

ATTACHMENT A

PDC and OPD Activities and Comments Regarding AU and ACLU Report **RECOMMENDATIONS**

The Montana Public Defender Commission (PDC) assigned each of the American University (AU) recommendations to one of its Committees. The Office of the State Public Defender (OPD) assigned each recommendation to an agency Team. The function of the Team was to gather information for and provide staff assistance to the Committees.

The Committees decided that some of the recommendations will become ongoing “goals and objectives” for the agency as a way to strive for continual improvement.

The Commission developed an “Agency Response to the 2008 American University Recommendations” and delivered this to various legislative committees during the 2009 and 2011 legislative sessions.

OPD developed a summary report entitled “Status Update on American University Recommendations” and provided this to the Commission and the Legislature at various meetings.

Each AU recommendation below is accompanied by the AU discussion of the recommendation, followed by a summary of the associated item from the American Civil Liberties Union of Montana (ACLU) report, if applicable, and the agency’s response, including actions, related documents and narrative.

This document uses “¶” references to refer to paragraph numbers in the Overview to which this is attached.

A. MANAGEMENT AND ADMINISTRATION

Recommendation 1: *The OPD needs to provide detailed information to adequately describe the Agency’s caseloads, dispositional processes, attorney workload, and related data that describes the Agency’s operations and services being performed.*

The 2005 Defender enabling legislation requires the Agency to provide detailed caseload and disposition information. Defender Commission Standards and policy requires the same information in more detail (Standard V-1, 2, Policy 115, 108). That information, in sufficient detail, has been promised by OPD staff. That promise has not been fulfilled. As a result no data driven substantive oversight is possible. Caseloads of staff attorneys and contract lawyers are at best minimally controlled; statistics on case disposition are not accumulated or reported. Time records of staff lawyers also are required (Policy 120). However, we did not see any such

records. Certainly, no such records are referred to or utilized in any evaluation of lawyers, assignment of cases, or performing the supervision function. There was substantial evidence that at least some of the staff lawyers have too many cases, and many of the Commission standards are not followed and, perhaps, totally ignored.

ACLU REPORT ITEM 1: OPD does not report on:

1. total cases issued to attorney during a year (FTE and Contractor);
2. substantive and dispositive motions or other data regarding case progression;
3. case disposition data; or
4. number of cases overturned on appeal.

RECOMMENDATION ADOPTED: Yes, to the extent resources are available.

GOAL AND OBJECTIVE: The Committee recommended that this recommendation be incorporated into the agency's ongoing goals and objectives.

POLICIES DEVELOPED OR REVISED: Policies 106, 107, 210, and 215.

RELATED DOCUMENTS: Operating and Financial Reports presented at the PDC regular meetings.

ACTIONS:

- OPD assigned this recommendation to the Information Improvement Team.
- The PDC assigned this recommendation to the Collective Bargaining Committee.
- Time reporting was revised and implemented into the case management system and a monthly report was produced to show who was reporting and who was not. The goal is to have 100% compliance 90% of the time.
- The Information Improvement Team created an Agency Information Project (AIP). The AIP's goal was to provide the agency with any information necessary to achieve the mission. The AIP (1) reviewed all reports to assure that each had value to the agency; if not the report was fixed to provide relevance or discontinued; and (2) recommended new reports.
- The Information Improvement Team recommended that New Dawn Technologies be hired to provide a review of how the agency uses the case management system and to provide direction to make the agency's reporting from the system more efficient. A contract was signed by OPD on September 1, 2010 with a value of \$35,885. New Dawn completed their review of OPD use of the software and suggested adjustments that were implemented with the assistance of the Team.
- The Team also recommended that a Case Management User Support position be created to provide ongoing training and to act as a help desk for users. This position was created and filled in 2010.
- The Collective Bargaining Committee met twice to review the recommendations of the Team and approved certain action items.
- Upon the recommendation of the Committee the PDC adopted a standard report, "Operating and Financial Report" to be reported to the PDC at its regular meetings.

- During FY 2010, the agency instituted quarterly field reporting from the regional, MCU, and Appellate office. Field reports contain information as to how each office operates and has sections that discuss caseloads and financial issues. These reports are sent to the Chairman of the PDC.

RESPONSE: Generally see ¶¶29-59, ¶133, and ¶¶142-158 of the overview. OPD does report on total annual cases worked on by FTE attorneys but not on those assigned to contractors, although FTE attorneys may not recognize this information in the form provided by OPD. The agency has this information on file as well as the total number of cases assigned to contract attorneys. OPD does not have sufficient support staff resources for entering into the case management system all of the detailed information that adequately describes the progress of cases, dispositional outcomes, and other case related data that describes all of the operations and services being performed and also support the FTE lawyers in representing their clients as well as improve the eligibility determination process. Improvements can be made in the collection and timely entry of the necessary data as more support staff become available.

Recommendation 2. *The case weighting system should be refined to provide a meaningful reflection of the work entailed in handling different types of criminal cases.*

The Agency does not have a workable caseload control system. A case weighting study is needed to determine the time it takes for various case activities. While there was a case weighting system presented to the Commission, the various weights assigned to a variety of cases are the product of unsupported perceptions and, in some instances, patently inappropriate. For example, all felonies are given the same weight. Obviously not all felonies should be in the same weight category, i.e. a capital murder should not be weighted the same as a felony theft, etc. Nor should a case that goes to trial be necessarily considered with the same weight as a case that is disposed of by a plea of guilty.

ACLU REPORT ITEM 3: The PDC has failed to respond to this issue in a meaningful way. Although a case weighting system was developed and refined, attorneys complain of being overworked and management ignoring the case weighting results.

RECOMMENDATION ADOPTED: Yes, but this is an ongoing process.

GOAL AND OBJECTIVE: The Collective Bargaining Committee recommended that this recommendation be incorporated into the agency's ongoing goals and objectives.

POLICIES DEVELOPED OR REVISED: The case weighting system rules have been revised on several occasions.

RELATED DOCUMENTS: CWS rules and worksheet

ACTIONS:

- OPD assigned this recommendation to the Information Improvement Team.
- The PDC assigned this recommendation to the Collective Bargaining Committee.

- Both groups made recommendations to the Labor Management Committee (LMC) for improving the case weighting system (CWS). The LMC is a group comprised of individuals from the attorney bargaining unit and OPD management.
- The LMC has changed the CWS on several occasions by either changing the weights for various case types or case activities or by adding new weights. It is expected that the LMC will continue monitoring and adjusting the CWS as the LMC finds appropriate.

RESPONSE: Generally, see ¶¶40-44, ¶¶56-66, and ¶¶71-76 of the overview. The CWS was created by the Labor Management Committee. Attorneys should bring their complaints to their representatives on the LMC so improvements can be made to the CWS. The PDC and OPD management will strive for getting more resources that will reduce case overloads. However, it is true that the PDC must decide upon a plan for refusing more cases than the agency can handle effectively.

Recommendation 3. *A meaningful system should be developed for evaluating the work of the lawyers.*

Little to no evaluation of the work of lawyers occurs, although promised. The Agency must develop and use an evaluation system that is practical and that starts with case disposition and the process of disposition.

ACLU REPORT ITEM 4: The ACLU report had comments from attorneys that the revised process was still not meaningful for providing feedback about their proficiency in the practice of law.

RECOMMENDATION ADOPTED: Yes, but considerably more work needs to be done.

RELATED DOCUMENTS: New evaluation forms and process.

ACTIONS:

- The agency assigned this recommendation to the Employee Recruitment and Retention Team.
- The PDC assigned this recommendation to the Collective Bargaining Committee.
- Both groups reviewed other state and federal defender processes and then developed a new attorney evaluation form and process that includes case disposition.
- The revised form and processes were reviewed by a sample of staff attorneys to provide feedback and recommend adjustments.
- The revised evaluation process is expected to be used for future evaluations, as modified through the current project underway.

RESPONSE: Generally, see ¶¶93-99 and in particular ¶95 of the overview. Also, refer to recommendation 11. Underway is a project of aligning the job descriptions of all employees with the tasks actually being performed and improving the evaluation program toward assuring that the performance of the employees will be evaluated on the basis of how well they are performing their assigned duties. Managers need more time away from client caseloads for supervision, training, mentoring, and the evaluation of FTEs and contract lawyers that not likely will be

forthcoming without reducing manager caseloads. For objective evaluations of the lawyers at least is the needed availability of the caseload data regarding what the lawyer did during the course of representation and what the disposition of the cases were. Nonetheless, managers are encouraged to discuss performance and other issues as needed, more often than just once per year. The agency is open to constructive suggestions for revising this process and the accompanying evaluation forms as the current project progresses.

Recommendation 4. *At a minimum, budget submissions should be supported by documentation describing the Agency's accomplishments presented in concrete terms.*

Budget submissions to the Governor, Supreme Court, Legislature and Commission are woefully inadequate. In the almost three years since the Defender Agency began to fully function, there has been little effort to document the Defender Agency's accomplishments. The Agency must track case progress and present concrete information on case disposition. That information should, at a minimum, be categorized by type of case and provide case result, caseload and case dispositions for each separate lawyer.

RECOMMENDATION ADOPTED: Yes, and the description of accomplishments will improve as more resources become available for capturing dispositional data.

GOAL AND OBJECTIVE: The Budget Committee recommended that this recommendation be incorporated into the agency's ongoing goals and objectives.

ACTIONS:

- OPD assigned this recommendation to the Information Improvement Team.
- The PDC assigned this recommendation to the Budget Committee.
- The Budget Committee reviewed the past budget and the process used to develop it along with the information gathered and reported. The Committee reviewed the progress of the Team and agreed that it was developing the right kinds of information that would support future budget requests.
- The PDC reviewed its basic information needs and that of other stakeholders of the agency and adopted a standard report (Operating and Financial Report) to be presented at PDC meetings. This information will also be used for budgeting.
- OPD has adopted and deployed a case closing form that includes case disposition and other information. OPD and the PDC are working toward incorporating the dispositional information into the annual reports.

RESPONSE: Generally, see the overview, in particular ¶¶56-66, and the response to recommendation 1. Case progress and case dispositional data used for evaluation of OPD's accomplishments can be misleading unless measured against national statistics such as those cited in ¶110 of the overview. As resources become available for capturing case progress and dispositional data, OPD management and the PDC believe the achievements of the agency will become clearer and that the agency beats the national statistics.

Recommendation 5: *The "minimal" caseload statutory requirement for the Chief Defender, Contract Manager and Regional Deputy Defenders should be reduced or eliminated.*

Managerial staffs, including the Chief Defender, the Contract Manager, and Regional Deputy Defenders have a significant caseload. As a result, supervisory staff are too busy representing clients. They are not managing. The problem is not only the lack of time to manage; simply stated, the problem may be a lack of desire to manage or a lack of knowledge as to how to manage. The Agency is adrift. In the next legislative session the Commission should submit a legislative proposal to eliminate the “minimal” caseload requirement for the Chief Defender, Contract Manager, and Regional Deputy Defenders. Until the “minimal” caseload statutory requirement is eliminated, the management staff should not undertake more than one case at a time, and not serious cases. As it now stands there is little to no time for management.

RECOMMENDATION ADOPTED: Yes, to the extent the chief public defender and the contract manager can no longer carry caseloads. However, there is difficulty in implementing the recommendation as to deputy public defenders due to the pressure of growing caseloads at the regional levels.

POLICIES DEVELOPED OR REVISED: Policy 114, Management Caseload Limitations

RELATED DOCUMENTS: Caseload reporting from managers.

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Personnel Committee.
- The Committee and Team developed Policy 114, Management Caseload Limitations.
- OPD asks its managers to adhere to the policy limits to the best of their ability, realizing that full implementation of this policy cannot happen until more staff attorneys can be hired to relieve manager caseloads.
- OPD submitted a decision package to the 2011 legislature for 4 FTE to be used to relieve caseloads for managers. Although the agency did receive some funding to help in this effort, two issues continue: (1) as caseloads increase the managers take more cases to alleviate the pressure on the staff lawyers, and (2) the time limits in Policy 114 were based on 2080 hours. It is now generally accepted that using 2080 hours is an unreasonable starting point to calculate hour limits for the policy as no attorney should be expected to produce 2080 hours of work due to leave, holidays, continuing education requirements, interruptions, and other job related activities. The agency has submitted a decision package for consideration during the 2013 legislative session to add FTE lawyers to reduce manager caseloads.
- Senate Bill 187 passed the 2011 Legislature prohibiting the Chief Public Defender and the Contract Manager from handling cases.

RESPONSE: Generally, see ¶2, ¶¶4-7, ¶¶24-26, ¶63, ¶65, ¶¶71-76, ¶¶83-87, ¶96, ¶99, ¶147, ¶155, and ¶158 of the overview. Managers in all but the smallest regions need relief from their caseloads without further overburdening other PDs so there is more time for observing, supervising, training, mentoring, and evaluating all employees. The same holds true for supervising and evaluating contract lawyers. OPD management does not have the independent authority to hire or mold the workforce needed for providing effective assistance of counsel [¶2].

The PDC and OPD management cannot exceed the budget appropriated without facing the dire consequences of being fired and found personally liable for payment of the amounts exceeding the budget even when expenditures for “client costs” are justifiable [¶2; ¶¶4-7].

Recommendation 6. *The Commission must become more aggressive in demanding comprehensive, reliable reports of Agency activity.*

The Commission meets often and regularly, but has not been effective in obtaining reliable information of the Agency’s work. It must insist upon implementation of an adequate data collection system in each of the regional offices. Implementation of a complete data collection system will require that each regional office and the contract management office have an information retrieval system in place. The system must allow managers to have immediate access to present caseload data by attorney (including information about the critical details of each case), caseload assigned by attorney, caseload disposed and disposition method by attorney. A staff person in each region must have responsibility for data integrity to insure that data is entered accurately and in a timely manner into the system. This recommendation is the foundation for most management functions in a unified statewide agency. It is the foundation for most of our recommendations. Without adequate information this Agency will not be able to function effectively and with efficiency.

RECOMMENDATION ADOPTED: Yes, to the extent resources are available for the collection and entry of more data into the case management system.

ACTIONS:

- OPD assigned this recommendation to the Information Improvement Team.
- The PDC assigned this recommendation to the Legislative Committee.

RESPONSE: Generally see ¶¶29-59, ¶133, and ¶¶142-158 of the overview and the responses to recommendations 1 and 4. The PDC has no doubt about the importance of maintaining timely entered caseload data into the case management system despite the view of some within OPD that unnecessary data is being collected [¶33]. OPD reports on total annual cases worked on by FTE attorneys. However, FTE attorneys may not recognize this information in the form provided by OPD. This information is on file as well as the total number of cases assigned to contract attorneys. OPD does not have sufficient support staff resources it needs to enter into the case management system all of the detailed information that adequately describes the progress of cases, dispositional outcomes, and related data that describes all of the operations and services being performed and also support the FTE lawyers in representing their clients as well as improve the eligibility determination process. Improvements can be made in the collection and timely entry of the necessary data as more support staff become available. Case progress and case dispositional data used for evaluation of the agency’s accomplishments can be misleading unless measured against national statistics such as those cited in ¶110 of the overview. As resources become available for capturing case progress and dispositional data OPD management and the PDC believe the achievements of the agency will become clearer and that the agency beats the national statistics.

B. CONFLICT OF INTEREST CASES

Recommendation 7. *A separate Conflicts Office should be maintained for trial and appellate cases with the director reporting to the Commission, not the Chief Defender.*

Rules of law and professional ethics forbid a lawyer and a law firm from representing clients where the lawyer or law firm would have a conflict of interest. Situations of conflict arise in trial level criminal cases, usually, but are not limited to cases where two or more persons are charged with the same offense. Conflicts also arise in appellate cases where the appellate lawyer is in the same firm or organization as the trial lawyer, and issues of ineffective trial lawyer should be alleged. Conflicting interests may also arise in family law and mental health cases. All conflicts should be quickly identified and resolved. There is a system in place to identify conflict problems. However, the present method for resolving the conflict problem is inadequate.

Although Commission Standards conclude that the Regional offices, the Appellate office, and the Contract Manager office are independent for conflict purposes, we strongly believe that conclusion is unsupported. The Chief Defender has complete and ultimate authority over Agency staff and contract lawyers. The Chief Defender hires, fires, disciplines and is to evaluate all lawyers and other staff in the Agency. She has the authority to exercise supervision and control over every aspect in the Agency's representation of clients. Obviously the Chief Defender should delegate to other managers; lawyers assigned to a case have the prime responsibility for that case. Nevertheless, the ultimate responsibility for representation of clients and the quality of that representation lies with the Chief Defender. Hence, the Regions created by the Commission are not independent and cannot be considered anything more than divisions within the Agency for managerial purposes and convenience.

Accordingly, we recommend that a separate conflicts office, trial and appellate, be maintained with its director responsible to and reporting to the Commission, not the Chief Defender. The Chief Public Defender should be totally without interest in the conflicts division. In the unusual event of three or more persons who require separate appointment of counsel, additional lawyers will have to be appointed by the trial judge. Those additional lawyers of course must be without any employment connection to the Defender Agency, as staff or by contract, and must be compensated from funds that are Not part of or do not come from Defender Agency appropriations.

RECOMMENDATION ADOPTED: Yes

POLICIES DEVELOPED OR REVISED: Policies 116 and 119.

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Legislative Committee.
- Senate Bill 187 passed the 2011 Legislature establishing a Conflicts Coordinator that reports directly to the PDC. The PDC recruited and hired a person to fill this role shortly after the 2011 legislative session. The Conflicts Coordinator began operations in August 2011 separate from the Chief Public and Appellate Defender operations. Generally, see

¶¶159-168 and in particular ¶¶164-168 of the overview. The conflicts manager position is currently filled as a half time, .5, FTE position without an assigned support staff position. The number of conflict assignments the conflicts manager must assign, administer, and supervise is too much for a half time FTE to handle. Moreover, there is no relief available when the conflicts manager is ill or on leave [¶168].

C. TRAINING AND CONTINUING EDUCATION

Recommendation 8: *The Training Director should regularly survey staff and contract lawyers to determine what training they believe are needed.*

ACLU REPORT ITEM 5: The ACLU report claims that employees believe that the training program is still inadequate as it is more focused on criminal defense while the agency has civil practice needs that lack adequate training, and that more on the job training is needed.

RECOMMENDATION ADOPTED: Yes

GOAL AND OBJECTIVE: The Personnel Committee recommended that this recommendation be incorporated into the agency's ongoing goals and objectives.

RELATED DOCUMENTS: Survey results from various training programs on file.

ACTIONS:

- OPD assigned this recommendation to the Expand Agency Training Team.
- The PDC assigned this recommendation to the Personnel Committee.
- Both groups met with the OPD Training Coordinator who agreed to periodically survey internal and external attorneys about training sessions and their effectiveness as well as obtain feedback about other training needs.
- The Training Coordinator distributes email-based assessment surveys.

RESPONSE: Generally, see ¶¶77-92 of the overview. Attendees are either provided evaluation sheets or directed to an on-line survey on which they can offer their comments and make suggestions for future training programs. Information is gathered about training needs from the RDPDs and staff. Online surveys are posted. People can submit proposals anytime on the agency's intranet. OPD has web training for DN and DI work. OPD also has a mentoring program and is working to expand it. A two-day DN training session has been conducted at some OPD offices since the visits by the ACLU team.

Recommendation 9: *Each training program should have systematic feedback and evaluations from attendees.*

ACLU REPORT ITEM 5: The ACLU report claims that employees believe that the training program is still inadequate as it is more focused on criminal defense while the agency has civil practice needs that lack adequate training.

RECOMMENDATION ADOPTED: Yes

ACTIONS:

- OPD assigned this recommendation to the Expand Agency Training Team.
- The PDC assigned this recommendation to the Personnel Committee.
- Both groups addressed this recommendation as part of their review of recommendation 8.

RESPONSE: Generally, see ¶¶77-92 and in particular ¶79 of the overview. Attendees are either given evaluation sheets or directed to an on-line survey on which they can offer their comments and make suggestions for future training programs. Information is gathered about training needs from the RDPDs and staff. Online surveys are posted. People can submit proposals anytime on the agency's intranet. Still, that does not mean every submission finds its way into the training program. Proposals and suggestions are considered in developing future training, priorities are set, and are scheduled into the program to the extent resources allow.

Recommendation 10: *At the very least the following activities should be a part of the training functions.*

- a. The training office should prepare and distribute a separate trial book applicable to each category of case, e.g. misdemeanor, felony, appellate, juvenile, etc.*

Trial books should be continually updated and be provided to contract lawyers as well as staff lawyers.

- b. The Training Director should be responsible for developing and implementing through Public Defender managers two introductory programs:*

First: an orientation program for all new staff, including an introduction to office processes and policies.

Second: an initial skills program for the attorney staff to introduce the attorneys to their professional duties.

The practice standards approved by the Commission should be introduced as part of the skills program. Thereafter, the Trainer should be available to managers to assist in continuing training to improve skills of staff they supervise. To the extent possible these services should be made available to contract attorneys through the Contract Director.

- c. The Training Director and the Appellate Division are developing a brief bank. That activity should continue and periodically be upgraded.*
- d. Every continuing education training program should continue to be recorded and the recordings made available to lawyers.*

Trial and motion practice demonstrations should be videotaped and the videos made available to staff. Practice demonstrations by staff lawyers should also be made on video to enable lawyers to observe their own performance.

- e. *A monthly newsletter summarizing recent noteworthy decisions from higher courts and of any changes in Agency policy and procedures should also be prepared and distributed.*

It is anticipated that additional staff may be required for the Training Director to implement these recommendations.

RECOMMENDATION ADOPTED: Yes, to the extent resources are available and time permits.

GOAL AND OBJECTIVE: The Personnel Committee recommended that this recommendation be incorporated into the agency's ongoing goals and objectives.

POLICIES DEVELOPED OR REVISED: Policy 118

ACTIONS:

- OPD assigned this recommendation to the Expand Agency Training Team.
- The PDC assigned this recommendation to the Personnel Committee.
- OPD hired administrative staff to support the training function to help address the issues of the report.
- OPD has hired an attorney to oversee and implement the mentoring policy and function.
- The Training Coordinator and other OPD staff developed and implemented an orientation program for new employees. The Training function conducts numerous training sessions each year including a boot camp for new attorneys.
- OPD and the appellate office continue to refine and expand the brief bank.
- The Training Coordinator has developed an agency-wide prototype of a trial book for criminal cases that should be available for review in FY 2012 with the goal of it being issued in FY 2013.

RESPONSE: Generally, see ¶¶72-92 and in particular ¶¶91-92 of the overview. A uniform DN practice manual, a juvenile delinquency resource guide, and a civil mental health law guidebook and additional trial books will be developed as resources permit.

D. EVALUATIONS OF LAWYERS

1. General

Recommendation 11: *An evaluation procedure for lawyers needs to be developed which is timely, is based primarily on objective data, and promotes the lawyer's professional development over the next year.*

The primary intent of evaluations should be to develop the best staff possible. Therefore, they need to be fair, dependable and timely. They should end with the employee and the manager having a clear plan for the lawyer's professional development over the next year.

Commission Standards (IV-E4, 5) and Policy (135) require yearly evaluations of staff and contract lawyers, including all supervisors. To date there have been no formal evaluations. The Chief Defender, together with another supervisor, is required to be involved in every yearly evaluation of every staff and contract lawyer. As discussed earlier in this report, a manual has recently been published by the Agency describing the prospective evaluation process which, if it were to be implemented, is both impractical and of little value in terms of assessing lawyers' performance. It includes courtroom observations of staff and contract lawyers, interviews with various persons who have observed the lawyer's work, and conferences with the lawyer who is being evaluated. There is a rating scale to be used by the evaluators. Oddly, the process totally fails to include any assessment of the case process and case results. The proposed evaluation is entirely subjective, anecdotal and impressionistic. Objective factors relating to disposition of cases that should be readily and easily attainable are totally ignored. In addition, the procedures proposed in the manual cannot possibly be implemented without the supervisory staff being greatly enlarged—an unlikely event.

Among many Agency employees there is also a perception of unfair favoritism and fear of unwarranted retaliation for perceived criticism of management. Those impressions may be exacerbated by any attempted use of the entirely subjective procedure outlined in the manual.

In place of these procedures, we urge the adoption of the evaluation procedures outlined in Section III C of this report. Of course, adopting those procedures would require implementing the case reporting system recommended

ACLU REPORT ITEM 4: The ACLU report had comments from attorneys that the revised process was still not meaningful for providing feedback about their proficiency in the practice of law.

RECOMMENDATION ADOPTED: Yes, but not very well due to managers needing more time away from client caseloads for supervision, training, mentoring, and evaluating that not likely will be forthcoming without reducing manager caseloads.

ACTIONS:

- OPD assigned this recommendation to the Employee Recruitment and Retention Team.
- The PDC assigned this recommendation to the Personnel Committee.

RESPONSE: Generally, see ¶¶93-99 and in particular ¶95 of the overview. Also, refer to recommendation 3. Underway is a project of aligning the job descriptions of all employees with the tasks actually being performed and improving the evaluation program toward assuring that the performance of the employees will be evaluated on the basis of how well they are performing their assigned duties. Managers need more time away from client caseloads for supervision, training, mentoring, and evaluating that not likely will be forthcoming without reducing manager caseloads. For objective evaluations of the lawyers at least is the needed availability of the caseload data regarding what the lawyer did during the course of representation and what the disposition of the cases were. Nonetheless, managers are encouraged to discuss performance and other issues as needed, more often than just once per year. The agency is open to constructive

suggestions as how to revise this process and the accompanying form as the current project progresses.

2. Special Issues Relating to Contract Lawyer Supervision and Evaluation

Recommendation 12. *Special procedures should be developed for evaluating contract lawyers, relying primarily on the information provided in the proposed closing documents.*

Clearly, the problems of supervising and evaluating contract lawyers are somewhat unique from those of staff lawyers. In the more heavily populated regions, the Deputy Defenders have, or should have, their hands full with supervising staff lawyers and handling their own cases. Even with substantial reduction of their caseload, staff obligations make it unlikely that the deputy defenders could participate heavily in the contract lawyer evaluations.

Of course, any observations managers make of a contract lawyer who is representing an assigned client in court should be reported to the Contract Manager, if noteworthy. Otherwise, evaluations of contract lawyers should be primarily the job of the Contract Director. Although Commission policy directs the Chief Defender to also be involved, her involvement should be limited to oversight and not in the active evaluation process.

The evaluation of contract lawyers should initially be based upon case dispositions and the process for case disposition. The fee petitions and proposed case closing documents should be the first line, the primary source for information relative to contract lawyer performance evaluations. Deputy defenders in regions with little or no attorney staff can be more actively involved in evaluating contract lawyers in their regions, especially in gathering information from third parties such as judges and prosecutors. If the suggested case closing documents are adopted and tabulated, most problems are likely to be identified from these documents and the fee petitions, without the need for actual observation of the lawyer in court, thereby reducing the evaluation burden to a more manageable activity as well as bringing a degree of objectivity into the evaluation process.

ACLU REPORT ITEM 4: The ACLU report had comments from attorneys that the revised process was still not meaningful for providing feedback about their proficiency in the practice of law.

RECOMMENDATION ADOPTED: Yes, to the extent available resources allow but significant improvement can be made with additional resources.

GOAL AND OBJECTIVE: The Contracts Committee recommended that this recommendation be incorporated into the agency's ongoing goals and objectives.

POLICIES DEVELOPED OR REVISED: Policy 130.

RELATED DOCUMENTS: The Standards of Practice.

ACTIONS:

- OPD assigned this recommendation to the Employee Recruitment and Retention Team.
- The PDC assigned this recommendation to the Contracts Committee.
- Policy 130 was in place and the Standards also address this subject. However, this function has limited staffing to adequately do all of the work required. OPD staffed the contract management function with a three quarter time contract manager and one full time administrative support staff. This staffing configuration was not able to fully comply with the time lines outlined in Policy 130. The Committee and the Team both agreed to revise Policy 130 and the Standards to allow for the review of contract attorneys to be done biennially rather than annually.
- The policy was also revised to allow for more oversight and review by the Regional Deputy Public Defenders.

RESPONSE: Generally, see ¶¶117-168 and in particular ¶¶147-158 and ¶168 of the overview. While some adjustments can be made in the way contract attorneys are currently being evaluated, the contract manager does not have enough time to evaluate each of the contract lawyers beyond what is currently being done. Meaningful assistance from RDPDs won't be available until their caseloads are reduced by the addition of more FTE lawyers who can absorb the managers' caseloads.

Recommendation 13. *A contract lawyer should be prohibited from having an assigned client becoming a fee client in the originally assigned case.*

A contract lawyer should be specifically prohibited from taking any money or benefit from an appointed client or from anyone for the benefit of the appointed client.

RECOMMENDATION ADOPTED: Yes

RELATED DOCUMENTS: Draft Standard revision IV.2.F (f) and (g).

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Contracts Committee.
- These groups recommended that the PDC adopt a new standard under Section IV. (Administration of Defender Services) 2. (Delivery of Services) F. (f) and (g) to address this recommendation. The PDC has not yet voted to adopt this recommendation.

RESPONSE: See ¶136 of the overview.

E. IMPLEMENTING EARLY CASE ENTRY

Recommendation 14. *An emergency lawyer should be available 24 hours, seven days a week to ensure immediate provision of counsel in compliance with the Commission Standards.*

Commission Standard III-2 imposes the obligation to provide counsel "...as soon as the person is under investigation, arrested..." and at the initial appearance. However, there is no evidence that

the Agency has seriously attempted to implement this standard. Indeed, as already noted, in some counties lawyers are not representing people at the initial court appearance.

Accordingly, it is recommended that implementation of this standard requires that each Regional Office require a lawyer, staff or contract lawyer, on a rotation schedule, to be designated as an emergency lawyer available 24 hours, seven days a week to provide his/her services when called. An agency emergency number should also be established in each Region for this service. Each police department and arrestee holding facility should be notified of the availability of an emergency public defender attorney and the telephone number of the duty lawyer posted in a plainly visible place in the police facility or holding cell area. If police agencies do not cooperate, a court order requiring cooperation should be requested. The availability of that service should be effectively advertised.

RECOMMENDATION ADOPTED: Not yet.

RELATED DOCUMENTS: See the decision packages and the minutes of the April 13, 2012 PDC meeting.

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Personnel Committee.
- The groups asked the PDC to adopt a budget decision package to address this issue.
- The PDC voted to defer the decision package for the 2013 biennium but has included it in its 2015 biennium budget process.

RESPONSE: See ¶64 of the overview. While it would be nice to have a lawyer available to rush right over for the immediate provision of counsel wherever and whenever needed, that is not practical in every instance in Montana no matter how much funding is thrown at doing so. Having a lawyer on call in the larger regions is somewhat practical when caseloads are reasonable but having a lawyer available in some of the remote areas of those regions and in the rural regions is not practical given the distances between OPD offices and outlying law enforcement agencies. Law enforcement and prosecutors should know not to take advantage of those situations but everyone knows they will from time to time. That means OPD must be ever vigilant and very aggressive in filing motions to quash or suppress whenever there is an abuse of the accused's constitutional rights.

F. PLANNING FOR CASE OVERLOADS, BUDGETING AND OTHER RESOURCE NEEDS

1. Caseload Control and Overload

Recommendation 15. *Management staff should develop a plan for situations in which case overloads occur, particularly when they coexist with budget shortfalls.*

There is evidence that at least some lawyers have too many cases. As noted earlier, the present system does not quickly present an up-to-date picture of caseloads of staff and contract lawyers

so that cases can be intelligently assigned. At present cases are assigned to staff by rotation without regard to case inventories unless a lawyer complains of case overload. In the present Agency environment, many lawyers are unlikely to complain about their work load. Hence, they may neglect some preparation or fail to timely represent clients. Accordingly, it is essential that managers themselves identify excessive caseloads of staff.

Also, there are no plans in place to confront a looming problem of too many cases and budget shortfalls. Management must be prepared to quickly submit a supplementary appropriation request. That request must document the emergency with concrete factual data.

Management staff should develop a plan to address the excessive case assignment problem when additional funding is not available. Any plan developed must assure that Commission Standards addressing quality of representation are not diluted and must be submitted to the Commission for its approval. (See formal opinion 06-441, ABA Standing Committee on Ethics and Professional Responsibility.)

ACLU REPORT ITEM 3: The PDC has failed to respond to this issue in a meaningful way.

RECOMMENDATION ADOPTED: Somewhat

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Personnel Committee.
- The groups agreed with OPD's current process of developing two and sometimes three financial reserves during its budget allocation process. The first is to cover shortfalls in all areas for personal services payouts or other payroll needs, the second is to cover shortfalls in the regions for contract services, and the third is to cover shortfalls in other areas.
- The state has traditionally had other contingency reserves to help agencies with shortfalls which provide other sources of funds.
- The state also has a supplemental funding process for those agencies that suffer financial shortfalls beyond their control. OPD has filed for and received supplemental or other funding in most every year of its operation. OPD keeps track of its expenditures and identifies those that were outside of its original planning process for inclusion in a supplemental funding process, if necessary.

RESPONSE: Generally, see ¶¶2-6, ¶¶8-9, ¶¶12-15, ¶¶56-66, and in particular ¶¶71-73 of the overview. The PDC and OPD management will continue to monitor its funding and report supplemental funding needs, as necessary.

Recommendation 16. *When caseloads of staff lawyers are at maximum levels for assuring effective levels of service and contract lawyer resources are exhausted, the Defender Agency must refuse to accept more cases.*

The ethics of the legal profession require that a lawyer should not accept more cases than the lawyer can effectively and timely attend to. Defender lawyers are bound to that ethical

requirement as are private practice lawyers. Accordingly, when a lawyer reaches the maximum number of cases she/he can handle, the lawyer must reject additional appointments. Any court order of appointment when the Agency has reached its maximum caseload should be challenged, and the Agency should be prepared to meet that contingency. Of course, it is essential that the Agency have reliable, up-to-date case numbers for each of its lawyers to support its refusal to accept appointments. Otherwise, challenging a court order of appointment cannot be justified.

ACLU REPORT ITEM 3: The PDC has failed to respond to this issue in a meaningful way.

RECOMMENDATION ADOPTED: Not yet.

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Personnel Committee.
- The groups addressed this recommendation with recommendation number 15.
- The Attorney Bargaining Unit is in discussions with agency management to study if it is possible to limit case intake when the system or region is out of resources. A case limit study group has been formed to address this issue and provide recommendations to the PDC.

RESPONSE: Generally, see ¶¶2-6, ¶¶8-9, ¶¶12-15, ¶¶56-76 and in particular ¶¶74-76 of the overview. The Attorney Bargaining Unit and OPD management are studying caseloads and ways for limiting case intake when the system or region is out of resources. The study group has been formed to address these issues, outline a process for limiting or refusing cases if the agency hits the maximum cases it can handle, and bring recommendations to the PDC. Some options being considered are bringing different court actions that will suspend ordering OPD to assign counsel or to order the dismissal of charges of certain types or levels until caseloads return to performable levels.

2. Budgeting

Recommendation 17. *Budgeting for the 2012-2013 biennial legislative session should begin immediately.*

Among the specific requests to the Legislature should be the following:

- a. An increase in the contract lawyer hourly rate to at least the federal court rate for appointed lawyers.
- b. Action to ensure that the salaries of defender staff attorneys are on a par with salaries of other state employed lawyers.

There is evidence that defender staff lawyer salaries are on average considerably lower than salaries of other state employed lawyers in Montana. Those salaries must be raised to be on par with salaries of other state employed lawyers. The Union that represents Defender Agency staff should be utilized to convince the Legislature to remedy this unwarranted discrimination. If this

discrimination continues, experienced, quality defender lawyers will be lost to other government offices.

- c. The “minimum” case requirement for all managers, including the Chief Defender, should be stricken from the Defender legislation.

If managers want and have time to represent a defender client or two, they should be allowed to do so only if they are adequately performing their management duties.

It is foreseeable that there will be a need to increase Agency personnel at management, staff and support levels. Implementation of the recommendations in this technical assistance report may require additional staff. The Commission should not hesitate in making such requests. For such requests to be persuasive, however, they must be supported by concrete data.

RECOMMENDATION ADOPTED: Yes, and the PDC and OPD management diligently work on this continuous process.

RELATED DOCUMENTS: 2015 Executive Planning Process document and related budget information.

ACTIONS:

- OPD assigned this recommendation to the Information Improvement Team.
- The PDC assigned this recommendation to the Budget Committee.
- The Committee and the Team reviewed the budgeting process.
- OPD traditionally begins budgeting nearly one year before the legislative session begins. Agency personnel meet to discuss staffing and funding needs based on caseloads and other factors.
- This draft budget is first submitted to the PDC for its approval/revision. The decision packages approved by the PDC are submitted to the Governor’s Budget Office for approval/revision. The surviving decision packages are included in the Governor’s budget to the legislature.
- The legislature ultimately approves funding for OPD.
- The 2015 biennium budget includes budget items for attorney pay and contractor rate increases.

RESPONSE: Generally, see the *Syllabus* and ¶6, ¶¶21-29, ¶¶39-44, ¶¶56-63, ¶65, ¶¶95-96, ¶98, ¶¶111-115, ¶¶117-120, ¶¶147-158, and ¶¶164-174 of the overview. The conclusion of the overview is that the management of OPD is so lacking in resources that performance of the mission becomes more and more in doubt. In large part the overview is an extension of an ongoing evaluation and an objective, verified assessment of what has been done toward compliance with the AU team recommendations and those of others along with conclusions about what it will take to achieve the true potential of OPD.

Recommendation 18. *There should be a separate fund category for emergency situations. Some examples where contingency reserve funds are essential are the high profile case, instances of extreme community disorder, and other catastrophic events.*

RECOMMENDATION ADOPTED: To the extent possible.

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Budget Committee.
- The groups elected to address this recommendation with recommendation number 15.
- OPD secured specific funding for capital defense during the 2013 biennium budget process and has requested it again in the 2015 biennium budget process.

RESPONSE: Generally, see ¶¶67-73 and in particular ¶67 and ¶¶70-71 of the overview. Also refer to the “actions” section to recommendation 17. It does not seem likely that OPD will have many separate emergency funds for different situations in view of the budgetary process outlined in Title 17, M.C.A.

G. IMPROVED COMMUNICATION BETWEEN THE CHIEF DEFENDER AND STAFF

***Recommendation 19.** The Chief Defender should communicate with staff regularly regarding the application of policies and procedures to OPD office operations, staff compensation, evaluation, etc., as well as any proposed changes in these policies.*

Issues relating to existing policies and procedures as well as any changes or additions to these policies, standards, or other internal Agency procedures should immediately be disseminated to staff. As it stands now such communication is seriously inadequate.

ACLU REPORT ITEM 2: (a) OPD central office micromanages; (b) there is a lack of transparency for hiring and firing; (c) favoritism and retaliation are demonstrated; and (d) there is a loss of confidence in the Chief Public Defender and the PDC.

RECOMMENDATION ADOPTED: Yes, but improvements can be made.

ACTIONS:

- OPD assigned this recommendation to the Improve Agency Communications Team.
- The PDC assigned this recommendation to the Personnel Committee.
- The groups decided that the newsletter should periodically contain policy information, when appropriate. They also discussed the potential need for a Communications Officer for the agency. The group recommended that the commissioners and OPD managers make contacts with various groups within each community.
- OPD is also looking at an expansion of both its website and the intranet.

RESPONSE: Generally, see ¶¶2-18 and ¶¶99-116 of the overview. Also refer to recommendation 21. (a) OPD, as required by state rules, has an Internal Control Committee in place to address inherent risks within its operation. One of the risks that the Committee has addressed and adopted measures to control or mitigate is to assure that state funds will not be misused in some

fashion and that OPD does not exceed the budget authorized by the legislature, at least without following the procedures outlined in Title 17, M.C.A. Levels of expenditure authorization, expenditure pre-approvals, and creating and monitoring budgets are some of the ways internal control has been instituted. OPD has had clean audits in recent history and will keep the controls in place to assure compliance and oversight. (b) OPD follows state human resource policy and/or union contract rules in all hiring and firing procedures. The agency will treat personnel information as confidential, where appropriate. (c) The PDC and OPD management hears accounts about favoritism and retaliation. Without more detail than what is usually heard it is difficult if not impossible to confirm the claims. Sometimes unflattering information is revealed when looking into claims [¶109]. Specific information should be provided so that claims can be addressed fairly. It would be helpful if there was an FTE dedicated solely to the task of overseeing the distribution of the information recommended by the AU team as well as other information of interest to staff, stakeholders, interested persons, and perhaps more importantly, to the public.

Recommendation 20. *The rationale for distribution of resources to Regions must be published, explained and supported by facts.*

As noted earlier in this report, there is presently the appearance of unjustified and uneven distribution of resources among the Regions. Billings/Region 9 is a prime example of perceived disproportionate allocation of resources. It has a comparatively high caseload, yet receives considerably less resources than other regions with a smaller caseload. If this is somehow justifiable, the justification should be demonstrated and communicated. If not justified, the allocation of resources should be adjusted. The recent addition of two lawyer slots in Region 9 is helpful. Unfortunately, on the basis of known facts, Billings is still underfunded and still without explanation to justify the disproportionate funding.

RECOMMENDATION ADOPTED: Yes, although some are not satisfied with the rationale.

ACTIONS:

- OPD assigned this recommendation to the Information Improvement Team.
- The PDC assigned this recommendation to the Personnel Committee.
- These groups developed a process that will be tested during the FY 2014-15 budget allocation process. OPD management intends to provide the PDC information that better outlines how resources are allocated and that is accompanied by the rationale for the allocations.
- Program managers, regional deputy public defenders or department managers will have the ability to attend that meeting and address the PDC as to their ability or inability to carry out their mission given the allocations.

RESPONSE: Generally, see ¶¶2-29, ¶¶65-66, and ¶¶175-176 of the overview.

Recommendation 21. *Special effort should be made to remove the fear of retaliation from management for publicly noting Agency problems.*

A number of staff believes there is blatant, unfair favoritism displayed by top management. Some also fear inappropriate retaliation from top management if they were to file a grievance, complain of having too many cases, or alert managers to other problems. Of course, any basis for such an impression must be eliminated. Also, staff must be assured that unwarranted discriminatory or retaliatory practices do not occur.

ACLU REPORT ITEM 2: (a) OPD central office micromanages; (b) there is a lack of transparency for hiring and firing; (c) favoritism and retaliation are demonstrated; and (d) there is a loss of confidence in the Chief Public Defender and the PDC.

RECOMMENDATION ADOPTED: Yes

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Personnel Committee.
- The groups asked that all federal and state policies related to this personnel issue be provided to all offices. This was accomplished. They also requested that union grievance policies be provided to the membership. Each member has been provided a copy of the union contract including grievance sections.
- The groups worked with the PDC to look into allegations of retaliation. Furthermore, the PDC invited various groups representing attorneys and non-attorneys to appoint a liaison to the PDC. These liaisons bring issues directly to the PDC if they are not resolved by management.

RESPONSE: Generally, see ¶¶2-18 and ¶¶99-116 of the overview. Also refer to recommendation 19. (a) OPD, as required by state rules, has an Internal Control Committee in place to address inherent risks within its operation. One of the risks that the Committee has made measures to control or mitigate is to assure that state funds will not be misused in some fashion and that OPD does not exceed the budget authorized by the legislature, at least without following the procedures outlined in Title 17, M.C.A. Levels of expenditure authorization, expenditure pre-approvals, and creating and monitoring budgets are some of the ways internal control has been instituted. OPD has had clean audits in recent history and will keep the controls in place to assure compliance and oversight. (b) OPD follows state human resource policy and/or union contract rules in all hiring and firing procedures. The agency will treat personnel information as confidential, where appropriate. (c) The PDC and OPD management hear accounts about favoritism and retaliation. Without more detail than what is usually heard it is difficult if not impossible to confirm the claims. Sometimes unflattering information is revealed when looking into claims [¶109]. Specific information should be provided so that claims can be addressed fairly.

H. REAFFIRMING THE COMMISSION'S AUTHORITY

Recommendation 22. *The Commission must demand accountability from staff for implementing its promulgated standards and policies and for providing competent, efficient representation.*

Pursuant to its mandate from the Montana Legislature (47-1-105 of the 2005 Montana Defender Act), the Commission has adopted standards and from time-to-time has issued administrative policies. However, there has not been any objective information illustrating implementation of those standards and policies. Indeed, there is evidence that some standards are not met, and that some policies have not been implemented. It is the obligation of the Commission to enforce its Standards and to cause its Policies to be implemented.

The Commission is without its own staff. Commissioners are not financially compensated; they have their own law practices or other occupations and meet only periodically. Hence, it is the duty of the Chief Defender with her staff to provide the information necessary for the Commission to function. The Commission must insist upon receiving adequate information. Having accurate, adequate, current, and objective information from staff should be the Commission's present and most pressing priority.

RECOMMENDATION ADOPTED: Yes, but lacks resources for the PDC to have its own staff.

POLICIES DEVELOPED OR REVISED: Policy 136

ACTIONS:

- OPD assigned this recommendation to the Improve Agency Communications Team.
- The PDC assigned this recommendation to the Standards Committee.
- These groups reviewed and approved agency Policy 136 regarding Standards Compliance. The Training Coordinator will contact various employees to monitor compliance.
- Checklists were developed for each of the major areas of the Standards to be used by both the Training Coordinator and the Contract Manager in monitoring compliance.
- The PDC adopted a web-based Standards monitoring system at the August 31, 2011 meeting.

RESPONSE: Generally, see ¶¶93-99, 147-158, and 169-174 of the overview. Managers in all but the smallest regions need relief from their caseloads without further overburdening other PDs so there is more time for observing, supervising, training, mentoring, and evaluating all employees. The same holds true for supervising and evaluating contract lawyers. A staff for the PDC requires personnel qualified by education, training, and experience to independently audit and evaluate OPD management and the effectiveness of the workforce in the performance of the agency mission.

Recommendation 23. *The Commission must become considerably more assertive in demanding relevant information from staff.*

The function of the Defender Agency is to effectively and efficiently represent their clients. The Commission has established Standards to guide staff. It is the duty of staff to prove that standards and policies are followed. It is the obligation of staff to prove its effectiveness and efficiency to the Commission, the Governor, and the Legislature. The staff has failed to do that.

RECOMMENDATION ADOPTED: The PDC has become more assertive.

ACTIONS:

- OPD initially assigned this recommendation to the Information Improvement Team and then it was reassigned to the Improve Agency Communications Team.
- The PDC assigned this recommendation to the Standards Committee.

RESPONSE: Generally, study the overview, in particular see ¶¶30-44, ¶¶56-63, ¶¶93-116, ¶¶142-158, ¶¶160-168, and especially ¶¶169-174. Undoubtedly and as acknowledged, the collection, entry, and reporting of relevant information needs improvement. However, OPD has been accumulating a lot of information. Much of that information has been condensed and reported to the PDC and other stakeholders but, perhaps, not in the most effective way. No one should conclude that some of the information from the chief public defender or the OPD staff is deliberately misleading, as some seem to believe. To the extent information presented has been less than accurate, and there are examples, rather than purposeful misrepresentation, the indications are that the cause has been too much reliance on the accuracy of the sources without adequate verification.

Recommendation 24. *The Commission should also raise challenging questions and provoke management into considering new options.*

The obligation of the Commission is to question! The managers must respond!
For example, how will staff respond to a sudden and unexpected riot or demonstrations where large numbers of people are arrested?

RECOMMENDATION ADOPTED: The PDC does frequently.

POLICIES DEVELOPED OR REVISED: Policy 180

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Personnel Committee.
- The groups reviewed and approved Policy 180, Incentive Awards, to encourage new options and ideas.
- A review of the minutes of PDC meetings should indicate that the commissioners do raise questions and discuss with OPD management new options for addressing issues and problems.
- The overview incorporates questions and options that have been posed.

Recommendation 25. *The Commission should consider selecting a secretary from its own ranks or hiring a person for that job and not rely upon the Chief Defender to act as secretary to the Commission.*

The Commission should consider hiring a staff person to provide support for its operation. Presently, it appears to rely on the Chief Defender and the Administrative Director. Neither the Chief Defender nor any other OPD staff member should hold any position on the Commission.

RECOMMENDATION ADOPTED: Pending

RELATED DOCUMENTS: SB 187 and related fiscal note. The EPP process for the 2015 budget process.

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Personnel Committee.
- A decision package was brought to the PDC for consideration but they did not adopt it for inclusion in the 2013 budget process.
- During the 2011 legislative session, SB 187 allowed for this activity to be funded from the collection of fees from OPD's clients. The fiscal note related to the bill expects that funds will be available in January 2013 to pay for this activity. The PDC decided not to hire staff that is paid for by an uncertain funding source and has decided to send in a decision package for the 2015 budget process to hire 3.00 FTE paid for with general fund.

RESPONSE: Generally, study the overview, in particular see ¶¶30-44, ¶¶56-63, ¶¶93-116, ¶¶142-158, ¶¶160-168, and especially ¶¶169-174. Undoubtedly and as acknowledged, the collection, entry, and reporting of relevant information needs improvement. However, OPD has been accumulating a lot of information. Much of that information has been condensed and reported to the PDC and other stakeholders but, perhaps, not in the most effective way. No one should conclude that some of the information from the chief public defender or the OPD staff is deliberately misleading, as some seem to believe. To the extent information presented has been less than accurate, and there are examples, rather than purposeful misrepresentation, the indications are that the cause has been too much reliance on the accuracy of the sources without adequate verification. A staff for the PDC requires personnel qualified by education, training, and experience to independently audit and evaluate OPD management and the effectiveness of the workforce in the performance of the agency mission.

Recommendation 26. *The Commission should insist that definitive lines of authority be established, published and be included in job descriptions and be communicated to all staff.*

While it is crystal clear that Randi Hood is the Chief Operating Officer of the Agency, other levels of authority have not been as clearly delineated. For example, who, or what position, is the second in command? Who is in charge when Ms. Hood is ill or on vacation or involved in a trial? Where does the Contract Manager stand in the line of authority in regard to the regional deputy defenders and contract lawyers within the regions? Where does the position of Training Director fall in the managerial hierarchy? Does he have authority to require staff lawyers to attend training sessions? Does he have authority to plan, schedule, and impose training requirements for the regions, or is that the prerogative of the regional deputies? Where does the Chief Administrative Officer stand in the line of authority? May he impose administrative procedures for the regions, or are those matters within the prerogative of the Deputy for the Region?

RECOMMENDATION ADOPTED: The PDC has.

RELATED DOCUMENTS: Agency organizational chart.

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Personnel Committee.
- The groups asked that an organizational chart be prepared and communicated to all program managers, regional deputy public defenders, and department managers. This was done at the Chief's meeting with these individuals.
- The chart was also posted to the agency's web site and is updated periodically to capture changes.
- Job descriptions were provided to each employee and they were asked to sign a statement verifying that they received it.

RESPONSE: See ¶¶97-98 of the overview. OPD more clearly established the lines of authority that were published after the AU team made this recommendation. A PDC committee is currently updating the agency's strategic plan. A part of that process is assessing the structural organization of the agency and recommending changes. Integrating the contract attorney program into this process should help clarify the somewhat fractured lines of authority currently laid out. Communicating the new strategic plan and any changes in the lines of authority established in the agency's structural organization can be published on the website upon approval by the PDC. Under consideration is hyperlinking the job descriptions and lines of authority at each position on the structural organization chart.

Recommendation 27. *The Commission should consider imposing its own limitations upon the private practice of law by a defender staff member at all levels of authority within the Defender Agency.*

A recent ethics opinion by the Montana Bar Association appears to find no prohibition against a Defender staff lawyer taking on private clients in civil cases as long as there is no interference with defender duties, and is done on the lawyer's own time. The Commission should develop more definitive guidelines for Defender staff attorneys regarding this issue.

RECOMMENDATION ADOPTED: Yes

POLICIES DEVELOPED OR REVISED: Policy 120

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Personnel Committee.
- The groups developed Policy 120, Outside Employment, for FTE attorneys.

Recommendation 28. *The Commission should require a strategic plan from each region that, among other things, results in measurable improvement in supervision, management, retrieval of information, and evaluation of staff.*

RECOMMENDATION ADOPTED: This has been done.

RELATED DOCUMENTS: Initial strategic plans from the regions and the appellate program and the quarterly field reports.

ACTIONS

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Personnel Committee.
- The groups agreed that each region and the appellate program would be asked to develop a strategic plan for delivery to the PDC.
- This was done during 2009.
- The current Quarterly Field Reports address provisions in those plans that are revised as necessary.

RESPONSE: See ¶¶93-95 of the overview. While there is nothing wrong with requiring each region to develop and maintain a strategic plan, those eleven plans must be consistent with the strategic plan of the agency approved by the PDC. Statutorily, one of the duties of the CPD is submitting for the approval of the PDC a strategic plan for the delivery of public defender services. Second, the chain of command must be observed. The coordination of those plans must be through the CPD to whom the RDPDs report. It would be inappropriate for the PDC to bypass the CPD if some issue over a regional plan arises.

Recommendation 29. *The Commission itself should evaluate and assess what statutory provisions have been adequately satisfied and where it has fallen short.*

Montana's Defender Legislation spelled out a number of specific duties of the Commission. Commissioners should examine those provisions (47-1-104 (1) (2) (3), 47-1-105, Montana Defender Act, 2005) to determine what provisions have been complied with a may not have been at this point. To make this assessment, the Commission must rely on information from Agency staff. The Commission must be insistent on a continuous flow of relevant information.

RECOMMENDATION ADOPTED: The PDC does as the overview demonstrates.

GOAL AND OBJECTIVE: This recommendation may be incorporated into the agency's ongoing goals and objectives.

POLICIES DEVELOPED OR REVISED: Agency strategic plan as revised.

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Legislative Committee.
- Recently the PDC appointed a Strategic Planning Committee and the agency appointed staff to assist the Committee in revising the agency strategic plan, including a review of Title 47.

RESPONSE: The overview is the latest PDC evaluation and assessment of where the PDC and OPD are in their efforts at achieving the true potential of OPD.

I. MISCELLANEOUS

Recommendation 30. *Commission members and Agency management should be active in proclaiming the value of the Agency throughout the state and should speak to civic organizations, schools, and other community groups regarding the role which the Agency plays in the community.*

Criminal defense is often not an undertaking most people see as valuable. The Public Defender is a new state agency using taxpayers' money to defend people charged with murder, rape, robbery and other mayhem. It is essential that the Agency demonstrates that it is an important part of law enforcement. It enforces the constitutions of the United States and the State of Montana. Hence, its value to the public must be brought to the attention of the public. Commissioners and staff should elicit invitations to speak at schools, civic organizations, private clubs, etc. to describe the need for the Agency and tell of its contributions to society in general and law enforcement in particular. After all, the Defender Agency protects the constitutional rights of all citizens when it enforces those rights for their clients.

RECOMMENDATION ADOPTED: Yes but everyone must do a much better job of promoting the value of the agency to the public.

GOAL AND OBJECTIVE: The Legislative Committee recommended that this recommendation be incorporated into the agency's ongoing goals and objectives.

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Legislative Committee.
- The groups encouraged all commissioners and agency staff to be proactive in communicating the value of the agency to the public.

Recommendation 31. *Investigative resources should be provided for misdemeanors as well as felonies.*

As noted earlier in this report, the study team was informed that, recently, lawyers have been instructed that they may not use investigators when preparing to defend clients charged in only misdemeanor cases. If that is true, that restriction should be rescinded immediately. A defense lawyer must have investigation done on all cases. Investigators are essential for a number of reasons. First: using investigators is more efficient than having the lawyer do all the investigation. Of course, a lawyer must also prepare for certain contingencies such as always examining the crime scene. Second: a lawyer cannot testify at trial. Hence, the second essential need is to have the investigator prepared to testify when necessary, such as, when impeaching a prosecution witness by a prior statement that is inconsistent with the witness' testimony. Conviction of a misdemeanor can be very serious. It may disqualify the person from certain occupations later in life. It is often the first step in the ladder of progression to ever more serious crime. It is important to as vigorously represent clients in misdemeanor cases as in other cases.

ACLU REPORT ITEM 6: The ACLU reported that investigation is not occurring in some important cases, including misdemeanors.

RECOMMENDATION ADOPTED: As best as can be done with the resources available.

POLICIES DEVELOPED OR REVISED: Policy 121

ACTIONS:

- OPD assigned this recommendation to the Structural Issues Team.
- The PDC assigned this recommendation to the Collective Bargaining Committee.
- This group developed and implemented Policy 121, Staff Investigators.
- On April 13, 2012 the PDC approved a decision package to hire additional FTE investigators to provide services to misdemeanor cases, when appropriate.

RESPONSE: Generally, see ¶18, ¶28, ¶112, and ¶138 of the overview. The PDC agrees with this comment and has submitted a decision package for inclusion in the 2015 budget process to address this issue.

Recommendation 32. *All lawyers should have authority to use automated legal research engines when necessary.*

We were informed that not all lawyers in the Defender program are authorized to use research tools, such as Lexis and/or Westlaw, at Agency expense. Such a restriction hampers the research ability of the excluded lawyers and is detrimental to morale.

RECOMMENDATION ADOPTED: Yes

RELATED DOCUMENTS: LEXIS Contract

ACTIONS:

- OPD assigned this recommendation to the Information Improvement Team.
- The PDC assigned this recommendation to the Information Technology Committee.
- The groups asked for and received funding from OPD in an amount to assure that LEXIS, a legal research engine, is provided to all FTE attorneys and to all contract attorneys that have requested it if they do substantial work for the agency.
- See ¶139 of the overview.