

## **Minutes for the Indigent Legal Services Board Meeting**

September 22, 2023

11 A.M.

In person at the New York City Bar Association

**Board Members Present:** Chief Judge Rowan Wilson, Diane Atkins, Judge Carmen Ciparick, Vince Doyle (via WebEx), Suzette Meléndez, Lenny Noisette (via WebEx)

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

**Guest presenter:** Drew Dubrin

**Minutes taken by:** Mindy Jeng

### **I. Approval of Minutes of June 2, 2023 Board Meeting (attachment) (vote)**

Ms. Atkins moved to approve the minutes. Judge Ciparick seconded the motion. The board approved the minutes unanimously.

### **II. ILS Budget Request for State Fiscal Year 2024-25 (attachment) (Patricia Warth & Burton Phillips) (vote)**

ILS Counsel Burton Phillips started the discussion about ILS' FY 2024-25 budget request by explaining that the State budget is comprised of a series of bills that govern appropriations. There are two appropriations bills that most directly impact ILS funding, and the State Operations bill is one of them. Mr. Phillips explained that this is the funding that covers staff salaries, office space, etc. For FY 2024-25, ILS is proposing that the Board approve a State Operations budget request that is an increase of \$958,024 over FY 2023-24. The funding would allow ILS to hire four additional positions, and it reflects the 3% general salary increase passed by the State Legislature in the FY 2023-24 budget to adjust for cost-of-living increases. Judge Ciparick commented that it was a modest request.

ILS Director Patricia Warth discussed ILS' Aid to Localities proposed budget request. For FY 2024-25, ILS proposes that the Board approve a request for an increase of \$46 million over the enacted budget from FY 2023-24. The State appropriation for ILS Grants and Distributions has been \$81 million since FY 2013-14. ILS is requesting a modest 3% increase to account for the cost-of-living increase. ILS is also seeking an increase for the *Hurrell-Harring* Settlement program. The request is for \$24.7 million, which is a \$847,000 increase over the past year. This also amounts to a 3% COLA increase. ILS is also requesting a 3% increase for the statewide *Hurrell-Harring* expansion. It would be a \$7.5 million increase over FY 2023-24.

Director Warth stated that ILS has repeatedly urged the State to increase the assigned counsel rates and amend County Law § 722-e to require the State to pay for the increase. The

final enacted FY 2023-24 budget increased the assigned counsel rates, but kept the statutory responsibility on the counties and New York City to pay for assigned counsel representation. However, the State appropriated \$92 million in ILS' Aid to Localities budget to reimburse counties and New York City for 50% of their expenditure for the increase in assigned counsel costs. Director Warth reported that so far 31 counties and New York City have claimed reimbursement for the first fiscal quarter. ILS is asking the State to continue the \$92 million in funding in FY 2024-25, though ILS continues to support the full assumption of increased assigned counsel costs by the State. An additional year of funding will give ILS better data on how much it would cost the State to assume the entirety of the cost.

Director Warth said that ILS is proposing that the Board authorize a request of \$50 million for Article 18-b Family Court Representation program, which is a \$35.5 million increase over the current year's budget. Director Warth stated that earlier in the year, the Chief Judge had asked if ILS could determine the amount of State funding needed to improve the quality of representation provided to parents in Family Court matters. ILS decided that since manageable caseloads are foundational to quality representation, and since the ILS Board has approved parent representation caseload standards established by ILS, the way to determine the State funding needed for quality parent representation is to determine the cost of bringing parent representation providers into compliance with ILS caseload standards. Therefore, this summer, ILS embarked on a survey of providers of parent representation to obtain the caseload, staffing, and expenditure information needed to determine the cost of caseload standard compliance, and ILS arrived at a conservative estimate: \$150 million statewide. ILS proposes a three-year phase in of State funding, starting with \$50 million for FY 2024-25.

Judge Ciparick asked whether ILS has the expectation that the State will accept this funding request. Director Warth said that the Division of Budget instructed agencies to keep their budget requests flat from FY 2023-24 levels. Director Warth noted that under Executive Law §§ 832 and 833, ILS answers to the Board, and therefore the ILS budget request should reflect the State funding necessary to pursue the statutory mission of improved quality public defense representation. Director Warth said that requesting \$50 million for improved quality parent representation, with the ultimate goal of \$150 million after three years, is an honest assessment of the funding needed, and a request with integrity. It is a big number, but it is a wholly defensible number.

Chief Judge Wilson stated that the Legislature passed a bill to create 14 more Family Court judges. He anticipates that the Governor will sign it. The Legislature and the Executive understand that it is important to fund parent representation. Chief Judge Wilson said that it is great that the State is providing these judgeships, but parent representation providers cannot fund representation for these parents. Chief Judge Wilson stated that he is still hopeful, though he is unsure whether the full \$50 million will be funded.

Chief Judge Wilson asked why more counties have not claimed reimbursement for the assigned counsel rate increase. Mr. Phillips said that some counties, depending on whether they use an e-vouchering system and the magnitude of assigned counsel vouchers, were finding

it a little more difficult to put together the reimbursement paperwork. Mr. Phillips said that he is actively working with those counties. There is a bit of a learning curve for the first quarter.

Mr. Doyle commented that there is a range of reaction from the counties to the assigned counsel rate increase. In Erie County, the main provider is the assigned counsel program. There is discussion about moving away from the assigned counsel program because the county cannot afford it with the high reimbursement rates.

Ms. Atkins asked whether there was information on where the 14 Family Court judges will be going. Chief Judge Wilson said that the location of the judges has been determined, with three going to New York City.

Ms. Meléndez said that \$150 million for compliance with the ILS parent representation caseload standards is a conservative estimate. Hiscock Legal Aid also did an analysis, and they found that the salary for parent representation attorneys is significantly less than at the DA's office. The ADAs have salaries in the mid-\$60,000s, and a city attorney's pay is six figures. Any time a lawyer in that field achieves some proficiency, they are out the door.

Judge Ciparick asked if the new Family Court judges will be dedicated Family Court judges. Chief Judge Wilson said they will be dedicated Family Court judges. They will not be "two-hatters." They will be running for office, and they will be elected positions. Chief Judge Wilson also said that the estimate for caseload compliance in parent representation cases at \$150 million is conservative. For example, the Permanent Commission on Access to Justice said that full funding of representation in Housing Court and Town and Village Courts would be \$1 billion.

Mr. Doyle made a motion to approve the ILS budget request. Ms. Meléndez seconded the motion. The ILS Budget was approved unanimously by the Board.

### **III. Approval of Revised Appellate Standards and Best Practices (attachment) (Cynthia Feathers & Drew Dubrin) (vote)**

Ms. Feathers introduced Mr. Dubrin, the Chief of Appellate Practice at the Monroe County Public Defender's Office. Ms. Feathers said she wanted the Board to hear a direct statement from a practicing appellate attorney.

Mr. Dubrin discussed working on the original ILS Appellate Standards and the changes they created in his office. He said that the implementation of ILS' Appellate Standards and Best Practices (established in 2015) brought his office closer to a consistently good level of appellate representation. He spoke to the most recent revisions and discussed what they mean to practicing appellate defenders. Mr. Dubrin said the changes reflect societal changes and changes in technology, among other things. The changes also emphasize the importance of awareness of gender and racial biases.

Mr. Dubrin said that changes to Standard 1 relate to the importance of technology. Counsel must select the appropriate software to conduct adequate record review. There is more prevalent use of electronic evidence, body cam footage, etc. Under Standard 4, the commentary states that briefs should be reviewed by someone with at least three years of experience. It is a critical step. While at institutional defenders, there is often a review process, brief review does not always occur with solo practitioners. The standards say that review should be compensated. The standards also reflect that mentoring is important, and the commentary recommends that a mentoring system should be set up.

Mr. Dubrin said that under Standard 6, attorneys are required to check for conflicts. The commentary also acknowledges that conflicts may arise from insufficient funding or excessive caseloads, which lead to unfairly preferencing the interests of one client over another. Mr. Dubrin stated that ILS has devoted a significant amount of money to address backlogs the Monroe County Public Defender Office had. The money has also allowed providers to attract and retain talented attorneys. Under Standard 9, there is a strong preference for in-person meetings. The revised standards provide guidance on the timing of the meeting. The meeting should be prior to filing of the brief. This way, the client can provide input. There should be client-centered lawyering. The standard was also revised to say that competent interpreters should be used for clients whose primary language is not English.

Mr. Dubrin said that Standard 11 emphasizes timeliness. Justice delayed is not justice served. The appellate attorney should focus on the client's perspective. Standard 12 includes commentary on effective brief writing. The commentary also discusses addressing racial and gender bias. ILS recently co-hosted an intensive CLE program on effective brief writing and brief writing workshops. A representative of the Innocence Project has taught a workshop. The workshops also covered racial justice arguments.

Standard 7 states that attorneys must consider the immigration consequences of the appeal and criminal and Family Court involvement for their non-citizen clients. It directs counsel to consult with ILS' Regional Immigration Assistance Centers. Mr. Dubrin said that revisions to Standard 20 were made considering the statutory changes to the County Law. It is important that counsel investigate 440 claims – ineffective assistance of counsel, illegal sentence. In many cases, 440 claims may be the only avenue for relief. It is no longer acceptable to say to the client, "that is outside the record and outside of my control." Under Standard 22, a lawyer owes the client their professional judgment. This principle must be balanced with client-centered lawyering. An attorney must consult with the client before moving forward on claims. An attorney should raise issues that the client wants to raise – any colorable claim unless it would hurt the client's case.

Ms. Feathers thanked the Board for their contributions to the revised standards. The revisions related to technological competence occurred after the Board highlighted that issue during the April 2023 Board meeting. The Board also noted the need for interpreters at

meetings and contributed to revisions regarding counseling about risks and waiver of oral arguments.

Mr. Dubrin said that he looked to see what other states have done regarding appellate practice standards. No other state standards compare to New York's in terms of depth, expectation, and client centeredness. He described the revised standards as "the gold standard" that should be the national model for standards.

Mr. Dubrin noted that the 2015 standards were a catalyst for change. His office didn't expect to meet the standards, but they have been an agent for change. It caused offices to recognize the importance of an in person meeting with the client. Each office ensures funding so that an in-person meeting can be accomplished. There was a change in attitude of the importance of the meeting.

Mr. Dubrin stated that 440 claims are now an important part of litigation. His office has devoted significant resources towards 440 claims. Mr. Dubrin shared a story that occurred earlier in the week when a client came to visit his office. He said that their office had just prevailed on the client's case on appeal, and on reversal, the charges were dismissed. The client came to the office because he had nowhere to go. Mr. Dubrin said he turned to case worker staff. She was able to find reentry services, find shelter, even provide bus fare for the client. That is what client-centered representation is supposed to be. Mr. Dubrin expressed thanks to ILS' standards for moving public defense in the right direction.

Director Warth said reform in a county-based system is not for the faint of heart. It is encouraging and motivating to hear these stories and to hear that some things are working and moving in the right direction. Because of the work the Monroe County Public Defender's Office is doing, clients feel like they are a safe place.

Director Warth said ILS would appreciate Chief Judge Wilson's assistance in distributing the standards to the Presiding Justices of the Appellate Division. Chief Judge Wilson said that he would distribute to the Presiding Justices.

Ms. Meléndez said that the appellate standards are terrific. She asked where there would be any guidelines directed specifically for attorneys for the children, including providing a structure for what best practices are. Director Warth said that under the Executive Law, ILS' mission is to work towards improving the quality representation attorneys for parents provide. Our mission does not include attorneys for children, which is a wholly state funded program. Ms. Meléndez said that she still sees potential for overlap. Some of the attorneys for children come from the 18-b lists, and they may also benefit from these standards.

Mr. Doyle said he wanted to thank Ms. Feathers and Mr. Dubrin. He believes the appellate standards are a great set of revised standards. Mr. Doyle expressed thanks for the response to the feedback from the ILS Board at the April meeting. It was always the hope that the standards would uplift the quality of representation.

Judge Ciparick moved to adopt the revised standards. Ms. Meléndez seconded the motion. The appellate standards were unanimously approved by the Board.

#### **IV. ABA's Revised Ten Principles of a Public Defense Delivery System and National Public Defense Workload Study (attachment) (Patricia Warth)**

Director Warth stated that two significant things happened recently in the world of national standards for public defense. First, the American Bar Association (ABA) revised their Ten Principles of a Public Defense Delivery System. For ILS, those principles have served as a north star on quality public defense systems. The ABA first issued the Ten Principles in 2002, emphasizing the importance of independent public defense delivery systems that are free from political or judicial interference. The 2023 revised Ten Principles continue the original Ten Principles, consolidating some and further elaborating on others. The Revised Ten Principles also add two new principles. There is a strong reminder that the State has the ultimate responsibility to fund an adequate public defense system. The Revised Ten Principles also address the importance of diversity and inclusion. The Ten Principles also discuss data collection and analysis, something that is very important to ILS.

One of the new principles is Principle 10, which states that public defenders should be legal system partners, and public defense providers should be included as equal partners in the legal system. Changes to the legal system should not be made before seeking the input of public defenders.

ILS already predicted some of these changes. Director Warth said that ILS knows that it must be attentive to diversity and the impact of implicit biases. ILS is deeply aligned with the ideas behind the ABA principles. But she also noted that the Ten Principles call for ILS to consistently be working toward quality improvements. For example, the Ten Principles call for a vertical representation model, by which the client is represented by the same lawyer throughout the case. We have not achieved vertical representation across the state. Director Warth also said that ILS wants to do more to elevate and amplify the voices of public defenders.

Director Warth noted that the Revised Ten Principles call for public defense attorneys to have manageable caseloads and define manageable caseloads as those that do not exceed caseload standards that are determined according to a data-driven, methodological sound manner. This is a segue to the second recent development - the issuance of the National Public Defense Workload Study (NPDWS), conducted by the ABA Standing Committee on Legal Aid and Indigent Defense (SCLAID), Rand Corporation, the National Center for State Courts, and Attorney Hanlon. The NPDWS standards replace those standards developed in 1973 by the NAC. The new standards recognize two foundational principles: things have changed dramatically in terms of what public defense entails and the significantly increased amount of discovery involved in representing clients, much of which is digital evidence such as video, other media, and forensics.

Director Warth said that after reviewing the NPDWS standards, ILS concluded that the ILS caseload standards are inadequate. The ILS caseload standards were developed before the 2019 discovery reforms. Director Warth explained that it is premature for ILS to revise its caseload standards now, as some providers in the state are still working towards compliance with ILS' caseload standards. But ILS is working internally and consulting with providers across the state to understand what ILS standards would look like if they were better aligned with the NPDWS standards.

Judge Ciparick commented that many people are having trouble with discovery reform. Many ADAs are also leaving the profession because of discovery reform. Director Warth said that ILS conducted a survey in partnership with NYSDA, CDANY, and NYSACDL about discovery reform in 2022. The conclusions were that discovery reform was necessary to improve the quality of representation and that the reforms have significantly enhanced the fairness of the criminal justice system, but it is hard work, and it takes energy and resources and commitment.

Chief Judge Wilson said that some have complained about a spike in speedy trial dismissals due to discovery reform. The Unified Court System's Division of Court Research is looking into that.

#### **V. ILS Office Updates (Burton Phillips)**

Mr. Phillips said his ILS office updates over the past year have given the Board an overview of the growth and progress of the office. The Western New York Regional Support Center office is now operational. The Attorney in Charge is in place and three of the staff members will be onboarded soon. The Attorney in Charge is currently interviewing for the final two positions. Since the last Board meeting, new staff have joined the ILS Statewide Appellate Support Center and the ILS Research Team.

ILS has also made offers to people to join the Criminal Defense Representation team, and ILS is currently interviewing for two positions in the Grants Unit.

Mr. Phillips noted that Ms. Feathers will be retiring in December. They are in the process of filling all open positions by the end of the year. ILS staff Liah Darlington and Jami Blair have done a tremendous amount of work in recent months in posting the positions, participating in the hiring process, and onboarding the staff. They were filling in for ILS Administrative Officer Christine Becker while she was out on parental leave.

#### **VI. Brief Update: *Hurrell-Harring* Settlement Enforcement Action (Patricia Warth)**

Director Warth said that there are no developments. The *Hurrell-Harring* parties are in negotiations, but ILS is not privy to these negotiations since we are not a party to the settlement. Director Warth said hopefully at the December meeting, there will be a more robust update.

**VII. Adjourn**

Chief Judge Wilson adjourned the meeting at 12:16 pm.