

## 2021.07.30 MEETING MINUTES

### Commission on Indigent Defense Services

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Quarterly Meeting – July 30, 2021

Location: North Carolina Administrative Office of the Courts

**Commissioner Attendees:** Darrin Jordan (Chair), Dorothy Hairston (Vice Chair), William “Gus” Anthony, Art Beeler, Brian Cromwell, Caitlin Fenhagen, Staples Hughes, Brian Jones, Channing Jones, Lisa Menefee

**Staff Attendees:** Chad Boykin (Financial Services Staff Attorney), Susan Brooks (Public Defender Administrator), D. Tucker Charns (Chief Regional Defender), Jeff Connolly (Regional Defender), Kristen DeSimone (Legal Assistant), Whitney Fairbanks (Deputy Director), Margaret Gressens (Research Director), Angela Henderson (Juvenile Contracts Administrator), Stephen Lich (Research Associate), Susan Perry ( Legal Assistant) Mary S. Pollard (Executive Director), Elisa Wolper (Financial Officer)

**Local and State Public Defender Program Attendees:** Glenn Gerding (Appellate Defender), Paul James (District 21), Robert Kemp (District 3A), John Nieman ( District 18), Samuel Snead (District 28), Wendy C. Sotolongo (Parent Defender), Deonte Thomas (District 10), Dolly Whiteside (Chief Special Counsel), Eric Zogry (Juvenile Defender)

**Guests:** Jackie Gonzalez (Private Investigator)

The meeting was called to order by Darrin Jordan at 9:00 am.

**The IDS Commission immediately went into Executive Session to discuss personnel and litigation matters. The minutes of the Executive Session are being withheld from public inspection pursuant to G.S. 143-318.11(a)(3) and (a)(6).**

**The Commission returned to open session around 10:00am.** Commissioner Jordan then proceeded with the welcome and conducted a roll call of members participating via telephone and video.

#### **Approval of April 9, 2021 Quarterly Commission Meeting Minutes**

Commissioner Jordan opened the floor for members to discuss the minutes from the April 9, 2021 Commission Meeting.

Commissioner Beeler moved to approve the minutes without amendment. Commissioner Cromwell seconded the motion. The minutes were approved by unanimous vote.

#### **State Government Ethics Act Reminder**

Commissioner Jordan reminded the Commissioners of their responsibilities under the State Government Ethics Act.

## **Remarks from the Chair**

Welcome Special Guests: Commissioner Jordan welcomed special guest Jackie Gonzalez.

Welcome New Staff: Executive Director Pollard introduced Chad Boykin, Fiscal Services Staff Attorney and Stephen W. Lich-Tyler, Research Assistant

## **Commission Business/ Votes:**

### Appointment of Appellate Defender.

Commissioner Jordan opened the floor to a motion to reappoint Glenn Gerding as the NC Appellate Defender for a new four-year term. Commissioner Hughes moved to reappoint Gerding and Commissioner Fenhagen seconded. The Commission voted unanimously to reappoint Gerding.

## **Director's Report on IDS Business**

### Contract Defender Program Update

Pollard began by giving the Commission a refresher on the contract defender program. She reminded the Commission that research staff's earlier study had allowed her to conclude that the current system does not allow IDS to meet its statutory mandate to collect data and that it was more expensive than any of the other delivery models, including public defender/ private assigned counsel (PAC) and PAC only models. Since meeting with Commission in April 2021, she had tasked Defender Administrator Susan Brooks with identifying and presenting alternative methods to staff.

Brooks expressed gratitude to the ABA for helping her identify jurisdictions that use alternate contract compensation methods. She noted that the systems often are county based, a few have offices designated to manage the systems, and that they used various compensation models. She concluded that she was in the process of consolidating the information she had gathered. Pollard and Brooks agreed that staff would be better positioned to update the Commission on the status of the current Contract Defender Program and the design and implementation of a replacement program at its next meeting.

### Field Update

Pollard relayed her recent experience at a lunch meeting with the Rowan County Bar, describing it as very informative. Several attorneys dedicated to this work attended and explained the constraints of too much work and too low pay. The Rowan County Bar requested a public defender office.

Pollard highlighted the agency's recent work on expanding resources for attorneys in the field including an upcoming field training on forensics. She also said agency's new sex offense was going so well that IDS might need to add more money to the project's budget. Chief Kemp

opined that the resource was timely because Marsy's law had led to a sharp increase in sex offense filed and a corresponding increase in the State's unwillingness to negotiate. Pollard added that the agency also was investigating the feasibility of a new resource for attorneys who had clients being held pre-trial as incapable to proceed.

Pollard advised the Commission that she recently began working with the State Bar's ethics committee on a question presented to it about indigent client's retaining counsel for the purpose of pre-trial release. She said she hoped committee also would consider a concern several superior court judges recently raised to her about defendants retaining counsel solely for the purpose of obtaining a guilty plea.

#### The Eight Year Plan for NC Public Defense

Pollard explained that she was working with the Strategic Partnership Initiative of the Office of State Human Resources to identify people, agencies, or organizations interested in helping IDS draft the eighth year plan. She advised that the materials OSHR provided IDS, including four expressions of interest, were included in the Commission packet. She again expressed her wish to work with the National Center for State Courts on the project since they already had significant familiarity the NC public defender programs and justice system.

#### NCAOC eCourts/ ICMS Initiative

Pollard briefly updated the Commission on the status of the rollout and IDS staff efforts to gather information about the impact of the rollout and the system on PAC and PD.

#### Defender Office Case Loads

Pollard tendered the floor to Jackie Gonzalez and Paul James for firsthand accounts of the impact stagnate PAC rates and growing caseloads continued to have on the public defense system.

### **Remarks from the Defense Team**

#### The Investigator's Role and the Impact of Stagnant Rates

Private Investigator Jackie Gonzalez provided the Commissioners with a presentation on investigation in criminal defense in North Carolina. She began with a brief explanation of the fact investigator's role in the process.

Gonzalez stated that many fact investigators are overloaded on their work. She summarized the reasons for the overload as:

- ⇒ \$55 flat hourly rate regardless of case type or experience level;
- ⇒ Higher rates in surrounding states;
- ⇒ Lack of increase in rates in spite of inflation; and
- ⇒ Cost of overhead for independent contractors.

Commissioner Cromwell pointed out that the lack of qualified, available investigators leads to some attorneys doing the fact investigation on their own, which likely results in IDS paying attorney rates for fact investigation work.

Commissioner Jordan relayed a case where he had a fact investigator investigate a case where the defendant had been presented with a guilty plea and the investigator discovered evidence of innocence.

Commissioner Fenhagen asked IDS to investigate the possibility of tiered rates based on expertise or other criteria for fact investigators.

(For Ms. Gonzalez's Power Point presentation, please contact Whitney Fairbanks. )

#### Update from the Chief Public Defenders

Paul James, Chief Public Defender for Defender District 21, added his own observations on the too limited use of investigators in his district including:

- ⇒ Inconsistent judicial approval of investigator requests;
- ⇒ Caseloads that do not allow attorneys sufficient time to investigate cases early and determine whether an investigator was needed; and
- ⇒ Delay in use of investigator until the case was too advanced.

James then pivoted to a discussion of the current case load status in his district. He noted that while his office is "fully staffed," his attorneys were more than 200% over their regular maximum caseloads. He opined that the only reason his office could maintain its current caseload was the Covid-19 related slow down and the state's inability to process cases. He pointed out that Forsyth County had a jury trial backlog of more than 18 months and the district court case backlog was more than 54,000 cases.

James expressed alarm that according to the workload study, his office needed an additional thirteen attorneys and six legal assistants before Covid-19 created a backlog. His alarm, he said, was compounded by a dangerously low roster of private assigned counsel. As of July 30, 2021, the Forsyth roster totaled 16 PAC.

- ⇒ List 1 (misdemeanors) – 12
- ⇒ List 2 (I-F felonies) – 10
- ⇒ List 3 (E-B1 felonies) – 8
- ⇒ Juvenile – 4-5

(Note: Shortly after the meeting, James notified IDS that another attorney had removed their name from the roster. The numbers above do not reflect the reduction.)

James posited several reasons for attrition in the roster including:

1. Low pay;
2. Delayed pay due to Covid-19 induced backlog;

3. PAC attorneys at capacity; and
4. Balancing appointed and retained cases. (James noted that even with the Covid-19 backlog, the time commitment of keeping up with the large number of stalled cases was impacting PACs ability to work on other case obligations.)

## **Fiscal Report**

### Update on 2020 – 21FY Budget & Spending

CFO Elisa Wolper began by advising the Commission that IDS ended FY20-21 with a modest surplus and that, because money appropriated to the PAC fund does not revert, it would be carried forward as non-recurring money in the FY21-21 PAC fund. The surplus was approximately \$2M. Wolper expressed a view that this money would decrease pressure on the local PD programs because it would eliminate or limit the need to move money from lapsed salary in the PD fund to the PAC fund. This might be critically important given reports from local PD programs that they are having trouble filling vacant positions.

Also contributing to the surplus in funds was the increase in fees (appointment and general court of justice fees) that took effect on January 1, 2021.

Spending highlights included:

- ⇒ IDS reverted \$3M to NCAOC for ICMS.
- ⇒ The targeted increase in fees that shrank the pool of cases paid at \$55 per hour. Wolper noted that it was still early to forecast full impact of the increase on the PAC fund.
- ⇒ After a lengthy depression in fee applications, IDS saw a sharp increase in submissions during the fourth quarter. Wolper posited that if spending through the fiscal year had been at or about the fourth quarter volume, IDS would not have ended the year with a surplus and might have run out of money early.

Wolper advised the Commission that she would have a better analysis of the prior fiscal year spending at the October 29 meeting.

## **Update on Legislative Session**

### PAC Appropriation

Pollard advised the Commission that the Generally Assembly did not have an agreed upon budget yet. The House's budget was more favorable to IDS than the Senate's. She expressed hope that there would be a budget by the October 29 Commission meeting.

## **Commission Business**

### Requests for Relief from Judgments for Attorneys' Fees

Pollard asked the Commission whether it would like to adopt a formal policy for the agency's handling of request from clients for relief from civil judgments for attorneys' fees. She

reminded the Commission that IDS recoups about \$10 million a year due to these judgments, much by setting the debts off through state income tax overpayments intercepted by the NC Department of Revenue.

According to Pollard, requests often arise only after DOR intercepts a taxpayer's overpayment. She explained that staff already was working on policies with NCAOC for requests for relief pending before the clerks of court. She expressed her opinion that a policy from the Commission that provided parameters, which would minimize when granting or denying requests for relief. Wolper noted that a policy would streamline the process for staff.

Jordan agreed that a policy is a good idea and suggested routing the work through the budget committee.

Hughes asked for an update on set-off debt from 2020 tax season. Pollard advised that there is a special provision in the house budget addressing the situation.

Jordan and Pollard reminded the Commission of the importance of the October 29 Commission meeting where Commission and Staff intend to celebrate 20 years of IDS and show gratitude for Commissioners past and present.

**Meeting adjourned by acclamation at 1:30pm.**