COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

NOVEMBER 19, 2020

The monthly meeting of the Committee for Public Counsel Services was held by video conference on Thursday, November 19, 2020 beginning at 5:40 p.m. Joseph L. Kociubes, Chair, presiding.

MEMBERS PARTICIPATING: Messes. Alvarado, Chester, and Petropoulos
Messrs. Apfel, Cinquegrana, Demissie, Kennedy, Miller, and White

The record will reflect that due to the ongoing coronavirus pandemic, the meeting was held via videoconference.

1. **Minutes of October 15, 2020 Meeting**

The minutes of the October 15, 2020 meeting were approved as presented.

2. **Amicus Request(s)**

C.M. v. *Commissioner of Dep't of Children & Family*, SJC-13015

Andrew Cohen, Director of Children and Family Law (CAFL) Appellate Panel, sought Committee approval to file an amicus brief in the case of *C.M.* v. *Commissioner of Dept. of Children & Family*, SJC-13015.

The SJC recently accepted the case on further appellate review and limited its review to "the scope of a social worker's immunity in attesting to facts contained in an affidavit accompanying and filed with a care and protection petition, and her supervisor's immunity for approving those acts." A CPCS amicus brief would argue that the Appeals Court correctly set the immunity standard for misrepresentations in social worker affidavits and would also highlight the trauma that children experience when they are removed from their home.

MOTION: **Mr. Demissie. That the Committee approve the filing of an amicus brief in the case of *C.M. v. Commissioner of Dep't of Children & Family, SJC-13015.***

SECOND: **Ms. Chester.**

VOTE: Unanimous.

Commonwealth v. *Jenks*, SJC-13016

Ira Gant, Staff Attorney for the CPCS Innocence program, sought Committee approval to file an amicus brief in the case of *Commonwealth v. Jenks,* SJC-13016. The Supreme Judicial Court (SJC) sought solicitation to answer to the following questions:

1. What information is sufficient, for purposes of G.L. c.278A, §3(b)(5), to merit a hearing on a defendant's motion for post conviction analysis under G.L. c. 278, §3.
2. Whether the use of digital photography for the comparative analysis of ballistics evidence is analysis that is a material improvement over any previously conducted analysis.

To date, CPCS has authored or co-authored amicus briefs in nearly every SJC decision interpreting the scope and applications of Chapter 278A. The questions in this case raise new and significantly important issues about defendants' access to post-conviction forensic testing to support their claims of innocence. The answers will have a specific impact on indigent defendants.

If approved, the Boston College Law School Innocence Program and Mass. Association of Criminal Defense Lawyers (MACDL) will join CPCS as amici. The New England Innocence Project has also expressed interest in joining.

MOTION: Ms. Petropoulos. That the Committee approve the filing of an Amicus brief in the case of *Commonwealth v. Jenks*, SJC-13016.

SECOND: Ms. Chester.

VOTE: Unanimous.

Silva v. *Barr*, U.S. Court of Appeals for the First Circuit, No. 20-1593

Wendy Wayne, Director, Immigration Impact Unit (IIU), sought Committee approval to co-counsel an amicus brief in the case of *Silva v. Barr*, U.S. Court of Appeals for the First Circuit, No. 20-1593. The issue in this case is important to CPCS clients: whether the Massachusetts offense of accessory after the fact (M.G.L. Ch. 274, §4), is considered an obstruction of justice offense under the Immigration and Nationality Act, and thus an aggravated felony.

The amicus brief would challenge the Board of Immigration Appeals expanded definition of obstruction of justice and argue that, under the proper definition, the Massachusetts offense of accessory after the fact, which can be charged in connection with even the most minor criminal offenses, cannot be an aggravated felony. If successful, this case would narrow the generic obstruction definition and decrease the number of Massachusetts offenses at risk of being included under this category.

MOTION: **Mr. White. That the Committee approve the IIU to co-counsel the filing an amicus brief in the case of *Silva v. Barr*, U.S. Court of Appeals for the First Circuit, No. 20-1593.**

SECOND: **Ms. Chester.**

VOTE: **9 in favor; 1 recusal. Motion passed.**

The following two amicus requests were presented for informational purposes only. Due to the timeframe of the cases, the Executive Committee approved the requests on November 2, 2020 and November 12, 2020, respectively.

Sign on in Support of Motion for Preliminary Injunction to Prohibit New Asylum Rule Expanding Criminal Bars from Going into Effect

On November 2, 2020, the Executive Committee approved Ms. Wayne to sign on to an amicus brief in support of a motion for preliminary injunction in a case that was being filed on November 2, 2020 in the U.S. District Court for the Northern District of California. The litigation is challenging a new asylum rule, scheduled to go into effect on November 20, which will bar the overwhelming majority of CPCS clients from applying for asylum.

The new administrative rule creates seven new mandatory bars to eligibility for asylum by expanding the existing criminal bars to asylum. The rule effectively eliminates the protection of asylum for noncitizens in Massachusetts with virtually any contact with the criminal justice system.

The litigation is being filed by the National Immigration Project, the Immigrant Defense Project, the Harvard Immigration and other organizations. The complaint will challenge the legality of the new rule on administrative, regulatory, and constitutional grounds. The amicus brief was filed on November 10th and highlighted the stories of what the impact would be for asylum seekers. A hearing on the temporary restraining order was held on November 18 and granted on November 19, 2020.

Commonwealth v. *Concepcion*, SJC-12383

Afton Templin, Director of Juvenile Appeals, received approval from the Executive Committee on November 12, 2020, to join an amicus brief in the case of *Commonwealth* v. *Concepcion*, SJC-12383. No amicus solicitation has been issued; however the case raises a number of issues of first impression due to the intersection of youth and disability and one which CPCS/YAD should weigh in on. The Juvenile Law Center and the Citizens for Juvenile Justice will each be filing an amicus brief, and YAD will be joining one of them.

Ms. Templin also informed the members that an amicus letter in support of an application for direct appellate review that they approved at the October 15, 2020 in a second degree murder case was allowed. The case is now in the full session of the Supreme Judicial Court.

3. **FY 2020 Attrition Statistics**

Lisa Bacon, Director of Human Resources (HR), provided a report to the Committee on fiscal year 2020 staff attrition. There has been a significant reduction in attrition over the last four years and the pandemic has not affected this trend. In FY 2020 the number one reason for leaving was retirement and the two main non-retirement reasons for leaving were personal reasons and for career development. The majority of people who left the agency for career development reasons had been with the agency for six years or less. Most attorneys who leave CPCS continue to do public interest work. One area of concern is that the agency continues to lose attorneys of color at a higher rate than white attorneys - In FY 2020 six of the 25 attorneys of color left the agency and of all employees of color eight out of 35 left.

The HR department conducts exit interviews of every employee and all are asked the same six questions and the information learned during the interviews are shared with managers to address issues if appropriate.

Anthony Benedetti, Chief Counsel, mentioned that the Committee has been discussing challenges related to attrition for a number of years. Historically, salary was the major reason for staff leaving but thanks to the legislature, salaries have dramatically increased. Management has been concentrating on non-compensation issues for staff leaving and instituted a number of positive changes. One major change was the creation of the Equity and Inclusion Director position and the hiring of John Lozada. Mr. Benedetti stressed that it is a complicated problem but the staff has been working to address it.

Mr. Lozada reported to the Committee some of the strategies that he is developing to enhance the connection among diverse employees across the agency. He has participated in a number of hiring processes to understand the ways talent is evaluated for different position across the agency. He has also been reviewing the hiring guide to provide recommendations to HR on changes to the hiring process.

He discussed his working group that was recently established that will look to develop new approaches on retention including assisting diverse attorney hires to pass the Bar exam, better acclimate within the agency and to be welcomed into the legal community. One example of a success was to get the Massachusetts Bar Association (MBA) to change their policy to allow for non-MBA members of affinity Bar Associations to participate on panels and in other capacities.

The working group will also be looking into identifying, recommending and implementing best practices for employee retention and advancement among existing staff and supervisors across the agency, as well as making recommendation for leadership training and new opportunities to support advancement among staff and supervisors.

Discussion ensued.

Mr. Kociubes requested the personnel subcommittee meet to discuss this issue. He requested staff provide the subcommittee information to assist them with this endeavor.

4. **Calendar Year 2021 Meeting Dates**

Denise Simonini, Executive Assistant, provided the dates for the Committee meetings for calendar year 2021. All meetings will be held on the third Thursday of the month with two exception. She also reminded the members that the December meeting was moved to Thursday, December 17th.

5. **Commitments $10,00 and Over Report**

Mr. Lucchetti provided the commitments $10,000 and over report for review. He highlighted two items that deviated more than 10% from the pre-approved amount: Office Resources (furniture/space planning), and Granite Telecommunications (telephone – data lines/analog/fax). Mr. Lucchetti asked for approval of the new amounts for Office Resources and Granite Telecommunications.

MOTION: **Mr. White. That the Committee approve the current spending estimates for Office Resources and Granite Telecommunications as presented.**

SECOND: **Mr. Miller.**

VOTE: **Unanimous.**

6. **Monthly Financial Overview Report**

Mr. Lucchetti presented the monthly financial overview report to the Committee for review.

The current year to date overall spending in all line items is approximately $53M out of available funds. As a result of the delayed fiscal year 2021 budget, a spending estimate for FY 2021 has not yet been created, but will likely be provided at the December meeting.

Based on the current interim budget, Mr. Lucchetti forecasts a projected total deficit of approximately $22M in the 0321-1510 private counsel line item account. Due to the pandemic, overall spending in all line items is running behind what was spent in FY 2020. Finance will continue to monitor the data.

Discussion ensued.

7. **FY 2021 Budget Update**

Mr. Lucchetti provided an update on the FY 2021 budget status. Spending in line item 0321-1500 (administration/oversight) was approximately $70M in FY 2020. Originally, the FY 2021 budget request was approximately $75M to cover current levels of spending for personnel, annualized raises and leases, as well as additional increases for FY 2021. As a result of the fiscal crisis, staff provided the legislature with a revised budget request for line item 0321-1500 of approximately $71.1M. This request reflected proactive cost reductions such as lease reductions and staff furloughs. The Governor's budget proposal provided $70.6M and the same amount was proposed by the House and the Senate. This amount would be short of our needs by approximately $1M.

The original request for the private counsel line item (0321-1510) was approximately $165.5M. A slightly revised request of $164.8M was submitted. The Governor's budget provided $161.3M. The House recommendation was approximately $150M and the Senate recommendation was approximately $161M. Our hope is that the higher Senate number is adopted which reflects more accurately expected spending.

A revised request for the court cost/experts line item (0321-1520) was $23M. The Governor's budget provided $24.2M and both the House and Senate adopted this figure.

Lisa Hewitt, General Counsel, provided an update on an Outside section of the FY 2021 budget that was passed in the House and adopted by the Senate. The provision allows the Committee to declare an "emergency" if they determine there is a limited availability of qualified private counsel for care and protection cases. Upon a declaration of an "emergency" the Committee may increase the compensation from the present rate up to $75/hour. This language is the same that has been included in previous year budgets as a tool for the Committee to address the counsel shortage in care and protection cases.

Ms. Hewitt also informed the Committee of action on two other Outside Sections: 1) the defeat in the Senate of an amendment which would negatively impact our clients relative to dangerousness hearings and 2) the inclusion of language that changes the deadline for private counsel to bill on cases, a billing timeline which would allow finance to project spending more accurately.

Overall, both the Senate and House recommended funding very close to the modified budget that the agency submitted to the Legislature in May. Appreciation was expressed to both the House and Senate for their continued support for the agency.

8. **Chief Counsel Report**

Mr. Benedetti reported that earlier this year, staff submitted a Freedom of Information Act request (FOIA) looking for information related to the Federal investigation against several

Springfield police officers. The request was ignored and as a result CPCS filed a lawsuit against the City for their failure to comply with the FOIA request.

In another matter, *Carrasquillo* v. *Hampden County District Court*, staff provided an update to Chief Justice Budd on the counsel situation in Hampden County.

With respect to ongoing COVID-related issues with the Trial Court, Mr. Benedetti reported that he followed up with Chief Justice Carey on a request for a meeting of all stakeholders to discuss current issues as well as planning for the future. The meeting will take place in late November or early December.

Prisoners' Legal Services (PLS) has had a class certified in their litigation against the department of corrections (DOC) and will be handling issues concerning prisoner conditions. CPCS will be assisting where possible.

Randy Gioia, Deputy Chief Counsel for the Public Defender Division, reached out to the Governor's Legal Counsel's office seeking assistance with attempts to secure confidential attorney/client virtual visits with all sheriffs. Unfortunately, this effort was not successful as the Executive branch has limited oversight responsibility over the sheriffs.

Finally, CPCS filed litigation on behalf of plaintiffs regarding parent/child visits in the case of *Mothers* v. *Baker*. The Department of Children and Family (DCF) has filed a motion to dismiss in the case.

Counsel Capacity Issues:

Vanessa Velez, Deputy Chief Counsel for the Private Counsel Division, indicated that there are currently two individuals in Hampden County without counsel. There are 22 out of county attorneys taking duty days in Hampden County. The out-of-county attorneys have been helpful in providing duty day coverage.

The zealous advocacy training was recently completed with 38 new bar advocates, four from Hampden County. There were 20 attorneys pre-approved to start taking assignments prior to completion of the program. Eighteen attorneys have been added to the superior court panel, two from Hampden County; 45 attorneys were added to the district court panel, four are from Hampden County; and 15 attorneys were added to the murder panel, three from Hampden County.

Michael Dsida, Deputy Chief Counsel for the Children and Family Law Division, informed the members that there are approximately 100 individuals without attorneys in Western Massachusetts. A certification training recently concluded and 29 new panel attorneys will be added to the certification list, the majority of whom are from Western Massachusetts.

Attorneys from other parts of the state have been invited to take cases in Western Mass. Staff have also been reaching out to Western New England Law School to encourage recent graduates to participate on the CAFL panel.

Mr. Dsida has encouraged local office heads and private bar resource attorneys to meet with local DCF staff and the court to strategize on ways to manage the assignments and to make the use of attorney hours more efficient.

Finally, he mentioned that judges are reluctant to approve motions for funds for social workers. He believes getting these motions allowed would free up attorneys to do other things and is working on addressing this problem.

Mark Larsen, Director of the Mental Health Litigation Division, indicated that the assignment of cases is progressing with no current problems. The only challenge has been getting attorneys to accept appeals assignments due to the hourly rate.

Afton Templin, on behalf of the Director of the Youth Advocacy Division, reported that YAD is currently assigning all cases in the juvenile court in the criminal division and assigning parole cases. She indicated, however, that several attorneys are close to the annual billing cap and may be unable to accept additional assignments this spring unless the cap is raised.

There being no further business to come before the Committee, the Committee adjourned into Executive Session to discuss a litigation issue at approximately 7:19 p.m.

Upon return to open session at approximately 7:44 p.m., the Committee recognized the outstanding job that Strategic Litigation Unit Director Rebecca Jacobstein has been doing with on the COVID litigation in addition to all of the other issues the Unit has been working to address.

The Committee then restated the following motion made in Executive Session.

MOTION: **Mr. Demissie. That the Committee approve staff to proceed with potential litigation related to a Springfield County matter.**

SECOND: **Mr. Apfel.**

VOTE: **Unanimous.**

There being no further business to come before the Committee, the Committee adjourned at approximately 7:46 p.m.

Respectfully submitted

/s/ *Mia Alvarado*

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Mia Alvarado, Secretary