

February 9, 2012

Richard E. "Fritz" Gillespie, Chair  
Montana Public Defender Commission  
44 West Park Street  
Butte, Montana 59701

RE: Public Comment Period for February 10, 2012 Public Defender Commission Meeting

Dear Chairman Gillespie and Commission Members:

We respect and appreciate the efforts of the Public Defender Commission ("Commission") to be responsive to internal concerns by requesting the AU investigation and report, addressing the ACLU report, and providing the liaison structure. We understand these efforts to be a continued manifestation of a goal of constant improvement of the work environment and production of excellent representation to our clients.

However, we believe it has been said before and must be said until the practice stops: The morale of 'the troops' is not improved by this Commission when anonymous hearsay is given weight in the considerations of the agency's failings.

The ACLU report is a product of an organization committed to the protection of constitutional rights but ironically appears to convict this agency in the court of public opinion based upon unconfirmed hearsay. When the ACLU brought the litigation that birthed this agency, they backed up their accusations with researched data and statements of people willing to identify themselves. The 2011 ACLU report, however, is admitted hearsay. (12/15/2011 Law and Justice Interim Committee meeting at 02:52:00, testimony by Scott Crichton, ACLU Executive Director, referring to the ACLU report as "anecdotal.") Tragically, nothing in the report suggests that any 'fact checking' was performed before the authors, as attorneys, began lobbing accusations as facts.

As criminal defense attorneys, when accusations are lobbed at our clients, we conduct investigations into the accusations to determine what the real facts are. We believe the Commission should hold the ACLU to the same standard; to determine, for example, whether the ACLU attorneys performed an investigation of every fact alleged.

Did the ACLU attorneys perform an investigation to establish the validity of the days claimed to be incarcerated before an attorney saw a client? Did the ACLU attorneys determine how many times the client was visited in jail and what was discussed? Did an attorney, in fact, represent a conflict-client after having identified the conflict to her supervisor? Is it validated that an alleged inebriated attorney actually contacted a client for a suggested fishing hole? Did the ACLU attorneys review the mail and phone policies of OPD before making implied suggestions for changes? The report identifies valid general deficiencies, but we respectfully request that this Commission be mindful of the unsubstantiated hearsay allegations contained in the ACLU report. As criminal defense lawyers, none of us would stand by and let our clients be accused without insisting on the right to confront the accuser, to ask questions and seek clarification.

Outside entities and individuals should not be permitted to make unsubstantiated anonymous accusations. (Including the unsubstantiated hearsay presented as facts by our legislators and used to withhold proper funding of this agency.) The call for transparency must start with the backbone to stand behind one's convictions, criticisms and suggestions. The continued acceptance of hearsay and anonymity to sully the efforts of this agency - which is the people who work for it - tears at the morale of the vast majority of troops, who wonder where the next bomb will be lobbed, and why no one is made to stand up and own their statements.

We also all know, as lawyers, that the cry of fear of possible retribution is just that - a cry. Montana has employment law and employment lawyers; the union has a grievance policy, and most of the troops are union members. The Commission has provided liaisons to compile issues anyone believes should be addressed. The effort to be open to suggestions and criticisms should be lauded. However, in the pursuit of constant improvement we believe that this Commission should not lose sight of the injury to the morale of the troops caused by a failure to require ownership of convictions, criticisms, and suggestions by individuals and entities.

By way of a hypothetical example taken from the survey submitted by the liaisons, if an attorney feels she needs more training in effective plea-bargaining, she should email her managing attorney and ask for it. If she doesn't get a response that puts her on the way to receiving the help she needs, she should continue up the ladder, forwarding the email as she goes, until she gets some mentoring. We can all agree that she should never be punished in any way for seeking help, and that if she felt she was being subject to retribution for complaining about a lack of attendance to her need for training, she could document that, too, and take it to the union, this Commission, court, the legislature, the press, and the ACLU. She should not be permitted to side-step this chain of command by way of submitting anonymous accusations. Doing so harms the agency and therefore those who serve it, and does nothing to help in the efforts to establish transparency or accountability.

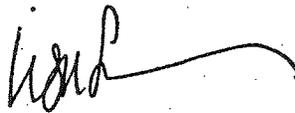
It is our sincere hope that this Commission will change its current policies and declare that entities and individuals who comment on the system by engendering anonymous accusations will be ignored. The ACLU report should be held to the same standards we live by -- that is, the ability to confront the accusers and substantiate the accusations. We also hope the Commission will require comments, criticisms, and suggestions to be owned by their declarant, and that it will not give credence to anonymity. Anonymous submissions to liaisons should end.

Recently, the staff of the Commissioner of Political Practices came forward to accuse him of ethics violations. The staff documented the alleged activities. In this agency, as attorneys, we should have no less backbone required of us.

Sincerely,



Chase Rosario



Lisa S. Korchinski

**From:** Caughlan, Deirdre  
**Sent:** Friday, February 10, 2012 1:25 PM  
**To:** Public Defender Commission  
**Cc:** Aemisegger, Nick  
**Subject:** Latest Staff Attorney Liaison Report

Chairman Gillespie and commission members:

In looking at the agenda for the Commission meeting, I do not know if you or the other commissioners have seen the Latest Staff Attorney Liaison Report from Nick Aemisegger.

I did not have time to respond to this "report" to the commission before court this morning. I am troubled that the report appears to indicate that all staff attorneys are of one mind about personnel issues and concern over the interim chief and the commission's involvement. This is not the case. When the liaison references "we" indicating that he represents the views of all agency attorneys that "we" does not include me or most if not all of the attorneys in Region 5.

I am further troubled that the "report" came out 15 minutes before the end of the day so agency attorneys were unable to respond to it in any constructive fashion before the commission meeting to let their personal views be known. Both the timing of the report and the tone are troubling and do not reflect my views. I also believe that rehashing concerns over the former Chief public defender are not constructive and the agency attorneys need to look to the future and not back.

I further do not share the liaison's views over the interim chief. In the few occasions that I have had contact with the interim chief he has been strongly supportive of efforts made on behalf of my clients even when it has been at the risk of angering both the Court and the prosecutor. For example, in the recent trials of Raymond Big Beaver and Eugene Gonzalez, it was discovered that the chief detective had concealed an exculpatory witness and then perjured himself first at the trial of Raymond Big Beaver and then renewed this deception at the trial of Eugene Gonzalez. When co-counsel and I discovered this we raised the issue through a series of motions to dismiss because of the Brady violations and perjury which we knew would raise the ire of the court and infuriate the prosecutor. Because of the potential fallout we advised our regional deputy and the interim chief of our proposed course of action (including the formal complaint to the Missoula Police Department that is still being prepared.) The interim chief encouraged us to pursue this course and was appropriately involved without micromanaging our plan of action.

I have found that when I have spoken up in the conference calls that we have had, that when either I or other members of the staff have disagreed with the contentions being raised by a vocal few we have been ignored and the complaining has continued rather than engaging in a constructive discussion addressed at facing and solving the issues. The liaison has not spoken to any of the attorneys in Region 5 about their issues and other than the brief survey attached to the report has not sought any other input.

I hope you take these comments into consideration both in considering the contents of the liaison's report and in selection of the new Chief Public Defender.

*Deirdre Caughlan, Lead Attorney  
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