

The Virginia Indigent Defense Commission
Commission Meeting
1604 Santa Rosa Road, Suite 200
Richmond VA 23229
December 12, 2013

Judge Alan Rosenblatt (ret.) welcomed everyone and called the meeting to order at 11:10 am. Other Commission members in attendance were Steve Benjamin, Tom Chaffe, Kristen Howard, Maria Jankowski, David Lett, Karl Hade, John Douglass, Judge Hanson, and David Walker, Administrative staff included Executive Director, David Johnson; Deputy Director, DJ Geiger; and Administrative Assistant, Diane Pearson.

Quorum requirements have been met.

The first order of business is to approve the agenda.

Mr. Walker made a motion approving today's agenda and the September 19th Commission meeting minutes. Mr. Benjamin seconded the motion. The motion carried.

Ms. Geiger welcomed and complimented Guy Horsley who has served as our counsel within the Attorney General's Office. She also welcomed Gregg Fleming who will replace Guy when he retires at the end of this year. She also welcomed Michael Jay who is staff with the House Appropriations Committee.

Mr. Johnson said that Tom Watkins, the Public Defender in Hampton retired December 2nd. He had been with the state 32 years and with us over twenty years. We are going to miss him. We hired, as the new Hampton Public Defender, Jill Schmidtke, who was the Chief Deputy in the Newport News office. We had ten candidates who were all qualified with four finalists. He thanked Tom Chaffe and Maria Jankowski for the time they spent helping with interviewing the four finalists.

Jim Hingeley who is the Public Defender in Charlottesville has recently been appointed to the Virginia State Bar Council.

Mr. Johnson advised that there is a group working on reviewing the qualification standards for court appointed capital counsel. We received a letter from the VCJC a couple of years ago that was also sent to the Virginia State Bar, and the Supreme Court. By statute, we are the three agencies that are in charge of the capital qualification standards. The VCJC is made up of equal numbers of defense attorneys, prosecutors, and judges. In the letter they pointed out that the standards hadn't been reviewed in ten years and a lot has changed including the establishment of the capital offices. They asked us to do a review. We put together a review committee and each group appointed five individuals, the study went on for over a year and a report was produced. The report was presented to the VCJC at their annual conference in September. It was given really strong support. The prosecutors in the room were very much in favor of the recommendations.

In Virginia before you can handle a misdemeanor case, you are required to take certification training. There is no such requirement of any kind for capital cases. The recommendations are extensive and involve training.

Mr. Johnson will meet with the representatives of the State Bar and Supreme Court and present the recommendations to the Commission at the March meeting.

The next item on the agenda is the budget update.

Ms. Geiger said in the meeting materials behind the budget tab are the usual expenditures by month. The last page of the report shows the FY14 central appropriation adjustment increases in the amount of \$2,497,100, which covers the 2% raise, healthcare and other funding adjustments. At the last Commission meeting we had not yet received an adjustment to pay for the raises and were showing higher expenditures for benefits and salaries. With the adjustment, we are back on track.

During the last meeting we walked you through a little bit of history with our budget starting with the judicial reversion that began several years ago for which we had to return close to \$1 million. We went over what we had to do to pay the reversion amount and now it is time to make adjustments again. The \$944,000 reversion is gone, and there is a smaller, \$200,000, reversion. Some of the adjustments we made to pay the reversion included hiring delays, frozen positions, and closing the appellate office. Now that the reversion is greatly reduced, it is time for us to reallocate those funds.

In the September meeting we had a few suggestions and you directed us to meet with the Personnel Committee to look at those proposals. After the meeting we tried to determine the best way to use those funds to impact caseload, workload, address some of the compression that has occurred from the lack of state raises for so long, and address retention. The Personnel Committee looked at the proposals substantively, rather than for funding, approved several proposals, and directed us to meet with the Budget Committee.

We met with the Budget Committee and they made some changes based on the availability of the funds and some of the questions and concerns they had. The recommended proposals for approval from the Budget and Personnel committees are in the meeting materials.

Judge Rosenblatt said that so much of the work members do, happens outside the regular Commission meetings. He thanked the members involved in the budget committee and personnel committee for their efforts over the past couple of months. He said it is great working with everyone and this is a hard working commission.

Ms. Geiger continued with the budget report. There are two sets of expenditures, on-going and the one-time. We had two goals for the ongoing expenditures. One is to improve the quality of representation of our clients through workload relief and improving the supervision of the attorneys. The second is addressing salary compression.

The first proposal is for one APD II position in the Danville Public Defender Office and is based on Danville having the highest caseload per attorney for several years.

Mr. Johnson added that Danville is an amazing office. It has consistently carried the highest caseload smoothly, without complaint. The Public Defender is Joe Schenk, who has done a terrific job. This new position is long overdue based on our caseloads and the quality of work in that office. An APD II will give him a little more experience for that office.

The next proposal is for an APD I position in the Fredericksburg Public Defender Office. Fredericksburg is always in the top five for caseload, and they are a multi-jurisdictional office, meaning there is a lot of ground to cover. We believe this office will benefit from an additional position. Coincidentally the workload study done for the Supreme Court indicates that circuit should have additional judges. If that goes through during the General Assembly, then an additional attorney in the Fredericksburg office will be helpful.

The Fredericksburg office handles the city of Fredericksburg and the counties of King George, Spotsylvania, and Stafford.

Both of these offices can accommodate the additional position without the need for more space.

The next request is to reclassify one APD II position to a Senior APD in the Richmond office. There is inequity in the ratio between supervising attorneys to line attorneys. We looked at each of the offices similar in size. Those offices are Norfolk, Virginia Beach, and Fairfax. Richmond has fewer supervisors per attorney. This is long overdue.

The next two proposals are somewhat similar. In Staunton, the public defender requested a satellite office. We currently have a satellite office in Warrenton which is part of the Leesburg office. Because the jurisdictions are so far apart, the attorneys end up driving long distances. The actual distance between Buena Vista and Lexington from the Staunton office is about 33 – 40 miles.

There are three part time APD I attorneys in the Staunton office who travel to these jurisdictions and it is tough for the Public Defender to supervise the daily work load. This came to light because of a Standards of Practice complaint.

The proposal is to reallocate the three part-time APD I positions as one senior public defender and one APD I. This would allow the office to handle more complex cases because of the senior attorney who will act as a supervisor. The total annual cost would be \$89,216.

The total expenditures for the three part time attorneys is about \$103,500 and the cost for the new full time positions would be \$159,773. There would not be a staff person in that office.

There was discussion regarding locations of jurisdictions covered by the offices.

The Winchester office covers six jurisdictions. Shenandoah, Warren, and Page Counties are significant distances from the others requiring extensive travel time for the attorneys. The three attorneys currently covering these jurisdictions are becoming stressed and burned out trying to meet obligations from the main office in Winchester. The Public Defender believes he needs a satellite office to better serve the clients and the courts in those jurisdictions.

The proposal for this office includes the allocation of a senior APD position. The Public Defender will reassign 2-3 attorneys to the satellite office along with the Senior PD. The Public Defender would also like to reallocate the part time secretary position as a full time position in the satellite office.

We believe this office will be able to operate more efficiently and cost effectively with a satellite office.

The costs for the Winchester proposals are:

Annual/On-going Personnel	\$117,428
Annual/On-going Non-personnel	<u>\$ 32,679</u>
Total	\$150,107

FY14 Costs \$ 90,890

The total cost for the proposed on-going items is \$422,674. The total cost for the proposed on-going items in FY14 is \$262,691. There is one other proposal that the Budget Committee recommended, and that is an upgrade of our Broadband speed. We have had Broadband for about a year and already maxing out the speed of the system. A lot of our applications, Google Mail, Case Management, and legal research are all internet accessible. The more people use the system, the slower it becomes. The proposal is to double the speed, which should keep us humming for a while.

The proposed amounts include the Broadband upgrade of \$20,400 annually, \$10,200 for FY14.

The cost to operate the Appellate office was \$610,000 per year. Our fiscal director is comfortable with on-going expenditures of no more than \$800,000. Using the \$800,000 less the \$422,674 in proposed annual ongoing expenditure adjustments, the balance is \$377,326.

The Budget Committee felt very strongly about doing something for those employees who have been with the IDC for a long period of time and have not had raises. For instance, an APD I who has been with the agency for six years is making the same amount as a newly hired APD. The compression issue was of great concern and retention somewhat secondary to that. Last year the state proposed to add \$65 per year of service to the base salary of employees who had been with the state five years. For example, an employee with ten years of service would receive \$650 added to their base pay. It does not sound like a lot but it is a very important gesture. It does go into your base pay, it stays with you, and gets counted toward retirement.

The Budget Committee recommended an increase in base pay for employees who have been with the IDC five years or more. The amount of \$100 per year of service would be added to the base pay. That cost is \$375,922.

There was discussion regarding the proposal.

Ms. Jankowski said that when the Budget Committee met there was a lot more proposed by the Personnel Committee. We reviewed what the Personnel Committee had proposed, then went through each item and discussed the impact on caseloads. What is here was a compromise for a way to address the offices that had an acute need and impact caseload but still leave some funds available to address the compression issue, thus touching all employees. The two issues were impact on caseload and retention of good employees. There were other offices we looked at that might need an attorney or something else. We looked at the caseload of each office and determined the best options to have money left over to address compression.

Ms. Howard said having been on both committees, we started out with lots and lots of different proposals. We went through a great deal of discussion. She believes this is a great compromise based on the funds available to make the biggest impact we thought we could have.

Judge Rosenblatt said that there is always concern of underestimating our future needs if some of this money does not materialize or another reversion. We discussed pretty thoroughly the options that are available such as a hiring freeze and some other options to keep us out of trouble. We had the \$800,000 figure in mind being the number we did not want to exceed.

Mr. Walker made a motion approving the ongoing expenditure proposals, including the alternate staff proposal of five or more years of service at \$100 per year of service at an estimated cost \$375,922 annually, and a FY14 cost of \$187,961. Ms. Howard seconded the motion. The motion carried.

Mr. Johnson added that we will follow what the state did for this increase and it will be based on the most recent evaluation.

The next item on the agenda is one-time expenditures.

Ms. Geiger said that fellows are volunteer attorneys. Several of our offices have volunteer attorneys who are licensed to take cases. We set them up with a legal research account and email. They have been a great benefit to the offices. One of the proposals would be to allow the offices to bring fellows on board for a maximum of nineteen weeks at \$20 per hour for twenty five hours a week. We have to limit the hours because of the limit on health care benefits.

Mr. Johnson added that some of the lawyers that are volunteering end up getting hired. In the administrative office we are looking for four fellows to assist with a DNA notification

project that the state has been working on for a while. The work has already led to several exonerations, and the hope is that there are more out there.

Ms. Geiger said that one of the initial proposals was for interns but the Budget Committee did not think it would be helpful because they cannot handle cases as can the volunteer attorneys. The intern proposal was discarded in lieu of the fellows or volunteer attorneys.

Mr. Johnson said that with the judicial reversion we had been required to return money. Now we want to focus on improving client representation and this was one way we could use the one-time money we have. That was the real focus of both committees to impact client representation.

There was discussion regarding wage employees, limits for unemployment, and health insurance.

Professor Douglass said that he sees this as a real win-win opportunity for the Commission to improve client service at a time when the legal job market makes a really important resource available to us at a very low cost and very low risk. He sees law students graduating and going out into the market and the forces that lead many of them to volunteer their time with the hopes they will get a foot in the door and get a job. He also sees a lot who are unable to do that, who are very capable and could help our offices, but are unable to do that because they are not getting paid. So instead, they take other jobs that are not good career starters. This is a talent pool available to us at a very low cost that we would not otherwise be accessing. This is a way for us to get that talent and because it is a limited period of time, we are not committing ourselves. This is something we might want to repeat in the future if we have the funds available.

Mr. Walker added that it is also a great hiring tool because you get to see the quality of their work.

Ms. Geiger continued with the remainder of the one-time expenditures. She said that our firewalls are due to be replaced in calendar year 2014. If we replace them this fiscal year it will save us about six months but will also allow us to pay it while we know we have the funds. The proposal is to replace firewalls at thirty five of our locations at the estimated cost of \$85,000.

We have two options with the IT Servers. We are trying to move to Cloud Storage which would allow us to store documents off site. Data would be backed up, and is good for our continuity of operations. We are still working on the technical side of it. If the cloud is not possible, we need to use servers. Ours are about to go out of maintenance. The cost of less robust servers which is all we would need if we go to the Cloud is \$88,000. If we need the more robust servers, the cost would be \$205,000. We will know in the next few months which of those options will work.

The last is a proposal for recording and projection equipment for the offices. We have not purchased anything like that for seven or eight years. The investigators could use the

equipment for their investigations. It would assist with presentations in court and assist with the required in-house training. The total cost is \$38,750.

The low estimate for all of the one-time expenditures is \$449,250, and the high estimate is \$1,278,750.

The overall cost of all proposed items is \$899,902 (low estimate) and \$1,729,402 (high estimate). This includes the annual costs (alternate staff proposal on compression adjustment) of \$798,596, FY14 costs of ongoing items \$450,652.

Judge Hanson made a motion approving the one-time expenditures. Mr. Walker seconded the motion. The motion carried.

The next item on the agenda is the legislative update.

Ms. Geiger said in our September meeting the Commission approved three pieces of legislation for introduction in the General Assembly session.

The first is recording proceedings to produce a statement of facts in lieu of transcripts. We have had reports where the courts refuse to allow recordings. They refused to allow our attorneys to have a digital recorder even when they have denied a motion in court for a court reporter or recording equipment. We had a bill drafted up to allow us to record and use that recording to prepare the statement of facts. Delegate Todd Gilbert will be carrying that bill for us.

The second bill adds misdemeanors to the statute allowing conditional pleas in felony cases. Right now you can only do a conditional plea in a felony. This would allow that to occur in misdemeanors as well. Delegate Hope is carrying that bill for us. He has actually already filed it as HB80.

The third bill addresses the Stokes case by adding the word lawfully to section 19.2-303. In effect, when a court orders someone not be transferred to DOC so they can have a hearing on a modification of a sentence, a subsequent transfer in violation of the court order will not cut off relief. Senator Stanley is carrying this for us.

The second item on the legislative update relates to the Capital Defender offices. During the 2013 General Assembly session a judicial reversion of \$200,000 was adopted as was a requirement to review the structure and workload of the capital defender offices to determine whether or not there needed to be a reallocation or plan to restructure those offices.

We contacted the Office of the Executive Secretary (OES) at the Supreme Court. They produced a spreadsheet of data relating to all charges of capital murder. Some of the charges were not felony 1 but instead felony 2 charges or were not true capital charges.

The data was from calendar years 2008 through 2012.

We collected data from the court, analyzed it and paired it down to what was truly a capital case (felony 1). We then collected all of that same data from our offices for the cases in which they were involved. There are two jurisdictions that do not use the court's system; Fairfax, and Alexandria so there was no data there. Virginia Beach left the court's system in 2009. Those three jurisdictions were checked either by contacting the clerk's office or by using the local circuit court system. We reconciled what we had from the courts with what we got from our offices to merge the data and then reviewed everything again.

There are two components to what we did:

- (1) What the data shows as the number of capital cases filed and handled by our offices, and
- (2) What else goes into determining what the workload of the offices should be.

The information we requested from the Sentencing Commission was on completed death penalty cases, and specifically whether or not the sentence was life or death. It was not specific to initiated capital cases. The information that was used based on outcome, not what triggered our appointment in the initial charge. It is not really apples to apples and that is covered in this report.

They also relied on the workload study that we did several years ago, which was aimed at getting a workload recommendation for the public defender offices. Within this report we cite other studies that look more comprehensively at what is required in the defense of a capital case. The workload study was intended for the public defender offices.

The Appendices show the data in charts.

Appendix A is the Sentencing Commission data.

Appendix B is the capital cases and charges statewide by our offices jurisdictions. One of the concerns was that capital cases have decreased significantly in the last several years but the chart showing cases and charges you can see that in 2008 there were 22 cases, in 2009 there were 26 cases, there is a dip in 2010, but the number is back up in 2011 and 2012. The number of cases over those five years is pretty steady.

Appendix C shows there were 20 charges and 17 cases that were not in the Court's data. Checking the on-line case information system, they were in the system, but in several of them the charge had been amended after the initial indictment to something other than capital murder. This is basically comparing our cases to the state list. We have several cases that our offices were involved in, but are not listed anywhere on the court's information, specifically Virginia Beach and Fairfax. There were others where there is an initial indictment on capital, but then it gets amended somehow so the data search did not either catch it, or the report did not show it, or there is some kind of discrepancy. Those cases are listed as well.

Appendix D is a summary of all of the information including the Supreme Court charges based on the data from the spreadsheet, the information that was not on that list, the total charges, our offices charges, and the percentage of cases our offices handled. Our offices are handling

fifty percent or more. There is some fluctuation and it makes sense because there are cases that last more than a year.

We looked at the statutory framework, the ethical requirements from the state bar, and then what the prevailing norm is in capital cases. Capital cases are different from every other type of case, even other murders. US Supreme case law has cited the American Bar Association guidelines for the appointment and performance of defense counsel in death penalty cases to identify the prevailing norms, so we cited them as well.

An attorney has to look at each of these factors in the context of the other ethical requirements and the statutory framework to figure out whether they can accept appointment in a case.

In subsection iv. on Page 8 we are getting into the more granular level.

In capital offices one more case can be too many, but in the public defender offices, particularly the larger offices, one more case is not going to make much difference. In a capital office, depending on what that case looks like, it could be the difference between quality of representation and ineffectual assistance of counsel.

There are some effectual mechanisms or tools to control the workload and, if needed to decline a case if there is a conflict or an office has too many cases. We have internal procedures to determine the drivers of workload in the capital defender offices. In instances where one of our offices cannot handle another case, we can ask whether another capital office has capacity through these internal structures.

The ability to recruit attorneys and staff that are experienced in capital representation is a matter we have struggled with in recruiting the right attorneys.

We get into logistical concerns with the geographic distances between where the client is housed, the office location, and the court. Then there are case factors and some other possible complexities. What if an office was representing a foreign nationalist? We have had witnesses in Russia and South America where they actually had to have body guards go in to certain areas to talk to people. It requires a lot more time in certain cases. We tried to capture as many of those situations as we could.

The conclusion we have come to is that the capital offices are appropriately staffed at this point, and are not over staffed.

Ms. Jankowski said that Doug Ramseur who is the Capital Defender in the southeast capital defender office spoke at a CLE sponsored by the federal bar association she attended and she complimented him on the fabulous job he did and also on one of his cases that he spoke on where in mid trial they got a plea. It was a fabulous outcome. She said that he deserves kudos, and she was proud of him and proud to be part of this group. He made us look good in front of a room full of really good lawyers. She said there were dozens of people prepared to lie, and if it had not been for that office, they would have gotten away with it.

There was discussion regarding this case.

Ms. Geiger said that similar to the annual report, this report is going to the legislature.

Mr. Lett arrived.

Judge Hanson made a motion to adopt and approve the review of the capital defender offices. Mr. Chaffe seconded the motion. The motion carried with Mr. Hade, Mr. Benjamin, and Ms. Howard abstaining.

Mr. Chaffe 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 and the Deputy 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, Mr. Lett 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 member so certified.

The next item on the agenda is the appellate policies and procedures.

Ms. Geiger said that we are updating the Appellate Policies and Procedures and have broken it down by policy, procedures, and comments, so that we only need to come back to the Commission when an actual policy change is proposed.

The procedures and comments that were added are meant to be more operational, more flexible. If there are changes in the way the court is doing something, we can adjust the procedure. Comments are more for advice and tips. We tried to make them more user friendly, more of a guide for the offices.

We added training for new attorneys, training for supervising appellate attorneys, and training for support staff.

Catherine Zagurskie, our Senior Appellate Coordinator, looked at prior years and the defaults we had, trying to find common threads and things that were tripping people up, causing problems. She then proposed adjustments either through the policies, procedures, or through

tips and comments. We added cross references to rules and cross references to the Standards of Practice. Those will be updated as needed.

We updated a lot of the forms so the offices have samples and standardized forms to send to clients.

We tightened up the language and added clarifications.

Mr. Johnson said this is just part of what we want to do, we want to try to raise the bar and in the past three weeks we have had four victories in the court of appeals. Catherine Zagurskie is doing a great job as our coordinator.

Appeals are now a big part of Boot Camp. At the end of January we will have our Appellate Conference. We just completed our late day lecture on appeals. We are doing a great job with the quality of appeals.

Judge Hanson made a motion adopting the Appellate Policies and Procedures. Mr. Lett seconded the motion. The motion carried.

The next item on the agenda is the training update.

Mr. Johnson said we had the Office Manager training in November. We have Boot Camp going on right now. We moved to twice a year; it is a smaller group. We have twenty five new attorneys. In four days they had thirteen lectures, six small group workshops, and breakout sessions. Professor Douglass gave a great lecture on cross examination.

The Appellate Supervisor training is in January. Sentencing Advocate training mid-January and the Management Conference in March.

The long awaited certification training redo is out. We previewed it in October and it is now being used. It is a lot slicker and represents our agency a lot better.

We started the late day lecture series again. We had an appellate lecture last week which was attended by about twenty five attorneys.

There was no further business.

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

The meeting adjourned at 1:05pm.

Respectfully Submitted:

Approved By:

Diane Z. Pearson, Administrative Assistant

David J. Johnson, Executive Director