COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

September 20, 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 Thursday**,** September 20, 2018**,** beginning at 5:34, p.m. R.J. Cinquegrana, Chairman, presiding.

MEMBERS PRESENT: Ms. Alvarado, Messrs. Hernando, Kennedy, and Kociubes
Ms. Petropoulos, Mr. Rosenfeld, and Ms. Shah
Messrs. Stern and White

TELECONFERENCING: Mr. Demissie

Mr. Cinquegrana welcomed new Committee member Georgia Petropoulos.

1. **Minutes of July 18, 2018 Meeting**

The minutes of the July 18, 2018 meeting were approved as presented.

2. **Private Counsel Gap Insurance**

William Shay, Director of the Audit and Oversight Department (A&O) reported to the members regarding coverage gaps in attorney professional liability insurance. The Committee has required that attorneys maintain malpractice insurance for over twenty years. In the last five years, this requirement was strengthened to provide better assurance that attorneys maintain continuous coverage. The A&O identified several scenarios in which attorneys and their CPCS clients are left without the benefit of professional liability insurance coverage. Mr. Shay went on to explain the various scenarios where the insurance gaps exist.

Mr. Shay reported that the Executive Committee had been informed of the issue and they determined that no specific action was feasible, but that the full Committee should be informed.

3. **Amicus Request(s)**

   a. Commonwealth v. Stanley Fredericq, SJC-12572

Randy Gioia, Deputy Chief Counsel for the Public Defender Division, sought Committee approval to submit an amicus brief in the matter of Commonwealth v. Stanley Fredericq, SJC-

12572. The Supreme Judicial Court (SJC) allowed Mr. Fredericq's application for further appellate review and sought amicus briefs to address the following questions:

> Whether the judge properly allowed the defendant's motion to suppress evidence found in his bedroom and in a crawl space on the ground that the police seized it by exploiting the (concededly) unlawful tracking of a cell phone using cell site location information; whether the Commonwealth established that the search and seizure were sufficiently attenuated from the unlawful tracking to dissipate the taint; whether the defendant had a reasonable expectation of privacy in the crawl space.

The brief would emphasize the disparate impact of giving comprehensive privacy protection only to those who can afford a single family house, and would urge the SJC to hold that common areas of a multifamily dwelling that are not open to the general public are within the curtilage of all residents of the building.

MOTION: Mr. White. That the Committee approve the amicus request in the matter of Commonwealth v. Stanley Fredericq, SJC-12572.

SECOND: Mr. Kociubes.

VOTE: Unanimous.

Due to time constraints in the following three cases, the Executive Committee approved the amicus requests. Mr. Gioia highlighted the issues in the Arias and Odgren cases.

b. Commonwealth v. Jose Arias, SJC-12510

The SJC granted further appellate review, and solicited amicus briefs on the following question:

> Where, pursuant to the "emergency aid doctrine," police officers may enter a home without a warrant if they have an objectively reasonable belief that someone inside may be injured or in imminent danger of physical harm, whether the doctrine extends to the type of circumstances presented in this case.

The amicus brief will argue 1) that this is not a proper case of reliance on the "emergency aid" exception to the warrant requirement and 2) it will argue that reliance on the high-crime area factor requires a greater quantum of evidence than that presented.

c. Commonwealth v. John Odgren, SJ-2018-M027

This is an amicus letter and not a brief, because it is not a case which the SJC has requested amicus briefs. In this case, the Commonwealth has requested the Single Justice of the SJC to lift an order that impounded motions for funds that were filed by the

defendant ex parte. The amicus letter will make it clear to the Single Justice the error of the Commonwealth's claim of access to motions for funds filed ex parte.

d. G.L. c. 211, §3 – Juvenile Issues arising out of the Criminal Justice Reform Bill

Joseph Mulhern, Interim Assistant Director of the Youth Advocacy Division (YAD), presented the overview on this amicus letter. In April 2018, Governor Baked signed into law comprehensive criminal justice reforms. Included in the legislation was a number of juvenile justice reforms, including raising the age of juvenile court jurisdiction from seven to twelve as well as decriminalizing civil infractions, violations of municipal ordinances and town by-laws, and certain first offense misdemeanors. Since the bill went into effect, YAD attorneys have been filing motions to dismiss based on the age based jurisdiction as well as first offense misdemeanors.

The Chief Justice has assigned Justice Cypher as the Single Justice to handle all the matters. The amicus letter would explain to the Single Justice the number of motions pending and the regional disparities that have resulted as clerks and judges grapple with the reform language. The letter would also request the petitions be allowed and the cases reserved and reported to the full bench without decision. Finally, the letter would also suggest the cases be paired for argument following an amicus announcement, so that a comprehensive analysis of the juvenile justice reforms could be achieved.

4. Breathalyzer Litigation Update

Anne Goldbach, Director of Forensic Services, provided an update on the breathalyzer litigation. She provided the following background:

- Three year ago the SJC held that lawyers who had filed a Daubert motion challenging the predecessor breathalyzer machine (the Drager 7110) were entitled to a hearing on the Daubert challenge to the machine.
- Chief Justice Dawley decided attorneys could file a challenge to the current breathalyzer machine.
- Hundreds of cases were consolidated.
- Judge Brennan held a hearing with all parties and requested five lawyers to lead the litigation.
- Challenges were made to the scientific reliability of the machine including source code, physiology of breath tests, and methodology used.
- Lack of standards/protocols was the only issue that prevailed.
- In February of 2017, Judge Brennan ruled that breath test results from the inception of the use of the machine until September of 2014, would be presumptively excludable but the Commonwealth could, on a case by case basis, try to prove the results were reliable.
- Attorney Tom Workman filed a freedom of information act (FOIA) request to obtain additional information. After obtaining the information he discovered the

Commonwealth appeared to have withheld every failed calibration worksheet for the machines.

- Lead counsel filed a motion to compel discovery of the failed worksheets as well as a motion for various sanctions.
- The Executive Office of Public Safety (EOPS) Secretary Dan Bennett conducted an investigation.
- Secretary Bennett discovered the Office of Alcohol Testing (OAT) had a culture and policy not to cooperate with prosecutors or defense attorneys.
- EOPS directed its lawyers as well as OAT lawyers to provide further discovery.
- A hearing on the motion for sanctions was anticipated.
- Meetings were held to resolve the issues. As a result, a series of stipulations were agreed upon and resolutions were submitted to the court but not yet acted upon. At the numerous meetings, there was an agreement that OAT withheld exculpatory evidence.
- In the joint recommendations, for those cases in which breath tests are deemed presumptively excludable, the DA's agreed not to use the breath test results except in the most serious cases like motor vehicle homicide, OUI serious injury resulting and OUI 5th or higher.
- OAT has agreed to: apply for accreditation by August 1, 2019; radically change discovery practices; and, make other documents discoverable.
- The joint resolution specifically indicates that none of this precludes motions to dismiss.
- All district attorneys signed on to the joint recommendations.
- Both sides agreed that the time period in which breath tests results are presumptively excludable will be expanded. The DA's argue that it should be August 31, 2017, which was the date on which the rest of the discovery was provided, and the defense wants it to be the date that the OAT lab is accredited. Judge Brennan will decide on the date. A hearing is scheduled for October 22, 2018.

5. **Private Attorney Capacity Update**

Mr. Benedetti requested each division to provide an update to the members regarding the attorney capacity shortages in each area.

Mark Larsen, Director of the Mental Health Litigation Department (MH) provided the following update:

- There has been an increase of approximately 30-40% in the number of cases filed each year.
- In FY 2018 nearly thirty attorneys (27 in all) on the MHLD panel reached the 1350 hourly limit. However, all of the attorneys were on multiple panels. Staff is working to increase the number of attorneys on the panel by providing additional trainings.
- Discussions have been taking place with new students at Suffolk Law to raise interest in the MH area.
- The annual billing caps of 1,350 hours and 1,650 hours is the major issue.

Mr. Mulhern provided an update for the Youth Advocacy Division (YAD).

- Several counties had duty days that were initially difficult to get attorney coverage, but these were eventually covered.
- The most frequent difficulties in assigning counsel were on cases that involved multiple co-defendants.
- Over the past three years, 106 attorneys have been added to the Youth Offender and Delinquency panels and approximately 75 attorneys left the panels.
- To alleviate potential problems, staff has met with courts and clerks and bar advocate programs to rearrange duty days and assignments.
- Staff has worked to recruit more experienced attorneys to the private panels to handle cases and to create mentor programs to assist newer panel attorneys.
- YAD has worked to strategically manage staff offices so staff can take a higher number of cases at the end of the fiscal year when the private bar starts hitting their billable hours caps.
- The greatest complaints received from private attorneys is waiting time in courts, and not receiving any of very few assignments on a duty day. Each of these problems makes the practice financially challenging.
- Over last two years, total number of assignments has dropped but we still need to maintain same number of duty days.
- Diversion options have increased.

Matthew Gilbertson, staff counsel with the private counsel division reported the following:

- Two main concerns with current private attorney capacity to accept cases:
    - 1) getting competent attorneys to accept duty days so that counsel is assigned, by the court, at time of arraignment;
    - 2) getting superior court certified attorneys to accept bind-over felonies in district court and superior court indictments which have been referred to the bar advocate program.
- Most counties are doing well; however, Hampden, Worcester, Plymouth and Middlesex are having difficulties assigning cases.
- Thus far in FY 2019, Pilgrim Advocates received forty-nine referrals that required superior court certified counsel. Of those forty-nine, five were without counsel within three days and two without counsel for five days.
- Middlesex County is having difficulty assigning duty days in district courts.
- Worcester and Hampden Counties are currently experiencing consistent challenges assigning superior court certified attorneys to bind-over felonies in district court and to superior court indictments.
- In Worcester County, one individual is currently being held and has been without counsel for six days. Of the sixty-six cases referred to the Worcester bar advocate program, requiring superior court counsel (since July 1, 2018), over half were assigned counsel within three days. However, there were eight individuals who were without counsel for over ten days.

- Worcester County lost twenty-four panel attorneys since January 1, 2017. Approximately the same number of attorneys has been added; however they are generally not as experienced as the ones who left.
- The Hampden County Lawyers for Justice has been referred 139 cases, requiring superior court counsel, since July 1, 2018. Currently, in Hampden County, there are two individuals who are without counsel. One of these persons has been held for eight days. The program was notified of the second person today.
- Hampden County is also currently having difficulty assigning duty days in district court.
- The administrators in both Hampden and Worcester Counties are sending requests daily to their panel attorneys. They also routinely send requests to all counties trying to assign cases.
- The murder list currently has 103 active attorneys throughout the state. Only 30 have not reached their limit of four active cases. In fiscal year 2018, there were a total of 236 assignments. Since July 1, 2018 there have been 57 assignments.

Michael Dsida, Deputy Chief Counsel for the Children and Family Law Division (CAFL) reported the following:

- The number of Care and Protection (C&P) cases the Department of Children and Family (DCF) filed in July and August is down from the previous year.
- Berkshire County filings are up by 88%. Staff is concerned about the possibility of counsel shortages because of the increase in filings.
- The rate increase to $75/hour that occurred last fiscal year in Hampden County solved the counsel crisis in the short term.
- Initially, the counsel crisis did not return when the rate returned to $55/hour; however it is slowly resurfacing.
- Currently there are twenty-four clients without counsel. Staff is checking every two weeks to determine how many individuals are without counsel.

Discussion ensued throughout the updates.

6. **Strategic Planning Update**

a. Diversity and Inclusion

Debra Krupp, Director of Administration and Operations, sought Committee approval to enter into a contract with Promoting Good, LLC for $31,626.00. The consultant will conduct anti-racism training for senior managers so that they are prepared to hire an effective Equity and Inclusion Chief (EIC) and support a successful diversity and inclusion plan; advise the Senior Management Team (SMT) on how to design the EIC positions; provide the SMT with an objective view of the agency, and to help the SMT prioritize CPCS's needs.

MOTION: Mr. Hernando. That the Committee approve the contract with Promoting Good, LLC for $31,626.00 as presented.

SECOND: Mr. White.

VOTE: Unanimous.

b. Equitable Resources

Due to the time constraints, the equitable allocation of resources to private attorneys was not discussed. Mr. Benedetti requested that the members review the proposals presented and return in October for a vote.

7. **Supervising Attorney Contracts**

Kevin Lucchetti, Chief Financial Officer, sought Committee approval to increase the hourly rate for Supervising Attorneys (Private Counsel Division), Juvenile Supervising Attorneys (Youth Advocacy Division) Resource Attorneys (Children and Family Law) and Regional Coordinators (Mental Health Division) as a result of the statutory hourly rate increase in the Fiscal Year 2019 General Appropriations Act (Chapter 154 of the Acts of 2018). The total difference in the contracts for fiscal year 2019 for the four divisions is $181,101.

MOTION: Mr. Hernando. That the Committee approve the increase the hourly rate for the supervising attorney contacts as presented.

SECOND: Ms. Shah.

VOTE: Unanimous.

8. **Monthly Financial Overview Report**

Mr. Benedetti presented the financial results for FY 2018, as well as the FY 2019 monthly financial overview report to the Committee for review.

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

The Commitments $10,000 and over report were presented to the Committee for review.

10. **Chief Counsel Report**

Mr. Benedetti requested Mr. Shay and General Counsel Lisa Hewitt, report on an issue related to the statutory caps on billable hours. In FY 2018, for the first time, there were 3 fiscal year statutory caps: 1,650, 1,800 and 2,000 hours

Ms. Hewitt explained that in mid-August Mr. Shay informed her that A&O had discovered that sixty-one attorneys were compensated for hours worked beyond their respective cap. It appeared

to be a computer coding problem resulting in a cumulative excess payment of $178,000. Ms. Hewitt noted that A&O quickly discovered the billing system problem and IT immediately corrected the coding error. A meeting was immediately convened and a solution was discussed.

Mr. Shay explained at the end of the fiscal year all attorneys are required by statute to submit fiscal-year-end bills no later than August 31st. In addition, the statute requires attorneys to track their billable hours. To assist attorneys, the agency sends out letters regarding the billing limits and the computer generates automated notices, informing attorneys when they cross various billing thresholds during the fiscal year.

A letter dated September 5, 2018 was mailed to the affected attorneys informing them of the bill processing error. A detailed billing history was provided with the letter. The attorneys were asked to contact the office if they believed the reported information was inaccurate. To date, there is no known issue concerning the accuracy of the reports. Since the letters were sent out, nine of the sixty-one attorneys have reimbursed the agency in full; six attorneys have asked for and were granted a payment plan.

Discussion ensued.

There being no further business to come before the meeting, the Committee adjourned into Executive Session at approximately 7:14 p.m.

Respectfully submitted,

/s/ *Julio Hernando*

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Julio Hernando, Secretary