

The Virginia Indigent Defense Commission

Commission Meeting
1604 Santa Rosa Road, Suite 200
Richmond VA 23229
March 5, 2015

Vice Chair, David Lett called the meeting to order at 11:05 am. Other Commission members present were Steve Benjamin, Tom Chaffe, Professor John Douglass, David Walker, Carmen Williams, Eddie Macon (designee for Karl Hade) and Kristen Howard. Members not present were Judge Alan Rosenblatt, Judge Edward Hanson, Kristi Wooten, Senator Donald McEachin, and Delegate Randall Minchew. Administrative staff included Executive Director, David Johnson; Deputy Director, Maria Jankowski; and Administrative Assistant, Diane Pearson.

Quorum requirements have been met.

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

Mr. Walker made a motion approving the agenda. Professor Douglass seconded the motion. The motion carried.

Mr. Walker moved to approve the December meeting minutes. Ms. Howard seconded the motion. The motion carried.

The next item on the agenda is the budget update.

Mr. Johnson said we are doing well. We have enough money to pay all of our bills and probably have some left over. We decided instead of going into detail on the budget in every meeting, with the Commission's approval, we would like to always have it available to you. The big budget meetings are in June when the budget is passed and December when we are half way through the year when we give you a detailed status update. When the Commission meets in September we are only two months into the year and there is really nothing to report. In this (March) meeting we are waiting for the state budget to be passed by the General Assembly.

May 7th the Budget Committee will meet to propose the formal budget for FY16. Between now and then, once the state budget is finalized we will find out how much money we might have left over. We have some IT projects that are pending and our new IT Director has been doing evaluations. If we wait until the June Commission meeting to get approval for these projects there will not be enough time to get them completed and paid.

Mr. Benjamin made a motion to authorize the Budget Committee when they meet May 7th to approve expenditures that exceed Mr. Johnson's pre-existing authority. Ms. Williams seconded the motion. The motion carried.

Mr. Macon, designee for Mr. Hade arrived at 11:10.

The next item on the agenda is the Policy Committee recommendations.

Ms. Jankowski said that the Policy Committee met and reviewed several proposals. The proposed changes are in the meeting materials. All changes have been voted on by the Policy Committee. Those present at that meeting were: Mr. Walker, Mr. Chaffe, Mr. Macon (designee for Mr. Hade), and Ms. Williams.

Chapter 2 – Professionalism

We made the following change:

C. Identification. We added “This shall apply in all forums and media including but not limited to electronic, digital, and internet communications.”

We wanted to make clear that what you cannot do face-to-face you can also not do on the internet.

2.5 Professional Organizations

We have always paid for the Chief Public Defender memberships for professional organizations. The proposed change is in A. ii. “if requested by the Public Defender the Commission authorizes payments for membership in the Criminal Law Section of the Virginia State Bar and any other organization approved by the Executive Director.”

That would include the NACDL and NLADA, and would have to be a benefit of the organization and the public defender office.

Chapter 3 – Employment Practices

3.9 Employee Duty to Report Criminal Charges and Convictions

Ms. Jankowski said that something came up this year that drew our attention to it. We noticed that this did not capture everything we need to be given notice on and was not written as succinctly and clearly as we felt it could and should be. We have rewritten it to say: “Notice required. All Commission employees must immediately notify the Public Defender or in the case of the administrative office, the Executive Director, in writing, of any criminal arrests, charges, indictments, violation of court order, and the disposition thereof.”

Mr. Benjamin suggested adding contempt of court as well. This was inadvertently taken out.

It clarifies that the Public Defender would then notify the Executive Director of any issues in their office.

We merged B. and C. so the paragraph reads more succinct and clear. We felt A. B. and C. conflicted and provided confusing advice as to what the requirements were. We believe this language is clearer.

3.11 Weapons Policy

Ms. Jankowski said that after great discussion it is recommended that we change this to a firearms policy. We changed the word “weapons” to the word “firearms.”

Mr. Johnson said that one of the public defender offices asked if they could display a sign that said “No firearms or weapons allowed past this point.” This is okay and may help their staff feel better.

Ms. Jankowski said she believes that Senator Garrett had a bill this year that was going to remove some of those items from 18.2-308.

Mr. Benjamin said the bill he remembers removed the criminal prohibition against selling those items.

3.12 Outside Employment

Ms. Jankowski said this is another area where the proposed language is more succinct and clear. The point to be made is that if you are a full time public defender you are not allowed to also be in the private practice of law. We wanted to make that clear.

Mr. Johnson added that we have always allowed our attorneys to take a pro-bono case on their own time with permission.

Mr. Benjamin said that if someone takes the day off work and represents someone that means they are engaging in the private practice of law. It should state without the express permission of the Executive Director and that would capture the present practice.

Mr. Johnson said we will be meeting with all of the chief defenders and their supervising attorneys next week. One of the items on the agenda is to go through all of these policy changes that go into effect April 1st. We will go over all of the expectations.

4.3 Teleworking

Ms. Jankowski said the current section on our teleworking policy is four pages stating that we do not allow teleworking but if we did, this is what it would look like.

Mr. Johnson added that this came about several years ago when an executive order stated that agencies will develop a policy on teleworking. We have examined the nature of our offices and it does not work for us. Our policy on teleworking is that we do not allow it.

Ms. Jankowski said the proposed language is to acknowledge that we have carefully considered it and found it is counter to our unique mission.

Mr. Johnson said the only exception is the continuity of operations plan if there is a flood or other disaster that keeps employees from working in the office. This is temporary for people to have the ability to work from home.

Chapter 5 – Compensation

Ms. Jankowski said the change is to fix an inaccuracy in the policy. Subsection A is on pay bands. We do not have pay bands. We needed to make sure it was not misleading and accurately reflects what we do have. What it states is that new employees are hired at the entry level salary for that position.

5.5 Direct Deposit and Payline

Ms. Jankowski said the old policy referred to an old EPPI program that does not exist. Everyone is required to have direct deposit. We took out the old language so it accurately reflects that all employees will have direct deposit.

Chapter 6 – Leave Policies

Ms. Jankowski said the changes are to make it clearer and more user friendly.

For example, in C.1.b. there is language about unanticipated leave and then considering the ability to anticipate the unanticipated leave. We felt like the language needed to make more sense. We deleted a part of subsection b. We have also deleted a large part of subsection C.2 as being common sense. If leave needs to be turned down it can always be granted at another time. Some of this is just to make it more logical and straight forward.

6.3 Workers Compensation

The only change is to add the language “work-related” before injury in the first paragraph of Eligibility, to clarify that it is only applicable in work-related injuries.

10.5 Travel Planning

Previously we required anyone who attended a training that was less than \$250 to pay out of pocket and then seek reimbursement. This is not best practice. Best practice is to use the state small purchase card. The state purchase card has a minimum that has to be spent and if the minimum has not been met there are fees associated with that. This will help us to meet those requirements and not get assessed those fees. The employees are still required to reimburse the agency if they do not attend the training.

Chapter 11 – Computer Use Policy

All of the following changes were made by our IT Director and perfected by the Policy Committee. Some changes reflect necessary mandates by VITA Security Standards and some were to address clarity. We want to have good policies that have longevity and do not have to be reworked every time something in IT becomes obsolete.

Mr. Johnson added that our new IT Director, Maurion Edwards, comes from a heavy information security background and so much of this is written to make sure we are in compliance with all of the security standards.

Ms. Jankowski said that Mr. Edwards plans to go over this section again to do some drilling down. We may come to the Commission a year from now with a great deal of changes. This was his six month overview.

Some items were added because we are now doing some Cloud Computing. In some instances we have added the language “unless authorized by the Executive Director.”

11.2 Access and Data Security

In the sensitive data section we took out ACeS, our internal attorney certification system, because it is not a sensitive system. We replaced it with CMS which is a sensitive system.

Mr. Walker said that as Chairman of the Policy Committee he would like to thank the entire staff, Dave and Maria and the members of the Committee for all the effort and hard work to make these changes.

Ms. Jankowski said the Committee was very active. She noted they were very detailed in the review, rewriting, and reworking.

Mr. Benjamin made a motion to accept the policies as stated with the two amendments, one in Section 3.9 to include “contempt of court”, and the second in Section 3.12 to add “without the express permission of the Executive Director.” Ms. Howard seconded the motion. The motion carried.

The next item on the agenda is the Standards of Practice update.

Ms. Jankowski said that the State Bar put out a proposed legal ethics opinion for comment and they relied heavily on our Standards of Practice. This was really an honor. In this legal ethics opinion, in support of the position they took, were a lot of our standards of practice. It is 1880 and basically the opinion states that even in a guilty plea you have an obligation to appeal your client’s conviction if requested. Apparently there is uncertainty or folks in the Bar who do not think you have to appeal if it is a guilty plea. This legal ethics opinion would clarify that you do have to appeal.

That being said, and as thrilled as we are that they relied so heavily on our Standards of Practice, we realized that the Standards could be written more clearly. It is the client’s decision to appeal not the attorney’s.

Standard 6.4 Entry of the Plea Before the Court

In Paragraph (c) in the Comments, replace “Right to appeal” with Grounds for appeal prior to the entry of the guilty plea.

Standard 9.2 Right to Appeal

We are striking “unless such right has been knowingly, intelligently, and voluntarily waived, and the action that must be taken to perfect an appeal.”

The concern was that that language might cause a practitioner some confusion.

We do not necessarily believe this needs a vote because it is not a change in our Standards of Practice. Our Standards of Practice have always stated that appeals must be taken in any case regardless of the attorney’s opinion of the merit of the appeal.

We wanted the Commission to see this and get your feedback whether there are any concerns or if a vote was needed.

Mr. Johnson said there are two Standards of Practice complaints that are moving through the process. We had a hearing on one last week. In both cases counsel was experienced. In both cases they were not guilty pleas. In both cases the lawyers disregarded the appeal saying it would be frivolous to do so.

Ms. Jankowski said Jae K. Davenport who is our Standards of Practice Enforcement attorney investigates those complaints and rights up a report.

It was really timely that these two complaints have been on the issue of the attorney failing to appeal and not honoring the client's decision or desires.

One of these hearings has been resolved, the other has not.

These two lawyers are private attorneys, not our attorneys.

Mr. Johnson said that if they were our attorneys the Standards of Practice would be the least of their concern. Our lawyers have to discuss the impact of a guilty plea and the appellate process with their clients and that is memorialized. There may be a letter on top of that depending on the office. We go way beyond the Standards of Practice.

Ms. Jankowski said then we actually shift to our Appellate policies and procedures that control what will happen at every stage. There are a ton of form letters that are generated. Once it is at the appellate stage we continue to appeal and will go all the way to the Supreme Court.

Mr. Benjamin said on page 1 of the proposed amendments to the Standards of Practice where the right to appeal is crossed out, it struck him to keep the language consistent, it should say "right to appeal" and then fill in the clarifying language. There are other circumstances that you do not want to preclude. He gave the example of a Brady violation prior to the entry of a guilty plea but it is discovered after while the court still has jurisdiction. He noted that might end up being the grounds for an appeal, or if you move to withdraw your guilty plea because of a preceding Bradley violation. He would like to leave open the opportunity for zealous appellate representation and would like to make sure we are not cutting off other avenues. The alternative wording for (g) might be: right to appeal except where otherwise permitted.

Mr. Johnson said the reason we did this is what the LEO focused on is that there seemed to be a misunderstanding with some attorneys with the distinction between the right to appeal and the grounds for appeal. By pleading guilty you may be giving up some of the grounds to appeal but you have not given up the right to appeal.

Ms. Jankowski said she believes the real challenge is writing this in a way that captures the inevitable conflict between the attorneys responsibility to make sure your client knows what they are giving up when they plead guilty and they have been fully advised of the ramifications of the guilty plea. We as attorneys have to make sure clients understand that they are giving up substantial rights for all practical purposes and except in rare circumstances any chance of winning on appeal. At the same time we have to make sure the lawyer understands that you still have to file that appeal regardless of how the case was resolved or your opinion on the merits.

Mr. Benjamin said the wording could be: the right to appeal on grounds waived by the entry of the plea.

The next item on the agenda relates to a grant.

Ms. Jankowski said the Deputy Secretary of Public Safety reached out to us. We have been given a grant from the Virginia Poverty Law Center to place a health advocate to help our clients get services, help, and hopefully substance abuse treatment. This expires in September. They are housed in Alexandria and Arlington. They have hired someone who is working in both our Alexandria and Arlington offices. The feedback has been fabulous.

The next order of business is the training update.

Mr. Johnson said that Monday is our Management Conference. A few years ago we started to include our Deputies and Supervising Attorneys. There will be a motivational segment. There will also be an hour on Google Drive training.

January 13th and 14th was our Investigator's Conference. This was very well received. We conducted it at a Holiday Inn here in Richmond.

January 30th was the Appellate Conference in conjunction with the Court of Appeals. There were two Judges who worked with our Senior Appellate Coordinator. We had presenters and then follow up workshops. The workshops were staffed by a Court of Appeals Judge and a Supervising Appellate Attorney. The reviews we received were fantastic. The Court of Appeals has said they have seen great improvement in the work from the public defender offices. They would like to know how to help the private bar.

We planned this to be really small because we were not sure if anyone would show up. The registration closed in minutes from being open. We had 34 people here and a wait list of double that. We will be doing this again July 10th at the University of Richmond Law School where we will be able to seat about 95 people. Thanks to the Law School for letting us do that. The judges are going to participate again. Everyone enjoyed the interaction.

February 6th Judge Bushnell did a live recording for our late day lecture.

May 11th through 15th will be our new attorney trial skill boot camp.

June 18th and 19th is the Initial Capital Certification Training. This is all part of the recommendations of the VSB, Supreme Court, and our work group. The changes in the qualification standards for the court appointed list. We sent out a "Save the Date" in January. We have already had about one hundred lawyers register. We are doing it at UVA Law School because we do not have any funding for it. We will be able to accommodate 150 people. We will get this professionally recorded because we realize we will have to offer a video replay. September 1st the old list expires. There is a waiver process. The bar for the waiver is very high. This has been a huge amount of work and effort. The Standards also require that to do habeas work you need specialized habeas training. That training is going to be July 31st here.

The agendas for both of these programs are complete; all of the speakers are lined up. We just need to get all of the logistics together. There will be a replay here and in Roanoke.

October 6th and 7th is the Annual Public Defender Conference in Hampton. Commission members are welcome to attend and receive the CLE.

Bonnie Hoffman has arranged to put together an advance trial skills boot camp for the more experienced attorneys in our system. We will house it here in November and is our first effort at establishing some real advanced training for our more experienced lawyers.

Of course, we have two days of certification training every month here in this office. We are going to be looking at it in the next year about when we might need to refresh it.

Ms. Jankowski added that Andy Block, Director of DJJ (Department of Juvenile Justice) reached out to us about partnering to do some training of our lawyers who represent juveniles. He will be coming to the Annual Conference.

In the meeting materials you will find the report of the Discovery Committee and the letter from the Chief Justice concerning it. This is a big deal and a lot of work was done on it.

Mr. Johnson added that the comments are due June 30th and we will wait if the Commission would prefer the comments come from the Commission instead of staff. We are going to ask the public defenders for their comments. At the June meeting we will give you some suggestions and let the Commission weigh in.

We will send our comments in a rough draft to the Commission members in advance of the June meeting.

Ms. Jankowski said that comments could be sent to her prior to the June meeting if they would like.

The next Commission meeting is June 11th; the agenda incorrectly states June 5th.

The resource website has now been made available to the court appointed attorneys and is in the process of being made available to the entire state. We made the decision to roll it out by judicial district in the event there were any glitches to be able to catch and fix them as it went out. If you are in our ACeS system, (our court appointed attorney system), you should have received it. It was all done through that system. It only went out to court appointed attorneys. If you would like the log-in information, we can share that with you. There is a generic user name and a generic password. The feedback so far has been excellent with helpful suggestions.

There was no further business.

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

The meeting adjourned at 11:56 am.

Respectfully Submitted:

Approved By:

Diane Z. Pearson, Administrative Assistant

David J. Johnson, Executive Director