

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

JUNE 14, 2022

The monthly meeting of the Committee for Public Counsel Services was held by video conference on Tuesday, June 14, 2022 beginning at 6:12 p.m. Joseph L. Kociubes, Chairman, presiding.

Due to the fact there was not a quorum, at approximately 5:55 p.m. non-voting agenda item number seven (Child Client Contact performance Standard Update) and a portion of the Chief Counsel Report as it related to the counsel shortage in Hampden County regarding Children and Family Law cases were discussed.

MEMBERS PARTICIPATING: Messes. Chester and Craven
Messrs. Apfel, Cinquegrana, Miller, Stern, and White

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

At approximately 6:12 p.m. a quorum was achieved with eight members attending at which point Mr. Kociubes called the meeting to order.

1. **Minutes of May 18, 2022 Meeting**

The minutes of the May 18, 2022 meeting were approved as presented.

2. **Amicus Request – Commonwealth v. Edwards, SJC-13242**

Attorney Benjamin Keehn sought Committee approval to file an amicus brief in the above case. The Supreme Judicial Court sought amicus solicitation on the following issues:

1. Whether the rules of professional conduct permit, prohibit, or require a criminal defense attorney to disclose - in response to a question by the judge at a pretrial conference - the defense's intention to raise a certain issue at trial (viz., alleged failure in the service of an abuse prevention order).
2. Whether the judge erred in dismissing the complaint with prejudice, after jury empanelment, based on the Commonwealth's failure to produce the correct, or complete, return of service, where, the Commonwealth claims, the discrepancy resulted from an

inadvertent, easily correctable mistake, the police report that was produced in discovery had the correct information, and the defendant therefore suffered no prejudice.

3. Whether the prohibition against double jeopardy bars a retrial in these circumstances, given the dismissal with prejudice after jeopardy had attached; or whether, as the Commonwealth claims, there is no double jeopardy barrier because jeopardy did not result in acquittal, and the defense attorney sandbagged the prosecutor by not acknowledging at the pretrial conference, when asked, that the defense intended to make the date of service an issue at trial.

The Appeals Unit has been in touch with the American Civil Liberties Union of Massachusetts (ACLU) and the Massachusetts Association of Criminal Defense Lawyers (MACDL) who are both interested in signing on to the proposed amicus brief. The brief would make two general arguments: 1) defendant's counsel was prohibited from disclosing the information at issue; and 2) although the judge characterized his ruling as a dismissal with prejudice, in effect, it was the declaration of a mistrial.

Discussion ensued.

MOTION: Mr. White. That the Committee approve the filing of an amicus brief in the case of Commonwealth v. Edwards, SJC-13242.

SECOND: Mr. Stern.

VOTE: Unanimous.

3. Court Cost Vendor Manual Update

William Shay, Director of the Audit and Oversight Department, informed the members of revisions and corrections made to the Court Cost Vendor Manual. The Court Cost Vendor Manual is the counterpart to the Assigned Counsel Manual. Minor updates were made and most of the changes were not substantive. He highlighted three of the changes made:

- a. Adds an explicit client "no show" policy where the client does not appear for an evaluation or related service and where time is reserved by the expert for that purpose.
- b. Court reporter attendance fee increased from \$185.60 to \$350.00
- c. Performance Complaints and Other Investigations provides a vendor with the right to submit a written rebuttal prior to agency action.

4. Court Cost Vendor Rate Increase

Mark Larsen, Deputy Chief Counsel, Mental Health Litigation Division (MHL), sought Committee approval to reinstate rates for court vendors to the rates paid in 2008. A list of the rates impacted by the change was provided to the members. The total annual incremental cost for all changes is estimated to be \$1.01M for FY 23 based upon pre-covid billing levels.

MOTION: Mr. Miller. That the Committee approve to reinstate 2008 rates for court cost vendors rates as presented.

SECOND: Mr. Cinquegrana.

VOTE: Unanimous.

5. **Contracts**

a. **FY 2023 Mental Health Regional Coordinator Contracts**

Joseph Robinson, MHLTD Trial Panel Director, sought Committee approval for FY 2023 Mental Health Regional Coordinators contracts. The Regional Coordinators support and oversee the work of MHLTD private panel attorneys in mental health cases. Their work includes conducting training for local attorneys, providing advice and technical support to attorneys practicing in the region, act as a liaison with the courts, assist with attorney recertification, assist in conducting performance reviews, as well as other duties. The scope of services of the contract is identical in substance to the prior fiscal year.

The total projected cost of the contracts for fiscal year 2023 is a maximum obligation of \$162,000. In the event that the Superior Court rate is raised to \$85/hr., the maximum obligation of the contracts will be \$183,600.

MOTION: Ms. Chester. That the Committee approve the FY 2023 Mental Health Regional Coordinators for a maximum obligation of \$183,600 as presented.

SECOND: Mr. Cinquegrana.

VOTE: Unanimous.

b. **FY 203 Bar Advocate program Contracts**

Rose King, Director, Criminal Trial Support Unit, sought Committee approval for the FY 2023 Bar Advocate Program contracts. There are twelve counties where the Bar Advocate program staff are responsible for assigning private attorneys to 80% of the criminal cases assigned in the trial courts. The program staff work closely with its Programs' Boards of Directors to select qualified panel attorneys, to ensure that attorneys remain current with liability insurance and continuing legal education, and to provide training to the panel. The staff also works with CPCS staff to investigate and conclude complaints and provides monthly reports to CPCS staff related to diversity goals and outreach and ensuring representation for all indigent defendants.

The contracts for FY 2023 include a few substantive changes, which Ms. King outlined. Except for these minor changes, the FY 2023 contracts terms are identical to those of FY 2022.

Also requested were increases in health insurance and unemployment insurance and anticipated increases in rent, other program costs, and costs related to the Massachusetts Paid Family Medical Leave.

The total estimated FY 2023 amount for the twelve Bar Advocate Program contracts, is a maximum of \$1,330,579.

MOTION: Mr. White. That the Committee approve the FY 2023 Bar Advocate Program contracts for the estimated amount of \$1,330,579, as presented.

SECOND: Ms. Chester.

VOTE: Unanimous.

c. FY 2023 Contract for Provision of Legal Services to Dukes and Nantucket Counties

Ms. King sought Committee approval to enter into a contract with Attorney Robert Moriarty for the provision of legal services for Dukes and Nantucket Counties. Attorney Moriarty does the job of both Bar Advocate program staff and of Supervising Attorney(s). He makes assignments to certified attorneys in indigent criminal and juvenile cases, facilitates the execution of contracts with panel attorneys, and obtains proof of each panel members professional liability insurance and CLE attendance. He also provides monthly reports to CPCS staff related to diversity goals, outreach, and assuring representation for all indigent defendants.

Ms. King outlined the substantive changes of the FY 2023 contract.

The total cost of the proposed contract is a maximum of \$51,000 which includes an additional \$6,000 in the event that the private bar superior court rate is raised to \$85/hr.

MOTION: Mr. Stern. That the Committee approve the FY 2023 contract to Attorney Robert Moriarty for the provision of legal services to Dukes and Nantucket Counties for the maximum amount of \$51,000 as presented.

SECOND: Mr. Apfel.

VOTE: Unanimous.

d. Hampden County Resource Attorney Extension

Andrew Don, Children and Family Law (CAFL) Trial Panel Director sought Committee approval to extend the current contract for Attorney Jay Clark, the Hampden County CAFL Resource Attorney, from July 1, 2022 through September 30, 2022, so that Attorney Clark may continue to

assist the Hampden Juvenile Court Clerk's office in making appointments of counsel for both new CAFL cases and cases requiring successor counsel.

MOTION: Mr. White. That the Committee approve the extension of the current contract with Attorney Jay Clark as presented.

SECOND: Mr. Apfel.

VOTE: Unanimous.

6. Contract – Public Consulting Group

Debra Krupp, Director of Administration and Operations, sought Committee approval to enter into a contract with Public Consulting Group (PCG) to conduct an agency risk assessment, update the Internal Control Plan, draft a business continuity plan, and develop a procedure for the agency to conduct an annual risk assessment.

PCG works primarily with public sector health, education, and human services organizations. They are based in Boston and have a master state contract which encompasses the creation of internal control and business continuity plans. The total cost of the contract is not expected to exceed \$150,000.

MOTION: Mr. Cinquegrana. That the Committee approve the contract with Public Consulting Group for an estimated cost of \$150,000 as presented.

SECOND: Ms. Craven.

VOTE: Unanimous.

7. Child Client Contact Performance Standard – Update

The following item was discussed prior to the official start of the meeting.

Michael Dsida, Deputy Chief Counsel, Children and Family Law Division, informed the members that the performance standard relating to attorney's communication with their clients in care and protection cases are being revised.

The revised performance standard will maintain the frequency of in-person contact that children's attorneys must have with their clients – at least every three months. In addition, the revised performance standard will require attorneys for children to meet with their clients upon the occurrence of certain key events in the case. It will also require attorneys for children to contact their clients upon the occurrence of certain other events, with the form of contact dependent on the

client's age and developmental level. Other changes were also made to bring it more in line with the goals of the standard.

The Revised Performance Standard 1.5 will take effect in July, 2022.

8. Monthly Financial Overview Report

Kevin Lucchetti, Chief Financial Officer, presented the monthly financial overview report to the Committee for review. The fiscal year ends on June 30, 2022 with the accounts payable period ending August 30, 2022.

At this point in the fiscal year the agency has spent approximately \$229.8M and he is projecting an overall surplus of approximately \$17.7M across all three agency line items.

9. Commitments \$10,00 and Over Report

Mr. Lucchetti provided the commitments of \$10,000 and over report for review, highlighting five items that deviated more than 10% from the pre-approval amount. The total obligations for the five vendors is \$2,408,863.

- Winslow Technology Group, LLC (IT hardware/software) - \$1,173,303
- SHI International Corp. (IT hardware/software) - \$610,766
- TBNG, Inc. (IT network & security consulting) - \$504,626
- Cellco Partnership, DBA Verizon Wireless (telephone) - \$72,918
- Gale Batchelder (HR recruiting firm) - \$47,250

He also highlighted two vendors where spending currently exceeds \$10,000 – MBA Insurance Agency, Inc. (insurance for bar advocate supervising attorneys) and Dominion Solutions, Inc. (HR employee business cards). These were reported to the Committee as required by the procurement policy.

Mr. Lucchetti requested approval for the adjusted amounts for the five vendors.

MOTION: Mr. White. That the Committee approve the current spending estimates for the five vendors as presented.

SECOND: Ms. Chester.

VOTE: Unanimous.

10. FY 2023 Commitment Over \$25,000 for Preapproval

Mr. Lucchetti sought Committee approval on anticipated expenditures expected to exceed \$25,000 for FY 2023 as required by the agency procurement policy. The policy allows the Chief Financial Officer to seek pre-approval from the Committee on an annual basis for obligations over \$25,000 during the course of the fiscal year. The majority of the vendors presented are for the continuation of routine services. The expenditures were broken down by 1) category; 2) vendor; 3) 2019 final cost; 4) 2020 final cost; 5) 2021 final cost; 6) 2022 estimated cost; 7) 2023 request; and 7) notes/purpose. The total estimated spending for FY 2023 is approximately 6.6M.

An affirmative vote of the Committee approves use of the vendors to exceed \$25,000 for FY 2023 without the need for further approval. Once approved, expenditures exceeding \$10,000 are reported to the Committee on the Monthly Commitments Report. Any individual contract that deviates more than 10% from the estimate will be brought back before the Committee for approval.

MOTION: Ms. Chester. That the Committee approve the list of all anticipated expenditures over \$25,000 for FY 2023 as presented and if a contract deviates more than 10% from the estimate, staff will return to the Committee for approval.

SECOND: Ms. Apfel.

VOTE: Unanimous.

11. FY 2023 Budget Update

Lisa Hewitt, General Counsel, provided an update on the FY 2023 budget. The full Senate finished their debate and approved their FY 2023 budget. She reported that this budget includes the Senate Ways & Means recommendations regarding full funding for all three of CPCS' line items.

- Rate increases for the private bar rates beginning after July 1, 2022
- Sufficient funding to annualize staffing salaries and planned needed growth to address the counsel crisis
- Sufficient funding to begin addressing the need to increase vendor payments for non-legal costs in the Indigent Court Cost fund

The Senate budget also included an Outside Section that creates a Title IV E trust fund. This is a reimbursement process through the Federal Government to pay states for representation of children who are either in foster care or are eligible for foster care.

Chief Counsel Anthony Benedetti, mentioned that the Title IV E trust fund money, is a federal program that a number of States have been accepting funds for several years. Mr. Dsida and his team have put together a long list of potential uses for the money. Ms. Hewitt and Mr. Lucchetti have been meeting with the comptroller's office on how to secure the funds for CPCS.

12. Chief Counsel Report

Mr. Benedetti provided the following updates:

Personnel

Mr. Benedetti welcomed Ted Waterman, Human Resources Director. Mr. Waterman has been with the agency for one month now.

Public Defender Division staff attorney Adrian Angus is receiving the Access to Justice Defender Award from the Massachusetts Bar Association at a ceremony on June 15, 2022.

Charu Verma, Public Defender Division staff attorney, has been elected as Vice-President of the National Civil Liberties Union.

Classification Study

At a prior meeting, Mr. Benedetti informed the members that a classification study would be conducted regarding pay equity. It has been put out to bid and are awaiting responses.

Mr. Waterman indicated that the study would focus internally on adjustments that need to be made to ensure staff is being taken care of.

Counsel Shortage

There continue to be challenges in all practice areas.

Mr. Benedetti informed the members of the ongoing steps being taken to ease the shortage in all areas.

Some of the steps taken are:

- Trying to make it easier for new attorneys to join the panel
- Providing opportunities for out-of-state attorneys to join the panel
- Providing information at the new lawyer swearing in ceremonies on how to join the panels
- Helping attorneys set up as non-profits to enable them to become eligible for federal loan forgiveness
- Exploring possible incentives to get attorneys to join a panel
- Opening the CAFL conflict office
- Seeking funding to open a western region adult criminal public defender office
- Creation of and hiring a talent acquisition person
- Discussion of creating a pre-petition representation program for CAFL cases
- Increasing hourly rate for private attorneys (legislative approval needed)

Some of the reasons for the large number of unrepresented individuals in CAFL cases are:

- Poor/unsanitary conditions of the Springfield and Juvenile Courthouses - Staff has been in constant contact with the court regarding the problems and asking them to address the issues
- Technology problems – attorneys cannot access the internet or conduct remote hearings due to the poor technology
- Scheduling issues

The CAFL conflict office will be open in early to mid-July and will be able to start taking cases shortly. Staff is in the process of filling positions for the office which will be bigger than originally envisioned.

Discussion ensued about what Committee members can do to help alleviate the counsel shortage situation.

The following portion was discussed at the beginning of the meeting prior to the official start:

Mr. Dsida indicated that there are approximately 300 individuals in Western Massachusetts without attorneys, including Franklin/Hampshire Juvenile Court. In Worcester County, the number of individuals without counsel is approximately 61.

He and his staff are trying to address the problem in both the short and long-term including continuing to work on expanding cooperation with Western New England Law School. Mr. Dsida reported that there has been a dramatic decline in the number of people admitted to the bar, as well as attorneys leaving the practice for a number of reasons.

Discussion ensued.

13. **Other Matters**

Mr. Kociubes informed the members it was time for the election of officers. As has been the practice, he asked Mr. White to serve as a one person nominating committee and that any member who wishes to serve as an officer should contact him and the new officers will be selected at the September Committee meeting.

There being no further business to come before the Committee, the Committee adjourned at approximately 8:03 p.m.

Respectfully submitted

/s/ *Joseph L. Kociubes*

Joseph L. Kociubes, Chair