APPENDIX A

A. **Memorandum to Public Defender Commission, Randi Hood, and OPD Attorneys and staff from Daniel Donovan. Self-Evaluation: ABA Ten Principles of a Public Defense System. April 15, 2008**

MEMORANDUM

TO: Public Defender Commission, Randi Hood, and OPD Attorneys and Staff
FROM: Daniel Donovan
RE: Self-Evaluation: ABA Ten Principles of a Public Defense System
DATE: April 15, 2008

The Commissioners set goals, policies, procedures and standards. § 47-1-105, MCA. While we do this with good intentions - primarily to provide high quality legal representation to the indigent citizen accused in Montana - we seldom receive any feedback as to whether the goals, policies, procedures and standards we have adopted are achieving this purpose. Our system has been described as a work in progress. We must examine what we have done and how we are doing so that we can decide what we need to do to make improvements to the system.

Thus, I have suggested that everyone involved in the OPD system do a self-evaluation in light of the ABA Ten Principles of a Public Defense System, i.e., the so-to-speak ten commandments upon which our system was established. I have also suggested that the Commission, as well as the OPD administrators, attorneys and staff perform a similar self-evaluation concerning the Standards for Counsel Representing Individuals Pursuant to the Montana Public Defender Act dated June 2007 (hereinafter "Standards").

The PDC has the duty under statute to "supervise and direct" the public defender system in accordance with statewide standards. § 47-1-105(2), MCA. Specifically, what standards are we complying with, what standards need to be amended or deleted, and what standards need to be added? Hopefully, the PDC will be able to secure funding to retain the services an independent, outside expert to conduct a thorough evaluation of the public defender system in Montana.

Set forth below is each of the ten ABA principles along with the commentaries. My evaluation follows the commentary of each principle.

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.

Commentary: "The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff."

My Evaluation: By law, our system must be "free from undue political influence and conflicts of interest." § 47-1-102(2), MCA. OPD is apparently free of judicial supervision and influence. The PDC has adopted this principle as a goal. Standards at ¶ IV2A. Judges have really no say

in appointing counsel or, for the most part, determining financial eligibility for OPD services. Judges have no authority over compensation for counsel or in determining whether the defense is entitled to investigative or expert services. The PDC is a non-partisan board although the commissioners are appointed by the Governor who is partisan. The selection of the Chief Defender and staff is made on the basis of merit although I do not know whether or not OPD has achieved "diversity in attorney staff."

My concern is two-fold. With respect to the budget, OPD is not independent of political influence if the Chief Defender and her staff are prohibited from advocating before the Legislature for a budget, or for budget items, which are not approved by the Governor. Also, OPD is not independent of political influence if the Chief Defender and her staff are prohibited from advocating for or against criminal justice issues and legislation before the Legislature. The Commentary to Principle No. 8 states that "[p]ublic defense should participate as an equal partner in improving the justice system." The Attorney General, the County Attorneys, and law enforcement all lobby the Legislature. Unless OPD is permitted to lobby, indigent criminal defendants and public defenders will have no voice. If these prohibitions are based on statute or regulation, I suggest that the applicable statute or regulation be amended.

2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

Commentary: "The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be *ad hoc*, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide."

My Evaluation: Our system complies with this principle as we have both a defender office with salaried attorneys and private lawyers who handle cases on a contract basis. *See,* §§ 47-1-102(4), 47-1-104(2), 47-1-201(3), MCA. Obviously, we do have "state funding and a statewide structure responsible for ensuring uniform quality statewide." The PDC has adopted standards relating to the appointment of private lawyers. *See, e.g.,* Standards at ¶¶ III5, III6, IV2, and IV5. However, I do not know if there is a "coordinated plan" as to the assignment of lawyers.

3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

Commentary: "Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter."

My Evaluation: By statute, the PDC is to "establish protocols to ensure that the office makes appropriate assignments in a timely manner." § 47-1-104(3), MCA The PDC has adopted standards relating to the early entry of lawyers into cases. *See,* Standards at ¶ III2A ("Effective

representation should be available to an eligible person upon request.....as soon as the person is under investigation, [or is] arrested, [or] charged."). Certainly, early entry is critical. Had not Al Avignone been assigned by the Bozeman Public Defender to represent John Lebrum shortly after arrest and had not Al immediately gone to the jail to meet with Lebrum, the result of the case would likely have been much less favorable to Lebrum.

The Standards also require representation prior to, and at, the initial appearance. *See,* Standards at ¶ III2B (The defendant "shall be entitled to consult with a public defender for not less than 15 minutes prior to his or her first court appearance."). To the best of my knowledge, potential PD clients in Cascade County are not being provided with counsel at the initial felony appearance. If so, this practice should be changed, in part, because,"[i]f feasible, counsel should offer representation for the initial appearances for the purpose of making a bond argument." Id. I know from experience in Cascade County that the district judges will reduce bail if the defendant is represented by counsel at the initial appearance. Perhaps procedures could be in place whereby a paralegal or financial eligibility tech could go to the jail first thing every morning to interview all new arrestees prior to the initial appearance. If a client is released on his or her own recognizance or is able to bond out at a lower bail after the initial appearance, the jails will be less crowed and the local authorities will save money on confining prisoners. Also, by saving money which would have otherwise been used for bail, the client and the client's family may have sufficient funds to retain private counsel and thus lighten the OPD caseload.

4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

Commentary: "Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel."

My Evaluation: Under Standard ¶ III2B, "counsel shall make personal contact with [an incarcerated person] within three working days" of the initial appearance. This standard requires the attorney to have a comprehensive meeting with the client if one was not already held prior to the initial appearance. I do not know if OPD is complying with this standard in Cascade County or anywhere else.

Private meeting space may be not be available in many facilities. For example, I know that there is a holding cell in the Cascade County Courthouse but there is no way for counsel to conduct a private conference unless the client is the only person in the holding cell. In Cascade County, the lawyer would probably have to go to the Cascade County Regional Detention Center to have "confidential access" to an incarcerated person.

5. Defense counsel's workload is controlled to permit the rendering of quality representation.

Commentary: "Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement."

My Evaluation: By statute, the Chief Public Defender is required to "establish procedures for managing caseloads and assigning cases in a manner that ensures that public defenders are assigned cases according to experience, training and manageable caseloads and taking into account case complexity, the severity of charges and potential punishments, and the legal skills required to provide effective assistance of counsel." § 47-1-202(7), MCA.; *see also,* § 47-1-215(2)(c), MCA. (Same duty applies to regional deputy public defenders).

From the beginning, the PDC has been concerned with caseload standards. Until recently, OPD was unable to keep track of caseload statistics. The PDC has adopted general caseload standards. *See,* § 47-1-105(2)(b), MCA; Standards at ¶ V1&2. More recently, the PDC adopted the following as suggested or recommended caseloads:

a. 50 felony cases (excluding those in which the death penalty is being sought) per attorney at any one point in time;
b. 100 misdemeanor cases per attorney at one point in time;
c. 80 juvenile offender cases per attorney at any one point in time;
d. 20 dependent and neglect cases per attorney at any one time;
e. 30 civil commitment cases per attorney at any one time;
f. 7 appeals to the Montana Supreme Court per attorney per year at any one time;
g. 7 post-conviction matters per attorney at one time; or
h. 4 petitions for *certiorari* or to the United States Supreme Court per attorney at any one point in time.

Also, the PDC was told at the February 29, 2008 meeting about a new case management system that is being tested in Missoula and Kalispell. OPD will not be able to hire sufficient personnel or properly justify its budget without accurate caseload statistics.

6. Defense counsel's ability, training, and experience match the complexity of the case.

Commentary: "Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation."

My Evaluation: This principle is required by law. §§ 47-1-102(3), 47-1-105(2), MCA. The PDC has adopted basic purposes which adopt this principle. "Counsel's workload [shall] match[]

counsel's capability." Standards at ¶ ID. "Counsel's ability, training and experience [shall] match the complexity of the case." Standards at ¶ IE. Presumably, the regional defenders, managing attorneys and supervisory attorneys assign cases with these purposes in mind. §§ 47-1-202(7) & 47-1-215(2)(c), MCA. I assume that a staff attorney would notify his or her supervisor if he or she was unable to handle a particular case.

7. The same attorney continuously represents the client until completion of the case.

Commentary: "Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal."

My Evaluation: As with Principle No. 6, the PDC has adopted a standard which mandates this principle: "To the extent possible, the same attorney continuously represents the client until completion of the case." Standards at ¶ ID. My impression is that, after sentencing, trial counsel has the option of either continuing to represent the client on appeal or request that the client be assigned to different appellate counsel. In the latter event, "trial counsel should cooperate in providing information to appellate counsel.....concerning the proceedings in the trial court." Standards at ¶ VI29B.

8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

Commentary: "There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation."

My Evaluation: I do not know whether there is, at present, a "parity of workload[and] salaries.....between prosecution and public defense." This should be a goal to strive for. I would suspect that, at present, there is not a "parity [of].....benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts[] between prosecution and public defense." Again, this should be another goal to strive for. The system was established "to ensure that adequate public funding of the statewide public defender is

provided." § 47-1-102(5), MCA.

As to compensation, "[t]he Chief Public Defender and his or her staff should be compensated at a rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices." Standards at ¶IV2B. Adequate and fair compensation for the salaried attorneys does not appear to be a problem. The salaried attorneys are represented by a union so presumably the salaried attorneys will be compensated on a par with attorneys who work for the Attorney General and other state agencies.

Contracts with private attorneys are not awarded primarily on the basis of cost, some thirteen factors are to be considered. § 47-1-216, MCA; Standards at ¶ IV2E. Contract oversight and enforcement is required and each contract lawyer is required to undergo an annual proficiency determination. § 47-1-216(5), M.C.A.; Standards at ¶¶ IV2F&5; Principle No. 10 below.

However, compensation for contract lawyers is a problem. Although the standards require that contract lawyers be provided with "[r]easonable compensation [at] levels consistent with these standards," the current hourly rate is only $60.00. Also, contract lawyers are not reimbursed for "actual overhead and expenses." By contrast, in the Federal system, court-assigned lawyers are paid $100.00 per hour and are reimbursed for expenses including mileage, parking, meals, lodging, photocopying, postage, long-distance telephone calls, and facsimile costs. Certain aspects of our State system are more equitable than the Federal system, e.g,, the State contractors are paid on a monthly basis and there does not appear to be a maximum fee amount for each type of case. I have been led to believe that it is not "politically" feasible to raise the hourly rate at this time. However, if OPD is system that strives to be "independent from political influence", an effort should be made to raise the hourly rate to $80.00 per hour as soon as possible. Otherwise, I question whether contract lawyers will be able to "provide quality legal representation."

9. Defense counsel is provided with and required to attend continuing legal education.

Commentary: "Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors."

My Evaluation: By statute, OPD is required to have a training coordinator. §§ 47-1-201(3)(a)(iv) & 47-1-210, MCA. The PDC is required to establish "continuing education requirements for public defenders and support staff." § 47-1-105(2)(d), MCA. The PDC has adopted standards which require staff attorneys and contracting attorneys to maintain a minimum number of CLE credits each year. *See,* Standards at ¶ VIAb ("complete twenty hours of continuing legal education within each calendar year), ¶ X1A (20 hours of Appellate Training), ¶ XI1A (20 hours of Post-Conviction Training), ¶ XII1A (20 hours of Sentence Review Training), ¶ XIII1A (20 hours of Youth Court Training), ¶ XIV1B, XV1B & ¶ XX1A (20 hours of Involuntary Commitment Training), ¶ XVI1B (5 hours of Involuntary Commitment of Minor Training), ¶ XVII1A (5 hours of Dependent/Neglect Training), ¶ XVIII1B (4 hours of Guardianship and

Conservatorship Training), ¶ XIX1A (2 hours of Parentage Training), and ¶ XXI1B (8 hours of Involuntary Commitment of Alcoholics Training). The goal is that "Counsel must meet these minimum standards before accepting a case. In order to provide effective representation, counsel must engage in regular and ongoing training." Standards at ¶ VI. Presumably, the annual performance evaluation of each staff attorney shall include a determination as to whether the staff attorney has completed the required CLE hours. *See,* Standards at ¶ IV4. The same review should apply to the annual proficiency determination for contract attorneys. *See,* Standards at ¶ IV5.

Eric Olson, the Training Coordinator, has done an outstanding job in organizing and presenting training programs. I have personally observed and made presentations at training programs For information about OPD training, go to http://publicdefender.mt.gov/training.asp.

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

Commentary: "The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency."

My Evaluation: By statute, the Chief Public Defender is required to "establish and supervise a .....performance evaluation program for attorneys and non attorney staff members and contractors." § 47-1-202(9), MCA. The PDC has adopted standards regarding performance evaluations. Standards at ¶¶ IV4&5. As stated above, performance evaluations and proficiency determinations are to be conducted on an annual basis. Id. The Chief Public Defender is also required to "establish procedures to handle complaints about public defender performance." § 47-1-202(10), MCA. I do not know whether there is an performance/proficiency program or a complaint procedure at present.