

2022.10.29 MEETING MINUTES

Commission on Indigent Defense Services

Quarterly Meeting – October 29, 2022

Location: NCAOC, Raleigh

Commissioner Attendees: Dorothy Hairston Mitchell (Chair), Art Beeler (Vice Chair), William “Gus” Anthony, Tonya Barber, Brian Cromwell, Caitlin Fenhagen, Karen Franco, Brian Jones, Jan Pritchett, and Miriam Thompson attended the meeting in person. Commissioner Stacey Rubain attended the meeting virtually.

Staff Attendees: Chad Boykin (Financial Services Staff Attorney), D. Tucker Charns (Chief Regional Defender), William Childs (Budget Manager), Whitney Fairbanks (Deputy Director), Aaron Gallagher (Finance Officer), Stephen Lich (Senior Researcher), Susan Perry (Legal Assistant), Mary S. Pollard (Executive Director), Chris Sadler (Research Director) Joy Zhao (Programmer) attend the meeting in person. Kristen DeSimone (Legal Assistant), Angela Henderson (Contract Administrator) Sarah R. Olson (Forensic Resource Counsel) attended the meeting virtually.

Local and State Public Defender Program Attendees: Laura Gibson (District 2); Burcu Hensley (Office of Juvenile Defender); J. Chad Perry (Chief Special Counsel); Robert Sharpe (Capital Defender); and Eric Zogry (Juvenile Defender) attended the meeting in person. LaTobia Avent (Office of Juvenile Defender); Dawn Baxton (District 14); Jennifer Harjo (District 5); John Neiman (District 18); and Beth Stang (District 29B) attended the meeting virtually.

Other Attendees: Joseph Kyzer (NCAOC Legislative Liaison); Amy Galey (NC Senator) attended the meeting in person; Dolly Whiteside; and Morgan Wiess (NCGA Fiscal Research) attended virtually.

Call to Order

The meeting was called to order by the Honorable Dorothy Hairston Mitchell, who then proceeded with the welcome and conducted a roll call of members participating via telephone.

Adoption of Proposed Agenda

Commissioner Rubain moved to approve the proposed agenda after amending it to move the executive session to an earlier point; Vice-chair Beeler seconded the motions.

Approval of July 15, 2022, Quarterly Commission Meeting Minutes

Commissioner Cromwell moved to adopt the minutes of the July 15, 2022, Commission meeting; Vice-chair Beeler seconded the motion. The minutes were approved unanimously.

State Government Ethics Act

Chair Hairston Mitchell reminded the Commissioners of their responsibilities under the State Government Ethics Act.

Remarks from the Chair

Chair Hairston Mitchell welcomed Goldsboro attorney Tonya Barber to the Commissioner and Laura Gibson as Chief Public Defender for PD District 2.

The Honorable Dorothy Hairston Mitchell administered the Oath to Ms. Tonya Barber.

Director's Report on IDS Business

Indigent Defense Services' Long-term Plan

Director Pollard updated the Commission on the long-term plan for indigent defense in North Carolina. Pollard referenced the North Carolina Commission on the Administration of Law and Justice's report on Indigent Defense. She advised that she had identified the two recommendations on which she and staff believed initial efforts should be focused:

1. expansion of the public defender system to cover the entire state; and,
2. increasing resources for Private Assigned Counsel (PAC).

Pollard apprised the Commission on the work she and staff had done over the last quarter including continued discussions with local bars and county commissioners, local service providers, the Chief Justice's 2016 Commission on Professionalism, the North Carolina State Bar, and the North Carolina Conference of District Attorneys.

Pollard then shared some statistical information with the Commission. NC State Bar research had determined that forty-eight of the one hundred counties in North Carolina qualify as an "attorney desert" under the State Bar's definition (fewer than one attorney per 1,000 residents). More than half of North Carolina attorneys practice in two counties and more than 63% of them practice in five counties. In one alarming anecdote, a District Attorney had relayed to Pollard that a Judge had to appoint an attorney with less than two years of experience to represent a child charged with homicide.

Pollard then turned the presentation over to Chris Sadler to explain the Research Departments work on "attorney deserts." Sadler said that Dr. Stephen Lich, Senior Research Associate, had developed a novel approach to identifying attorney shortages and surpluses by looking at the number of out-of-county attorneys who regularly accept appointments in each county. Pollard added that while a county appears to have a "surplus" in labor as evidenced by export of work to outlying counties, many of do not in fact have enough attorneys to cover the local work.

Lich and Sadler used the attached map to distinguish counties that must important labor (shortage) from counties that export it (surplus). Research and Budget Planning was able to use the data to identify the districts in the most immediate need of additional labor and create a roll-out schedule for public defender programs tailored to the immediacy of the need.

Commissioner Cromwell noted that many counties with labor shortages abut counties with surpluses and asked whether volume in shortage counties was large enough to justify the expenses

of importing labor from surplus counties. He asked whether it would make more sense to just change venue from a shortage county to surplus county? Commissioner Pritchett noted that changing venue is labor intensive, and it might be more difficult to bring cases to the attorneys than it is to bring attorneys to the cases.

Pollard further explained that while projecting the cost-effectiveness of potential public defender programs, staff realized that in some cases it would make more sense to establish offices that span district court rather than superior court districts. Budget Planning Director Childs used Superior Court Districts 6A and 6B and District Court District 6 to illustrate. Noting that between the two superior court districts, only 6A has a population center of any size. Given the difficulty of importing sufficient private assigned counsel into geographically large rural districts, he posited that it might make sense to create an office that covered District Court District 6 and spanned the two superior court districts.

Hairston Mitchell said the NC State Bar had established a full “Legal Desert Committee,” which was currently conducting extensive research. She noted that recruiting for indigent defense was not only problem with legal deserts. Commissioner Pritchett noted that in Forsyth, the local bar was exploring changes to the pro bono rules to increase interest in private assigned work. NCGA Member Galey relayed that there has been chatter about a change in the scope of practice rules that would allow paralegals to provide representation in some criminal matters.

Pollard asked the Commission to consider adopting a six-year plan to expand the public defender system throughout the state. Fenhagen so moved. Commissioner Franco seconded. Jones asked for further discussion and then asked Pollard whether there would be continued research into whether a public defender office makes sense as the best delivery model in each district or county. Pollard answered that IDS would always look at the district’s current ability to meet demand to assess whether a PD office is the right decision for that location.

Pollard reminded the group that a healthy local PAC roster would always be critical to a good public defense system. She noted that wave three reflects where the system is healthiest right now but expressed concern that current trends mean that wave three counties will look more like wave one by the time IDS gets to them. She referred to Lich’s research into average length of practice in local bars and expressed her opinion that it might be easier to attract attorneys to public defender offices. She also explained that the plan is to ask the legislature to approve and fund biennium by biennium rather than in one fell swoop.

Chief Public Defender Laura Gibson provided a view from on the ground in a rural multi-county district. Both the state employed public defenders and private assigned counsel carry very large caseloads. Some PAC in her district have as many as one hundred appointed cases at any given time and she must recruit from without the county frequently. She expressed a firm opinion that public defense would not function in her district without a strong private bar.

Chair Hairston Mitchell then asked if Fenhagen and Franco wanted to renew their motion, which they did. The motion to approve a six-year plan to expand public defender programs throughout the state was approved unanimously.

Update on ICMS

Chad Boykin, Assistant General Counsel, updated the Commission on the NCAOC's ongoing eCourts initiative referred to as "ICMS." ICMS, he said, was scheduled to go live on October 10, 2022 but was delayed in September." Boykin used his presentation to highlight the possible impact on IDS operations due to ICMS and staff's efforts to address them before rollout:

- IDS collection of debt via the Department of Revenue's Set-off Debt (SoD) program.
 - To operate SoD, IDS needs to be able to calculate interest in real time. ICMS does not continuously calculate interest, which means that without some manual operation, ICMS will not accurately display the debt and the intercepts may be based on incorrect amounts.
 - Because there are approximately 25,000 intercepts each tax season, manually updating the interest before each intercept or each call will have a dramatic and immediate impact on the SoD.
 - The direct loss to the program is projected to be around \$1.7M.
 - SoD staff will lose access to the SoD module, which will dramatically increase the amount of time it takes to research an intercept and set-off. The SoD program has a staff of two.

Boykin also updated the Commission on a semi-digital fee application pilot with Cherokee County. Because ICMS is unlikely to offer an electronic option for the process, Boykin and fiscal staff decided to work with clerk's staff in Cherokee to make some immediate improvements. He explained that attorneys will continue to submit paper fee applications for judicial approval, but clerical staff will scan and upload the fee applications to a file sharing program, thus removing several steps from the process. The pilot would also increase staff's ability to track fee applications, which, in turn, will lead to better customer service starting with quicker, more accurate payments.

Boykin advised the Commission how NCAOC shares data with IDS and others is about to change. IDS relies on these data extracts for everything from appointing clients to generating reports to the General Assembly to identifying systemic issues. Pollard added that she had recently met with NCAOC executive staff who indicated that they are invested in making the information sharing happen.

MAC System Implementation

Fairbanks and Charns provided the Commission with a quick update on staffs work to wind-down the unit-based contract system and roll-out the Managed Assigned Counsel program. Given the point in the process, staff expressed hope that they would be able to provide the Commission with a more robust report in spring or summer 2023.

Budget & Spending

Review of FY2022/ Forecast for FY2023

William Childs & Aaron Gallagher provided the Commission with an update on spending in fiscal year 2022 and a budget forecast for the remainder of fiscal year 2023. Gallagher began by walking the Commission through the day-to-work of the fiscal team and how their work supports public defense in North Carolina. He explained that his office's primary obligation is the payment of attorneys and experts, travel reimbursements, dues reimbursements for close to 300 attorneys, invoices for service and goods, leases. His staff also is responsible for preserving the records for all these activities.

To highlight the work his staff does, Gallagher noted that four staff members process almost 2,000 applications a week or 250 a day while maintaining accuracy and a three-week turnaround on most fee applications. Jones recalled the days when IDS would run out of money at the end of the fiscal year and PAC went several weeks unpaid but, he noted, he no longer hears any complaints about timing.

Gallagher then provided the Commission with some highlights from the prior fiscal year and first quarter of this one noting an increase in the number of PAC submitting fee applications, which appeared to correlate to the Commission's recent decision to increase PAC rates. Gallagher said that month over month spending was trending upward for both capital and non-capital attorneys and experts.

Hairston Mitchell asked about the NCAOC's recent decision to provide parking reimbursement to some staff and whether anyone had tried to negotiate parking rates with the counties. Gallagher responded that some counties had already negotiated prices with vendors. Pollard advised that IDS was unable to negotiate better pricing in Durham and, as a result, she had to impose an income cap on the benefit.

Childs then presented IDS's FY2023 projections to the Commission. He began by presenting our expenses during the last fiscal year including spending on public defender programs, Private Assigned Counsel, state defender programs, and administration.

Childs advised that demand had trended sharply upward during the first quarter of FY2023, especially in the volatile PAC fund. However, after aggregating appropriations, receipts, IV-E reimbursements, and carryforward, Childs projected that IDS would be able to cover demand in FY23 but would carryforward less from FY23 to FY24. He further projected that even with diminishing carryforward, IDS would meet demand through FY24 or FY25.

Beeler asked if IDS was taking steps to meet future shortfalls. Pollard reminded the Commission that earlier projections suggested that demand would exceed available funding earlier than FY25. Even so, given the attrition amongst PAC, the Commission had approved a rate increase in January 2022. Because the increase appeared to have slowed the exodus of PAC attorneys, its value still outweighed the risk of a shortfall.

Updates from the Field

Laura Gibson, District 2 Chief Public Defender, expressed her gratitude for the opportunity to attend the Commission meeting and see the work the Commission puts into supporting the Public Defender system.

Commission Business

Adopt 2023 Meeting Calendar

The Commission voted unanimously to adopt the proposed Commission meeting schedule.

Committee Reports

Fairbanks advised the Commission that Hairston Mitchell and Commissioner Hughes wanted to be present for the Diversity Committee discussion; however, Hairston Mitchell had to leave early and Hughes was unable to be present. Fenhagen objected to delaying the discussion any longer.

Sarah Olson, Forensic Resource Counsel, presented a statement on confederate memorials on courthouse grounds. Fairbanks gave the Commission an historical update on the Commission's reluctance to issue resolution on matters that it considered outside the scope of the Commission's work on funding and resource building for the public defense in North Carolina.

Further discussion was tabled for a later meeting.

IDS Rules & Policies

Eric Zogry, Juvenile Defender, provided Legal Representation in Juvenile Murder Cases – Update. Zogry walked the Commission through his office's recent activities to prepare for implementation of the new juvenile felony murder rules.

1. Rules development
1. Recruitment of qualified counsel
2. Training
3. Stakeholder engagement
4. Demand analysis

Zogry advised that next steps include the finalization of the rules and revision of existing forms. Hensley updated the Commission specifically on OJD's efforts to recruit qualified attorneys. As of the date of meeting, more than sixty attorneys had expressed interest in joining the roster.

Quarterly Misconduct Report

Fairbanks directed the Commission's attention to the misconduct report noting that three attorneys who regularly receive payment from IDS were reprimanded in May of 2022. She highlighted Newton's reprimand for poor record keeping and excessive billing. Newton self-reported to the bar after IDS notified her of concerns about her billing in capital appointed cases. Sharpe expressed his opinion that Newton had made several mistakes in reporting but that

she had not intentionally done anything inappropriate. Pollard advised that Newton refunded the overpayment to IDS and then resubmitted corrected bills to IDS for payment. Cromwell moved that the Commission take no action; Pritchett seconded. The Commission voted unanimously in favor of taking no action.

Fairbanks then drew the Commission's attention to two reprimands. The Commission directed staff to remind the attorneys that they must immediately notify IDS of any future action by the State Bar or Grievance Committee.

Other Business

Vice-chair Beeler recognized Commissioner Pritchett for his service on the Commission.

Executive Session

Pursuant to G.S. 143-318.11(a) (3) and (6) the Commission went into Executive Session to consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body; and to consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee.

The Commission returned from Executive Session at 1:15pm increase salaries for Juvenile Defender, Parent Defender, and Chief Special Counsel in consideration of their important work and to close the equity gap amongst the defenders.

Commissioner Pritchett moved to adjourn the meeting without reaching all business. The motion was adopted, and the meeting was adjourned at 3:05pm.