

## **Minutes: Indigent Defense Subcommittee Meeting, July 29, 2016**

Committee and Subcommittee Members present: Brooks, Jordan, Holcombe, Kemp, Maher, McLaurin, Melton, Rubin, Smith (Reporter), Wagoner, Waters. Other present: Carmen, Fairbanks, T. Murray, Portner, Robinson.

The minutes from the May 6, 2016 Indigent Defense subcommittee meeting were approved.

Tom Maher discussed the uniform fee schedule pilot project required by the Appropriations Act, S.L. 2016-94. The idea of the pilot is to expand the use of flat fee compensation. Maher noted concerns about flat fees (all of which are described in more detail in the Subcommittee's draft report). He expressed the hope that any evaluation of the pilot project would look not only at impact on funding but also on outcomes for clients. He indicated that the districts have not been picked for the pilot project, nor has the fee schedule been set. His expectation is that the pilot will involve all cases in District Court, including felonies. He noted that the legislation could be read to include juvenile delinquency and parent representation cases. IDS was not in favor of the pilot. Maher suggested that it will not help predict IDS costs because case costs don't change a lot. Rather, the most important issue with respect to predicting costs is the number of cases for which IDS is required to provide services. Reporter Smith asked whether legislators looked at the data, included in the Subcommittee's draft report, regarding negative outcomes when flat fees are used. Maher responded that he did not know whether that data was examined.

Brooks noted that neither she nor legislators understand why IDS pays someone to travel to represent a capital defendant. Maher explained that IDS policy calls for the Public Defender to be contacted first in capital cases; in fact many public defender offices take a significant number of these cases. If the Public Defender office cannot take the case because of conflict or workload, IDS seeks to obtain representation within the county. However, sometimes local lawyers have conflicts or are overloaded. In this instance, IDS goes to lawyers in the next closest county. He noted that it is now exceedingly rare for the lawyer to be located in a county that is very far away.

Discussion turned to a section by section review of the draft report. Key discussion points included:

- Melton noted that the content on page 6 about authority to appoint Chief Public Defenders needed to be corrected to indicate that when IDS was created the senior resident Superior Court judge had that authority; that authority was not transferred to IDS until 2013.
- In discussing independence, it was agreed that the report should clarify that the focus is on independence from the judiciary, not the legislature.
- Regarding the report's recommendation that budgetary authority should revert to the pre-2015 standard, several alternative possibilities were discussed. There was a consensus that the current recommendation should remain, with some softening of the language to express a "preference" for the pre-2015 standard. During discussion it was noted that although current AOC leadership has no interest in modifying IDS's budget, that could change with a change in leadership. It was determined that as written the report reinforces, for future leaders, the importance of budgetary independence from the judiciary. Although the possibility of recommending that a Memorandum of Understanding between IDS and the AOC be developed, there was a consensus not to do so. It was agreed however that the report should be revised to reflect the current AOC leadership position regarding noninterference with the IDS budget.

- Some modifications were made to the language on page 22 regarding IDS's authority to create public defender offices.
- The most significant discussion pertained to the recommendation that the IDS Commission's authority to select Chief Public Defenders be restored. Although the current recommendation is consistent with national standards and with an approach that calls for uniform and consistent supervision and oversight of all lawyers doing indigent defense work by IDS, the two Chief Public Defenders present—Kemp and Melton--expressed a preference for local control. It was noted that because the report calls for a dramatic expansion of public defender and regional public defender districts, this issue would become bigger if those expansion recommendations are adopted. It was also noted that local appointment authority could become quite complicated with regional public defender offices that incorporate more than one district. Concern was expressed about reactions by senior resident Superior Court judges to the loss of appointment authority. It ultimately was agreed that the draft report would move forward to Committee as written but that Reporter Smith would prepare a briefing paper for the Committee outlining the different views on this issue. Kemp and Melton agreed to send Smith a one paragraph summary of their position.
- On the recommendation that approval of PAC fee applications be done by system-employed supervisors, not judges, Melton indicated that her local bar did not favor this and they indicated that they did not have issues with judges cutting fees. Maher noted that fee cutting by judges is not common but that when it does occur it is a big issue. Waters noted that some District Court judges routinely cut PAC fees and that some lawyers do not list all of their hours out of fear of running afoul of these judges. In response to concerns about the feasibility of doing this, it was noted that the overall recommendations contemplate additional resources in the public defender offices. In response to a question about whether other jurisdictions do fee applications as recommended in the report, Maher noted that it is done this way in the federal system. Questions were also raised about how the client can be heard if the fee approval is not done in court. Maher noted that one option would be to have a fee schedule for the client (recoupment) and a separate system for paying PAC, as is done in Wisconsin.
- It was noted that the report would benefit from new terminology for "system employed supervisors."
- It was noted that the report should clarify that the trial judge still retains inherent authority over counsel.
- It was agreed that the section recommending indigency standards should appear earlier in the report. With respect to indigency rates, Carmen noted that North Carolina's indigency rate is similar to that in other jurisdictions; she agreed to provide Reporter Smith with this data.
- In the recommendations regarding qualifications and performance standards, it was noted that text needed to be added regarding qualification standards. Although it was noted that qualifications may vary depending upon district, Maher argued for and all agreed with the importance of uniform minimum standards.
- It was agreed that the recommendation that appointment of counsel be done by the magistrate be removed in favor of a modification of current law to require a first appearance within 24 hours (or next day of District Court) for all in custody defendants (those charged with both felonies and misdemeanors). This revised approach was consistent with the overall recommendation of expanding public defender and regional public defender offices throughout

the state and the specific recommendation that they regularly review jail logs. It was agreed that the report should continue to recommend that magistrate not take waivers of counsel.

- It was agreed that the section on compensation based on merit on page 39 should be deleted.
- The text regarding flat fees should acknowledge the current legislative direction and should recommend that any decision about the use of flat fees based on outcomes of cost and quality of the new pilot program.
- Regarding voucher systems, the text should not suggest a pilot but rather should recommend evaluation of the Texas client choice program before piloting client choice.
- There was a consensus for expanding the section on debt forgiveness to include prosecutors and other public-service attorneys within the judicial branch.
- It was agreed that the section on declassification minor crimes should acknowledge the approach recently taken by the General Assembly.

In terms of next steps, Reporter Smith will revise the report to incorporate these and other suggestions made at the meeting. The revised report will be circulated, along with the briefing paper noted above, to the Committee for consideration at its August meeting.