

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

November 18, 2015

The monthly meeting of the Committee for Public Counsel Services was held in the Committee's conference room at 40B Bromfield Street, 1st Floor, Boston, MA on Wednesday, November 18, 2015, beginning at 5:06 p.m. R.J. Cinquegrana, Chairman, presiding.

MEMBERS PRESENT: Messrs. Gosselin, Hernando, Kociubes, McGuire
Ms. Tewksbury and Messrs. Watkins and White

TELECONFERENCING: Messrs. Healy and Kennedy

1. Approval of October 20, 2015 Minutes

The minutes of the October 20, 2015 meeting were approved as submitted.

2. Amicus Request(s)

A. Commonwealth v. Teixeira and Commonwealth v. Meade

John Hayes, Attorney-in-Charge, Boston Superior Court Office, sought Committee approval to file a combined amicus brief in the matters of Commonwealth v. Teixeira and Commonwealth v. Meade. The Supreme Judicial Court (SJC) issued the following amicus solicitation in the two pending cases:

In a prosecution commenced by complaint in the District Court or Municipal Court for crimes not within the final jurisdiction of the court, as to which the defendant has a right to be proceeded against by indictment, whether the Commonwealth can be ordered, in a judge's discretion, to provide discovery to the defendant in advance of the probable cause hearing to be held pursuant to G.L. c.276, §38, and Mass. R. Crim. P. 3(f).

He went on to explain that these cases present the question whether a defendant who is awaiting indictment on a charge that is not within the final jurisdiction of the district court may receive discovery in connection with the probable cause hearing to which a defendant is supposed to be entitled under G.L. c.276, §38, and Mass. R. Crim. P. 3(f). The decisions in these cases are likely to have great significance for any defendant charged with a bind-over felony, because they will inform district court judges whether they have the authority to order that discovery be provided to the defendant during the weeks and sometimes months that it takes for the case to be indicted, during which time the case will otherwise languish in the district court. The issue is of particular concern to those defendants being held without bail.

MOTION: Mr. Kociubes. That the Committee approve the combined Amicus request in the cases of Commonwealth v. Teixeira and Commonwealth v. Meade.

SECOND: Mr. Watkins.

VOTE: Unanimous.

B. Commonwealth v. Sylvester

Nancy Bennett, Deputy Chief Counsel for the Private Counsel Division, sought Committee approval to file an amicus brief in the case of Commonwealth v. Sylvester. The SJC has solicited amicus briefs on the following issue:

Whether the defendant was deprived of the effective assistance of counsel when he pleaded guilty in 2002 to a charge of indecent assault and battery, where his plea counsel allegedly did not explain to him adequately the consequences that such a plea would have under the sex offender registration and notification act, G.L. c. 6, §178C et seq.; whether, as with immigration consequences, see Padilla v. Kentucky, 559 U.S. 356 (2010), plea attorneys must adequately advise their clients concerning consequences under the sex offender act.

She indicated that the decision in this case will likely affect CPCS's interest in two important ways. First, it will likely set forth the standard that CPCS attorneys, both public and private, will need to abide by when representing defendants in criminal courts. Second, we provide counsel to putative registrants in sex offender registration proceedings. As a result, the Court's decision will likely not only affect the obligations of trial counsel and the rights of their clients, it could also have a significant effect on the rights and obligations of the agency's sex offender registration clients.

The amicus brief will address two issues. First, it would describe the extraordinarily harsh impact sex offender registration can have on a person's life and second, the brief would discuss whether prevailing professional norms require counsel to advise their clients about sex offender registration consequences.

Ryan Schiff from the Special Litigation Unit would draft the brief with assistance from R. Scott Miller of our Alternative Commitment & Registration Unit.

MOTION: Ms. Tewksbury. That the Committee approve the amicus request in the case of Commonwealth v. Sylvester.

SECOND: Mr. White.

VOTE: Unanimous.

C. Commonwealth v. Carlos Stevenson

Randy Gioia, Deputy Chief Counsel for the Public Defender Division, sought Committee approval to submit an amicus brief in the matter of Commonwealth v. Carlos Stevenson. The SJC has issued an amicus solicitation as follows:

Whether the judge erred in finding that the Commonwealth's use entirely of hearsay evidence (i.e., the investigating police officer's testimony) to obtain an indictment was, in the circumstances, "pernicious" and constituted the type of "extraordinary circumstance" that required dismissal of the indictment.

This case raises serious, meritorious questions of public policy for citizens accused of sex crimes. Defendants charged with sex crimes frequently face irreparable damage to their reputation, restrictions on their liberty pretrial, the stress of a public trial, and significant costs to the public. The exclusive use of

hearsay insulates the prosecutor's case from risk, limiting the contradictions and fallibility of memory on the part of witnesses. Most importantly, it subverts the grand jury's performance of its function.

MOTION: Mr. Kociubes. That the Committee approve the amicus request in the matter of Commonwealth v. Carlos Stevenson.

SECOND: Mr. Watkins.

VOTE: Unanimous.

D. A.T. v. C.R.

Barbara Kaban, Director of Juvenile Appeals, sought Committee approval to submit a letter in support of an Application for Further Appellate Review (FAR) and if the FAR is approved to submit an amicus brief in the matter of A.T. v. C.R.

Ms. Kaban explained that on October 16, 2015, the Appeals Court upheld a juvenile court order, finding an 11 year-old boy in violation of the new anti-harassment statute, G.L. c. 258E, based on statements he allegedly made to and about an 11 year-old classmate. The Appeals Court decision in this case applies adult standards to the actions of an 11 year-old, ignoring federal and state case law, which has clearly established that child status matters when determining blameworthiness.

Ms. Kaban indicated that this case may set important precedent for how children will be treated in hearings going forward.

MOTION: Mr. Kociubes. That the Committee approve the request to submit a letter in support of the Application for Further Appellate Review and if the FAR is approved to submit an amicus brief in the matter of A.T. v. C.R.

SECOND: Mr. McGuire.

VOTE: Unanimous.

Mr. Benedetti informed the members that Barbara Kaban was retiring from CPCS and thanked her for her service and contributions to the agency. The Committee recognized her for her service and congratulated her on her retirement from CPCS.

3. Contracts

A. Juvenile Supervising Attorney Contracts

Helen Fremont, Staff Counsel, Youth Advocacy Department, sought Committee approval for the juvenile supervising attorney (JSA) contracts and hours for the second half of FY 2016. She stated that starting in FY 2017, the plan is to change from calendar year JSA contracts to fiscal year contracts, in order to be consistent with other CPCS contracts.

She explained that there are no changes to the contracts, except that they are for six months in order to complete FY 2016, rather than for the full calendar year. The total cost of the contracts for these six months is \$156,000. This is the same cost as last year's contract, prorated for six months.

MOTION: Mr. White. That the Committee approve the Juvenile Supervising Contracts and hours for a six month period during the second half of FY 2016 in the amount of \$156,000.

SECOND: Mr. Hernando.

VOTE: Unanimous.

B. Bar Advocate Program Contracts

Carol Beck, Director of Criminal Trial Support, sought Committee approval for calendar year 2016. There are two substantive changes to the contracts. They are:

- Bar advocate programs will maintain a written leave policy for their employees and will ensure that leave balances are maintained in writing; and
- The term of the contract has been changed from 12 to 18 months in order to move these contracts onto a fiscal year cycle. Further contracts are anticipated to be 12 months in length.

Ms. Beck indicated that there are no changes in funding at this time. The total amount for the 18 month contracts is \$1,398,131.46. Annualized, this is the same as last year's \$932,087.64 total amount.

MOTION: Mr. Watkins. That the Committee approve the Bar Advocate Contracts as submitted for 18 months to move the contracts to a fiscal year in the amount of \$1,398,131.46 with an annualized amount of \$932,087.64.

SECOND: Mr. White.

VOTE: Unanimous.

C. Provisions of Legal Services to Dukes and Nantucket Counties

Ms. Beck sought Committee approval to enter into a contract with Attorney Robert Moriarty for the Provision of Legal Services to Dukes and Nantucket Counties. The contract contains two modifications. They are:

- That Attorney Moriarty's superior court certified panel members may take superior court assignments in the Martha's Vineyard and Nantucket District Courts in non-conflict situations, where the CPCS Public Defender Division would prefer to not accept the assignment; and
- The term of the contract has been changed from 12 to 18 months in order to move the contract onto a fiscal year cycle. Future contracts are anticipated to be 12 months in length.

The total cost of the contract is \$54,000. Annualized, this is the same as last year's \$36,000 contract amount.

MOTION: Ms. Tewksbury. That the Committee approve the 18 month contract with Attorney Robert Moriarty for the Provision of Legal Services to Dukes and Nantucket Counties in the amount of \$54,000 with an annualized amount of \$36,000.

SECOND: Mr. Kociubes.

VOTE: Unanimous.

D. Supervising Attorney Contracts

Ms. Beck sought Committee approval for Supervising Attorney contracts for an 18 month period to move the contract onto a fiscal year cycle. The contract is identical to the one used in 2015, except for the following change:

- Late Performances Assessment Reports cannot be applied to meet the contract requirements for months of service more than three months prior to the submission date. For example, a Performance Assessment submitted in April can be applied towards January's contract requirements, but not towards December's.

The Supervising Attorneys provide oversight of private attorneys handling CPCS assignments through the bar advocate programs. CPCS contracts with Supervising Attorneys on a part-time basis, usually ten hours per week, so that these attorneys maintain their skills as practitioners and can use those skills to assess and assure the quality of services provided by assigned private counsel. In some counties, the level of supervision allows for a performance evaluation of each panel attorney only once every three years. The long term goal is to provide performance evaluations for each attorney every two years. Ms. Beck is seeking to achieve this goal through annual or semi-annual incremental increases in the number of supervising attorney hours. Because the disparity between supervisory resources and the number of panel attorneys and complaint investigations is greatest in Hampden and Plymouth counties, she is requesting an increase in supervisory attorney hours in those counties: Ten hours weekly in Hampden County and five hours weekly in Plymouth.

The supervising attorney contracts will be moving to a fiscal year. Therefore, the funding approval being sought is for 18 months for a total cost of \$1,488,240, which is \$992,160 on an annualized basis.

MOTION: Mr. White. That the Committee approve the Supervising Attorney contracts as submitted for an 18 month period to move to a fiscal year cycle in the amount of \$1,488,240, which is \$992,160 on an annualized basis.

SECOND: Mr. Hernando.

VOTE: Unanimous.

E. Attorney Dorothy Storrow

Anthony Benedetti sought Committee approval to enter into a contract with Attorney Dorothy Storrow for the period of November 18, 2015 through June 30, 2016, in the amount of \$36,750. Attorney Storrow will be paid with funds awarded to CPCS from the Federal Court Improvement Program administered by the Supreme Judicial Court. She will be reimbursed on an hourly basis at the rate of \$60 per hour for a maximum of 600 hours. An additional \$750 is available to reimburse her for travel and parking.

Attorney Storrow will take the lead on planning and presenting new curriculum, including the development of a 12-hour mandatory writing program for appellate attorneys and programs on basic negotiation skills and the use of expert witnesses. She will continue to help with presenting lectures and coaching small group exercises at certification trainings, as well as assisting in updating chapters of our two-volume training manual, Child Welfare Practice in Massachusetts.

MOTION: Mr. Hernando. That the Committee approve the contract with Attorney Dorothy Storrow as submitted for the period of November 18, 2015 through June 30, 2016, in the amount of \$36,750 and with additional \$750 for travel and parking reimbursement, to be paid with funds from the Federal Court Improvement Program.

SECOND: Mr. White

VOTE: Unanimous.

F. PC Refresh Procurement

Mr. Benedetti sought Committee approval to acquire 60 Dell desktops in an amount up to \$68,670 for desktops that are past warranty at the end of calendar year 2015. Procuring these devices fits the Agency strategy to extend the desktop refresh cycle from three years to four years. Functional, older devices will be redeployed for use by interns or contractors or as 'loaner' devices in the event a primary device is out of service.

MOTION: Mr. Hernando. That the Committee approve the Agency to Acquire 60 Dell desktops in an amount up to \$68,670.

SECOND: Mr. Watkins.

VOTE: Unanimous.

4. 2016 Calendar Year Meeting Dates

Denise Simonini, Executive Assistant, was instructed to provide the members with the dates of the Committee meetings for calendar year 2016 based on the results of the poll she received from the members with their availability.

5. FY 2016 Monthly Financial Overview Report

Kevin Lucchetti, Chief Financial Officer, presented the FY 2016 monthly financial overview report to the Committee for review. The forecast remained unchanged.

Mr. Benedetti reported to the Committee that the FY 2015 final supplemental budget that passed included \$129,000 that was leftover (unspent) in the 0321-1500 account and authorized its use in the current fiscal year. He thanked General Counsel Lisa Hewitt for her efforts working with the Legislature on this issue. He also thanked the Legislature and the Administration for allowing these funds to be carried over.

6. Commitments Over \$10,000 Report

Mr. Lucchetti presented the November commitments report to the Committee for review. There were no new commitments to report this month.

7. Chief Counsel Report

Mr. Benedetti reported on the following items:

- Lisa Kavanaugh was recognized by the Massachusetts Lawyers Weekly as one of the Top Women Lawyers of the Year.
- The Sentencing Commission held a hearing on November 18, 2015 to hear generally from interested parties on a wide-range of issues. He appeared before the group and testified on mandatory minimums, as well as a host of issues regarding sentencing. Another hearing may be held in the western part of the state. The District Attorneys and Attorney General also testified at the hearing.
- CPCS was appointed to the Massachusetts Criminal Justice Review Bipartisan Working Group. This group is a result of outside researchers, the Council of State Government (CSG), coming into Massachusetts to analyze the state's criminal justice system. The researchers are coming to Massachusetts at the invitation of the Governor, the Senate President, the Speaker of the House, and SJC Chief Justice Gants. A Steering Committee has been comprised of the Governor, the Lieutenant Governor, the Senate President, the House Speaker, and SJC Chief Justice Gants. There will also be a working group of 25 people representing stakeholders across the criminal justice field. Mr. Benedetti will be participating in this working group. An initial meeting of the group has not yet been held.

Mr. White mentioned that he is very familiar with the CSG and the Justice Resource Center is an excellent operation. He expressed his enthusiasm and believes that it will be beneficial on many levels.

- CPCS will be weighing in on the Governor's opioid bill. Initial information on the concerns that CPCS has with the proposal has been distributed to the House and Senate Leadership and to the Legislative Committee that is working on the bill. Initial feedback has also been given to the Administration and CPCS staff will be meeting with them to discuss the proposal

The Committee adjourned into Executive Session at 5:59 p.m. and returned to open session at 6:48 p.m.

Upon return to open session, Chairman Cinquegrana affirmed the following motions made during Executive Session.

MOTION: Mr. Cinquegrana. That the Committee approve the salary levels for the ten senior managers for a total annualized cost of \$89,148 as specified in schedules provided to the Committee.

SECOND: Mr. White.

VOTE: Approved - Nine in favor; Mr. Gosselin abstaining.

MOTION: Mr. Cinquegrana. That the Committee approve the recommendation of the staff to increase the salaries of all other managers as specified in schedules previously provided to the Committee to the total annualized cost of \$826,752.

SECOND: Mr. Hernando.

VOTE: Unanimous.

MOTION: Mr. Cinquegrana. That the Committee approve the salary increases for staff in line-item 0321-1500 in the schedules previously provided to the Committee to a maximum total annualized cost of \$950,000.

SECOND: Mr. Hernando.

VOTE: Unanimous.

MOTION: Mr. Cinquegrana. That the Committee approve the salary increases for staff in line-item 0321-1504 in the amount of \$1,500,000 that was allocated by the Legislature for this purpose and as outlined in the schedules previously provided to the Committee.

SECOND: Mr. Kociubes.

VOTE: Unanimous.

8. FY 2017 Budget Proposal

Mr. Benedetti stated that the budget subcommittee consists of Mr. Hernando as Chairman, Mr. Kennedy, Mr. Watkins, and Mr. White.

Mr. Hernando informed the members that the subcommittee met twice during the course of the month to review the budget request proposal put forward by staff. He then asked Mr. Lucchetti to give a summary of the recommended proposal.

Mr. Lucchetti started out by explaining that there are four appropriations line items in the General Appropriation Act that fund CPCS.

Mr. Lucchetti started out by explaining the four primary appropriations.

1. 0321-1500 – administrative / operations / oversight
2. 0321-1504 – public counsel (staff for case taking attorneys)
3. 0321-1510 – private counsel (payments to private counsel through e-bill system)
4. 0321-1520 – court costs / experts (payments to vendors through v-bill system)

Mr. Lucchetti then presented the budget in two categories; the maintenance request and the expansion/new initiative request.

The total maintenance request proposal calculation is \$233.3M. The amount is approximately an \$18.4M increase over our anticipated FY 2016 spending. This projected amount was based upon current payroll/staffing levels and current vacancies. Additionally, other known operational built in increases such as scheduled lease/space acceleration obligations, annualized cost of the mileage rate increase, compensation relief for staff, and private bar rate increases were included.

The new initiative/expansion request was then presented. The total expansion request proposal calculation is \$10.5M. When the expansion proposal cost is added to the cost of the maintenance request the overall total becomes \$243.8M. The expansion/new initiative cost was calculated by factoring in several rate changes. The first rate change factored in was the cost of implementing the increase of the hourly rates paid to the private bar as recommended by the Massachusetts Legislative *Report of the*

Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, Chapter 253 of the Acts of 2004 (“Report”). The second factor calculated was a raise proposal for staff in both the 0321-1500 and 0321-1504 accounts.

Mr. Hernando mentioned that the subcommittee initially voted favorably on a \$5.5M proposal which is less than the full “Report” recommendation; however, after further discussion, the subcommittee felt it best that the full committee deliberate on whether to request the full amount of the recommendation from the “Report”.

Mr. Hernando also pointed out in last years’ budget request, the full “Report” recommendation was endorsed.

The following table summarizes the “Report” recommendation, existing rates, and rates now being requested.

<u>Case Type</u>	<u>Historical Rates (FY 2005)</u>	<u>Commission Recommendation</u>		<u>Existing Rates¹</u>	<u>Requested Rates (FY 2017)</u>
		<u>FY 2006 (Enacted in 2005)</u>	<u>FY 2008 (Not enacted)</u>		
Murder	\$61.50/hr.	\$100/hr.	\$110/hr.	\$100/hr.	\$110/hr.
Superior Court ²	\$46.50/hr.	\$60/hr.	\$70/hr.	\$60/hr.	\$70/hr.
District Court ³	\$37.50/hr.	\$50/hr.	\$55/hr.	\$53/hr.	\$55/hr.
CAFL cases ⁴	\$46.50/hr.	\$50/hr.	\$60/hr.	\$55/hr.	\$60/hr.
CHINS Cases	\$46.50/hr.	\$50/hr.	\$55/hr.	\$50/hr.	\$55/hr.

Mr. Benedetti then mentioned the challenges facing the Children and Family Law Department, which will need to be addressed prior to the enactment of the FY 2017 General Appropriation Act. The number of cases statewide continues to rise significantly beyond last year’s numbers. Despite hiring attorneys and certifying scores of private attorneys to take CAFL cases, CPCS is still experiencing a shortfall in the number of attorneys needed to service these cases. To address the shortfall in attorneys, CPCS would like the ability to increase staff, while also continuing to increase the private bar capacity. Several trainings have been held over the last 18-24 months and one to two more will be held during the remainder of this fiscal year. A FY 2016 supplemental funding request may be made to help address this attorney shortfall this year rather than waiting for funding to be secured during the FY 2017 budget process. Funds from that appropriation would not be available until July 2016.

¹ The “Existing Rates” provided for District Court and CAFL “Case Type” appearing in this chart take effect on July 1, 2016, pursuant to § 212 of Chapter 46 of the Acts of 2015.

² This rate includes sexually dangerous person cases.

³ This rate includes Juvenile Court cases and was increased from \$50/hour to \$53/hour, pursuant to § 119 of Chapter 46 of the Acts of 2015, effective July 1, 2016.

⁴ This rate includes Care and Protection cases and was increased from \$50/hour to \$55/hour pursuant to § 119 of Chapter 46 of the Acts of 2015, effective July 1, 2016.

Discussion ensued.

MOTION: **Mr. Hernando. That the Committee approve a total FY 2017 budget request in the amount of \$249,780,281, which includes the full "Report" recommendation, with staff presenting all options to the legislatures.**

SECOND: **Mr. White.**

VOTE: **Unanimous.**

On a final vote, Mr. Benedetti informed the board that, assuming that the Supreme Judicial Court makes new appointments prior to the next meeting, Mr. McGuire's term has expired and tonight was his last meeting, as well as Ms. Steiker's term. He thanked Mr. McGuire for his contribution to the Committee and for bringing his experience as a long time staff public defender and more recently as an attorney working closely with the private bar to the meetings.

Mr. McGuire thanked everyone and indicated that he was honored to be on the Committee and wished everyone the best of luck in the future.

There being no further business to come before the meeting, the Committee adjourned at approximately 7:36 p.m.

Respectfully submitted,


Joseph L. Kociubes, Secretary