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Governor

OFFICE OF THE STATE PUBLIC DEFENDER STATE OF MONTANA

RESPONSE TO OPD'S ITEM 8 – UPDATED FROM 12/31/15 (Bill Hooks):

OPD 8. Provide an explanation for growth in inactive cases. Check to assure that inactive cases are removed from the case durations and are not affecting the numbers. Explain the policy change that increased the number of inactive cases.

Response: OPD is required to report for each fiscal year the number of cases that remain open but are inactive. These are cases that do not require active work by attorneys.

We monitor the status of each case in our case management system. The number of inactive cases has increased in part due to a 2013 modification to our internal policy on reporting the status of criminal cases in which a deferred sentence was imposed. Prior to the change, most cases in which a deferred sentence was imposed were then closed in our case management system. If a petition to revoke the sentence was filed later in the underlying matter, a new case was opened. Now, when a deferred sentence is imposed, the case is placed on inactive status in our case management system.

We see an increase in some of our criminal case types, such as misdemeanors, and the increase in "inactive" cases may result from an increase in deferred sentences being imposed.

The number of cases reported as inactive has increased due to a second internal change. Some private attorneys would provide information and mark as "closed" cases in which deferred sentences had been imposed. These should have been listed as "inactive" cases. We have centralized the case closing function for cases handled by private attorneys, and as a result we gave a more accurate number of inactive cases.

Cases also may be moved to "inactive" if the state appears not to actively pursue a pending matter. Additionally, if an arrest warrant has been issued in a case, we will place the case on inactive status until the warrant is served and the accused appears, or the warrant is quashed.

These cases can languish for a long period of time, and as of now we carry these inactive cases from year to year. Our next step is to develop a procedure for identifying those cases that should be closed, and scrubbing these "inactive" cases from our report.

OPD does not include the period in which cases are inactive when calculating case durations.

RESPONSE TO OPD'S ITEMS 9, 18, and 21 (Fritz Gillespie):

OPD 9. What changes would the Commission and/or the agency offer for improvements to the agency? What is the impact of the change on the budget? Are there pilot projects that could reduce caseloads? Holistic Defense? Can the Commission offer changes to statutes to make the agency better?

OPD 18. Eligibility requirements: how does it work and what are some suggestions to improve it? Re-issue RFP to see if someone in the market will provide this function in a cost-effective manner. Should the agency ask that the courts take back this function – what are the benefits? Research what other states do in this area.

OPD 21. State special revenue issues – make this part of our submission to the Task Force. Also consider an RFP.

Response:

- 1) Amend 47-1-111 only to the extent judiciary does eligibility determination;
- 2) Amend 46-18-251(2) to move payment to OPD from (e) up to (c);
- 3) Application fee;
- 4 & 5) Amend Title 17 to exempt OPD from AR policies & use Title 46 collected by judiciary as 46-8-114 provides or create a separate collector agency but ignore or downplay CAs under 7-4-2713;
- 6) Payment not part of sentence; &
- 7) Do not go forward with amending 47-1-104 or the statutes therein so all users might pay unless there is buy-in with 4) & 5) above

RESPONSE TO DAVE BOHYER'S ITEM 37 (Fritz Gillespie):

TASK FORCE 37: Provide a report from the Public Defender Commission on efforts to contract with national entity, e.g. the National Conference of State Courts, for an efficiency study of the agency.

Response: More than once in the past the PDC has considered bringing in a national agency to do an efficiency study of OPD during the decision package process in developing the OPD budget request. Each time the discussion was short because it was decided there were too many other higher priorities needing funding. During the 2015 legislative session it was suggested that perhaps the National Conference of State Courts [NCSC] would do an efficiency study of OPD at little or no cost like it had done for the Montana district courts. It was reported to the PDC that NCSC does these studies at little or no cost for agencies within the judiciary and since OPD is an executive branch agency it would not be available to do the efficiency study.

Further inquiry revealed that NCSC would contract with OPD to do an efficiency study. The study was outlined to begin in 2016 but a final report would not have been available until after the 2017 legislative session had adjourned. The cost of the study was proposed to be slightly more than \$200,000. The 2017 biennium budget for OPD appropriated \$250,000 discretionary spending per year to the PDC to address criminal case growth, DN caseload pressures appellate caseload pressure, and unforeseen fiscal pressures. The PDC asked OPD management to identify ideas for spending the discretionary funds. Among proposals were presented to the PDC budget committee was a NCSC efficiency study. The budget

committee was divided over whether a NCSC study met the letter or spirit of the intent behind the appropriation of the discretionary funds. Inquiry about intent was made of OBPP and sub D legislators before and at the TF meeting on December 10, 2015. Based in part on what was learned, the PDC elected at its December 11, 2015 meeting to not use the discretionary funds to pay for a NCSC efficiency study.

Consideration has been and will continue to be given to bringing in another national organization such as the NLADA if funding can be found. In the meantime, the PDC did set aside up to \$10,000 to bring in consultants from the National Association for Public Defense [NAPD] for advice on how OPD might change its practices to be more efficient. The PDC will soon begin the process of adopting decision packages for the next proposed budget.

RESPONSE TO DAVE BOHYER'S ITEM 13 (Response Pending):

TASK FORCE 13: Provide proportionality research in regard to contractor proficiency vs agency staff attorney proficiency.

PLEASE NOTE: The agency asked for clarification and received the following reply from Judge Haynes, task force member:

List of Judge Haynes' Questions Regarding "Proportionality Research"

1. The U.S. and Montana Constitutions provide that a person accused of a crime for which incarceration is a possible penalty is entitled to legal counsel provided (paid for) by the state. Art. VIII, sec. 14, of the Montana Constitution states that "no money shall be paid out of the treasury unless upon an appropriation made by law." Since 2005, when the Montana Public Defender Act was enacted, the Public Defender Office or the Appellate Defender Office, or both, have regularly requested supplemental appropriations because the costs incurred for indigent defense services provided by or through the PDO/ADO have exceeded amounts initially appropriated.

Question: In the respective opinions of the Public Defender Commission, the Chief Public Defender, and the Chief Appellate Defender, what financial constraints, if any, are there when providing constitutionally guaranteed public defender services?

2. Section 47-1-104(3), MCA, requires, whenever "a court orders the office [of public defender] or the office of appellate defender to assign counsel, the appropriate office shall immediately assign a public defender qualified to provide the required services." Section 47-1-102(5), MCA, states that one purpose of the Montana Public Defender Act is to "ensure that adequate public funding of the statewide public defender system is provided and managed in a fiscally responsible manner."

Question: Once the OPD or APD appoints a qualified public defender as counsel as required under section 47-1-104(3), MCA:

(a) what "benchmarks" does OPD/APD use to ensure that the funding that underpins the services is "managed in a fiscally responsible manner" as is required under section 47-1-102(5);

(b) how does OPD/APD ensure that an OPD/APD-employed public defender or the contract public defender is adhering to the "benchmarks"; and

(c) what actions does OPD/APD take and at what point in the process of providing the required services does OPD/APD take the actions if the "benchmarks" are not met?

3. The Montana and U.S. Constitutions and associated case law guarantees every citizen the right to effective legal counsel in certain proceedings, even when the citizen is unable to pay from the citizen's own assets for the services provided. The state

legislature has the duty and responsibility to ensure that the aforementioned constitutional rights are preserved and, simultaneously, to exact from the taxpaying public only as much revenue as is necessary to provide the spectrum of goods and services required by law, including but certainly not limited to legal counsel services provided to certain individuals who are unable to pay for the services.

Questions: (a) Do the Public Defender Commission, Office of Public Defender, and Office of Appellate Defender, respectively, believe that the constitutional right to legal counsel supersedes the legislature's duty to guard the public fisc?

(b) If the answer is, "Yes, the constitutional right to legal counsel supersedes the legislature's duty..." what limit, if any, is there on the expenses incurred to provide legal counsel?

(c) If the answer is, "No, the constitutional right to legal counsel does not supersede the legislature's duty...", how does the Commission, OPD, and OAD limit expenses incurred in providing legal counsel?

4. Under section 46-8-113, MCA, if a defendant represented by the Office of Public Defender pleads guilty prior to trial to: (a) one or more misdemeanor charges and no felony charges, the defendant is required to pay \$250 for the cost of counsel, or (b) one or more felony charges, the defendant is required to pay \$800 for the cost of counsel.

Questions: (a) Do the amounts of \$250 for a misdemeanor and \$800 for a felony reasonably represent the actual costs incurred by the OPD, whether provided by an OPD-employed attorney or an OPD-contracted attorney, for the services provided in defending a defendant who pleads guilty to the charges?

(b) Under what circumstances, if any, does the OPD allow the actual costs of providing legal counsel to exceed the \$250 or \$800 thresholds?

(c) When the actual costs incurred for providing legal counsel exceed the \$250 or \$800 thresholds, at what point and in what manner is the Chief Public Defender, Regional Public Defender, or Chief Appellate Defender informed that the costs have exceeded the thresholds?

(d) What action does the Chief Public Defender, Regional Public Defender, or Chief Appellate Defender take when informed that the costs incurred have exceeded the thresholds?

(e) Are the actions taken by the Chief Public Defender, Regional Public Defender, or Chief Appellate Defender required to follow written policies and procedures or are the actions taken determined *ad hoc* on a case-by-case basis?

(f) If the actions to be taken are required to follow written procedures, how does the Chief Public Defender or Chief Appellate Defender ensure that the procedures are followed and what does either Chief Public/Appellate Defender do if the procedures are not followed?

5. Federal and state law distinguish between employees and contractors. The OPD and APD each have employees who are attorneys and contract with private attorneys.

Questions: (a) What limits and requirements in regard to work methods and products does the OPD or APD place on a contract attorney when the contract attorney is compensated by the OPD or APD for providing legal counsel to an indigent defendant?

(b) Does OPD or APD have written guidelines that clarify what actions taken by the OPD or APD in regard to legal services provided by a private, contract attorney would make the contract attorney, for legal purposes, e.g., the purposes of taxation, labor laws, or fringe benefits, an employee of the OPD or APD rather than an independent

contractor? (c) If the answer to question 5. (b) is "Yes", please provide a copy of the written guidelines.

6. The constitutional right to legal counsel extends to a defendant's right to appeal.

Questions: (a) Under what circumstances, if any, does the Office of Appellate Defender have the authority to decline, ignore, or override a client's desire to appeal?

(b) What procedure does the OAD's or Commission's policy or rule(s) require an OAD-employed or OAD-contracted attorney to follow if the attorney believes there is no basis for appeal but the client insists on appealing?

(c) How, if at all, does the Chief Appellate Defender manage a case on appeal that a subordinate attorney or contract attorney believes has no basis for appeal but that the client insists on appealing?

7. The OPD and APD rely on the "Case Weight System" for tracking OPD and APD attorney workloads. Each case within a PD Region is assigned by the Regional PD or Regional Managing Attorney (or Conflict Coordinator). A separate JustWare Form is maintained for each attorney. The JustWare Report for the Region, compiled from the JustWare Forms, is provided to each OPD attorney assigned to the Region and is also sent to the OPD Central Office. The JustWare Forms and Reports are used to help assure that an attorney, attorneys within a Region, or the agency is not exceeding ethical caseload limits. The Forms and Reports are not used to measure performance.

Questions: (a) How effective, in the judgment of the Commission, the Chief Public Defender, and the Chief Appellate Defender, are the JustWare tools in achieving their caseload management purposes?

(b) Are cases assigned to contract attorneys also included in the JustWare system?

(c) Are the actual hours worked on a case and reported by an attorney on the JustWare Forms compared to the hours assigned to the case under the Case Weight System?

Questions (con't):

(d) If the answer to 7. (c) is "Yes", what are the OPD's and APD's observations about the hours assigned under the Case Weight System and the actual hours recorded by the attorney assigned to the case?

(e) Has the OPD or APD conducted statistical analysis of the data contained in the JustWare Forms and Reports?

(f) If the answer to 7. (e) is "Yes", what conclusions has the OPD or APD reached?