

Sentencing Alternatives Workgroup¹
Meeting Summary and Workgroup Assignments
July 8, 2015, 10:00 AM to 11:30 AM

Atwood Building, 550 W. 7th Avenue, 1st floor conference rooms, Anchorage

Commissioners present: Stephanie Rhoades, Trevor Stephens, Quinlan Steiner, Wes Keller, Brenda Stanfill, Kris Sell, John Coghill

Participants present: John Skidmore, Dunnington Babb, Ken Truitt, Gail Sorenson (?), Tony Piper, Alysa Wooden, Phil Cole, Al Wall, Billy Houser, Doreen Schenkenberger, Cathleen McLaughlin, Jordan Shilling, Leslie Hiebert

Pew/JRI Staff present: Terry Schuster, Rachel Brushett, Leonard Engel, Emily Levett, Melissa Threadgill, Zoe Townes

AJC Staff Present: Susanne DiPietro, Mary Geddes, Giulia Kaufman, Susie Dosik, Brian Brossmer (new staff member)

Future Meetings: Monday, August 3 at 2:30 PM

The meeting began at 10:06 a.m. Unfortunately, this and other ACJC meetings on July 8 were plagued by technical difficulties with video and audio conferencing. Our apologies to remote attendees who were unable to hear or participate.

Staff attorney Mary Geddes introduced the Commissioners and members present, and then gave the background for the meeting.

Previously, [this Workgroup had formulated proposals](#), for the Commission, concerning (1) the substitution of a deferred disposition (DIS) statute for the current suspended imposition of sentence (SIS) statute, and (2) pretrial diversion. At the last Commission meeting, Attorney General Craig Richards² requested additional time for the Department of Law to discuss the proposals and offer input. Consequently, the Commission asked that the Workgroup reconvene for the purpose of getting the DOL input. John Skidmore, the Criminal Division Director, attended this meeting and related Law's questions and concerns.

Deferred Disposition proposal

Skidmore said that the Department of Law agrees the SIS statute is 'not working' when it comes to avoiding a permanent record of conviction and that DOL also 'has no problem' with the idea of judges dismissing a case upon completion of conditions. However, he was concerned: (1) that although the Workgroup had proposed statutory language for an SIS substitute, such language did not include the list

¹ The current Workgroup roster lists Commissioners Brenda Stanfill, Jeff Jessee, Wes Keller, Stephanie Rhoades, Kris Sell, Trevor Stephens, and Quinlan Steiner. Clint Campion is listed as the DOL representative. Others on the email list are: Fred Dyson, Jeff May, Janet McCabe, Barbara Armstrong, Amanda Price, Sarah Heath, Leslie Hiebert, John Skidmore, Natasha Pineda, Ken Truitt, Steve Williams, Natasha Pineda, and Trina Bailey.

² AG Richards has replaced Deputy AG Svobodny on the Commission.

of crimes currently excluded from eligibility for an SIS disposition; any proposal should address why such exclusions were not included in the DIS, if that is what is intended, and in any event, any inconsistencies in the current list of SIS exclusions should be reviewed; (2) that the DIS proposal should state what burden of proof would be required to establish the defendant's compliance and eligibility for dismissal; (3) whether DIS could or should be restricted to plea-only scenarios given that denying DIS might amount to an impermissible burden on defendant's rights (AKA a trial penalty), (4) whether a judge's deferred disposition that reduces a charge e.g. from a felony to a misdemeanor (ref. page 2, last line) would constitute interference with the prosecutorial function, and (5) whether a DIS outcome could be ordered in spite of an existing Rule 11 agreement between the parties.

With respect to the matter of exclusions (#1), Commissioner Stephens explained that the Workgroup had reached no conclusion and therefore had decided to take no position on excluded crimes, leaving the question of any exclusions up to the Commission or up to the Legislature. Commissioner Rhoades referred Skidmore to Workgroup statement on page 3 which documented that decision. Commissioner Bryner agreed with Skidmore that the Workgroup's decision – not to decide on exclusions – had gotten lost in the weeds. Commissioner Steiner further explained that since the Legislature would be ultimately considering the proposal, it was thought that it was unnecessary for the Workgroup to go through this process. Commissioners Coghill and Keller urged the Workgroup to 'go as far as you can' to address potential exclusions because the Legislature would be hard-pressed to give the same level of attention to the proposal. Even if consensus could not be reached on the exclusions, then the Commission would have ensured that everyone's opinion had been heard.

Some discussion followed whether there should be hearings held, either by the Workgroup or the Commission itself. Commissioner Bryner noted that all the ACJC meetings – including workgroup meetings – are public hearings as members of the public can ask to be heard. Members agreed to do outreach to their own constituencies on the matter of exclusions.

With respect to the burden of proof question (#2), Susanne DiPietro noted that the standard under Rule 43(c) was "in furtherance of justice" and wondered why that wouldn't also apply. Commissioner Stephens indicated that he assumed that the decision is entrusted to the exercise of judicial discretion.

With respect to whether DIS should be extended to those defendants who contest their charges, (see #3), it was noted that a SIS is allowed for defendants who go to trial. Commissioner Rhoades expressed the view that it should be the same with the DIS.

With respect to the remaining concern (#4) that there might be a possible separation of powers problem if a court can reduce (as opposed to dismiss) a charge brought by a prosecutor, staff agreed to research the question, as did Commissioner Stephens.

Commissioner Bryner also suggested that the group read the LRS opinion on the somewhat related matter of expungement which had been distributed to the Barriers Workgroup. That opinion had expressed the view that judicially-ordered expungement of convictions could be unconstitutional because it would infringe on the Governor's pardon power in a strong executive-model state like Alaska. However, the article did distinguish (as legal) pre-conviction type dispositions such as the existing SIS.

With respect to concern #5, Skidmore said that he would not want a Rule 11 agreement for resolution of a case to be upended or undermined by a DIS. It was agreed that the Workgroup's proposal would need to address this question.

As a result of this discussion, it was finally agreed that:

- Mary will immediately provide a list of the crimes which are currently excluded from the SIS treatment. [It is attached.] She will also review other states' deferred disposition statutes with respect to excluded crimes and report ASAP on her research.
- Commissioner Stephens will forward to staff any research concerning the separation of powers questions suggested by our discussion. Staff will distribute.
- John Skidmore will identify inconsistencies in the current SIS statute. "Inconsistencies" includes identifying very recent statutes that would be arguably appropriate for exclusion. He will provide that information ASAP to staff.
- Workgroup members will
 - Review a look at each of the current SIS exceptions and any information timely provided by DOL with respect to "inconsistencies";
 - Contact any constituencies or interested persons to learn their views on the SIS/DIS proposal and on possible categorical exclusions; and
 - Be prepared by our next meeting to express a view as to whether conviction under the various statutes should preclude all convicted individuals from DIS relief.

Pretrial Diversion

At the prior Commission meeting, AG Richards had reported that the Criminal Division was revising its policies with respect to pretrial diversion. In this meeting, Skidmore confirmed that the Division has officially changed its policy. The Criminal Division now encourages its office chiefs (the district attorneys) to offer pretrial diversions. There remains interest in a statewide program.

PTD will be principally used for property and drug crimes. If the crime is a misdemeanor or a class B or C felony, no central office oversight or involvement is required. If the crime is a class A or unclassified crime, central office must approve. If the crime is a DUI or a DV offense, then central office wants to be advised of it.

By pretrial diversion, DOL expects that the person involved will have to satisfy some condition or conditions - such as community work service, restitution, participation in a rehabilitation program,- in order to gain the benefit of diversion

Commissioner Rhoades expressed her strong support for the change in DOL policy. She also asked the Workgroup to discuss whether it should proceed with its proposal to recommend a statute that expressly authorizes the DOL to offer pretrial diversion. Skidmore asked what would be gained from such a statute given that the exercise of pretrial diversion is ultimately a prosecutor's choice. Commissioner Bryner said that PTD could only be authorized as an option because of separation of powers issue. Dunnington Babb noted that a statute expressly authorizing the option is an expression of public policy not a directive. Skidmore said he could not agree that it would be beneficial.

It was agreed that the Workgroup would return to this specific question , i.e. should it recommend the passage of a statute recognizing the option of pretrial diversion, given that the Department of Law has already indicated that it had changed its policy and was now encouraging local office chiefs to offer it?

The meeting ended at 11:35 AM.