

Minutes for the Indigent Legal Services Board Meeting

April 14, 2023

11 A.M.

In person at the New York City Bar Association

Board Members Present: Acting Chief Judge Anthony Cannataro, Diane Atkins, Judge Carmen Ciparick, Vince Doyle, Suzette Melendez (via WebEx), Lenny Noisette (via WebEx)

ILS Office presenters: Patricia Warth, Burton Phillips, Cynthia Feathers

Minutes taken by: Mindy Jeng

I. Approval of Minutes of December 4, 2022 Board Meeting (vote) (attachment)

Acting Chief Judge Cannataro called the meeting to order. Mr. Doyle made a motion to approve the minutes, and the motion was seconded by Ms. Atkins. The minutes were unanimously approved by the Board.

II. Update on State Fiscal Year 2023-24 Budget

ILS Director Patricia Warth noted that usually, the Board is able to review the final enacted State budget by the April Board meeting, but this year the New York State budget is still being negotiated. ILS has two significant budget priorities: increased funding for parent representation and increasing the statutory hourly rate for assigned counsel.

Regarding parent representation, Director Warth stated that she anticipates ILS will receive in our Local Aid funding at least the same amount as last year (\$4.5 million). It is unclear if ILS will receive more. Director Warth noted her plan to discuss strategies for increased parent representation funding at an upcoming meeting of the ILS Chief Defender Advisory Group.

Regarding the imperative to increase the statutory hourly rates for assigned counsel attorneys, Director Warth noted that the current rates were too low when enacted in 2004, and of course they remain too low now. Director Warth said that ILS is optimistic that there will be a rate increase included in the final enacted State budget, but they do not know what the increase will look like or if the State will fund the increase. She emphasized that requiring the counties to fund the increase will almost certainly undermine the work that ILS is doing in using State funding to improve the quality of public defense services, as counties will likely look to reduce their costs for public defense costs to fund the rate increase.

Acting Chief Judge Cannataro asked whether there will be two separate rates for assigned counsel, one for New York City and one for outside the city. Director Warth said she

does not know what is currently being discussed in budget negotiations. She acknowledged that practically speaking, there currently are two different rates: New York City's assigned counsel rate is \$158 per hour due to the *NYCLA* lawsuit, and outside of New York City the rates are \$75 per hour for felonies and other non-misdemeanors and \$60 per hour for misdemeanors.

III. ILS Appellate Standards and Best Practices, Revised 2023 (attachment)

Director Warth prefaced the discussion about the proposed revisions to the ILS Appellate Standards and Best Practices by saying that the Board is not being asked to vote to approve the revised standards at this meeting. ILS will most likely be asking the Board to approve the standards at the June meeting.

Cindy Feathers discussed the decision to revise the ILS Appellate Standards and the process for doing so. She noted that the original ILS appellate standards were approved and promulgated in 2015, which was before ILS received additional state funding for the *Hurrell-Harring* settlement and its extension statewide and before the ILS Regional Immigration Assistance Centers were created. Not only are there more resources for appellate representation, but the rules of appellate practice have also changed since 2015. Significantly, there has also been a meaningful shift in thinking about racial justice as it relates to child welfare and criminal justice cases.

Ms. Feathers stated that her predecessor at ILS convened a working group to discuss the appellate standards. Ms. Feathers replicated this strategy, using the ILS Appellate Advisory Council, which has been meeting for the past five years to discuss appellate issues. Nine members of the Advisory Council formed the appellate standards working group. When the group confronted a topic on which outside expertise would be valuable (such as habeas petitions and 440 motions, working with non-citizen clients, immigration issues, etc.) they reached out to experts. Ms. Feathers said that the group also received input from the New York State Bar Association's Committee on Mandated Representation.

Ms. Feathers noted that the core elements of the standards remain the same, particularly the value of client-centered representation. She then provided the Board an overview of the changes, focusing on Standards 1, 4, 6, 9, 10, 12, 20, and 24.

Judge Ciparick asked whether the standards can be circulated. Acting Chief Judge Cannataro stated that they were not final so they should not be circulated at this time. The Board members had several comments and suggestions for the revised standards, providing specific feedback on Standard 1 (attorney competence), Standard 9 (client meetings), Standard 10 (counseling clients about risks), Standard 14 (oral argument), Standard 25 (case file), and Standard 26 (*coram nobis*). Board members also discussed the importance, where the client is not proficient in English, in having counsel ensure that interpreters are available for in-person meetings and translators are available for written communications—a theme which underlies several of the standards. Board members also spoke of the value of training and access to

expertise, such as training and expertise on technological matters and accessing translation services.

Acting Chief Judge Cannataro concluded this agenda item by noting how valuable these standards are to practicing attorneys, but also in helping the judiciary understand the work of appellate defense attorneys.

IV. ILS Annual Report (attachment) (vote)

ILS Counsel Burton Phillips said he was pleased to discuss the ILS Annual Report for 2022. The reason that it is called the annual report of the ILS Board is because it fulfills the Board's statutory requirement pursuant to Executive Law § 833 to submit an annual report to the governor, judiciary, and legislature. The report opens with a reflection by Director Warth about the 60th anniversary of *Gideon v. Wainwright*.

The report discusses the ongoing work from the HH and Statewide teams. The counties and providers are effectively using HH and Statewide funding to implement reforms, and the positive impact of this funding is detailed in reports that the HH and Statewide Teams have written. Mr. Phillips emphasized though that ILS is also clear-eyed about the obstacles that remain, such as ongoing recruitment and retention issues faced by institutional public defense providers, stagnant assigned counsel rates, and insufficient funding for parental representation.

The annual report also discusses ILS' work in improving the quality of parent representation, including awarding grants to 17 counties to improve quality and to improve caseloads for parent representation attorneys, and Lucy McCarthy's role as the new Director of Quality Enhancement for Parent Representation.

The report also highlights that it was a banner year for the Appellate Representation Unit. Prior to 2022, the unit consisted of one person (Cindy Feathers). Now, the unit includes the new Statewide Appellate Support Center, which has an eight-person team to support trial and appellate counsel in trials, appeals, etc.

Mr. Phillips said the annual report also highlights some achievements of the Research Unit, which works with over 130 public defense providers to collect much needed data. The Research Unit's expertise in collecting and analyzing data has resulted in high quality reports. The Research Unit has also ably represented ILS at high profile national research events such as the American Society of Criminology conference in Atlanta. Mr. Phillips noted that ILS' Research Unit is engaged in collaboration with external stakeholders as well. ILS collaborated with the New York State Defender Association and other organizations to produce a report surveying defense attorneys about the discovery reforms. The report demonstrates that there was a significant positive impact on the ability of defense lawyers to provide quality representation.

Mr. Phillips emphasized the important work of the Grants Unit. All of ILS' work depends on state funding flowing seamlessly to the counties and New York City for improved quality

public defense. Mr. Phillips said that the Grants Unit continues to take a customer service approach, and as a result are doing an admirable job.

Mr. Phillips stated that ILS' administrative staff had their hands full in 2022, as ILS added many new staff people. Additionally, it was the first year since the COVID pandemic began where the staff returned to regular in-office work. ILS allows staff to work up to 50% remotely subject to supervisor approval. This policy has allowed ILS to operate efficiently and enhance employee satisfaction. The administrative staff has also been integral in fostering ILS' commitment to diversity, equity, and inclusion.

Mr. Doyle noted the Board members should have their names listed in the annual report. Director Warth agreed and said Board members will be added to the report. Mr. Doyle moved to adopt the annual report, with the addition of a page listing the Board members. The Board unanimously approved the report.

V. ILS Office Updates

a. Integrating *Hurrell-Harring* Settlement and Statewide Teams

Director Warth said they will defer this discussion to the June meeting.

b. New ILS Office staff

Mr. Phillips said that ILS has brought on additional staff since the December 2022 Board meeting, including a Research Associate for the Parent Representation Unit, multiple attorneys and a paralegal for the Statewide Appellate Support Center, and a Graduate Intern for the Research Unit. ILS also recently hired a new Assistant Manager of Information Services who will be starting with ILS in May. There will be more information at the next meeting about additional staff that are moving their way through the approval process.

c. Postings for vacant ILS Office positions

Mr. Phillips shared that they are currently recruiting for staff to fill an open Data Outreach Officer position, as well as attorneys for the Criminal Defense Representation Unit and Western New York Regional Support Center.

VI. Brief Update: *Hurrell-Harring* Settlement Enforcement Action

Director Warth explained that ILS issued a letter to the *Hurrell-Harring* parties in May 2022 that identified two counties being out of compliance with the terms of the HH settlement due to the State's failure to increase assigned counsel rates. As a result, the plaintiffs filed a notice of non-compliance and negotiations between the State and the plaintiffs eventually fell apart. In December 2022, the plaintiffs filed a settlement enforcement action in Albany County Supreme Court. Judge Connolly, the judge on the original HH case, was assigned. More recently, the plaintiffs filed a preliminary injunction, and the State filed a motion to dismiss. The court

denied both the preliminary injunction, and the motion to dismiss. Director Warth said that ILS is anticipating that they, and the implementing and monitoring agency, may be asked to provide some information if the enforcement action reaches the discovery phase.

Acting Chief Judge Cannataro asked how will ILS receive the discovery requests? Director Warth said the plaintiffs will likely serve the discovery demands on the State, and the State may turn to ILS for information. Mr. Doyle said it was also possible for the plaintiff to serve a third-party deposition notice or non-party subpoena on ILS.

Director Warth said in relation to the State's motion to dismiss, the State Defendants have not contested that there is a violation of the settlement. The real issue is, what is the proper relief? Director Warth said that everyone is hoping that this enforcement action will be resolved by the State enacting and funding an assigned counsel rate increase in this year's State budget. The desired outcome is that the State agrees to raise and pay for a much-needed rate increase.

VII. Adjourn

Prior to adjourning the meeting, Judge Ciparick acknowledged that this was Acting Chief Judge Cannataro's last meeting as ILS Board Chair. On behalf of the other Board members, she thanked him for his exemplary service to the ILS Board and to the judiciary as Acting Chief Judge.

Judge Ciparick then moved to adjourn the meeting, and Mr. Doyle seconded the motion. The meeting was adjourned at 12:10 p.m.