

MONTANA PUBLIC DEFENDER COMMISSION

Butte-Silver Bow Courthouse

Butte, MT

February 24, 2014

MINUTES

(Approved at the April 25, 2014 Meeting)

Commissioners Present

Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; Brian Gallik, Bozeman; Roy Brown, Billings; and Margaret Novak, Chester. Kenneth Olson, Great Falls, and Ann Sherwood, Pablo, attended by phone.

Commissioners Absent

Christopher Daem, Billings; Majel Russell, Billings; Michael Metzger, Billings

Staff Members Present

William Hooks, Chief Public Defender; Kristina Neal, Conflict Coordinator; Harry Freebourn, Administrative Director; Peter Ohman, Training Coordinator; Wendy Johnson, Contract Manager; Anne DeWolf, Regional Deputy Public Defender, Bozeman; Chris Thomas, Indigency Specialist. Wade Zolynski, Chief Appellate Defender, attended by phone.

Liaisons

Cathy Huston, liaison for support staff and investigators; Eileen Larkin, liaison for non-management appellate staff and attorneys, attended by phone.

Interested Persons

Greg DeWitt, Legislative Fiscal Division; Scott Crichton, Executive Director, American Civil Liberties Union of Montana (ACLU); Senator Jon Sesso; Hon. Kurt Krueger, District Court Judge, Second Judicial District

1. Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Fritz Gillespie at 9:15 a.m.

2. Introductions

Chairman Gillespie introduced new commission member Roy Brown. Commissioner Brown's legislative experience will be a valuable asset in the upcoming session.

Peter Ohman is the new training director; he has been with OPD since the inception of the agency as the regional deputy in Bozeman. Wendy Johnson recently returned to OPD from Texas to take the contract manager position. She was previously an assistant public defender in the Helena regional office and the Appellate office.

3. Minutes of October 18, 2013 Meeting (*Action Item)

Commissioner Petaja moved to approve the minutes of the October 18, 2013 meeting as drafted. Commissioner Gallik seconded and the motion carried.

4. Commission Liaison/Executive Board Reports

Support staff and investigator liaison Cathy Huston gave highlights of her written report. Support staff wages are a major concern; the wage gap within the agency is widening because most support staff are being paid at 2006 markets. Some support staff would qualify for public defender services. The investigators and attorneys are in favor of focusing on improving support staff wages and hiring additional support staff next session.

Chairman Gillespie said that the Commission will support the investigators' firearm proposal in the next session, making it an agency-requested bill. It will also be presented to the Law and Justice Interim Committee for their endorsement.

Appellate liaison Eileen Larkin also submitted a written report. The Commission did not have any questions for Ms. Larkin, but Chairman Gillespie had some points to make regarding the Appellate Office. It is apparent that they are achieving more and more success, which he believes is due to a better selection of issues. He also noted that the office has been sending out email alerts regarding Supreme Court reversals and other decisions of interest.

5. Commission Questions/Comments on Submitted Reports

A. Chief Appellate Defender Report

Chief Appellate Defender Wade Zolynski noted that turnover has declined significantly for both attorneys and support staff in his office. The number of new cases is approximately the same as this time last year. The appellate case-weighting system indicates that several attorneys continue to be over the recommended number of units. It is helping Chief Zolynski to determine how to assign cases; he currently has about 25 to distribute.

The Appellate office has seen some very positive results in the first half of the fiscal year despite operating under challenging circumstances. Details are in Section 5 of Chief Zolynski's written report.

B. Conflict Coordinator Report

Conflict Coordinator Kristina Neal continues to have a high number of cases, about 35% of which are DN cases. Her office is running well with the addition of an FTE attorney in Great Falls and an additional part-time support staff to assist the attorney. Having an FTE attorney has taken the pressure off the contract pool which has benefited the Havre region as well. Ms. Neal is developing a report to show the cost savings of using FTE for conflict work. Chairman Gillespie would also like to see the case-weighting numbers for the FTE attorney. These reports will be useful going into the next session to support the request to make the modified employees permanent.

C. Chief Public Defender Report

Chief Public Defender Bill Hooks recognized the contributions of the outgoing training coordinator and contract manager. Eric Olson and Larry Murphy joined OPD before the doors opened. They served with distinction and their presence will be missed by many.

Chief Hooks had one more introduction—Anne DeWolf is the new regional deputy in Bozeman now that Mr. Ohman has taken the training coordinator position. Ms. DeWolf was a staff attorney in Bozeman, which was seen as a model region under Mr. Ohman's leadership. Chief Hooks is confident that Ms. DeWolf will maintain that reputation.

Chief Hooks summarized his written report. He is optimistic about how things are going in Program 1. Good work is being done in the face of daunting workloads with most attorneys above the case-weighting threshold of 125 hours. The significant caseload increases and high turnover rate led to actions to try to limit the number of new cases in the courts of limited jurisdiction in Helena. Although the opening round was unsuccessful in the courts, the Governor's office has provided additional resources to add employees in Helena and elsewhere to relieve the excessive caseloads. One of the new Helena positions will be a resource advocate, and Chief Hooks expects that performance indicators will demonstrate that it is cost-effective and will result in increased attorney productivity to have someone in that role. Implementation of the career ladder has resulted in a significant decrease in attorney turnover in the first half of FY 14 and that is also cause for optimism.

Commissioner Gallik asked if the federal investigation of the Missoula County Attorney's office, the Missoula Police Department, and the University of Montana's Office of Public Safety had impacted OPD. Chief Hooks said that it may have resulted in more law enforcement activity on campus, increasing the number of misdemeanor cases. In addition, cases have increased with the appointment of a new municipal court judge in Missoula.

Chairman Gillespie asked Chief Hooks to comment on his involvement on three boards. As a member of the Montana Board of Crime Control, Chief Hooks has the opportunity to work with their vast constituency including victim's advocates, CASA volunteers and the Native American community, providing him with a different perspective. He can also give the other members a sense of the issues facing OPD. The Commission on Courts of Limited Jurisdiction is comprised of judges and attorneys and is primarily concerned with educating judges in the limited jurisdiction courts. He has been involved with the revision of their bench book and has developed some very fruitful relationships. Chief Hooks is also the lone defense attorney member of the Forensic Sciences Laboratory Advisory Board, which consists of representatives from law enforcement, prosecutors, courts, and the private sector. They are currently addressing complaints about the turnaround time in the crime lab.

i. Performance Audit Follow-Up

The performance audit conducted by the Legislative Audit Division (LAD) in 2012 focused on the contracting and eligibility determination processes. In the November, 2013 follow-up, LAD reports that OPD is in the process of implementing seven of the nine original recommendations. The two that have not been implemented are Recommendation 5, prohibiting individual public defenders from making eligibility determinations, and Recommendation 4, related to performance evaluations of contract attorneys.

Chief Hooks explained the regional deputies' involvement in the process to rescind the appointment when an applicant is determined to be ineligible for OPD services. Since an attorney must file the motion to rescind, Chief Hooks and the LAD will never be in agreement that the regional deputies should not be involved in the process. Chairman Gillespie said that determining eligibility is a function of management that is directly related to funding if OPD is representing people who should not qualify. In addition, support staff should have management support in making difficult decisions, especially in hardship determinations. Changes to statute or administrative rules will be considered to resolve the problem. Chief Hooks noted that the agency did issue a request for proposals to contract out the eligibility determination procedure, but no bids were received.

Regarding Recommendation 4, OPD is working diligently to improve the ability to conduct meaningful performance evaluations of contract attorneys. Given the increasing number of cases and OPD's reliance on contractors, Chief Hooks determined that a full-time contract manager was needed. He noted that the growing number of contractors over vast areas makes it progressively more difficult to evaluate them all in a two-year period.

Commissioner Gallik asked if contractors have been terminated in the past and how problems come to the agency's attention. Chief Hooks doesn't know of anyone that has been terminated during his tenure. He and Ms. Johnson will be working to develop a uniform process for handling complaints, as well as ways to get meaningful input from judges and clients as part of the evaluation process.

D. Contract Manager Report

Contract Manager Wendy Johnson spent her first month on the job meeting with staff, reviewing the recommendations in the American University and ACLU reports, and looking for ways to improve the contracting program. She is considering changing the way the MOU cycle runs, which is currently the same two year period for everyone. The administrative work of renewals could be spread out by using a two year cycle from the time an individual MOU is first signed. The case management program will be used to flag renewal dates and track proficiency determinations.

Contractors have complained about the availability of their training opportunities compared to FTE attorneys. In response, Ms. Johnson and Mr. Ohman are developing some desktop trainings that would be available to contractors in the regional offices.

Day to day operations, including reviewing non-conflict bills and pre-approvals, are working smoothly. Commissioner Petaja asked about the difficulty in getting closing forms from the contract attorneys. He suggested that contractors shouldn't be paid if they are not providing them. Ms. Johnson said that her assistant is following up weekly instead of monthly now and is getting better results.

Chairman Gillespie is interested in providing contract attorneys with access to the case management program in the future so that they can move away from submitting paper forms. This will become more important as the courts implement electronic filing. Ms. Johnson is working with the IT supervisor on a software solution that would allow the contractors to submit their billing and electronic closing forms online.

6. Public Comment

Chairman Gillespie invited public comment before breaking for lunch, but there was none.

5. Commission Questions/Comments on Submitted Reports (continued)

E. Training Report

Training Coordinator Peter Ohman reported that he obtained a \$6,500 grant to train attorneys representing children in dependent neglect proceedings. The training will be held in the summer.

Desktop training is being delivered via Lync, which is similar to Skype. There is live interaction to allow for questions and discussion. The next one will be offered statewide to all FTEs for the first time. There are connectivity issues if too many people are accessing the server at once, so they will use TVs and projectors to deliver the program in larger offices. He hopes to bring the contract attorneys in to participate as well once the bugs are worked out. Upcoming topics include DN

cases, evidence, trial practice and appellate practice. Mr. Ohman is taking advantage of the expertise of OPD's own attorneys for these areas. Once a core curriculum of hour-long presentations is established, they will be offered as stock presentations to new FTE and contractors on an individual basis via Lync. They will be eligible for interactive CLE credits.

The agendas for upcoming events include making evaluations more meaningful for FTEs and improving the process for evaluating contractors at next week's management training in Helena. The support staff conference agenda will include training on eligibility determination, the case management program, legal terminology, and sentencing. Chairman Gillespie requested that if a glossary of terms is developed for support staff, that it be circulated to the Commission as well. Commissioner Novak said that would be especially helpful for new members who are not lawyers. Topics for the annual meeting in October include a childhood trauma training currently offered to judges, and an ethics component incorporating a film about a rabbi who worked with Adolf Eichmann during World War II.

F. Financial and Operating Status

This will be combined with the discussion of the Executive Planning Process (item 9).

7. Draft Eligibility Determination Policy (Policy 105) (*Action Item) and Application Form Update

The Commission adopted a streamlined application form at the July 15, 2013 meeting, and it has been piloted in two regions. Bozeman is a mid-size region and Havre is a region with only one support staff and far flung courts. Chief Hooks is confident that if the new form works in those offices it will work elsewhere. The project has demonstrated the benefits of the new form and it is ready to be rolled out statewide—it has increased the amount of information applicants are providing resulting in more complete, timely, and efficient processing. The presumptive eligibility component is a big improvement in efficiency; verification can be done online, without requiring documentation from the Department of Public Health and Human Services.

Chief Hooks reviewed the changes to Policy 105. Section 2, Definitions, is new. The household definition (2.1) comes from the statutory reference to 15-30-2337, MCA. Presumptive indigence, 2.4, allows services for those people who are unable to complete the form but that are obviously entitled to representation (e.g. homeless people). Section 2.5 formalizes the repeat client provision that had been in practice in many offices and was commented on by the LAD. Another new section is 6.5, which excludes an alleged victim's income if they live with the alleged assailant/applicant. Recovery of fees is no longer part of this policy and will be dealt with separately.

Discussion of the draft policy included a suggestion to further define income to be considered under Attachment A such as unemployment benefits; whether an employer's contribution under the Affordable Care Act should be considered; and the definition of gross income.

There was additional discussion regarding how payment of public defender fees are determined; whether the courts should have access to the information on the application form at sentencing when determining the ability to pay; how presumptive eligibility relates to fee assessments; the lack of uniformity in assessing fees around the state; and the inappropriate practice of requiring a defendant to agree to pay public defender fees in exchange for a plea bargain. This area is a work in progress subject to case law and changes in administrative rule and statute.

Chairman Gillespie invited public comment, but there was none.

Commissioner Gallik moved to adopt the application for court-appointed counsel statewide, as well as the accompanying policy, Policy 105, and the motion carried. Training on the policy and the new form will be part of the support staff conference at the end of April. There was general agreement to delay implementation until after the in-depth training is conducted.

8. Discussion of Proposed Administrative Rule Changes Related to Eligibility Determination

There is currently one administrative rule related to the determination of indigency (2.69.301). Chief Hooks drafted a memo with options for additional rules to make the process more formal. Commissioner Petaja and Chairman Gillespie agreed that defining income and any exemptions to income are important rule changes to consider. They urged looking at Title 15 for guidance. Chairman Gillespie noted that this is not an action item, but an initial conversation; he asked the members to think about suggestions for these and other potential new rules for the next meeting.

9. Budget Issues

A. Executive Planning Process for 2017 Biennium

Mr. Freebourn said that the agency is expecting a shortfall this fiscal year, partly due to the high number of DN cases and the length of time it takes to resolve them. Modified (temporary) employees are being hired to handle the increased caseloads, especially in areas with an insufficient contractor pool. Other payroll issues include the reduced attorney turnover rate impacting vacancy savings, and high payouts for certain long-time employees retiring this year. There will also be a deficit in the capital defense fund. The shortfall will be funded through a fiscal transfer from FY 15, personal services contingency, and SB 410 funds. The plan to cover the anticipated FY 15 shortage has not yet been developed.

Commissioner Gallik asked how the prosecution handles their part of the high costs related to death penalty cases. Chairman Gillespie doesn't believe that the Attorney General is required to track these expenditures separately. Commissioner Brown noted that there are continuing defense costs throughout the appeals process, which can last many years; he supports life without parole as more cost-effective than imposition of the death penalty.

Mr. Freebourn introduced the Judge Krueger. Judge Krueger is very satisfied with the public defenders in this district. He knows they work many hours, and he thinks they utilize their time well. However, he said that the OPD budget request should address the problem of insufficient support staff to allow attorneys to be even more productive. He noted that there are very few contract attorneys in this area, which he believes is due to the low hourly rate. The contractors are serving multiple jurisdictions, and the amount of travel they do results in scheduling delays in his court. Chairman Gillespie said that although additional support staff have been previously requested, they have not been approved in the past. The request for additional support staff FTE will be a priority this session, along with a pay increase for current support staff and the addition of resource advocates. Judge Krueger was very supportive of the resource advocate concept. They would be an asset in mental health cases and family court as well as freeing up lawyer time in criminal matters.

Senator Jon Sesso was invited to speak. He thanked the Commission for volunteering their time and for coming to Butte, and assured them that he will do whatever he can to help keep the ship afloat in the next session. He urged the Commission to continue to be forthright and information-based in addressing the challenges they face. He thinks there is increasing understanding by his colleagues of what those challenges are. Senator Sesso is also in favor of increasing support

services. It is unfortunate that OPD has been the poster child for “growth in government,” and he said that it needs to be made clear that these are jobs that were transferred from the local to the state level when they agency formed; it did not represent real growth of new jobs. Finally, Senator Sesso suggested reducing the number of decision packages to get the most important ones front and center.

Mr. Freebourn gave a high level overview of the EPP document. It will be moved to the Budget Committee for more detailed work. Draft legislation and preliminary budget priorities are due to OBPP in April, with final budget priorities due in August. The decision packages in the EPP document will need to be combined and prioritized.

The EPP identifies challenges to be addressed in various areas without presenting suggested numbers at this point. Staffing is presented as a team approach; Chief Hooks is a staunch supporter of more support staff and increased wages for them. This will free the attorneys to do more legal work.

10. Legislative Issues

A. Law and Justice Interim Committee

Chief Hooks updated the Law and Justice Interim Committee at their February meeting on the litigation in Helena to halt assignment of new cases. Modified employees are being hired in Helena and gradually in other areas where there is a critical need, including Polson, Missoula, Great Falls and Billings.

B. Legislative Timeline

See handout.

C. Potential Legislation for 2015 Session

Three items that were proposed in the 2013 session but did not advance—the “household” definition, flat fee contracts, and removing jail time for certain misdemeanors—will be presented again in 2015. The concealed weapons bill was brought by the investigators independently last session, and the last two items, to replace State Special Revenue with General Fund and to provide a meeting stipend to Commission members, are new. Chief Hooks would like to add an additional proposal, to allow the regional deputies to be involved in the eligibility determination process. The Legislative Committee will prioritize these and any additional proposals for the Commission’s approval.

11. Public Comment

Legislative analyst Greg DeWitt responded to Commissioner Gallik’s earlier question about the cost of death penalty cases on the prosecution side. County attorneys prosecute these cases, and the state funds half of their salaries. The Attorney General’s office provides oversight and advice to the county attorney, and may sit as second chair. Mr. DeWitt did a study of death penalty costs for the Legislative Finance Committee’s March, 2012 meeting. Because only OPD tracks per-case costs, he used a model based on the Kansas system to gather information and estimate costs incurred by other entities. The [study](#) and a [follow-up](#) memo are available on their website.

Scott Crichton, ACLU Montana Executive Director, saluted OPD, saying it’s laudable what people can do with the limited resources they are given. The stress the system is experiencing is undeniable. In fact, the entire criminal justice system is in crisis, with overcrowded prisons and jails, and the current probation and parole board study. When the statewide public defender system was created, there

was unanimous bipartisan support. Now that has eroded and people need to be convinced again of the importance of public defense. One attempt at re-education is through free screenings of the film *Gideon's Army* in various venues, including Helena, Billings and Missoula. Legislators and others including the general public have been invited to the screenings. They welcome ideas on how to construct dialog outside of Helena to rebuild non-partisan support. Finally, the ACLU has requested what may be perceived as a burdensome amount of data from OPD as they try to find ways to help OPD get the needed resources.

Chairman Gillespie acknowledged the size of ACLU information request, and said the agency will do its best to gather the information according to the ACLU's timeframe. Some of the information may have to be submitted as raw data, which Mr. Crichton will gladly accept.

Chairman Gillespie announced that the incoming State Bar president, Mark Parker, is looking for ways to support public defense in Montana. The Bar has invited OPD to their trustees meeting in May, along with Chief Federal Defender Tony Gallagher.

The Montana Judges Association has petitioned the Supreme Court for a change to the judge substitution rule that would make substitutions more restrictive and more expensive. A 60-day comment period began February 18. Chairman Gillespie is working with Chief Hooks and Chief Zolynski on a unified response. Please forward suggestions to them.

12. Old Business/New Business (*Action Items)

A. Approve Eligibility Determination Policy (Policy 105) (*Action Item)

Action was taken under item 7.

B. Status of Administrative Rule Review

This item was not addressed.

C. Directives to Committees

Chairman Gillespie assigned the EPP to the Budget Committee and proposed legislation to the Legislative Committee. Commissioner Brown agreed to join the Legislative Committee.

D. Set Future Commission Meeting Dates

Meet-o-matics will be circulated for March committee meetings and a conference call meeting of the full Commission in the first week of April.

Chairman Gillespie had a final item of new business. Chief Hooks declined to enter into an MOU with a former employee to do contract work, and the employee petitioned the Commission to override the decision. Chairman Gillespie asked if this is the kind of oversight and supervision the Commission should be undertaking. His opinion is that the Commission should not be acting as an appellate process to overrule the decisions of their three direct reports, especially when there are existing processes for grievances and human rights complaints. He invited discussion and feedback from the other members. The consensus was that the Commission is not interested in micromanaging the program managers, and they have bigger policy issues to address at this level. Chairman Gillespie will inform the former employee that the Commission will not consider the complaint.

13. Adjourn

The meeting adjourned at 4:30 p.m.