COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

January 25, 2017

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, January 25, 2017, beginning at 5:34 p.m. R.J. Cinquegrana, Chairman, presiding.

MEMBERS PRESENT:	Messrs. Healy, Kociubes, Miller, and Rosenfeld Ms. Shah, Messrs. Stern, Watkins, and Mr. White
TELECONFERENCING:	Messrs..Hernando and Kennedy

1. **Minutes of the December 20, 2016 Meeting**

The minutes of the December 20, 2016 meeting were approved as presented.

2. **Amicus Request**

Randy Gioia, Deputy Chief Counsel for the Public Defender Division, sought Committee approval in the matter of Commonwealth v. Dew, SJC-12225. The Supreme Judicial Court (SJC) has solicited amicus briefs on these related questions:

> Whether a witness's in-court identification of a defendant is inadmissible where it was preceded by an unequivocal pretrial identification by the witness that allegedly was the product of a suggestive procedure (although, apparently, not so suggestive as to require suppression); whether the degree of the suggestiveness of the pretrial identification is relevant in determining whether that identification was "unequivocal.

CPCS is seeking permission to file an amicus brief, in partnership with the Massachusetts Association of Criminal Defense Lawyers (MACDL) in Dew that argues for a broad rule of exclusion of in-court identifications even where the prior identification was the product of a perfect identification procedure for the following reasons: (1) there is a substantial risk that juries will place undue weight on in-court identifications; (2) there is a risk that the witness is not identifying the actual perpetrator during the in-court identification procedure, but rather the person the witness identified during the out-of-court procedure and (3) to keep reminding the court about the inherent risks of in-court identification procedures. Additionally, the CPCS

amicus will argue that the Court should further exclude any evidence of the witness's stated level of certainty when the out-of-court identification is made.

The parties' briefs have not yet been filed and the case has not been scheduled for oral argument. It is estimated that the case will be argued in April or May of 2017, and the amicus brief will be due shortly before oral argument.

The amicus subcommittee has reviewed this request and has unanimously approved the request.

MOTION: **Mr. Kociubes. That the Committee approve the filing of an Amicus brief, in conjunction with MACDL, in the case of Commonwealth v. Dew, SJC-12225.**

SECOND: **Mr. White.**

VOTE: **Unanimous.**

3. **Monthly Financial Overview Report**

Kevin Lucchetti, Chief Financial Officer, presented the monthly financial overview report to the Committee for review. There were no changes in the report from the previous month.

Estimated run out dates for the private bar line item for the following appropriations are:

0321-1510 – March 2017
0321-1520 – May 2017

A supplemental request for funds has been submitted to the Administration. On-going conversations have been held with the Administration as well as with the Ways and Means Committees of the House and Senate regarding the need for supplemental funding.

Mr. Lucchetti also updated the members with respect to a lease agreement with the Quincy office, located at 10 Granite Street. At the July 19, 2016 meeting, the Committee approved a five-year lease extension for that office. The Department of Capital Asset Management and Maintenance (DCAMM) reviewed the lease and recommended signing only a one-year tenancy agreement. There were concerns with respect to the landlord finalizing improvements that were requested. Based on this recommendation, only a one-year tenancy agreement was signed.

4. **Commitments $10,000 and Over Report**

Mr. Lucchetti presented the commitment of $10,000 and over report to the Committee for review. There was one new commitment for Crisis Management Group Inc. for consultant services for the employee assistance program (EAP).

5. **FY 2018 Budget Update**

Mr. Benedetti discussed the Governor's proposal for the FY 2018 budget which was released earlier in the day. He expressed that it is a positive budget and thanked Mr. Lucchetti and General Counsel Lisa Hewitt for their budget advocacy to the Governor's staff. The Governor's budget (House 1) proposes an appropriation amount for FY 2018 of $227,453,598 for CPCS.

Mr. Lucchetti informed the members that, although an overall positive proposal, the House 1 budget does not provide funding for any backfills for attorney positions in either the 0321-1500 or 0321-1504 line item accounts.

Ms. Hewitt reviewed the line item language in 0321-1500 which would reduce the mandate for staff to represent indigent clients from twenty-five percent to twenty percent of overall cases. The language would also require CPCS to file a report to the executive office for administration and finance and the house and senate committees on ways and means informing them of any expected surplus or deficiency for fiscal year 2018 in line items 0321-1500, 0321-1510 and 0321-1520. In addition, CPCS would be required to submit a report providing a comparison of fiscal data from the prior two fiscal years, FY 2015 and FY 2016.

Ms. Hewitt also reviewed four pertinent Outside Sections relative to the following issues: 1) collecting sex offender registry fees; 2) fentanyl trafficking enforcement; 3) laboratory analysis of cocaine; and 4) a study of CPCS.

Mr. Benedetti explained that the next steps in the budget process is the Ways and Means Joint Budget hearing with the House expected to release their budget in mid- to late April and the Senate releasing its budget in late May. The Legislature is expected to send a final budget to the Governor by the end of June.

6. **Chief Counsel Report**

Mr. Benedetti updated the members on the following items:

- Hinton Drug lab litigation, the SJC Bridgeman case and the Amherst drug lab litigation (Dookhan and Farak)
- Continuing efforts to address the CAFL counsel crisis
- Private counsel survey results
- Audit of CPCS by the Massachusetts State Auditor's office
- CPCS Board Member issue

Hinton Drug Lab Update

Mr. Gioia informed the members that an important opinion, *Commonwealth v. Bridgeman* (Bridgeman II) 476 Mass. 298 (2017), was released by the SJC on this matter last week. The SJC has crafted a three step protocol for the resolution of the approximately 24,000 outstanding

cases. There was a hearing before Single Justice Bostford on Monday, January 23, 2017, to start the process as described in the opinion. The three steps of the protocol are as follows:

1. In Phase 1 the District Attorneys have 90 days to exercise their discretion and reduce the number of Dookhan defendants by dismissing with prejudice all drug cases that they could not or would not prosecute if new trials were ordered. The District Attorneys must conduct an individual review of each case. After 90 days they must file three letters with the court. They are: a) "Ruffin" letter – no relief because the drug analysis was conducted after the defendant pleaded guilty; b) a list of all cases in which the District Attorneys are moving to vacate; and 3) a list all cases in which the District Attorneys are not moving to vacate.
2. Phase 2 is the "Notice Phase" - All "Dookhan" defendants whose cases are not on the list for dismissal must receive timely notice. The notice must be accomplished within 30 days and by a specific mailing. The District Attorneys bear the financial burden of the notice.
3. In Phase 3 CPCS shall assign counsel to everyone who wants to explore the possibility of filing a motion for new trial.

If the number of people who request counsel is too large, despite the best efforts of CPCS to assign counsel, the single justice of the SJC can fashion a remedy based on the following: a) if the best efforts fail based on the absence of necessary funding; b) the inability of CPCS to qualify adequate numbers of private attorneys to serve as bar advocates because of the low hourly rate; c) the unavailability of bar advocates because of the limitations on the number of hours they can bill within the fiscal year; and 4) if there is a systemic overload because of too many motions filed.

Amherst Drug Lab

Sonja Farak was a chemist at the lab who was using drugs for approximately ten years before it was discovered. There are approximately 10,000 cases that have not been identified. Several hearings have taken place and CPCS is awaiting decisions from Superior Court Justice Carey in Hampden County. CPCS has sent letters to all the District Attorneys in the Commonwealth asking for their plan regarding notification to clients affected by the misconduct of the chemist.

Discussion ensued.

Mr. Benedetti reported to the members that staff Attorney Benjamin Keehn, who has been one of the leading litigators in the Hinton drug lab case, and staff Attorney Rebecca Jacobstein, who has been one of the leading litigators in the Amherst Drug lab case, have both been selected by the *Massachusetts Lawyers Weekly* (MLW) as Lawyer of the Year. Members congratulated both Attorneys for their work in this litigation and on their being recognized by MLW.

CAFL Counsel Crisis Update

Mr. Benedetti reminded the members of the working group convened by Chief Justice Gants that has been meeting regularly. The follow-up to the last meeting was to send a letter from Chief Justice Gants and Chief Justice Carey to attorneys on the CPCS CAFL panel who have billed, but who have not reached their billable hours for the year, and urging them to consider taking additional cases, primarily in western Massachusetts. The group also discussed ideas on how to increase interest in the panel, aside from an increase in the hourly rate.

Private Counsel Survey Results

Nancy Bennett, Deputy Chief Counsel for the Private Counsel Division presented the members with the results of the survey that was distributed to the private bar through The MassInc polling group. The purpose of the survey was to plan for the future and assess the capacity of the practice area panels to deliver the services. The highlights of the survey are:

- 20% of respondents indicated they were planning to decrease or were unsure of their participation in the next year
- 42% of respondents indicated they were planning to decrease participation or were unsure of their participation over the next three to five years
- 15% of respondents indicated that they are reaching the cap for the number of allowable billable hours
- 542 private attorneys are certified for Superior Court, but only 27 took more than 35 superior court cases in FY 2016 (statewide?)

Barriers to the Practice

- Hourly Rates
- Billing restrictions on travel time and in-court waiting time

Incentives to the Practice

- Types of cases
- Assignment process
- Support provided by CPCS supervising attorneys, resource attorneys, mentors, and training
- Support provided by CPCS staff

At December 20, 2016 meeting, Committee members requested that information be provided on the cost to reinstate the wait time and travel reimbursement, as well as a breakdown of attorneys reaching the maximum of 1,650 billable hours. Ms. Bennett informed the members that she, along with the other private counsel deputies, is working on a proposal to present to the Committee for the changes to these policies.

Discussion ensued.

Audit of CPCS

Mr. Benedetti reported to the members that the Office of the State Auditor has informed CPCS that they will be conducting an audit of the agency. It is standard procedure for a state agency to be audited. The audit is expected to begin in February, 2017.

CPCS Board Member

Mr. Benedetti reported that board member Brian Gosselin has concluded his tenure as a Committee member.

MOTION: **Mr. White: That the Committee acknowledge Mr. Gosselin's years of service and commitment on the board.**

SECOND: **Mr. Healy.**

VOTE: **Unanimous.**

There being no further business to come before the meeting, the Committee adjourned to executive session at approximately 6:41 p.m.

Respectfully submitted,

Joseph Kociubes

Joseph Kociubes, Vice-Chairman