

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

March 14, 2018

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 Tuesday, March 14, 2018, beginning at 5:34 p.m. R.J. Cinquegrana, Chairman, presiding.

MEMBERS PRESENT: Ms. Ball, Messrs. Kociubes and Rosenfeld, Ms. Shah
Mr. Stern

TELECONFERENCING: Ms. Alvarado, Messrs. Healy and Hernando
Ms. Tewksbury and Mr. White

1. **Minutes of February 13, 2018 Meeting**

The minutes of the February 13, 2018 meeting were approved as presented.

2. **Minutes of February 20, 2018 Emergency Meeting**

The minutes of the February 20, 2018 emergency meeting were approved as presented.

3. **Amicus Request(s)**

A. *Commonwealth v. Plasse*, No. SJC-12486

Randy Gioia, Deputy Chief Counsel for the Public Defender Division, sought Committee approval to submit an amicus brief in the case of *Commonwealth v. Plasse*, SJC-12486. The Supreme Judicial Court issued the following amicus solicitation in the case:

Whether, or to what extent, a judge may consider an offender's rehabilitative needs, including factors associated with eligibility for a Department of Correction program, in determining the term of a sentence of incarceration.

This is an appeal of a District Court judge's decision to sentence the defendant to two years in the house of correction, "not to punish" her, but to give her enough time behind bars to "get through" a drug treatment program that the judge hoped she would enter and complete while serving her sentence.

Private attorney Lisa Newman-Polk has agreed to write the brief under the supervision of Attorney Benjamin Keehn.

MOTION: Mr. Kociubes. That the Committee approve the submission of an amicus brief in the matter of *Commonwealth v. Plasse*, SJC-12486.

SECOND: Mr. Rosenfeld

VOTE: Unanimous.

B. *Commonwealth v. Lys*, No. SJC-12476

Wendy Wayne, Director of the Immigration Impact Unit (IIU), sought Committee approval to submit an amicus brief in the case of *Commonwealth v. Lys*, SJC-12476. The amicus brief will address the scope of the prejudice standard in a motion for new trial based on failure to properly advise a noncitizen client of immigration consequences. An amicus brief from the IIU would likely address two questions:

1. Whether the recent U.S. Supreme Court decision, *Jae Lee v. United States*, 582 U.S.____, No. 16-327 (June 23, 2017) alters Massachusetts law relating to prejudice under *Padilla* and *Clarke*
2. What evidence is sufficient to support a finding of prejudice under the “special circumstances” prong of *Jae Lee* and *Clarke*

MOTION: Mr. Kociubes. That the Committee approve the submission of an amicus brief in the matter of *Commonwealth v. Lys*, SJC-12476.

SECOND: Ms. Shah.

VOTE: Unanimous.

Chief Counsel Anthony Benedetti informed the members that in his visits to bar advocate programs around the State, he has heard much praise for Ms. Wayne and the IIU for their expertise and responsiveness to questions from attorneys in the field dealing with immigration issues.

C. *Commonwealth v. A Juvenile*, No. SJC-12455

Josh Dohan, Director of the Youth Advocacy Department (YAD), sought Committee approval to submit an amicus brief in the case of *Commonwealth v. A Juvenile*, SJC-12455. This case is an appeal from the denial of a petition of G.L. c. 211, §3, challenging a bail order set in the New Bedford Juvenile Court. The issue presented by the case is whether it is lawful to impose a cash bail on a juvenile in a delinquency case where the juvenile is in the custody of the Department of Children and Families (DCF), and DCF has a policy of not posting bail for the children in its

custody. The amicus brief submitted will be a partnership with YAD and the Children and Family Law department (CAFL).

MOTION: Ms. Shah. That the Committee approve the submission of an amicus brief in the matter of *Commonwealth v. A Juvenile*, SJC-12455.

SECOND: Ms. Ball.

VOTE: Unanimous.

4. Report on Approved Amicus Request

Mark Larsen, Director of the Mental Health Litigation Division, reported on the amicus request in the matter of *In Re: M.C.*, No. SJC-12481. Due to time constraints in the case, the request was approved by the Executive Committee. The SJC issued an amicus solicitation in this case on the following issue:

Whether the respondent's due process or equal protection rights were violated when his involuntary commitment hearing took place at the hospital, rather than at the courthouse where, he argues, the hospital lacked reliable recording equipment, unauthorized recording devices were substituted, and large portions of the hearing were, as a result, not recorded.

The SJC granted M.C.'s application for Direct Appellate Review. The amicus brief will address the above issues and, potentially, the related issue of whether this practice also implicates Respondents' rights under the Americans with Disabilities Act.

5. CPCS Audit Overview

William E. Shay, Director of the Audit and Oversight Department (A&O) provided the Committee with an overview of the audit of CPCS that was conducted by the Office of the State Auditor (OSA). The Committee was previously provided with a copy of the Official Audit Report of The Committee for Public Counsel Services and the Office of the Commissioner of Probation (Audit No. 2017-1104-3J) (Report), dated March 28, 2018, and the press release.

The auditors began their audit February of 2017, and it lasted for one year. Staff responded to the following requests from the auditors:

- Ninety-five requests for information
- Demonstrated a large variety of agency audit protocols:
 - Full audit process
 - Caseload and billable hours audits

- Court cost vendor reviews
- Court cost vendor audits
- Bail only audits
- Demonstrated the E-Bill system
- Provided access to a test account on E-Bill
- Discussed external testing of CPCS IT systems
- Discussed security features of the electronic billing systems
- Discussed the district court recertification process

Mr. Shay recognized two of his staff members that were present – Auditor Denise Torracco and Attorney Maura Dupray, both of whom also worked directly with the auditors.

Overall, the Audit Report was favorable; however it focused on only the random audits that A&O performs and not the many other audits that are done and also, a single bill that the auditors indicate should not have been paid. The payment was a relatively small amount to a court cost vendor and was one bill of over one million processed for payment to vendors and attorneys during the audit period; however staff believes their finding was based on a factual error.

Also, the auditors informed staff in writing that they would be provided a final formal exit conference prior to release of the audit report. This did not happen. The audit manager acknowledged that it was a failure of the OSA audit process not to provide a formal exit conference. Staff believes that had a formal exit conference occurred, the issue regarding the single bill described in the Audit Report would have been corrected prior to publication.

Mr. Shay informed the Committee that the plan was to draft a formal detailed letter to Auditor Suzanne Bump pointing out the factual error in the Report and asking that it be corrected.

Chief Counsel Anthony Benedetti thanked the Audit and Oversight Department for all the work they performed during the audit process.

Discussion ensued.

6. Compensation Hearing Update

Michael Dsida, Deputy Chief Counsel for the Children and Family Law Department (CAFL), provided an overview of the private counsel compensation hearings. The first of three hearings was held in Taunton on March 6, 2018. There were six Committee members present, who heard testimony from two panels of attorneys and a few individual speakers. Also present was Representative Chris Markey.

The first panel focused their testimony on how the low hourly rate for Superior Court practitioners is jeopardizing the ability to provide counsel. The second panel consisted of mental

health, Youth Advocacy, and CAFL practitioners, and they echoed the same concerns about the hourly rates not being sufficient to generate the number of lawyers needed.

The Springfield hearing was cancelled due to inclement weather and will be rescheduled. There is a Boston hearing scheduled for March 20, 2018.

7. CAFL Update

Mr. Benedetti informed the members that there has been a positive response to the increase in the rate to \$75.00/per hour for CAFL attorneys in Hampden County. The backlog of clients who were currently without timely appointed counsel were assigned counsel within days after the passage of the legislation.

Mr. Dsida indicated that staff has been in constant contact with the clerk's office in Springfield and all reports indicate that cases are being assigned promptly. He also mentioned that he has been hearing of attorney shortages in Worcester County and that he had requested the court keep him apprised of any changes in assignment patterns.

8. Monthly Financial Overview Report

Kevin Lucchetti, Chief Financial Officer, presented the monthly financial overview report to the Committee for review. He continues to anticipate a projected deficit of approximately \$30M in the 0321-1510 and 0321-1520 line item accounts.

At previous Committee meetings, Mr. Lucchetti mentioned the Administration and Finance (ANF) reserve account (1599-1690 Caseload and Deficiency Reserve), which includes funding to supplement CPCS in line items 0321-1510 (private attorney compensation) and 0321-1520 (indigent court costs). The next payment of approximately \$12M is scheduled for April 15, 2018, and will off-set the \$30M deficit.

9. Commitments \$10,000 and Over Report

Mr. Lucchetti presented the commitments of \$10,000 and over report to the Committee for review. There were no new commitments to report.

10. Other Matters

Nancy T. Bennett

Mr. Benedetti announced to the Committee that this meeting would be Nancy Bennett's final meeting with her retirement effective at the end of April. Ms. Bennett started her career over 35 years ago with CPCS. She has been a staff public defender, a training unit manager in the private counsel division, and, her final position, the Deputy Chief Counsel running the private counsel division. He informed the Committee of a number of accomplishments during Ms. Bennett's career and emphasized her client-centered approach and her role as a national leader in advocating for and implementing improvements in the leadership, training, and oversight of the private bar. Committee members thanked Ms. Bennett for her years of service to the agency and its clients.

Meeting with Governor's Legal Counsel

Mr. Benedetti, Mr. Lucchetti, General Counsel Lisa Hewitt, and Mr. Cinquegrana met with Lon Povich, the Governor's Legal Counsel, to update him on the CAFL counsel crisis and seek his support on the then-pending legislation.

Fentanyl Policy

Randy Gioia, Deputy Chief Counsel for the Public Defender Division, informed the members of the recently implemented Trial Court policy prohibiting fentanyl from being allowed in the courthouse, except in very limited circumstances where the defendant can make a compelling showing of need. The trial court determined that fentanyl is an extremely dangerous drug and adopted the new policy in response to the determination. This policy creates an issue for defense attorneys who are trying cases in which fentanyl is alleged. Judges want to give a corrected instruction to inform the jury that the reason the drug is not in the courtroom is due to its dangerousness. CPCS will continue to oppose this policy and express its due process concerns, with the probability that it may eventually be litigated.

Videoconferencing

Mr. Gioia provided the Committee an update on the Trial Court efforts to expand videoconferencing in the courthouses. He reported that CPCS has continually expressed its concerns and general opposition and has recently partnered with Suffolk University on a survey of staff attorneys and private counsel seeking feedback on their experiences. The survey resulted in 30-40 pages of comments on how bad videoconferencing is for clients.

A summary of the survey was provided to Chief Justice Carey and as a result a meeting has been scheduled for the beginning of April with all Chief Justices of the Trial Court to discuss the issue.

There being no further business to come before the meeting, the meeting adjourned into Executive Session at approximately 7:16 p.m.

Respectfully submitted,

/s/ *Joseph L. Kocinbes*

R. J. Cinquegrana, Chairman