

The Virginia Indigent Defense Commission
Commission Meeting
1604 Santa Rosa Road, Suite 239
Richmond VA 23229
March 15, 2012

Judge Alan Rosenblatt (ret.) called the meeting to order at 11:10am. Other Commission members in attendance were Steve Benjamin, John Douglass, Karl Hade, Maria Jankowski, Kristen Howard, David Lett, Kent Smith, Kristi Wooten, and Judge Hanson. 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.

Judge Hanson moved to approve the meeting agenda. Ms. Jankowski seconded the motion. The motion carried.

The next item on the agenda is the approval of the December 8, 2011 minutes.

Ms. Jankowski made a motion to approve the minutes. Judge Hanson seconded the motion. The motion carried.

Mr. Johnson introduced our three new attorneys; Jae K. Davenport, Standards of Practice Enforcement Attorney; Catherine Rusz, Legal Resource Attorney, and Catherine French who replaced Joe Sadighian as our senior Appellate Coordinator. Catherine French was in the Richmond Office where she was handling appeals. Catherine Rusz used to work in the Richmond Office and has been in private practice. Jae K was in the Franklin Office for 6 ½ years.

Mr. Johnson said their job descriptions have been expanded to include training.

Mr. Johnson explained that the Hampton Office was established in 2004. There are fourteen lawyers; five are currently supervisors, the public defender, a deputy, and three seniors. The new public defender is Tom Watkins. One of the senior positions is vacant and we would like permission to reclassify it as an APD II. We would like to take that senior position and move it to Bedford. Bedford is the only office that does not have a supervising position, other than the chief public defender.

Judge Hanson made a motion to reclassify the senior attorney position in Hampton to an APD II and to reclassify an APD II position to a Senior APD position in Bedford. Mr. Lett seconded the motion. The motion carried.

The next item on the agenda is agency operations.

Ms. Geiger said that we added new language in Paragraph 4 of the Authority of Executive Director for the Commission's consideration. This is for the Executive Director to determine the method of procurement. Under the state's Public Procurement Act, state agencies are required to procure goods and services by specific methods depending on the level of the expense and the type of goods being purchased.

There are instances when the preferred method does not need to be used. If the agency determines it is not practical or fiscally advantageous or when the agency is not sure of all of the specifications or the full scope of work. We would have to wait until the next quarterly Commission meeting to approve a written determination of which procurement method should be used based on the analysis of all the facts. We are asking that you delegate authority to the Executive Director to make that written determination if it is not advantageous or practical to use the preferred method. The Executive Director would then reduce that determination to writing.

Professor Douglass made a motion to approve the delegation to the Executive Director the authority to determine the method of procurement. Judge Hanson seconded the motion. The motion carried.

The next item on the agenda is the office expense allowances policy.

The problem with this is that it was adopted by the Public Defender Commission and was never readopted by the Indigent Defense Commission. We currently have some part time assistant public defenders working out of their own offices. This is either because we do not have space for them in the public defender office or they are in a multijurisdictional office and are in a jurisdiction that is far from their office. There is a cost savings to have them located close to the courthouse. There are fewer than ten people who work this way.

Judge Hanson made a motion adopting the office expense allowances policy. Professor Douglass seconded the motion. The motion carried.

The next order of business is the policy update.

Mr. Johnson said that Catherine French, our Senior Appellate Coordinator, has updated the Standards of Practice relating to appellate petition and brief preparation, Section 10.3.1. This is an effort to keep the Standards current.

Mr. Benjamin enthusiastically moved to adopt the Standards of Practice relating to appellate petition and brief preparation as amended. Judge Hanson seconded the motion. The motion carried.

There was discussion regarding the motion and the importance of the Standards of Practice regarding appellate petitions and briefs. Mr. Benjamin pointed out that this is extremely important.

The next order of business is the budget update.

Ms. Geiger said that the General Assembly finished on Saturday without a budget to return next Wednesday, March 21st. The versions that made it to the floor chambers did not change our budget in any way. The overall judicial reversion amounts remain unchanged at \$5.3 million. There are no items directly affecting the Commission. There are changes in the judicial department not specifically related to the judicial reversion amount. For the VIDC there are no proposed changes. Our \$42,607,377 will remain unchanged. The \$944,000 judicial reversion remains. With the General Assembly heading into special session, there are no guarantees.

There was discussion regarding the House and Senate versions of the budget.

Ms. Geiger said that the current expenditures through February 29, 2012 are \$30,017,004; \$1.23 million was for the retention bonuses that the Commission approved. Subtract that from the expenditure amount, we have expended \$28,786,865. This is an average of \$3.5 million per month. Our remaining cash as of March 1st is \$13,900,000. That leaves an average for the last four months of the year to spend of \$3.485 million. There is a difference of how much we have been spending and how much we have left to spend per month of about \$113,035. Multiply that shortage for four months leaves a deficit of \$452,140.

There is only one payroll to pay in June. Payroll on average is about \$1.56 million. That is an actual savings. We subtract the projected deficit from that and we have a balance of \$1.1 million less the \$944,000 for the judicial reversion and that leaves us with a positive balance of \$164,482. This is vastly different from the \$1.3 million we ended with last year. That number does not include prepayment for any items including State Bar dues for our attorneys. Last year we prepaid three months of rent, our Virginia State Bar dues, the Bank of America statement for June, and our copier maintenance. This is traditionally what we have paid to head off expenses for the following year.

This means things are going to be rather tight and we will need to monitor expenses.

Last year we lifted the ninety-day hiring delay, we unfroze the positions that had been frozen for a couple years and reallocated them. Our turnover and vacancy savings have dramatically decreased and we paid the retention bonuses. The retention period is in effect until May 25, 2012 and has been very effective.

We have had a history of generating more than \$2 million of turnover and vacancy savings every year. This year the projection is that we will generate about \$500,000. We are not generating it the way we did. We were artificially increasing our turnover and vacancy through the hiring delay and the frozen positions, both of which have gone away.

Our Budget Analyst will be checking our expenditures weekly and our cash balance daily. Every week we will go through the line items to determine what we spent. Once we have our expenditures for March we will be better able to predict where we will end up in June. The

Commission has given the Executive Director permission to reinstate the hiring delay so that is an option for us. Another option is to not prepay some of the expenses we prepaid in the past and delay some of those costs to next year. It might make next year a little tighter as we are probably not going to get any additional funding but we do have some options to head that off.

We will not be replacing the IDSS financial system this year. This was budgeted, so we can find some savings in not completing that project. We can shut down some of the supply spending.

Having more people on the payroll also affects expenditures in other categories. We are paying more mileage, using more supplies, using more postage, etc. We will monitor the spending and meet with the Budget Committee in May.

The people who accepted the retention bonuses are required to stay until May 25. We have had a couple of people leave, but the amount we recoup from the bonus is offset by the requirement to pay their accumulated annual leave balance.

There was discussion about the number of new attorneys looking for work and the economy and the effect it is still having on employment.

Discussion continued about expenses and the ability to adjust spending and stay on top of spending.

Ms. Geiger said that there is a chart in the meeting materials that shows the vacancy savings for the last four years. The lowest line on the chart is this year. There is a spike at the end of the year that represents when the General Assembly approved the Appropriations Act to eliminate the costs of some benefits during the last five payrolls of the fiscal year. This artificially inflated the turnover savings. While there is generally an uptick at the end of a fiscal year, the provisions of the Appropriations Act caused it to be blown out of proportion.

The next item on the agenda is the turnover and vacancy update.

Amy Williams reported that in FY10 we had an overall turnover rate of 12%. This was calculated by looking at all of the positions that turned over in the agency and put that against our overall FTE (full time employees) which is 542.

The first line is overall and the second is attorneys. The attorney turnover was higher at 14% for FY10, FY11 12%, and FY12 8%. Overall turnover for FY10 was 12%, FY11 11%, and FY12 8% overall as of the March 9th pay period.

We started compiling exit interview surveys in September. Anyone voluntarily leaving our system is sent a summary form. We haven't had a good response therefore we are looking into changing it. Sometimes it is difficult for people to complete an exit interview when still employed. We will begin following up after they are gone to see if they are more willing. We did

get some results and have summarized those results. We hope that as responses increase we will be able to use this data for management trainings.

The next item on the agenda is strategic planning.

Ms. Geiger said that the Department of Planning and Budget (DPB) is the Governor's budget builder but they also have the authority to review the state's strategic planning program. Although it wasn't required for our agency a few years ago, at the time they strongly recommended that we get on board with strategic planning.

We created a committee and complied with the basic minimum requirements. Some years we are required to update some items and some years we are not allowed to enter any new data. They provided training last year and informed us that the Auditor of Public Accounts (APA) a legislative branch auditor is now auditing strategic plans for agencies. They gave specific attention to what the auditors are now looking for in strategic planning. That signaled to us to take another look at it and basically start from scratch.

We have provided Strategic Planning (FAQ's) to the chief public defenders. The Strategic Plan is basically a road map for the agency. It looks at where we are now, where we want to go, and how we are going to get there.

The second question on the FAQ's is why? There is a state requirement that and is actually in the Code of Virginia stating there is going to be strategic planning for state agencies.

The third question covers what. What are the components of a strategic plan? Some of these are universal to strategic planning. Non-profits and governments have a different view on it than private corporations.

We have provided this information to the chief defenders along with a schedule and opportunities for them to have as much or as little input as they have interest in so that we get some information and feedback from the field offices, their perspective, and the benefit of their knowledge and experience so that it is more comprehensive. That was not done during the first strategic plan development; instead, we had only a few select public defenders provide information. We are sharing more information with the chief defenders and encouraging them to participate.

There is a time table in your binders. We decided to build enough time to complete all of the components and review them with you in an effort to meet the end of August deadline that DPB generally has. We do not have information on the deadline at this point but it typically is the end of August or beginning of September.

It is a very aggressive agenda and we have senior management meetings every two weeks. We provide information to this group of volunteers and give them deadlines and they then provide us with information.

There was discussion regarding strategic planning and the importance of it.

Ms. Geiger continued with the VIDC Mission statement.

There was a lot of discussion about the best Mission statement and the best Vision statement. Members agreed to review the amended language and vote on the best options after closed session.

CLOSED SESSION

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 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.

Ms. Jankowski 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 and that were identified in the motion by which the closed session was convened.

Each member so certified.

Judge Hanson moved to grant the Executive Director the authority to reallocate the part time sentencing advocate position currently assigned to the Newport News public defender office to another public defender office that does not currently have a sentencing advocate position. Ms. Wooten seconded the motion. The motion carried

The discussion continued regarding the Mission and Vision statements and a decision determined that the following be adopted:

The VIDC Mission statement:

The Virginia Indigent Defense Commission provides quality legal representation to individuals who are accused of crimes and unable to hire an attorney through the administration of a state public defender system, the certification of court appointed

counsel, and the development, advancement and enforcement of the Standards of Practice for Indigent Defense Counsel pursuant to the US and Virginia Constitutions and the laws of the Commonwealth.

Ms. Jankowski made a motion to adopt the Mission statement. Mr. Lett seconded the motion. The motion carried.

The VIDC Vision statement:

Virginia Indigent Defense Commission: Ensuring highly skilled, dedicated professionals; exceptional criminal indigent defense representation; and comprehensive training.

Mr. Benjamin moved to adopt the Vision statement. Ms. Howard seconded the motion. The motion carried.

The next item on the agenda is the training update.

Mr. Johnson said that on January 5th and 6th we had a Management training conference that included the chief public defenders, as well as their deputies and senior assistants. We emphasized performance management and in-house training. The conference was well received and the evaluations were the best we ever received after training.

Karen Michael, a well-known and respected employment law attorney was one of the featured speakers. She is a dynamic speaker. She had a great presentation that was really effective, and we would like for her to return for future trainings.

We will hold a Sentencing Advocate conference in May and have several big trainings planned in the coming months. Boot Camp will be the end of July. We are relying heavily on speakers from within our system and because of this we are able to help them come up with their presentations. This year we will step up the appellate boot camp training.

The annual conference will be held in September. We put together an annual conference planning committee this year. We will meet next week to discuss topics. The committee will help recruit speakers.

The big training we have planned for reviews is the attorney certification training. When we move the administrative office to the second floor, we will update some of our equipment to improve our trainings.

There are two groups of attorneys from the public defender offices who have recently been through the certification training. One group is going to deal with the first day of training, that is six hours designed for adult work, and the other group the second day of training, is four hours.

We will be working with both of these groups to come up with the topics and rewrite the program and recruit speakers. We think with the new equipment and our training manager's help, we can come up with good quality training.

Mr. Johnson said he believes training is going to take a big step forward the next couple years. We want to make the on-line resources available to the private bar.

He would like to discourage seasoned attorneys from using the basic certification training to get CLE hours as it is designed for new lawyers. We plan to develop a new training for the more advanced attorneys and market certification training for new attorneys. We have had some really big groups every month in the certification trainings.

The next order of business is informational items.

Mr. Johnson said that on April 2nd he and Judge Rosenblatt are meeting with the Chief Justice and the president of the state bar. This is an opportunity to look at the capital attorney qualification standards.

Our Newport News office and the Administrative office will be moving in the next few months. Newport News is moving to a better building and office space, and the administrative office is moving to the second floor of this building.

We have four Commission members whose terms will be expiring this year. Maria Jankowski, David Walker, and Carmen Williams are appointed by the Speaker of the House and Judge Rosenblatt who is appointed by the Senate Committee on Rules.

We have a dynamic commission and hope all will be reinstated.

Janice Johnson our Budget and Finance Director is retiring in June.

Mr. Benjamin said that during the General Assembly session legislation had been introduced that would have deprived Judges of the ability to take matters under advisement unless there was agreement of the prosecution with the defense. DJ worked tirelessly on this, made a very good presentation to the Senate Courts Committee. The amount of credibility she has with the General Assembly is staggering. That bill failed and that is very important for us.

The rest falls into alarming developments. The use of a tracking device is a search, and the use of such a thing requires a search warrant. The Governor sent in a bill very late in the session to create a mechanism for obtaining a search warrant for tracking devices. This bill was in very bad shape when it went in and what ultimately passed is in appropriate shape, but the biggest problem with it is that it mandates that the affidavit, the search warrant, and the return documentations be sealed and remain sealed unless someone is charged and can demonstrate that the ends of justice require unsealing or that it is necessary to adequately advise them of the nature of the crime with which they are charged.

One consequence of this is that search warrants for tracking devices will be issued on less than adequate grounds and used for inappropriate purposes. Without these documents being unsealed we will never be able to do anything about it.

This deprives defense lawyers of the opportunity to ferret out favorable information. Because we are unable to get access to sealed court records it means there is going to be an affirmative obligation on the prosecution to determine if there is exculpatory information contained within sealed court records.

We will need to train our attorneys to be aware of the procedures surrounding searches via tracking devices.

They are using subterfuge to deliver items to targets that contain a tracking device that are then clipped to clothing, homes, phones, etc. There is a whole world of tracking devices out there that will remain sealed. This will be a big change in what we do in our cases.

For the first time ever we have a mandatory life sentence for a non-homicide offense. Any sex, be it forced or consensual with a child twelve or younger is rape, forcible sodomy.

After the prosecutors first heard the bill, it came back with an amendment that was adopted. The mandatory life sentence applies when it is alleged in the indictment so they can opt out of imposing a mandatory life sentence. It gives them tremendous leverage in compelling guilty pleas.

A bill passed that in situations where a jury hangs on sentencing a new jury is empanelled solely to determine the sentence, not to rehear the entire case. This is problematic because we are not permitted in most circuits in this Commonwealth from telling the jury of their ability to follow sentencing ranges. So juries decide guilt without any knowledge that there may be a minimum sentence that they have to impose. When they get that information it is often times the cause for the jury to hang on sentencing.

If they convict someone on a questionable case and the jury hangs, the jury coming in to perform the sentencing function will not have heard the questionable case on guilt, but that is a policy decision.

Mr. Benjamin said he was on a panel in New Orleans at the ABA mid winter meeting that focused on indigent defense statewide with other bar presidents from several states. We might be the only state in the country that has standards of practice enforcement mechanisms and certification requirements. People were astounded to hear what we have done in Virginia. We have become a model for the rest of the country.

Mr. Johnson said that the ABA has a death penalty moratorium project. They are going state by state examining their delivery system for capital representation. They sent us a questionnaire

and will point out areas where we are lacking. We will meet a lot of the benchmarks. We have a meeting scheduled with them in the next couple weeks.

Mr. Benjamin added that the president elect for the Virginia State Bar is a lawyer in Richmond, Dave Harless. The NACDL, through a grant, hosted training on immigration consequences because of the Padilla decision, which requires attorneys to advise their clients of potential immigration consequences resulting from convictions. NACDL put on a one-day seminar to talk with bar presidents, non-criminal people, and policy makers to help them understand the big problem.

February 21st and 22nd is the next winter NACDL meeting to occur simultaneously with American Academy of Forensic Sciences annual meeting in DC. Mr. Benjamin would like to have the public defenders attend.

If any member of the Commission is interested in working on the national level next year on either indigent defense reform or any issue dealing with criminal justice, Mr. Benjamin is very interested in moving Virginia up the ladder nationally.

There was no further business.

Mr. Lett made a motion to adjourn. Judge Hanson 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