

## 2023.01.28 Meeting Minutes

### Commission on Indigent Defense Services

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Quarterly Meeting – January 28, 2023

Location: UNC-SOG, Chapel Hill

**Commissioner Attendees:** Tonya Barber, Brian Cromwell, Joseph Crosswhite, Caitlin Fenhagen, Staples Hughes, Bryan Jones, Stacey Rubain, and Miriam Thompson

**Staff Attendees:**

Chad Boykin (Assistant General Counsel, Financial Services), Kevin Boxberger (Regional Defender), D. Tucker Charns (Chief Regional Defender), William Childs (Budget Manager), Kristen DeSimone (Legal Assistant), Whitney Fairbanks (Deputy Director/ General Counsel), Aaron Gallagher (Finance Officer), Angela Henderson (Contracts Administrator), Stephen Lich (Senior Researcher), Mary S. Pollard (Executive Director), Chris Sadler (Research Director)

**Local and State Public Defender Program Attendees:**

Woodrena Baker (District 15B), Dawn Baxton (District 14), Ronald Foxworth (District 16B), Jennifer Harjo (District 5), Burcu Hensley (Assistant Juvenile Defender), Stuart Higdon (District 27A), John Neiman (District 18), J. Chad Perry (Chief Special Counsel), Robert Sharpe (Capital Defender), Sam Sneed (District 28), Wendy Sotolongo (Parent Defender), Beth Stang (District 29B), Deonte' Thomas (District 10), Bud Woodrum (District 5), Eric Zogry (Juvenile Defender)

**Other Attendees:**

John Rubin (UNC-SOG); Timothy Heinle (UNC-Sog)

**Call to Order**

The meeting was called to order by the Honorable Joseph Crosswhite, who then proceeded with the welcome and conducted a roll call of members participating virtually.

**Adoption of Proposed Agenda**

Commissioner Hughes moved to approve the proposed agenda and Commissioner Cromwell seconded the motion. The proposed agenda was adopted.

**Approval of October 28, 2022, Quarterly Commission Meeting Minutes**

Commissioner Fenhagen moved to adopt the minutes of the October 28, 2022, Commission meeting; Commissioner Cromwell seconded the motion. The minutes were approved unanimously.

**State Government Ethics Act**

Acting Chair Crosswhite reminded the Commissioners of their responsibilities under the State Government Ethics Act.

**Director's Report on IDS Business**

Director Pollard welcomed Kevin Boxberger as IDS' newest Regional Defender and updated the Commission on Staff efforts to reach full staffing.

### Update on ICMS

Chad Boykin updated the Commission on the NCAOC's eCourts roll-out slated to begin in four counties on February 13, 2023. He reported that IDS had requested NCAOC expedite a set-off debt job because SOD accounts for approximately \$5M in receipts yearly all of which go to the PAC fund and the greatest volume of intercepts usually is in March and April. NCAOC had informed him that the requested job would not be ready until late April. Boykin advised that IDS was exploring various risk reduction options including temporary staffing and technological workarounds.

### MAC System Implementation

Director Pollard reminded the Commission that IDS ended the unit-based contract system at the end of 2022. She acknowledged that IDS is not currently able to meet the same quick payment turnaround in the new system as it was in the old. Payment processing had gone from two to seven to ten days. Noting seven to ten days still was significantly quicker than the payment timeline in non-contract counties, Pollard acknowledged that IDS had failed to communicate the new timeline and manage expectations amongst the contract attorneys.

Angela Henderson, IDS Contract Administrators, and Fairbanks updated the Commission on the implementation of the Managed Assigned Counsel program. Fairbanks gave a very high-level update on the work of the last two years, including engaging in RFP for new, customizable off the shelf time management system; piloting the program in District 15B; developing payment processing forms; disseminating contracts; and winding down old contracts. Fairbanks also acknowledged IDS' failure to adequately communicate changes in payment deadlines but advised the Commission that IDS fiscal and contract staff were in the process of creating strict review and hand-off timelines. She said they also were working on communication templates that would clearly and transparently convey timelines including expected dates of payment.

Angela Henderson relayed the contract numbers to the Commission. As of January 28,

- 130 signed MAC contracts;
- 110 Adult Criminal and 20 Juvenile Delinquency contracts;
- 28 Adult Criminal and 1 Juvenile Delinquency contractor had declined to renew; and
- 13 new contractors with assistance from Charns and Boxberger.

### Review of FY2022 Q1 - Q2 Spending

Aaron Gallagher, Chief Fiscal Officer, and William Childs, Budget Manager, provided the Commission with an update on spending year to date and projections for the remainder of the fiscal years. Childs advised that spending was in line with where fiscal staff wanted it to be—no carry forward debt anticipated and greater than usual salary reserve. He cautioned that IDS might see some carryforward as early as 2025 but noted it was not likely.

### 2023 Legislative Agenda and Session

Director Pollard presented IDS' 2023 legislative agenda to the Commission, beginning with IDS' appropriation request. She advised that IDS would push equally for public defender expansion and private assigned counsel funding, because both are critical to a function public defense system.

#### Appropriation requests:

1. Moving costs – Pollard directed the Commission’s attention to a one page document in their packet which outlined the reasons why IDS needed to relocate, and the costs associated with it. She directed their attention to two funding requests—one for moving and one for implementing document retention, accessioning, and destruction plan. The Office of Special Counsel, Raleigh, would likely move in with IDS central staff. Offices of Capital, Parent, and Appellate Defenders would remain in Durham but in a new location. The Office of Juvenile Defender and IDS fiscal staff would remain at the NCJC.
2. Pay equity for all Commission appointed defenders.
3. Additional public defender staff.
4. Additional fiscal staff in existing offices.
5. Bar dues and parking costs.

#### Non-appropriation requests:

Public Defender Selection Statute. Pollard presented the Commission with draft changes to 7A-498.7(b) and (b), Public Defender Offices. For the reader’s convenience, current language, proposed revisions, and justification for revisions are listed below and followed by discussion.

- Change the number of nominees the local bar must send to the senior resident from “two to three” to “not more than three.”
- Eliminate requirement that NCAOC Director, in consultation with IDS Director, submit an additional name to the senior resident.
- Change the pool of attorneys eligible to participate in the bar vote from “attorneys who reside in the district” to “members of the local bar.”
- Establish protocol for selection when the public defender district spans more than one superior court district and the two senior resident superior court judges disagree about whom to appoint.
- Create a deadline for senior resident to appoint public defender following a bar vote and authorize the Commission to make appointment if senior resident fails to meet deadline.
- Vest initial appointment decision with the local bench and bar but authorize the Commission to make retention decisions.

Number of Names Sent by Bar to Senior Resident. The current statute requires the attorneys who reside in the district send two to three names to the senior resident for each new and subsequent appointment. Pollard pointed out that this, along with the requirement that the NCAOC send an additional name after consulting with IDS, often results in a strawman list. She questioned the efficiency, particularly when it is a reappointment. Jennifer Harjo, District 5 Chief, acknowledged that there might be more than one or two qualified people who might seek the position if it is a new position. However, she also asked why the bar needs to send more than one name to the senior resident when there is consensus on one.

Tie-break Protocol. Pollard illustrated the issue using District 16A, which spans two superior court districts and, therefore, has two senior resident superior court judges. The current statute provides no guidance for how to resolve a disagreement between the senior residents about whom to appoint. Suggestions for how to break a tie included language establishing seniority amongst the senior residents, vesting authority with chief district court judge, or vesting it with IDS Commission.

Dawn Baxton, District 14 Chief and current president of NC Public Defender Association shared her preference to keep the district court judges out of the decision-making process. Woodrena Baker, District 15B Chief, concurred with Baxton's assessment. John Nieman, District 18 Chief, expressed his strong preference for keeping the decision with superior court bench rather than the district court bench. Commissioner Fenhagen noted that the mere involvement of IDS in the decision-making process might lead to the senior residents coming to an agreement.

Initial Appointment and Retention Decision. Pollard explained that as currently written, the statute requires the bar vote, an NCAOC referral, and senior resident selection every four years. The draft revision would move the retention decision to IDS. The local bar would vote to send names to the senior resident for a new or successor public defender. After that, every four years the IDS Commission would conduct a performance review of the chief and either reappoint her or send the matter back to the district for a new election. The bar would not be able to consider an incumbent IDS declined to retain in a send back election.

Baxton opined that the language prohibiting a current chief who is not approved for reappointment by IDS from consideration by the local bar might lead to animosity between the local bar, local bench, and IDS.

John Neiman, District 18, expressed support for the Commission making the retention decision if IDS involved people at the local level in its assessment. Beth Stang, District 29B Chief, also said she supported the change to the retention of the chief public defender if IDS staff sought local input from the local bench and bar before the Commission made a reappointment recommendation. Harjo said she liked the balance struck by the initial decision residing with the senior resident and retention decision with the Commission. Stuart Higdon, District 27A Chief, said he supported moving the retention decision to IDS, noting that autonomy from the judiciary was important and the change would provide some measure of that. Deonte' Thomas, District 10 Chief, concurred his colleagues and said in support of the change.

Ronald Foxworth, District 16B Chief, expressed some concern about the change. He reminded the Commission that the legislature returned the appointment authority to the senior residents after moving it to IDS because the senior residents believed the authority should be with them. Pollard pointed out that the local bar and senior resident would continue to make initial appointments and that IDS would rely on the local bar and senior resident for input before making a retention decision. Foxworth then said he was okay with suggested revision.

Commissioner Fenhagen asked why the Commission should not be responsible for both an initial appointment and a retention decision. Pollard said she would revise the draft legislation to include

both if the Commission requested but explained that she had taken a pragmatic approach during drafting. She also reiterated her opinion that the local bar and bench should have significant involvement in the process. Commissioner Fenhagen indicated that she supported the pragmatic approach.

Commissioner Crosswhite shared that some senior residents with whom he had spoken were uncomfortable appointing the public defender, a decision they see as clearly political. He conceded that judges make other appointments, including magistrates and clerks, but differentiated those as non-advocacy positions. Harjo offered an amendment to the draft that would allow a senior resident to delegate the initial decision to the Commission. Commissioner Hughes agreed.

Changes to Attorneys Eligible to Vote. Pollard noted that the current statute limits the pool of attorneys eligible to vote to attorneys who “reside in the district.” This disenfranchises attorneys who may be members of the local bar and practice in the defender district but live outside of it. Pollard highlighted one potential problem with changing the language to “member of the local bar: local bars are aligned with prosecutorial districts, but prosecutorial districts are not always aligned with defender districts. Returning to District 16A for illustration, Pollard pointed out the defender district encompasses Scotland and Hoke Counties, each of which falls into a different local bar district. Because each local bar included counties outside of the defender district, the vote would include attorneys who practiced and or lived in counties not served by the public defender.

Baxton expressed concern that “member of local bar” presented a dilution issue. Baker concurred. Stang pointed out the incongruence between the public defender statute and the district court judge appointment statute, which allows any member of the local bar to vote on potential appointments. Commissioner Rubain said understood the issue but remained concerned about the language restricting the bar vote to attorneys who live in public defender district. She requested staff rework the language to expand the pool of voters without over diluting it.

The following changes to G.S. 7A-498.7 were presented to the Commission for vote:

- Reduce the number of nominees that must be sent to senior resident to not more than three;
- Allow IDS Commission to break a tie between two senior resident judges;
- Insert deadline for action by the senior resident on bar vote;
- Allow senior resident to delegate initial decision to IDS Commission; and,
- Allow IDS Commission to make retention decision.

Acting Chair Crosswhite asked if there was any further discussion before calling the matter to vote. All Commissioners present voted to approve the above while also directing staff to further wordsmith the provision that expands the eligible voting pool.

## **Update from the Field**

### Research and Planning

IDS Research Director, Christopher Sadler, gave the IDS Commission an update on the research department's recent work. (Presentation available on request.) Sadler used the following projects to highlight how the research department advances IDS' mission:

- Cherokee County Fee Application Pilot. In anticipation of the forthcoming changes due to eCourts, IDS staff identified a county to pilot a digital fee application process. Working with Cherokee County, IDS arranged for a secure transmission of digital fee applications from the county to IDS using the AOC's SharePoint system. While it was too early to analyze, Sadler expressed confidence that it would speed up the payment processing since it removed the need for the clerk to process and mail a paper copy to Raleigh.
- Public Defender Expansion. Sadler explained how he and Dr. Stephen Lich had worked to provide clean data in a digestible form to help the Director and Commission make decisions about expanding public defender programs.

## **Commission Business**

### IDS Rules & Policies

#### Uniform Appointment Plan – Proposed Changes

Pollard requested the Commission approve a change to the Uniform Appointment Plan, which was implemented, either by adoption or statutory action, on January 2, 2020. While IDS is not required to review the plans until 2025, immediate changes are needed due to attrition amongst private assigned counsel. Acknowledging that it is an issue throughout the state, Pollard advised that recent issues in a handful of districts made the issue apparent.

Currently the plans prohibit a judge from appointing an attorney whose name does not appear on one of the rosters. In exceptional circumstances, the court can appoint a consenting qualified attorney who is not on the list. Pollard asked the Commission to approve amending the plan to require the Judge to consult with the IDS director whenever no attorney on the appropriate list is available and no qualified attorney consents to appointment. If, after consultation, IDS failed to arrange for counsel from the district, the judge could then appoint any qualified attorney, with or without consent, who is a member of the district bar.

Commissioner Hughes asked whether allowed IDS to draft a willing attorney from outside the district while also limiting the judge to draft a qualified, if unwilling attorney, from inside the district. After some discussion, Commissioner Hughes moved that the Commission adopt the changes subject to changing "[i]f IDS fails to arrange for counsel from the district" to "[i]f IDS fails to arrange for counsel from any district[.]" All Commissioners present voted to approve the proposed changes subject to Hughes's amendment.

#### Providing Legal Representation in Juvenile Murder Cases – Update

Eric Zogry, Juvenile Defender, updated the commission on his continued work on OJD's "Felony Juvenile Murder" program, which would allow his office to recruit and maintain a roster of attorneys qualified to represent children in first degree murder cases. The Commission

requested Zogry put together an ad hoc Committee to review the final rule and policy drafts then return to the Commission at its next meeting.

Request for Waiver of One-year Fee Application Deadline

Chad Boykin

Chad Boykin, Assistant General Counsel, presented three requests for waiver of the one-year deadline to file a fee application the widow of attorney Bruce Cunningham, who had passed away unexpectedly. His widow submitted the applications as part of winding down Cunningham's practice but more than one year after the cases were disposed. All Commissioners present voted to approve the payment without penalty.

Quarterly Misconduct Report

Fairbanks advised the Commission that the Bar had reprimanded a New Bern attorney after finding that he used information gained while representing a court appointed client to advance the case of a client who subsequently retained him. The Commission requested Staff advise the Chief Public Defender of the reprimand.

Fairbanks advised the Commission that Director Pollard had declined to continue contracting with one contract attorney and terminated the contract of another. The Commission asked for a high-level recounting of the events underlying the director's decision. In one case, the attorney was charged with a criminal act and failed to notify IDS or the regional defender. The other involved a complicated history of bar complaints, contempt proceedings, and appeals. While the contempt was on appeal, the attorney had repeatedly failed to notify IDS or the regional defender about the proceedings. The Commission requested no further action.

**Executive Session**

Commissioner Jones moved that the Commission went into Executive Session to consult with an attorney employed or retained by the public body to preserve the attorney-client privilege between the attorney and the public body pursuant to G.S. 143-318.11(a) (3). All Commissioners present voted to go into executive session. The minutes of the Executive Session are being withheld from public inspection pursuant to and to G.S. 143-318.11(a)(3).

The Commission returned to open session and the Chair adjourned the meeting at 3:25pm.

Next Meeting: July 28, 2023 (Location TBD)