being sent back to the committee. Mr. Lett seconded the motion. The motion carried.

The next order of business is the legislative proposal.

Ms. Geiger said that we have two legislative oriented requests. In speaking with Karl Hade with the Supreme Court, we have decided to table the delayed appeal statute for further discussion.

There was discussion regarding the reason for tabling the delayed appeal statute. Judge Rosenblatt said that this may be handled with a rule change as opposed to dealing with the legislature on it and the Supreme Court thinks that it probably needs a little more discussion. This is something that just appeared.

Mr. Benjamin said it is a very real and current problem.

Ms. Geiger added that Mr. Hade believes the court prefers a dialogue on the issue rather than legislation. They feel that because it involves a couple of rules of the Court that they would want to have a say in that. In the event that they are not able to have some kind of dialogue before legislation is proposed, they may need to oppose the legislation because they do not know enough about it.

The delayed appeals statute allows for a delayed appeal when a case is dismissed. The Court of Appeals had been dismissing cases, but sometime in 2008 started to instead, deny them when the transcript wasn't filed or wasn't filed in a timely manner. There is no substantive decision actually made, the case does not get heard. It cuts off the appeal process and you need to go the habeas route. Instead of dismissing, denying makes that change. They started doing this in mid stream.

Mr. Benjamin added that the background on this is that we discovered we had a pervasive problem of appeals being defaulted for three basic reasons 1) the notice was not filed on time 2) the transcript was not filed on time 3) or the petition for appeal was not filed on time. In each instance it was not the defendant's fault, it was the attorney's fault but the defendant was penalized and had to muster, at his own expense, a full habeas proceeding in order to get his appellate rights restored. So the General Assembly enacted legislation which gave him an opportunity to do this without that additional expense. But now this legislative remedy has been modified by the new jurisprudence of the Court of Appeals.

Mr. Benjamin believes the General Assembly would like to react to this because their intent now has been compromised.

Ms. Geiger added that we can request legislation and it never needs to get introduced and never needs to get any further than delivered to us from Legislative Services. We can do that as a place holder.

Mr. Benjamin added that Legislators have a limit on the number of bills they can introduce except for those bills they put in place holders by Monday. If you wait until later it becomes a lot harder. He suggested making the request so if we decide we need it later there won't be a penalty.

Ms. Geiger said that this might be a battle between the courts. The rule of the Court of Appeals allows for an extension on the transcript, the Supreme Court rule does not, making one jurisdictional and one not jurisdictional. If it is a battle between the courts, and we are now coming into the mix, she is unsure of what that means for us politically with the courts. If the Supreme Court disagrees with the Court of Appeals in the interpretation and it is going to be handled in the courts, do we need to expend political capital to change the statute.

Mr. Benjamin made a motion to file a request for legislation before Monday, December 7, 2009 and delegate the Executive Director, with appropriate consultation, the discretion to determine the Commission's legislative platform agenda. Mr. Anderson seconded the motion. The motion carried.

The second legislative item is a request from Just Children.

Ms. Geiger said that the Crime Commission has been conducting a study of the juvenile justice system in Virginia for three years. They are scheduled to review the results on December 15, 2009 and in leading up to that meeting we have been requested to support a letter to the Crime Commission that would support three different items. 1) To grant juvenile court judges the authority to make transfer decisions for all offenses except those for which transfers are currently automatic. 2) Require that youth who have been transferred and are awaiting trial are held in juvenile detention centers rather than adult jails unless they have demonstrated a substantial risk to other detainees. 3) Provide additional enhanced training on juvenile sentencing options to circuit court judges.

The Commission acknowledged the arrival of commission member, Senator John Edwards.

There was discussion regarding the request for support for the reform of Virginia's juvenile transfer system.

Mr. Johnson said that this is something that will obviously benefit our clients. We have a very narrow legislative mandate to represent people in court.

Mr. Benjamin said that if we want to help this legislation, and if legislation is introduced, there is a way for the Commission to approve that position, which would then permit you or Ms. Geiger to appear before the respective committees and say this is the position of the Commission. We feel that judges should have the discretion. That is the correct way to do it, if we want to advocate a position in support of legislation.

Once we sign the letter, it is going to be used to support whatever legislation emerges which might be very different from what we see here.

Ms. Howard added that the letter does ask the Commission to take a position on the issue.

Ms. Wallace said that it is appropriate for the Commission to be looked to for information on this issue because it is something we have expertise about based on what we do. We can make a motion to give you guidance and direction so Ms. Geiger can testify as appropriate.

Senator Edwards made a motion that the position of the Commission be in favor of an appropriate return of discretion to juvenile court judges in matters related to transfer of juveniles to be tried as adults. Judge Hanson seconded the motion. The motion carried with Mr. Benjamin and Ms. Howard abstaining.

Judge Hanson moved that the Virginia Indigent Defense Commission convene in closed session to discuss personnel issues pursuant to the personnel exemption contained in §2.2-3711(A) (1) of the Code of Virginia.

This meeting will be attended only by members of the Commission, however, pursuant to §2.2-3712 (F) of the Code of Virginia, the Commission also requests the attendance of the Executive Director, the Deputy Director, and the Training Director, because it is reasonable to believe that their presence will aid the Commission in its consideration of the matters which are the subject of the closed session.

Mr. Lett seconded the motion. The motion carried.

After reconvening into open session, Judge Hanson moved for a roll-call vote asking that each member certify that, to the best of his or her knowledge, during closed session the Commission heard, discussed, or considered only public business matters that were lawfully exempted from open meeting requirements under the Freedom of Information Act.

Each Commission member so certified.

Mr. Anderson moved that the Commission direct the Executive Director to contact the Arlington Public Defender for the purpose of terminating her employment either by accepting her resignation effective no later than December 7, 2009 or advising her that should she not submit her resignation on that date the Commission will terminate her employment on that date. Ms. Jankowski seconded the motion. The motion carried.

Ms. Jankowski made a motion to give the Executive Director the authority to reclassify the Human Resource Manager position to Human Resource Director. Ms. Carmen Williams seconded the motion. The motion carried.

Ms. Jankowski made a motion to extend Ms. Hicks administrative leave through December 7, 2009. Judge Hanson seconded the motion. The motion carried.

There is an additional policy amendment. Section 6.9 Administrative Leave, Section B, Subsection 5. This will be brought up during the next policy and procedure committee meeting.

Mr. Benjamin said that he and Dean Douglass have looked at the empowering statute for the Indigent Defense Commission and nowhere in there are we given the power to either request legislation or take a position on matters related to criminal justice other than indigent defense, arguably. We have very specific powers. Even though we do not have the specifically delegated power to request legislation, he believes we have that of necessity. Any state agency, if it perceives a need to request of a legislator, legislation to

enable it to do its duties that is appropriate. He believes we do not have a problem asking a member of the General Assembly to introduce a bill. He does not see any provision here that permits us to take a position on criminal justice issues other than perhaps, strictly the state of indigent defense before a legislative body but we have done that today. He suggested that although we may have taken a position and authorized you to advance that as our position, until we have further contemplation of this that you not appear before a legislative body to advance a formerly adopted position of the Commission. He has never heard of this being done before, it seemed okay to suggest that but now he sees that we do not have that specific power to take a position on matters related to criminal justice.

There was discussion regarding the Commission's position and Mr. Benjamin suggested exploring this more.

Dean Douglass said that there is a provision that empowers us to report annually on the state of indigent defense in the Commonwealth and it would seem implicit the power to report the effect of all kinds of procedural rules on the adequacy and outcomes. For example, taking a position on delayed appeals and defaults is partially a report on what happens in the course of indigent defense. It is a typical problem of indigent defense. Our powers may be a little broader than chapter and verse and there may be a broader history of this agency like any other state agency becoming involved in legislative affairs so he does not know if we are confined to that statute.

Judge Rosenblatt said that if the Commission wants to explore it we should refer it to a committee and thoroughly discuss it because he believes there will be a lot of disagreement on it.

He reads the statute to say that we can advocate on issues that deal with running the Indigent Defense Commission. If it is an issue dealing with criminal justice and they ask for our opinion, we are here to give them our opinion.

Mr. Johnson added that they are constitutionally elected officers but the Commonwealth Attorneys have no hesitation weighing in on every issue that affects our clients and there is a deafening silence from the defense bar. Ms. Geiger is a very good spokesperson on many of these issues. However, there is a real need for the defendants to have someone speaking for them

Mr. Benjamin said that the way this was handled in the past would be an appearance before a committee in a personal capacity and not as representing the Commission.

Senator Edwards said that the Commonwealth Attorneys have an association that can down every bill, they are very powerful. It is difficult to go against the Commonwealth Attorneys Association. There is nothing on the other side, it is a huge vacuum. Ideally the Virginia College of Criminal Defense Attorneys should be up there with a paid lobbyist, which they are not going to do, arguing that side. Steve Benjamin does a great job but if the Commonwealth Attorneys are there who wins, Steve or them?

We do not want to come across as being political, ideological, or pushing a cause to the point where someone criticizes you. I do not see this as a serious issue if it is done in a responsible manner and in a selective series of issues. Pick your issues carefully otherwise you lose credibility.

The Supreme Court lobbies, the State Bar does not. The Bar Association is the lobbying group because that is a volunteer organization. The State Bar does not lobby because they are a function of the Supreme Court.

Ms. Jankowski asked if there was a way to couch this as an effective representation of juvenile issues. Is there any way to make it more of an indigent defense issue? Are the indigent juveniles disproportionately transferred?

Mr. Benjamin interrupted to say that he needs to leave but wanted to add that the agenda for the Chief Justice training initiative will include three speakers on forensic issues; one is going to present the National Academy of Sciences report and describe the findings and recommendations.

The second speaker is an auditor of forensic laboratories through out the country and is going to talk to our defenders about vulnerabilities and weaknesses within scientific laboratories, the importance of protocols, what it means if protocols aren't being followed, the risk of contamination and the things they should be looking for in the laboratory system.

The third speaker will talk about what happens when DNA is analyzed. This is not evidence 101, this is evidence once received at the lab, then it is walked through step by step, the procedure of analyzing DNA in a forensic setting. This is important for two reasons. 1) Our lab is changing to a system for analyzing DNA that would bring it into conformity with the rest of the nation so it will be a new platform that no one is used to seeing. 2) It is easier to understand the DNA you are being confronted with if you understand the mechanism that it goes through in the lab. It helps to understand where the weaknesses are and where you can have unreliable results.

A fourth speaker is going to talk about the use of drug dogs. We are going to give a presentation on ethics so those who attend will fulfill one hour of their ethics CLE.

The fifth speaker is Jeff Bishop. He will talk about appellate work and the constitutional issues involved in sentences that are way outside the guidelines. It has a tenable constitutional dimension and possible constitutional issues involved with jury sentencing.

The program is April 9, 2010. Mr. Benjamin will advise everyone of the registration date.

Senator Edwards said that the Legal Aid Society lobbies all the time. The Virginia Capital Representation Resource Commission lobbies from time to time. They handle habeas cases involving capital defenders.

Ms. Wallace added that she believes it is completely appropriate for us to be dealing with issues that have to do with the administration of justice. All of the other legs of the stool do. We want a justice system that works fairly and efficiently and for that to happen everyone involved has a role to play and expertise should be heard. She understands the politics and we should do it selectively and appropriately because if we don't there will be a huge void that isn't being filled. Then we will be contributing to the imbalance or potential unfairness. Not to mention the fact that we have a whole cadre of public defender attorneys who are looking for leadership from this commission. We would not be living up to that responsibility if we didn't address issues as appropriate. She is confident that Dave and DJ will move forward appropriately with the legislature, educating them about what we know from our area of expertise.

The next item on the agenda is the training update.

Mr. Johnson reported that budget constraints allowing, our annual conference will be in May at the Cavalier Hotel in Virginia Beach. There is also the trial skills boot camp again. The office managers and public defenders will be here in January to train on policy changes as well as other updates. We haven't

done a sentencing advocate/investigators conference in a couple years and will bring them together in April.

The next item on the agenda is projects update.

Ms. Geiger said we have a member from the Department of Planning and Budget (DPB) Best Practices Divisions, working as a consultant in our office reviewing all of our financial business processes to identify inefficiencies and make recommendations for changes. She has concluded her work on the payroll processing system and has charted out what our current practice is, which was about eleven pages, and has condensed it to a one page process. We will be meeting with the Payroll Services Bureau tomorrow and hopefully taking the new process live with the 12/25-1/9 payroll. If this is successful it will free up about thirty percent of Janice Johnson's time and about forty percent of Lena Francisco's time. Janice is our general accounting manager and Lena is our accountant. We are hoping that we will not have to fill the position that was previously held by Lou Bellman who was an accounting technician. We have held the position open but believe that there will be some efficiencies through technology and through the streamlining of processes that will save us from filling that position.

The steering committee for the caseload study has members from the State Bar, the Commonwealth Attorneys Association, the Supreme Court, our Public Defenders offices, and the private Court Appointed Attorneys. We will be meeting Friday, December 11, 2009. This will be the last meeting of this committee to get the latest report and latest information on the work that has been done so far. We should have a report for you in the Commission's first meeting next year.

Ms. Wallace said that in February 2010, the US Attorney General, Eric Holder is having an indigent defense conference.

Mr. Johnson will attend and has been asked to invite a prosecutor involved specifically with juvenile work. Mr. Johnson advised that a former assistant public defender, who is now a deputy commonwealth attorney, and Charlottesville Public Defender, Jim Hingeley, will attend as well.

There was no further business.

Judge Hanson made a motion to adjourn. Mr. Anderson seconded the motion. The motion carried.

The meeting adjourned at 2:20 pm.

Respectfully Submitted:

Approved By:

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Diane Z. Pearson, Administrative Assistant

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David J. Johnson, Executive Director