

GEORGIA PUBLIC DEFENDER STANDARDS COUNCIL

Minutes of a Regular Meeting

December 10, 2004

10:00 AM

The regular meeting of the Georgia Public Defender Standards Council (Standards Council), an independent state agency within the judicial branch, was held on Friday, December 10, 2004, at the office of the Standards Council, 104 Marietta Street, Suite 200, Atlanta, GA 30303.

Council members present were Emmet Bondurant (Chairperson), Wilson DuBose (Vice-chair), Natasha Perdew Silas (Secretary), Gerald Word, Wyc Orr, Hon. Michael Hancock, Hon. Willie Lockette, Michele Henderson, and Larry Schneider (ex-officio). Council member Paul Kurtz arrived after the presentation on the Juvenile Performance standard.

Staff members present were Michael Mears (Director), Sarah Haskin (Deputy Director), Cindy Wang (Deputy Chief Legal Officer), Chris Adams, Jon Rapping, Trish McCann, and Hannah Allerdice.

Guests included presenter, Mary Ann Scali (Deputy Director of the ABA Juvenile Justice Center) and circuit public defenders Arthur English (Griffin), Gary Bowman (Flint), and Lee Robinson (Macon).

Other guests are listed on page 7.

I. CALL TO ORDER

Chairman Bondurant called the meeting to order at 10:03 AM after a quorum was declared. He welcomed the guests.

II. APPROVAL OF MINUTES

A motion was made to approve the minutes from the last Standards Council meeting held on October 29, 2004. The motion was seconded and adopted.

III. PUBLIC COMMENTS

There were no public comments.

IV. ACTION/VOTING ITEMS

A. Juvenile Performance Standard

Trish McCann stated that comments have been received and introduced Mary Ann Scali, Deputy Director for the American Bar Association (ABA) Juvenile Justice Center, and Karen Worthington, Southern Juvenile Defender Center, to present the proposed Juvenile Performance Standard. Scali first commended the Standards Council for its dedication to juvenile issues and emphasized that as a juvenile defender, the lawyer's principle duty is to represent the express interests of the child rather than the

legitimate interests of the child. The juvenile defense attorney must ascertain whether or not the child has the ability to participate in the defense. The defender may ask for a guardian ad litem to represent the best interests. (Report attached.) The best interest model may have the lawyer taking positions against the child's interest. The express interest rule would also protect against disparate treatment of racial and ethnic minorities. Many of the juvenile advocates support this position.

B. Concerns with the proposed Juvenile Performance Standard

1. Ethical considerations

What should the criminal defense attorney do when the lawyer thinks that the child is making the wrong decision?

The attorney should ask for the appointment of a guardian ad litem or withdraw from the case.

2. "Real world" considerations

a. Who's going to pay for the guardian ad litem?

A guardian ad litem is an agent of the court.

b. Would "hard and fast" rule tie the hands of the attorney?

Attorney should follow the express interests of the child after the child has consulted with the attorney. It is no different from representing adults.

c. Would rule put attorney in a position to either follow standard or do the right thing?

Attorney should do the same thing as ethics rule dictate.

d. Would rule give attorney an excuse to get away from making the hard decisions?

Following the express interests of child instead of legitimate interest would put the attorney in an objective position, rather than subjective. The judge decides best interest of the child.

e. What happens when child is deemed competent and has a defense, but rather pleads guilty?

The attorney can always withdraw from the case.

f. What if the child is being induced by a parent, judge, or prosecutor?

The attorney still decides legal strategy. Judge Tilley stated that the juvenile court judge is not fooled when the attorney states express interest. The judge would decide best interest of the child. As long as child is fully represented, the court is fully comfortable with lawyers treating juveniles like adults.

Scali stated that the ABA guidelines lay out what decisions lawyers should make and what decisions the child should make.

C. Other issues presented

1. Training

Scali stated that training is important because of the different way to counsel children and to talk to children.

2. Disallowing waiver of counsel

Council member Word pointed out that this issue was discussed, but decided that it would not be appropriate to place it in the Juvenile Performance Standard. Vice-chair DuBose wondered if the Council had authority to disallow waiver of counsel since that is within the court's province.

Scali stated that North Carolina, Louisiana, Maryland, and Virginia disallows waiver of counsel.

3. Presumption of indigence for juveniles

May have a fiscal impact on the Council's budget.

4. \$50 Application fee

Howell stated that juveniles may have to waive counsel because the parent does not pay the application fee though most of the time the parent is the complainant. The indigence of the juvenile should be determined by the juvenile's income.

Director Mears pointed out that there is already a procedure in place for public defenders to represent defendants even though the fee has not been paid. With the exception of the Cordele Public Defender Office, the offices will start collecting application fees on January 1, 2005, per HB 1EX. The public defender decides whether to represent when the fee is not paid.

A suggestion was made to amend the determination of indigency standard by basing this determination on the juvenile's financial resources and to make qualification include a determination of whether there's a conflict between child and parent. However, a conflict may not be apparent at time of arraignment. Solution: Amend standard by adding additional provision to exclude parent's income determination if there's a conflict. Director Mears pointed out that there is catch-all language already in the standard which can be used for that qualification. There is a concern of getting the standard to legislative oversight committee in time. If amended, the change may impact ratification of standard. Chairman Bondurant prefers delayed ratification rather than vague catch all provision. Council member Word suggested that this may be a matter of training for circuit public defenders rather than amendment.

Stali said some states consider parents' income. Some states presume indigence. She is unaware of any states that look at child's income. Maryland waived indigence finding when there's a conflict, though Maryland tries to collect against parent. Council member Lockette stated that there is a need for consistent approach.

Chairman Bondurant stated that for the next meeting, there should be draft language as guidance to everyone, proposed amendment to indigency standard dealing with juveniles.

Also, need draft of proposed additional standard of prohibiting waiver of counsel. Council member Lockette said the Council can direct public defenders to be there when the defendant wants to waive counsel.

Council member Word made motion to adopt the Juvenile Performance Standard as published. Vice-chair DuBose opined that the issue has not been fully discussed.

Under Code of Professional Conduct, there is no delineation of child and adult regarding clients.

Chairman Bondurant suggested leaving the Juvenile Performance Standard as is, but add footnote that in the event that the lawyer becomes convinced that the child's express interest compromises the lawyer's ethics, then he or she may withdraw from the case and seek appointment of a guardian ad litem for the child. Commentary language may be added later.

Comment would be: after counseling the child, if the child's express language does not accord with the lawyer, then the lawyer may withdraw or seek the appointment of a guardian ad litem.

Council member Orr pointed out that various parts of the Juvenile Performance standard seem to be in conflict regarding the lawyer's duty. However, if recognizing the lawyer's right to withdraw, then the inconsistencies seem okay.

Chairman Bondurant expressed concern over paragraph 3.2 of the standard, specifically regarding privilege. Council member Kurtz said that the Council cannot define the role of the guardian ad litem. The sentences after the first sentence of 3.2 will be removed and added as a comment. [Director Mears and Deputy Chief Legal Officer Wang opined that restating these sentences as commentary would not substantively change the Juvenile Performance Standard to require re-publishing it for another 30 days.]

Director Mears explained that privilege does not extend to the guardian ad litem. However, communications between the lawyer and the guardian ad litem may be privileged. The guardian ad litem is standing in place of the parent, not the attorney.

Council member Word amended his motion to adopt the Juvenile Performance Standard as presented to include the change moving the last 2 sentences of 3.2 into a comment. Secretary Silas seconded the motion. It was suggested that the Council may add in the commentary that lawyers may talk about facts of case to guardian ad litem. The motion passed 7 to 2.

- D. Amendment to bylaws.** The amendment to the bylaws to address technical mistakes was addressed next. Council member Word moved for adoption, it was seconded and passed 9 to 0.

[Vice-chair DuBose left the meeting.]

- E. Council Resolution 13-04.** Resolution 13-04 was discussed next. Director Mears explained that the municipal courts were concerned that they will lose criminal jurisdiction. Since the Council has not adopted standards specifically geared towards municipal courts yet, the resolution was necessary for implementation of the indigent defense system. Council members wanted to stress that the resolution was not an implied waiver of any statutory rules, i.e. the 72 hour rule. Council member Kurtz moved for adoption. It was seconded and passed 8 to 0.

VI. DIRECTOR'S REPORTS

A. Revised Budget

Deputy Director Haskin explained that because money is needed for conflict cases, the monies left over from counties that opt out are slated for the handling of conflict cases. The budget assumed 15% of cases will be conflict cases. Bob Spangenberg helped project a reasonable rate to compensate conflict attorneys and remain within the budget. The only rate that would come within the budget is the current Supreme Court Guideline rates of \$60/hour (for in-court work) and \$45/hour (for out-of-court work). With those rates, Spangenberg estimated that the Council will be \$24,800 over the budgeted \$7 million for conflict cases. However, the Council can absorb this cost. Anything more will be problematic. Director Mears asked the Council to approve the rate with the understanding that the Council may revisit this rate at a later time.

Council member Kurtz moved to approve the rate of \$60/\$45. The motion was seconded and adopted 8 to 0.

The revised budget request was also moved to be adopted. It was seconded and passed 8 to 0.

B. Conflict Cases

Director Mears explained how conflict cases will be handled. The Fulton County Conflict Defender Office may handle cases from DeKalb, Rockdale, and Clayton. There will be conflict case administrators in the Chattahoochee (Columbus) and Atlantic circuits. The administrator for Augusta passed away and new arrangements will need to be made to administer conflicts in the Augusta Circuit. The circuits will be broken down to 7 geographical areas for conflict cases. Paul Kehir will be in Atlanta monitoring the system.

He is developing plans to use for conflict cases. Each circuit public defender must keep a record of why the office conflicted out. Just because there are multiple defendants does not mean there is a conflict. There

must be adverse theories of defense. There will be procedures to determine conflict. The Council will send a list of attorneys to the administrators and will monitor the costs. The circuit public defenders are responsible for identifying conflicts and delegating and designating the conflict person. There will be more discussion on conflict of interest issues like multiple defendants.

Council member Word pointed out that a conflict of interest may arise later in the process, perhaps at trial.

C. NLADA, NACDL, and GACDL memberships

Director Mears was able to work out tremendous discounts and benefits for all public defenders.

IX. OTHER REPORTS

A. Legislative update for funding

Deputy Director Haskin stated that the meeting with the Governor's Office was really positive. The biggest concern was the revenues generated from the fees. Deputy Director Haskin told the Governor's Office that the Council's FY05 budget request will be met. The funds collected may be a little short for the FY06 budget request, but should be sufficient. She also talked about the upcoming biennial legislative conference where new and incumbent legislators will be attending.

B. Update on circuits contracting with GPDSC for additional personnel

Deputy Director Haskin reported that the Standards Council is currently in negotiations with 37 circuits that are contracting with the circuit public defender offices for a total of 310 employees.

C. Update on training

Training Director Jon Rapping was introduced to the Council. Director Mears and Rapping gave a brief update of the trainings.

Regarding JCATs training, 178 people have been trained to date. Cordele and Brunswick circuit public defender offices should have their JCATs system go live by the end of the month. The counties that have opted out have already been trained.

X. CONCLUSION

A. Miscellaneous

1. Performance evaluation forms

Director Mears distributed the performance evaluation forms to be used by the circuit public defenders for their employees.

2. Savings on pre-trial incarceration costs

Council member Kurtz suggested bringing in a 3rd party, such as the Carl Vinson Institute, to conduct a study on how much money the public defender system is saving the counties.

B. Next Council Meeting

The next Standards Council meeting will be January 28, 2004 @10:00 AM. On the agenda will be the following:

- Approval of minutes
- Proposed drafts of commentaries to the Juvenile Performance Standard and Determination of Indigency Standard
- Proposed draft of Standard on Prohibiting Waiver of Counsel in Juvenile cases

The meeting was adjourned at 2:02 PM.

C. Guests in attendance:

Hon. Velma Tilley, Bartow County Juvenile Court
Karen Worthington, Southern Juvenile Defender Center
Amy Howell, Southern Juvenile Defender Center
Lance Stewart, Southern Center for Human Rights

These minutes are respectfully submitted this ____ day of December, 2004, and adopted this ____ day of _____, 200__.

Natasha Perdew Silas, Secretary