

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

September 16, 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, September 16, 2015, beginning at 5:37 p.m. R.J. Cinquegrana, Chairman, presiding.

MEMBERS PRESENT: Ms. Craven, Messrs. Kennedy, Kociubes, McGuire, Stern, and Messrs. Watkins and White

TELECONFERENCING: Messrs. Gosselin and Hernando

1. Approval of July 15, 2015 Minutes

The minutes of the July 15, 2015 meeting were approved as submitted.

2. Amicus Request

a. Commonwealth v. Keith Todd

Barbara Kaban, staff attorney with the Youth Advocacy Department, sought Committee approval to submit a letter to the Supreme Judicial Court (SJC) in support of the juvenile's application for Further Appellate Review in the matter of *Commonwealth v. Keith Todd*. A Juvenile Court judge granted the juvenile's motion to dismiss a youthful offender indictment for rape. The Commonwealth appealed and the Appeals Court reversed the Juvenile Court's decision.

The Appeals Court decision in this case, will have far reaching consequences in youthful offender cases as it substantially lowers the quantity and quality of evidence required for the Commonwealth to meet its burden of proving "the infliction or threat of serious bodily harm" to a grand jury under the Youthful Offender Act, G.L. c. 119, § 54. Further, the decision holds that, as a matter of first impression, the Commonwealth need not give the grand jurors any instructions concerning the requisite elements of a youthful offender indictment and that merely reading the indictment to the grand jurors suffices.

Ms. Kaban explained that the Appeals Court decision has created an impermissible standard which, if left unchallenged, has the potential to subject a substantially greater number of children to harsher, disproportionate punishment.

MOTION: Mr. Watkins. That the Committee approve the request to submit a letter in support of the juvenile's application for Further Appellate Review in the matter of *Commonwealth v. Keith Todd*.

SECOND: Mr. McGuire.

VOTE: Unanimous.

b. Commonwealth v. Onyx White

Ms. Kaban sought Committee approval to submit an amicus request in the case of *Commonwealth v. Onyx White*. The SJC has requested an amicus brief in this matter, asking:

[W]hether police lawfully searched the contents of the defendant's cellphone, where the phone was obtained without a warrant from a locked cabinet at the defendant's high school, where it had been stored pursuant to school policy on the defendant's behalf; where it was held by the police for approximately ten weeks before they obtained a search warrant; and where during the time it was preserved in a matter that prevented a third party from remotely erasing its content.

Ms. Kaban explained that the issue in the amicus request concerns children's legitimate expectation of privacy in their persons and the items they bring to school.

MOTION: Mr. Watkins. That the Committee approve the request to submit an amicus brief in the matter of *Commonwealth v. Onyx White*.

SECOND: Mr. McGuire.

VOTE: Unanimous.

c. Commonwealth v. Magadini

Nancy Bennett, Deputy Chief Counsel, Private Counsel Division, sought Committee approval to sign on to an amicus brief in the matter of *Commonwealth v. Magadini*. The SJC issued the following amicus solicitation in this matter:

Whether, and how, the defense of necessity applies in the case of a homeless individual who trespasses on private property in order to find safe shelter in winter conditions; and to what extent must one go in such circumstances to pursue legal alternatives to trespass.

The case is constitutionally momentous in several respects, and the American Civil Liberties Union of Massachusetts (ACLU) intends to file an amicus brief. The brief is being authored on behalf of ACLU by Ropes & Gray partner Kirsten V. Mayer.

MOTION: Mr. White. That the Committee approve the request to sign on to an amicus brief in the matter of *Commonwealth v. Magadini*.

SECOND: Mr. Kociubes.

VOTE: Unanimous.

d. *Commonwealth v. Epps* and *Commonwealth v. Millien*

Randy Gioia, Deputy Chief Counsel, Public Defender Division, sought Committee approval to submit a single amicus brief for both cases. The SJC issued the following amicus solicitations:

1. *As to Defendant Millien*, “[w]hether the defendant, tried and convicted in 2010 on charges of assault and battery on a child causing bodily injury and substantial bodily injury, see G. L. c. 265, s. 13J (b), first and second pars., was denied the effective assistance of counsel where his trial counsel did not consult an expert on shaken baby syndrome; whether the judge erred in denying the defendant's motion for a new trial, supported by expert testimony challenging the evidence at trial of shaken baby syndrome, where, despite finding subpar performance by counsel in failing to consult an expert, the judge ruled that the same did not deprive the defendant of a substantial ground of defense, given the powerful medical evidence presented by the Commonwealth.”
2. *As to Defendant Epps*, “[w]hether the defendant, tried and convicted in 2007 on a charge of assault and battery on a child causing substantial bodily injury, see G. L. c. 265, s. 13J (b), second par., is entitled to a new trial because of newly discovered evidence (i.e., changes since the time of trial in the state of the scientific research on shaken baby syndrome and abusive head trauma) or on the ground of ineffective assistance of counsel (i.e., counsel's alleged failure to use to the defendant's advantage the state of the research as it existed at the time of trial).”

CPCS has a conflict of interest in the case because trial counsel was a staff attorney; therefore the amicus brief will be handled by an appellate bar advocate rather than by a staff attorney from the Appeals Unit.

MOTION: Mr. White. That the Committee approve the filing of a single amicus brief for both *Commonwealth v. Epps* and *Commonwealth v. Millien*, with a disclaimer in a footnote indicating that trial counsel was a staff lawyer.

SECOND: Mr. Watkins.

VOTE: Approved. Mr. McGuire and Ms. Tewksbury abstaining.

3. Agency IT Update

Anthony Benedetti gave an overview of the technology and IT infrastructure status of CPCS prior to the creation of the CIO position and the hiring of Daniel Saroff. The creation of the position has allowed for full time attention to these critical agency needs. Mr. Saroff spent time initially assessing the IT and technology needs of the agency and developing an initial action plan.

Mr. Saroff presented to the Committee an overview of what has been accomplished in the last year and recognized the hard work of the entire IT staff as well as the support of the management team. He distributed a PowerPoint presentation and proceeded to discuss some of the specific highlights of the accomplishments of the last year which included:

- Automation
- Enabling technology modernization
- Technology modernization
- Security upgrades and testing
- Roll-out of completely new intranet and website for CPCS
- Case opening automation
- “In court” web application
- Ebill technical upgrade
- Security upgrades and testing
- Moving to “paperless” case management
- Improved remote access
- Secure Wi-Fi across all CPCS offices
- Virtual training / webinar capability (in process)
- Acquisition of end-user automation tools

Discussion ensued.

4. Public Compensation Hearing Update

Nancy Bennett updated the members regarding the recent public compensation hearings that were held in several locations. She thanked Committee member, Mr. Healey, for the use of the Massachusetts Bar Association conference room for one of the hearings. She also thanked Mr. White and Mr. Watkins for chairing the hearings in Boston and Dedham respectively.

She explained that CPCS is required by statute to conduct the hearings every three years and in FY 2015 the hearings were conducted in Boston, Springfield and Dedham.

Common themes from attorneys who testified were as follows: log period of time passed since the private counsel rates were updated; due to the passage of time since the Legislative Commission recommended raising the hourly rates, only implementing stage two of the proposed rates would be inadequate; the differential between the rate for the district court case and the rate for superior court cases and Children and Family Law cases (CAFL) is inadequate because attorneys felt that these cases were more serious and complex and therefore the rate

differential should be greater; Massachusetts Association of Criminal Defense Lawyers (MACDL) President Liza Lunt testified that the rates in federal court are \$126/hr. for felony cases, and \$180/hr. for capital cases, and she advocated for CPCS rates of \$75/hr. for district court, \$100/hr. for superior court, and \$150/hr. for murder cases.

One other important theme consistently raised was the concern over cost-cutting mechanisms put in place in 2010-2011 in responses to the statewide financial crisis at the time: in particular, cuts that affected wait time in court and travel time. Attorneys requested those cuts be reversed.

Mr. White mentioned that the testimonies presented were heartfelt and that those testifying were genuinely attempting to make the members aware of what they are facing in their practice.

Mr. Watkins agreed with Mr. White and added that he felt there was a level of resignation bordering on despair regarding the compensation that he hadn't sensed in previous years.

Both Mr. White and Mr. Watkins stated that the attorneys testifying are clearly dedicated to indigent defense, that they enjoyed doing the work and feel they are making an important contribution.

5. Financial Overview Report

FY 2015

Kevin Lucchetti, Chief Financial Officer, submitted the monthly financial overview report for FY 2015 to the Committee for review. He indicated that FY 2015 would result in approximately \$130,000 being reverted in the 1500 and 1504 accounts, and that the 1510 and 1520 accounts had a current deficiency of approximately \$4.4M. A supplemental budget request is currently pending to secure this funding, and CPCS has also requested language to allow for the ability to transfer supplemental funds between the 1510 and 1520 accounts.

Finally, the pending bill contains language that would allow for funds provided in FY 2015 to address the ongoing drug lab cases (Dookhan) to be used in FY 2016. These funds are not appropriated only for CPCS, but also agencies dealing with the problem

FY 2016

Mr. Lucchetti presented the monthly financial overview report for FY 2016 to the Committee for review. Anticipated spending for the year is approximately \$215M. This estimate includes what is an anticipated deficiency in the 1510 and 1520 accounts.

Mr. Benedetti pointed out that the maintenance request of \$218M did not include the funds that were requested by the Committee for substantial salary increase for staff or the hourly rate increases for the private bar. These funds are included in the expansion request number submitted as part of the budget request.

6. Commitment \$10,000 and Over Report

Mr. Lucchetti presented the FY 2016 commitments of \$10,000 and over to the Committee for review. This month there are five new commitments which were C&W Realty Company (painting for Springfield office), PeopleServe Prs., Inc. (IT consulting services), Crisis Management Group, Inc. (employee assistance program), Quench USA, Inc. (bottled water services), and ICIM, Inc. (HR recruitment software).

Mr. Lucchetti also highlighted a matter related to facilities and infrastructure, reminding the members that in May they approved the new VoIP phone system for all offices that did not yet have it. He pointed out that the conference call equipment being used for the meeting was part of the new system and that all conference call should have an improved quality. He thanked the Committee for approving the spending on the new system.

7. Chief Counsel Report

In his Chief Counsel report, Mr. Benedetti highlighted two recent legal developments. The first was an SJC ruling striking down an ordinance in Lynn, MA that prohibited sex offenders from living in 95% of the community. This is an issue that CPCS has been litigating since 2006. Larni Levy, Director of the Alternative Commitment and Support Unit, has been working with John Reinstein of the American Civil Liberties Union (ACLU) on this issue. The matter ended up before the SJC with CPCS staff attorneys, Ben Keehn and Beth Eisenberg, working on the case. There have been a number of press reports on the issue which will be forwarded to the Committee.

The second development is an issue involving the manner in which prisons screen female attorneys who are trying to get into the prisons to visit clients and the requests made of women with respect to their undergarments. This has been an on-going issue with the Department of Corrections (DOC) for many years. In February, a female private attorney contacted Ms. Bennett and explained how she was instructed to “shake out her bra” prior to being allowed to see her client. CPCS has worked with the MBA, Massachusetts Association of Criminal Defense Attorneys (MACDL), and the private attorney to address this issue and has met with Dan Bennett, Secretary of the Executive Office of Public Safety and Security. As a result, the regulations have been changed with new ones having gone into effect on June 26, 2015. A similar issue at the Billerica House of Corrections was addressed quickly with calls to the Middlesex Sheriff's office by Carolyn McGowan, Attorney in Charge of the Somerville Superior Court office.

Mr. Benedetti pointed out that the positive results on both these issues are examples of the staff and private attorneys working positively together.

There being no further business to come before the meeting, the Committee adjourned into Executive Session at approximately 6:42 p.m.

Respectfully submitted,


Joseph L. Rociubes, Secretary 