

The Virginia Indigent Defense Commission
Executive Committee Meeting
1604 Santa Rosa Road, Suite 200
Richmond VA 23229
December 6, 2012

The Executive Committee of the Virginia Indigent Defense Commission was called to order at 10:20am by Chairman, Judge Alan Rosenblatt (ret.). Other Commission members in attendance were Maria Jankowski, Judge Edward Hanson, and Senator Richard Stuart. Administrative staff included Executive Director, David Johnson; Deputy Director, DJ Geiger; and Administrative Assistant, Diane Pearson.

Quorum requirements have been met.

The first item on the agenda is the approval of the June 14, 2012 minutes.

Senator Stuart made a motion to waive the reading of and approve the minutes. Judge Hanson seconded the motion. The motion carried.

The next order of business is the legislative update.

Ms. Geiger said there are four items to be discussed. The Indigent Defense Task Force of the Virginia State Bar is proposing a rule change.

The Task Force is a group that has been working on discovery reform for three years. This is a step toward discovery reform but has taken the path of a rule change as opposed to specific legislation. The Indigent Defense Task Force will present this proposal to the Executive Committee and Council of the Virginia State Bar at the February meeting, and if approved there, it will be presented to the Supreme Court for its consideration. The deadline for input is January 15, 2013.

We have been asked by one of the Public Defenders if the Commission would be willing to take a position on this and to support it. We then polled all of our Public Defenders for their thoughts. For the most part if they don't have some sort of open file discovery in their jurisdiction they feel that overall this rule would be a step forward.

They did have two concerns with the language. Subsection B provides that the defense counsel would get police reports and recordings and information pertaining to the case including material facts that tend to impeach or negatively impact the credibility of the Commonwealth's witnesses.

Subsection C requires the defense counsel to disclose names and addresses of any alibi witnesses.

They feel this is a little uneven, that it is more of a burden on the defense than it would be on the prosecution.

Another concern is in Subsection E. Currently the timing of the motion is ten days, the rule change would make it forty five days. We have heard from at least two jurisdictions where the trial is not set within that much time, so forty five days would be unworkable.

What they are asking for is permission for staff to send a letter to the Indigent Defense Task Force in support of this rule change noting the two concerns that we have with the language.

Mr. Johnson said that this is a step in the right direction. This task force has been trying to bring together all the sides and address them, and they have put a lot of work into it. What has come out of it is watered down from what it originally was. The Public Defenders would like for us to support it because it benefits our clients. It does put some burdens on the defense. It would be nice to have something codified or in the rules.

Mr. Johnson said that the Commonwealth's attorneys who were on the task force are still on it, and they individually supported this. This is a product with their input.

There was discussion regarding input and action.

Ms. Geiger said that after the Public Defenders were polled, we realized there was some concern with the forty five days. We then said we would like you to consider supporting this noting some concerns. We previously have not taken a position on a rule change.

Maria Jankowski joined the meeting.

There was discussion regarding involvement and about the proposal being a half way measure.

Mr. Johnson said we would have to explain to the Public Defenders why we would not get involved because there is a lot of frustration. We have been talking about discovery reform for half a decade and something has finally come forth and if the Commission does not support it there would need to be an explanation.

This is not great discovery reform, and if it goes through as a rule change, the feeling will be that we are done, and we will never get anything else. The problem is that this does not look anything like the original proposal.

At this point we are responding to the task force but the task force has not asked us yet.

There was discussion about not responding at this time. Discovery reform is a great thing but some public defenders get complete and total open file discovery. This might cause some disruption.

Ms. Jankowski said it varies from case to case and some individual prosecutors tend to be more forthcoming and some are disinclined to be forthcoming. Sometimes it is born out of the prosecutor being insecure and sometimes it is born out of being lazy and failing to return phone calls.

Todd Petit, the Public Defender in our Fairfax office has said this is a start but it does not go far enough.

Mr. Johnson said that the Fairfax prosecutor's position is you plead guilty or take a jury, so they try more juries than anyone else.

Judge Rosenblatt said that the Executive Committee will recommend to the full Commission to take no action on the task force at this time because we are not informed enough and there is not sufficient consensus to take a position.

Ms. Jankowski said she might feel comfortable saying that the Commission supports meaningful discovery reform in Virginia and the Commission is concerned about the widespread limitation of discovery, the widespread inconsistency with policy.

Ms. Geiger said the second item is the legislative action memo. She would like to succinctly state our legislative policy approach for the General Assembly session. We look at how legislation will directly impact our ability to represent clients and whether it directly affects the operations of the agency.

The second consideration is whether it is a public policy matter for the General Assembly. The materials provide some examples of when we've stepped in and when we haven't stepped in.

The third consideration is educational. This is when we do not really have a position but we would like to present some facts and possible consequences that no one has brought up before. This has served us pretty well and is similar to what the Court has done.

We generally have the Executive Committee look at the legislative bills that have been proposed, and if we have enough bills that actually affect the agency, get direction from them. If that is not possible or we do not have many bills but issues come up during session, generally the Commission has given us the discretion to look at them and based on this approach, take some action.

We ask that you consider renewing that or adopting that approach.

No vote is necessary but we discuss this every year.

The Executive Committee recommends continuing with that policy.

Ms. Geiger said there is one bill, HB1325 that had been pre-filed that we have some concern about. Last year, HB750 proposed to basically eliminate deferred disposition unless all the parties agreed. We opposed that as an attack on judicial discretion, and we were concerned with how that was going to affect our ability to represent our clients. The Senate actually voted against it. HB1325 is more narrow, but for the same reasons we would want to oppose this legislation as well. She doesn't think that anyone would argue that a juvenile whose case has been transferred and was charged with capital murder probably should not get a deferred disposition, but she does not think that taking that underlying discretion from the judge is something that would benefit our clients on a holistic basis. She believes this would be the first step. If this passes next year there would be another bill that chips farther away at that discretion. This is a prelude. They could not get HB750 passed so this is another attempt to take a smaller bite.

Senator Stuart said that we need to come up with an answer to this. He said it is very difficult to come up with the sections that you should be able to defer and should not be able to defer. Some of us believe in judicial discretion, the House does not.

Ms. Jankowski asked if the House has any evidence of instances where a juvenile was waived to Circuit Court either automatically or on motion and that case was deferred.

Ms. Geiger said that when HB750 was before the House Criminal Law Subcommittee there were not specific instances. It was tied to the judicial reelection where they focused on a case in which there was a mandatory minimum and the judge would not follow it. She believes the underlying issue is the discretion part and there is not the trust, they disagree with how these things are being handled.

We asked the public defenders if they have ever had a judge defer one of these cases. One public defender said that if they have done it, it was a child between the ages of ten and fourteen, there was a mental incapacity, or there was something wrong with the charges.

There was one where the charges were amended before they got to court so it would not have been captured.

She believes that the premise of this is exactly what Senator Stuart said, that some people believe in judicial discretion and others disagree. She thinks that is what drives this more so than the actual offenses.

The basic issue in this bill is judicial discretion, and the position we took last year was to oppose the legislation.

Judge Rosenblatt said that the Executive Committee recommends to the full Commission that we oppose this.

The next item is an article in the Virginia Lawyers Weekly regarding the return of an appellate defender in the commonwealth.

Ms. Geiger said this has not been pre-filed yet. The budget amendments are not on the system yet. We found out through our Appellate Coordinator, Catherine Zagurskie, that Sandy Sanderson was interested in advocating the return of an appellate defender in the state.

Mr. Johnson said that Sandy Sanderson was the first Appellate Defender several years ago. In the 2012 session, there was a budget amendment proposed that was never discussed with us. He explained to Sandy that we now have a supervisor in every office, and we have an appellate coordinator in the administrative office.

To have a true appellate section would include about forty attorneys and would be about \$5-6 million a year, not \$275,000. Our appellate coordinator is also a training resource for the offices.

There was discussion regarding the cost of having an appellate office and the need for it.

Senator Stuart said this will not go anywhere because there is no money.

The Executive Committee recommends taking no position on this.

There was no further business.

Ms. Jankowski made a motion to adjourn. Senator Stuart seconded the motion. The motion carried.

The meeting adjourned at 10:55

Respectfully Submitted:

Approved By:

Diane Z. Pearson, Administrative Assistant

David J. Johnson, Executive Director