

Response to AU 2009 Study and ACLU 2011 Evaluation of the Office of the State Public Defender¹

Syllabus

On schedules set by these courts, independently from each other, the Office of the State Public Defender (OPD) "... is required to deliver public defender services in all [208] courts in this state," scattered to every corner of Montana from Eureka to Ekalaka and Broadus; from Plentywood to Lima and West Yellowstone [¶¶118-119]. Within that structure of courts are an ever growing number of treatment/specialty courts [¶118]. Public defenders also represent clients before the sentence review commission [¶118].

Below the appellate level, the caseload is approaching the range of 30,000 new cases in FY 2012 without the agency having any real control over that growth or the number of cases filed [¶34; ¶¶40-42; ¶¶45-55]. OPD had a carryover of 17,469 active cases from FY 2011 [¶34; ¶39]. At the appellate level, a handful of writ of supervisory control cases have been submitted in FY 2012, and the carryover of 11 postconviction relief cases from FY 2011 had grown to 16 active cases by March 31, 2012 [¶58]. In the office of appellate defender (OAD), having no real control over its caseload either, the 250 appeals carried over from FY 2011 had grown to a balance of 329 appeals at the end of March 2012 [¶¶43-44; ¶58].

The primary mission of OPD is providing "effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to assistance of counsel at public expense" [¶19]. Public defenders (PDs) cannot provide their clients with effective assistance of counsel guaranteed by our Constitutions if OPD management cannot supply the resources required by the PDs for fulfilling their ethical obligations [¶19]. OPD management must have a workforce sufficiently trained, adequately paid, and large enough in each skill set with sufficient resources to possibly accomplish every chore that must be done in capably performing the mission of the agency [¶¶20-29; ¶¶56-63; ¶¶66-76; ¶¶77-92; ¶¶111-114].

Providing effective assistance of counsel requires attorneys to regularly and frequently meet and communicate with clients, interview all of the witnesses or have them interviewed, study the evidence, conduct legal research, evaluate the case, brief substantive and dispositive motions, appear in court, negotiate a plea agreement appropriate for the case or prepare for and go to trial, and prepare for sentencing upon a change of plea or conviction [¶57; ¶63; ¶¶75-76; ¶80; ¶95; ¶113]. Investigators and support staff are needed by these attorneys to do their jobs [¶18; ¶29; ¶138]. Similar to the duties of the trial counsel, the appellate attorney must communicate with the client; gather, examine, and study the appropriate portions of the record on appeal; analyze the merits of the issues the client wants presented; thereafter inform the client of the lawyer's opinion about the merit and the potential for success on each issue; write

¹This response takes a trip back through many of the AU recommendations, the findings of the AU and ACLU teams, and supplies information about what OPD has done and plans on doing so all of the stakeholders and interested parties can better assess what OPD has accomplished and for a clearer understanding of the challenges the agency faces. At the end of the overview are listings of the agency's activities and comments following each of the 32 recommendations made in the October 2009 AU report and the October 2011 ACLU report that was organized around several of the AU recommendations (Attachment A).

briefs, or file an Anders brief if the appellant does not agree with the appellate lawyer that there are frivolous issues [¶59].

For the appellate work, the agency currently allocates 9 full-time equivalent (FTE) attorneys, including the chief appellate defender [¶21]. At the regional level, there are 16.75 attorneys in management that have been taken from the 115.25 attorneys the agency is currently authorized [¶21]. The remaining 98.5 FTE lawyers are dedicated full time toward representing clients at the district court and courts of limited jurisdiction levels [¶21].

OPD can anticipate only 221 work-days from any of the FTE lawyers or managers [¶22]. About 1,500 productive-hours per year (221 days x 7 productive-hours/day) is all OPD can realistically, but perhaps optimistically, expect from those attorneys and managers when interruptions, meetings, and other requirements are taken into account [¶23].

147,750 productive-hours from the 98.5 FTE staff attorneys annually are available to OPD management for the representation of clients in all of the different kinds of cases OPD handles [¶23]. 20,540 productive-hours are theoretically available from the 16.75 FTE managers under OPD policy 114 as currently written [¶24] which currently offers a total of 168,290 hours a year for client representation. However, OPD policy 114 must be amended because the current caps on manager case hours were adopted on the basis of a 2,080 productive-hour work year that isn't available in a 221 day work year [¶ 5]. Moreover, especially in the more densely populated regions, caseload demands severely compress the time managing attorneys have for administrative duties and providing leadership composed of observing, supervising FTE staff and contract lawyers, allocating caseloads and resources, training, mentoring, and performing evaluations of all FTEs and aiding in the evaluations of the contract attorneys [¶¶25-27; ¶¶51-52; ¶63; ¶65; ¶¶83-84; ¶87; ¶96; ¶99; ¶101; ¶110; ¶117; ¶142; ¶¶144-147; ¶155; ¶157]. Of course, there will be no management-hours available if caseloads for managers are eliminated; but there could be about 13,514 hours if some managers can carry some caseloads which would make 161,264 productive-hours available from 115.25 FTE lawyers for representing 35,000 to 40,000 or more clients each year [¶¶25-26].

The number of cases already open and new cases entering the system determine the workload of the agency at any given time [¶¶56-59]. The Public Defender Commission (PDC) standard for attorney caseloads is intended to be essentially the same as the National Advisory Commission on Criminal Justice Standards and Goals (NAC) study recommending that maximum annual caseload levels should not exceed 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 non-capital appeals per attorney per year [¶62]. Many of the FTE attorneys exceeded the PDC and NAC caseload standards in FY 2011, far more than did in FY 2010 [¶63].

Around 200 contract lawyers were assigned 7,276, or 26%, of the new cases assigned in FY 2011, either on contract or conflict assignments, at a cost of \$5,256,546 [¶27; ¶117; ¶¶120-121]. Contracting through a "competitive process" required by M.C.A. §47-216(3) is for assuring the attorneys are qualified, competent, and can provide effective assistance of counsel rather than for being sure lawyers in private practice in the area get a competitive share of OPD cases [¶122]. Obviously, private attorneys must be appointed in cases where conflicts arise

[¶120; ¶¶159-168]. Contracting with attorneys in private practice can be cost effective in relatively active courts remote from the regional office and in rural regions where there are few FTEs; court dockets conflict; when cases require certain experience and proven skills the FTEs in the area do not have; and, funds available, when the stress of case overloads on the FTEs can be relieved by contracting cases out even where OPD has offices with several FTEs [¶120]. Restrictions on exceeding the appropriated budget and budget constraints limit the use of contract attorneys because they cost OPD at least \$16/hour more than FTEs cost [¶27].

OPD has 19.5 FTE investigators employed who, producing 1,514 productive-hours per year over 223 workdays, give OPD management 29,523 investigator-hours per year for assignment on the agency caseload [¶28]. There are not enough hours in the day for these few investigators to cover appropriate misdemeanor cases as well as providing additional time for difficult, complex felony cases and also be available to assist contract lawyers [¶28; ¶112; ¶138].

54 support staff personnel dispersed across the regions and the major crimes unit provide OPD management with 81,756 FTE support staff-hours per year [¶29]. Pleas from FTE lawyers for more support staff help in the representation of their clients have gone largely unheeded due to budget constraints [¶29]. The sections on data collection and eligibility determination provide more justification for an increase in FTE support staff [¶¶29-39; ¶¶45-55]. For instance, an estimated 16 FTE support staff dedicated to data collection, entry, and maintenance of the case management system is required, more than a fourth of the current support staff [¶¶38-39].

Expressions of need for more support staff for eligibility determination and data collection might be viewed as attempts at greater micromanagement by those who believe OPD is overly zealous in determining eligibility and presently is collecting unnecessary data. The American University (AU) and American Civil Liberties Union of Montana (ACLU) teams on the other hand have been critical of the agency for not collecting and recording necessary data, something with which the PDC and OPD management agree. Moreover, the need across the regions for increased uniformity and consistency in administrative functions has been noted by more than one team looking at OPD operations. The reality is that OPD simply does not have enough support staff to verify eligibility in every case, collect and report data adequately, and also assist the lawyers in performing the agency's primary mission of effectively representing indigent clients. No one can dispute OPD's need for more investigators. Managing attorneys at the regional level need much more time for administration and leadership. As essential as contract attorneys are to OPD operations, their services are more expensive per hour than FTE lawyers. Allowing more FTE attorneys for handling the increasing stress of an ever growing caseload demonstrates fiscal responsibility. Funds are scarce for covering all of the client costs the attorneys need for effectively representing their clients. The client harm that might result from these shortages of resources can take many forms, some of which can be gleaned from paragraph 113.

OPD management does not have the independent authority to hire or mold the workforce needed for providing effective assistance of counsel [¶2]. The authority for determining the occupations of employees belongs to the Department of Administration (DOA) and the number of

positions and employees lies with the budget director [¶8]. The legislature can amend any determination made by DOA or the budget director [¶8].

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]. Other statutory or regulatory requirements influence their scope of independence in managing the agency [¶9]. They must comply with all applicable laws and abide by the rules of conduct for public employees [¶3].

The best management will fail without the availability of the resources needed for performing the mission of any organization or public agency. 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.

DRAFT

Overview

¶1 The American Civil Liberties Union of Montana (ACLU) evaluation found that various recommendations made in the American University (AU) report had not been effectively implemented, mainly in the areas of central administration, oversight and supervision, and management. Virtually every quarter has offered opinions about the performance of the Office of the State Public Defender (OPD) and the effectiveness of its management.²

¶2 **Limitations on OPD Management.** Attached to the Department of Administration (DOA), OPD is a statewide executive branch agency created in part to “ensure that the system is free from undue political interference and conflicts of interest.”³ This freedom, however, does not liberate the Public Defender Commission (PDC) and OPD management from statutory and regulatory requirements with which managers of other executive agencies must comply.

¶3 Excess Expenditures Unlawful. It is unlawful for the PDC or OPD management to expend or permit expenditures in excess of the legislative appropriation.⁴ Doing so is misfeasance in office that makes the individual subject to removal from office or employment.⁵ Further, aside from potential prosecution,⁶ a violator of *M.C.A. §17-8-103(1)* is “... personally liable ... to the state for the amount of the excess unlawfully expended.”⁷ “An action ... may be brought upon complaint of the attorney general, of the legislature by joint resolution, of the legislative finance committee, or of any taxpayer, filed in a district court of this state.”⁸

¶4 Budgetary Limitations. A review of *M.C.A. §17-7-101, et seq.*, gives an introduction into the complexity of the budgeting and appropriation process. The review should also illuminate many of the limitations within which an executive branch agency must be managed. The singular role of OPD management and the PDC is the preparation of the agency budget request submitted to the budget director who can make further inquiries and investigations into

²Near the end of this response is a summary of responses by fewer than half of the OPD attorneys to a survey focusing on their reaction to the ACLU report (Attachment B). Other attorneys testified at the February 10, 2012 PDC meeting that the summary was not representative of their views on the ACLU report. The summary, however, presents a diversity of opinions of some lawyers that are somewhat indicative of information presented to the PDC before and are illustrative of the frustration and loss of confidence expressed in the ACLU report. The survey questions and the summary can also be viewed in the “Attorney Liaison” report, item 3, on the agenda of the February 10-11, 2012 PDC meeting, <http://publicdefender.mt.gov/meetings/02102012.asp>.

³*M.C.A. §2-15-1028* and *§47-1-102(2)*; this purpose is consistent with the first of the American Bar Association’s “Ten Principles of a Public Defense Delivery System” found at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

⁴*M.C.A. §17-8-103(1)*.

⁵*M.C.A. §17-8-104(1)(b)*.

⁶The public defender commissioners and the OPD managers are public employees, as are all of the agency FTEs. *M.C.A. §2-2-102(7)*. Each must comply with the applicable laws and abide by the rules of conduct for public employees when acting in their capacities as public employees. *M.C.A. §2-2-121*. “Public employees” are “public servants,” *M.C.A. §45-2-101(64)(a)*, subject to prosecution for official misconduct. *M.C.A. §45-7-401*.

⁷*M.C.A. §17-8-104(1)(a)*.

⁸*Id.*

the request before submitting a preliminary budget proposal to the governor who, in turn, submits an executive budget to the legislature.⁹ It becomes the duty of the legislature to adopt a budget which “must be limited so that a positive ending general fund balance exists at the end of the biennium for which funds are appropriated.”¹⁰

¶5 “Expenditures by a state agency must be made in substantial compliance with the budget approved by the legislature.”¹¹ The conditions contained in the general appropriations act and the legislative intent established in the narrative accompanying the act are used for determining substantial compliance.¹² “An explanation of any significant change in agency or program scope must be submitted on a regular basis to the interim committee that has program evaluation and monitoring functions for the agency pursuant to Title 5, chapter 5, part 2.”¹³ For OPD, the interim committees are the law and justice interim committee and the legislative finance committee.¹⁴ The process for dealing with significant changes is laid out in *M.C.A. §17-7-138, et seq.* OPD has some ability to move resources within the agency; but, to be certain, the PDC and OPD management cannot deviate from the operating budget without a green light from “approving authority.” Program transfers of appropriations within a fiscal year are subject to legislative fiscal analysis and comment by the legislative finance committee.¹⁵ Expenditures during the first fiscal year from appropriations for the second fiscal year and supplemental appropriations are covered at *M.C.A. §17-7-301, et seq.*

¶6 It is, therefore, elementary that the budget appropriated by the legislature greatly influences the ability of the PDC and OPD management in alleviating the problems identified by the AU and ACLU teams. In 2009, the AU team told the PDC and OPD management that “*Budgeting for the 2012-2013 biennial legislative session should begin immediately.*”¹⁶ The AU team said specific requests to the legislature should include an “increase in the contract hourly rate to at least the federal court rate,” *i.e.*, from \$60/hour to \$125/hour; salaries for full-time equivalent (FTE) attorneys be increased to being on par with the salaries of other state employed lawyers; and the minimum case requirement for all managers be stricken.¹⁷ The AU team thought the need for an increase in OPD personnel at all levels was foreseeable.¹⁸

¶7 The proposed agency budget for FY 2012-2013 sought to bring FTE salaries up to the salaries other lawyers holding comparable FTE positions and a more moderate increase to \$75/hour in the contract attorney hourly rate was included. These requests were not included in the Governor’s budget submission to the 2011 legislature.¹⁹ They will be included again in the

⁹*M.C.A. §17-7-111 to §17-7-123.*

¹⁰*M.C.A. §17-7-131.*

¹¹*M.C.A. §17-7-138(1)(a).*

¹²*Id.*

¹³*Id.*

¹⁴*M.C.A. §47-1-105(9) and §47-1-201(10).*

¹⁵*M.C.A. §17-7-139.*

¹⁶10/2009 AU report, recommendation 17, p. 62-63, <http://publicdefender.mt.gov/resources.asp>.

¹⁷*Id.*

¹⁸*Id.*, p. 16; recommendation 10.e., p. 59; recommendation 17, p. 63: “It is foreseeable that there will be a need to increase Agency personnel at management, staff and support levels.”

¹⁹See “2013 Biennium Appropriation Update,” item 6.D, on the agenda of the August 29, 2011 PDC

next proposed agency budget for FY 2014-2015.²⁰ Legislation was not proposed for striking the caseload requirement for managers in anticipation of a budget shortfall. Nonetheless, SB 187 prohibited the chief public defender (CPD) from having a caseload. Funding for more FTEs was approved. Those funds have been used in part for relieving workload stress on attorneys and staff. Some have been used for maintaining manager caseloads within OPD policy 114²¹ limits but there is not an amount sufficient to absorb the entirety of the manager caseloads.

¶8 Full-time Equivalent Personnel. *M.C.A. §2-18-204* regarding FTE personnel is a limitation on the independence of the PDC and OPD management in molding and adapting the agency workforce as a need for change is perceived or is recommended from within the agency. The DOA determines the occupations for positions of employees.²² The list of occupations can be amended upon an agency request. The number of positions or FTEs can be modified at the request of agency management. The budget director determines the number of positions and FTEs “of each agency or program prior to preparation of the executive budget and before the beginning of each fiscal year.”²³ Obviously, the PDC and OPD management can advocate for changes in the workforce but the authority to make a change lies elsewhere. Furthermore, the legislature has the authority to amend any determinations of the DOA or the budget director.²⁴

¶9 Other Examples of Limitations. Other examples of influences on the way OPD is operated and managed are listed in the “OPD Appointments” attachment to this response (Attachment C). Some such as the safety team, data security, technical security, and records management are important components of agency management but do not often draw much attention. Now there is renewed emphasis on the *M.C.A. §2-15-114* requirement for the security of OPD data. Others like the OPD internal control team implementing internal control policies set by the DOA do draw attention.

¶10 Claims of Micromanagement of Resources. The ACLU reported that micromanagement of regional and local office affairs was a complaint that surfaced over and over again.²⁵ Apparently thinking a regional deputy public defender (RDPD) should be authorized to lease office space, as evidence of micromanagement, the ACLU report refers to OPD and the CPD personally inspecting potential sites for new office space in Kalispell.²⁶ Leasing authority cannot be delegated to a RDPD. “A state agency may not lease, rent, or

meeting at <http://publicdefender.mt.gov/meetings/08292011.asp>.

²⁰ See “2015 Budget Items,” item 8.D, on the agenda of the April 13, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/04132012.asp>.

²¹ See OPD policy 114, <http://publicdefender.mt.gov/policies.asp>. OPD policies can also be found in the “Policies and Procedures” section of the OPD *Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp>.

²² *M.C.A. §2-18-204(1)*.

²³ *M.C.A. §2-18-204(2)*.

²⁴ *M.C.A. §2-18-204(3)*.

²⁵ 10/2011 ACLU report, p. 3, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>; or at <http://www.aclumontana.org/images/stories/documents/publicpolicy/montanaopdreport.pdf> on the Montana ACLU website although the page cites won’t match due to the formatting of the report.

²⁶ *Id.*

purchase real property without prior approval of the department [of administration].”²⁷ The state leasing officer within the DOA negotiates and enters into contracts for the leasing of office space. The activity of OPD and the CPD in this instance can be viewed as an example of good management in data gathering assistance when put in the context of who has the actual authority for entering into contracts for office space.

¶11 Another example given was that, “In many instances, the Chief Public Defender must personally sign off on requests for expenditures greater than \$200.”²⁸ Actually, OPD requires preapproval of all “client costs” expected to exceed \$200 per task in all cases involving FTE, contract, and conflict attorneys, including appellate and major crimes unit cases.²⁹ “Client costs” are defined as “all monies to be expended in the preparation, investigation and litigation of public defender cases.”³⁰ Clearly, the ACLU team would like to see much of the preapproval authority and expenditure authority delegated to the regional level or below. Under discussion is an increase in the preapproval threshold. But, on careful analysis, the notion of local and regional managers having unlimited authority for approving and making expenditures is not very workable in some respects and in other respects is simply inconsistent with state accounting policies and procedures regarding internal control practices.

¶12 First, on behalf of the PDC and OPD, the CPD must assure that the agency expenditures are made in substantial compliance with the budget approved by the legislature so no one loses their job, is prosecuted, or is personally liable for amounts unlawfully expended.³¹ Consequently, for these reasons alone, the CPD is going to maintain extensive oversight and supervision over whatever authority is delegated to RDPDs, autonomous of each other, and office managers. To whatever extent delegated authority is increased these managers will be required to promptly, consistently, and uniformly report meticulously accurate authorization and expenditure data to the central office so the agency is in substantial compliance with the budget approved by the legislature.

¶13 There are complementary reasons. The DOA “shall establish a system of financial control so that the functioning of the various agencies of the state may be improved, duplications of work by different state agencies and employees may be eliminated, public service may be improved, and the cost of government may be reduced.”³² The state accounting division of the DOA has primary responsibility for carrying out those directives. How the division fulfills its responsibility is outlined in the “Internal Control Guidebook” embodied in policy 399.³³ One of the first things learned from the guidebook is that “Management is responsible for establishing

²⁷ M.C.A. §2-17-101(2).

²⁸ *Id.*

²⁹ See OPD policy 125, <http://publicdefender.mt.gov/policies.asp>.

³⁰ *Id.*

³¹ ¶3-¶5, *supra*.

³² M.C.A. §17-1-102(1).

³³ See <http://accounting.mt.gov/forms/chapters/default.mcp.x>.

and maintaining agency internal controls.”³⁴ OPD has done a good job as can be seen by a review of the financial compliance audits conducted by the legislative audit division.³⁵

¶14 Additionally, with some exceptions, the procurement of goods and services must be made in compliance with the provisions of Title 18 and the regulations promulgated thereunder. With the delegation of approval and expenditure authority goes the responsibility of following the procurement requirements while complying with all of the internal control policies and procedures promulgated by the state accounting division of the DOA for meeting the directives of *M.C.A. §17-1-102(1)*. These reasons predict continuing close oversight of expenditures in the regions.

¶15 In fulfilling the statutory and regulatory responsibilities, OPD management has set up an internal control team. This team, on which the CPD sits, long ago gave the chief investigator and local managing attorneys expenditure authority up to \$500 and the RDPDs authority up to \$1,000. Local office managers have expenditure authority up to \$200. But expenditure authority is different from preapproval authority for “client cost” amounts over \$200.

¶16 Cited by the ACLU as another example of micromanagement,³⁶ OPD preapproval of mental health evaluations, a “client cost,” grew out of mental health evaluations being ordered that were not appropriate for the circumstances and frequently were far more expensive than the cost of an appropriate evaluation. OPD has had and continues to have a mental health professional available for assistance in determining the appropriate evaluation. Saying Dr. Wendlandt is not an attorney³⁷ presumptuously implies that lawyers untrained in mental health know more about which tests and evaluations are appropriate than a trained mental health professional. Training has been given about the differences between many kinds of tests and evaluations and the reasons why those tests and evaluations are appropriate in certain situations and are not helpful in others. The mental health professional is available for consultation. Getting approval of a request for the correct evaluation is no more of a problem than the inconvenience of asking and perhaps having to wait a time for the approval. Emergencies get special attention. Insistence on an inappropriate evaluation will likely suffer a denial. The PDC decided some time ago that preapproval was the correct policy. No one has come forward with reasons for abandoning the policy except inconvenience and a perceived infringement on the judgment of the public defender (PD) or the local manager. These reasons have not become more persuasive when the subject is raised periodically since the policy was adopted.

¶17 The only “experts” required by OPD to enter into memorandums of understanding (MOUs) are mental health evaluators. Contract investigators are also required to enter into MOUs. Preapproval of other experts, another “client cost,” is required in the same manner as preapproval for mental health evaluations are required. Perhaps presently underutilized are chemical dependency evaluations done before plea agreements are negotiated. Every PD knows

³⁴ *Id.*, p. 7.

³⁵ See http://leg.mt.gov/css/publications/audit/audit_reports_AgencyAlpha.asp.

³⁶ 10/2011 ACLU report, pp. 3, 9, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

³⁷ *Id.*, p. 9.

that alcohol and prescription or illegal drugs are in some way a factor in a vast majority if not virtually all misdemeanor and felony cases. Knowing the outcome of a chemical dependency evaluation coupled with a proposed treatment plan before plea negotiations forearms the PD with a defensible argument for an alternative to incarceration. Budget constraints put pressure on managers to deny requests or to avoid requesting chemical dependency evaluations that can lead to imperceptible or immeasurable client harm. Certainly, all levels of OPD management must monitor the hiring of experts as a part of the agency's responsibility in complying with the statutory, regulatory, and state internal control policies already discussed while assuring clients receive the responsible representation they are guaranteed by our Constitutions. The ACLU report makes it clear that management must be vigilant in assessing whether too much emphasis is being put on fiscal accountability at the expense of client harm.³⁸ Title 17 will be followed for notifying the appropriate authorities if it is determined there is.

¶18 *“Investigative resources should be provided for misdemeanors as well as felonies.”*³⁹ The AU team said it was informed that PDs were instructed they could not use investigative services in misdemeanor cases. The team listed many excellent reasons why PDs must have investigators.⁴⁰ The ACLU team referred to approval of requests for additional investigative resources as another illustration of micromanagement.⁴¹ The ACLU team is correct in saying OPD micromanages this scarce resource. The AU team's list of reasons for investigating misdemeanors as well as felonies remain as valid and true today as they were three years ago. If PDs have been informed investigators are not available in misdemeanor cases, they should not have been. OPD tries to make investigators available in all of the misdemeanor cases it can. But the facts are that OPD does not have enough FTE investigators to cover all of the cases where investigation is needed and OPD cannot, as it must, stay within the budget appropriated by the legislature if those services are contracted. There is not enough flexibility within the OPD budget for management to move much previously earmarked funds for paying investigators without being short for other necessities.

¶19 **Resources and Mission.** The best management will fail without the availability of the resources needed for performing the mission of any organization or public agency. The primary mission of OPD is providing “effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to assistance of counsel at public expense.”⁴² Public defenders cannot provide their clients with effective assistance of counsel guaranteed by our Constitutions if OPD management cannot supply the resources required by the PDs for fulfilling their ethical obligations.

¶20 Workforce-hours. A vital, essential management resource is the number of productive hours available from the workforce for client representation, management,

³⁸ *Id.*, pp. 9-10.

³⁹ 10/2009 AU report, recommendation 31, p. 67, <http://publicdefender.mt.gov/resources.asp>.

⁴⁰ *Id.*, p. 67.

⁴¹ 10/2011 ACLU report, pp. 3, 9-10, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

⁴² M.C.A. §47-1-102(1). See the “Mission Statement” section of the OPD *Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp> for an expansive discussion about what the primary mission of OPD entails.

administration, and training. The OPD mission cannot be accomplished without the expenditure of workforce-hours.

¶21 FTE Attorneys. The entire agency currently employs 124.25⁴³ FTE attorneys. In addition, there are central office attorneys and a conflict manager who do not carry caseloads. The training coordinator does not carry a caseload due to the demands of the position.⁴⁴ There is also a .75 FTE lawyer in the training section. The CPD is now prohibited from maintaining a client caseload,⁴⁵ as is the 0.5 FTE conflicts manager⁴⁶ and the chief contract manager⁴⁷ who also supervises the major crimes unit as the other portion of the FTE position. Of the 124.25 attorneys with caseloads, 9 are in the office of the appellate defender, one of which is the chief appellate defender. The appellate attorneys devote their time to appellate work and none to trial work. Not only would doing so potentially create a conflict, their workloads do not permit the luxury.⁴⁸ Of the remaining 115.25 FTE attorneys, the PDC has restricted the hours the 11 RDPDs and 5.75 managing attorneys can spend representing clients so they have more time for managing, supervision, mentoring, training, and performance evaluations.⁴⁹ Thus, OPD depends on 98.5 FTE lawyers devoting full time toward representing clients at the district court and courts of limited jurisdiction levels.

¶22 221 FTE Staff Lawyer Work-days per Year. A 2080 work-hour year comes from 260 work days, *i.e.*, 52 weeks times 5 eight hour days. Although paid on the basis of 2,080 hours, expecting that many productive-hours per year from the most efficient lawyer is not realistic when at least 10 holidays,⁵⁰ not less than 15 but not more than 24 vacation days,⁵¹ up to 12 sick leave days,⁵² and 15 hours of continuing education⁵³ reduce the work year. Thus, 260 work days shrink to not more than 221 FTE staff lawyer work-days per year.

¶23 147,750 FTE Staff Lawyer-hours. 8.0 productive-hours per day, *i.e.*, representing clients or managing, over 221 days provides 1,768 hours. 1,547 hours comes out of 7.0 productive-hours per day. Seven productive-hours over 221 work days is more realistic, although probably optimistic after OPD training, office meetings, breaks, and other requirements are taken into consideration. Thus, the productive-hours per annum is rounded down to 1,500 to

⁴³ See p. 1 of the "Operating Report," item 8.A, on the agenda of the February 10-11, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/02102012.asp>.

⁴⁴ M.C.A. §47-1-210.

⁴⁵ M.C.A. §47-1-202(2).

⁴⁶ M.C.A. §47-1-118(2).

⁴⁷ M.C.A. §47-1-216(2).

⁴⁸ See p. 2 of the "Chief Appellate Defender Report" on the agenda of the April 13, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/docs/04132012/ADO.pdf>.

⁴⁹ See OPD policy 114, <http://publicdefender.mt.gov/resources.asp>.

⁵⁰ M.C.A. §1-1-216; one more every other year for election day.

⁵¹ M.C.A. §2-18-612; DOA MOM 03-0310, #134.

⁵² M.C.A. §2-18-618; DOA MOM policy 03-0305.

⁵³ By rule of the Montana Supreme Court, lawyers admitted to the Montana Bar must certify annually that they have attended 15 hour of approved continuing legal education to maintain their licenses to practice. The union contract OPD has with the FTE lawyers provides that they will be paid while attending continuing legal education conferences.

account for lawyers entitled to more than 15 vacation days and the meetings and other requirements. 1500 hours equates to 6.79 productive-hours on each of the 221 working days. Even that may be hopeful when travel time and time waiting in court are considered. 98.5 FTE lawyers producing 1,500 hours of production gives OPD management 147,750 FTE staff lawyer-hours annually.

¶24 20,540 Management Lawyer-hours. 20,540 lawyer-hours are available from the 16.75 FTE management lawyers under current policy 114.⁵⁴ Hours for regional deputies allow 1,400 caseload hours in the rural regions 6 (Havre), 7 (Lewistown), 10 (Glendive), and 11 (Miles City); 1,000 hours in the mid-sized regions 3 (Great Falls), 4 (Helena), 5 (Butte), and 8 (Bozeman); and 600 hours in the large regions 1 (Kalispell), 2 (Missoula), and 9 (Billings). Caseload hours for one managing attorney in Kalispell (1,040), one in Polson (1,500), one in Hamilton (1,500) and one in Great Falls (1,700) are allowed. The 1.75 managing attorneys in region 9 (Billings) are already limited to 1,700 hours each. When these hours are added, OPD managers have only 168,290 FTE lawyer-hours per year for providing effective assistance of counsel in the new cases opened each year below the appellate level that is now approaching 30,000 in FY 2012.

¶25 Further Reduction of Management Caseload Hours. “*The “minimal” caseload statutory requirement for the Chief Defender, Contract Manager and Regional Deputy Defenders should be reduced or eliminated.*”⁵⁵ The management lawyer-hours in OPD policy 114 were set using 2080 hours per year, 40 hours per week for 52 weeks, as the basis for an FTE attorney. The PDC clearly was not restrictive enough in light of using 1,500 hours of productive time per year for both management and client representation. Taking into account the findings and commentary in the AU and ACLU reports, it will be prudent for the PDC to prohibit all OPD managers from carrying caseloads as recommended by the AU team. The PDC should at least limit the caseload hours of the managing attorneys and the rural RDPDs to somewhere in the area of half, mid-sized RDPDs to a third, and to a quarter or none for the RDPDs in the three large regions. Doing this would yield 13,514 management-hours using 1,500 hours as the base. OPD management would be left with 161,264 FTE lawyer-hours per year. Eliminating caseloads for the 17 managing attorneys would take away the 20,540 hours and leave OPD management with the 147,750 FTE staff lawyer-hours for client representation.

¶26 Greater limitations on caseloads carried by managers will most certainly increase the cost paid for contract attorneys and/or increase the stress on FTE lawyers who would shoulder the burden of more case assignments. Weighted caseloads, *i.e.*, caseloads after being weighted using the case weighting system, carried by managing attorneys in FY 2011 demonstrates a need for more FTE attorneys just for keeping the management caseload hours within OPD policy 114 limits. Recent caseload data shows that some managers are increasing their caseloads to relieve the stress on the other lawyers. The “Caseload and Workload” section of the *OPD Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* shows that many FTE staff lawyers exceeded the case weighted standard of 150 units last fiscal year. The higher cost of contract hours drives ever growing FTE caseloads as OPD strives to stay within its budget. No

⁵⁴ See OPD policy 114, <http://publicdefender.mt.gov/resources.asp>.

⁵⁵ 10/2009 AU report, recommendation 5, p. 56, <http://publicdefender.mt.gov/resources.asp>.

flexibility remains in the FTE workforce for taking over manager caseloads. Absorbing a greater reduction in manager caseload hours will require even more FTE lawyers as the most cost efficient way to meet increasing demand.

¶27 Of course, contract attorneys provide representation in conflict cases. There are not enough FTE lawyer-hours to cover the other cases so representation is contracted to the extent OPD can and remain within the budget appropriated. In FY 2011, 7,276 or 26% of the 27,664 new cases were assigned to contract lawyers.⁵⁶ Referring the overload to contract attorneys is a more costly option when the average hourly cost for an FTE lawyer has been calculated to be about \$72/hour⁵⁷ and the average hourly cost for a contract lawyer is in the \$95/hour range.⁵⁸ The simple explanation is that contract attorneys are paid \$60/hour (compared to \$125/hour for federal PD appointments) while the average cost per FTE attorney with benefits and insurance is about \$35/hour.⁵⁹

¶28 29,523 Investigator-hours. OPD has 19.5 FTE investigators employed.⁶⁰ There are 223 work-days available to management because investigators do not have the 15 hour mandatory continuing education requirement the lawyers have. 1,514 hours gives OPD management 29,523 investigator-hours per year⁶¹ for assignment on the agency caseload. In 2009 the AU team concluded, “Investigative staff must be increased so that this prioritization [of felony cases receiving priority over misdemeanors] is unnecessary.”⁶² No stretch of the imagination is needed for the realization that more FTE investigators are needed for covering appropriate misdemeanor cases as well as providing additional time for difficult, complex felony cases.

¶29 81,756 Support Staff-hours. 54 support staff personnel in program 1, dispersed across the regions and the major crimes unit,⁶³ provide OPD management with 81,756 FTE support staff-hours per year.⁶⁴ Testimony before the PDC in the past has included pleas from the lawyers for more support staff help in the representation of their clients. The pleas have gone

⁵⁶ See ¶4 of the “FTE vs. Contractor Hourly Rates” section of the OPD *Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp>.

⁵⁷ The FTE vs. contract attorney hourly cost analysis used a rule of thumb that the employees will be 80% efficient based on an informal survey among FTE attorneys when the analysis was done. 2,080 hours/year times 80% yields 1,664 productive-hours per year. However, for the reasons outlined in paragraphs 22 and 23, OPD now believes 1,500 productive-hours is more accurate than 1,664. Using 1,500 productive-hours instead of 1,664 increases the cost of FTE staff lawyer-hours to \$79/hour still leaving a \$16/hour difference from the \$95/hour contract lawyers cost OPD.

⁵⁸ See the “FTE vs. Contractor Hourly Rates” section of the OPD *Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp>.

⁵⁹ *Id.*

⁶⁰ See p. 1 of the “Operating Report,” item 8.A, on the agenda of the February 10-11, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/02102012.asp>.

⁶¹ 1,514 productive-hours/year x 19.5 = 29,523 investigator-hours.

⁶² 10/2009 AU report, p. 67, <http://publicdefender.mt.gov/resources.asp>.

⁶³ See p. 1 of the “Operating Report,” item 8.A, on the agenda of the February 10-11, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/02102012.asp>.

⁶⁴ 1,514 productive-hours during a 223 day work year x 54 = 81,756 support staff-hours.

largely unheeded due to budget constraints. The sections on data collection and eligibility determination provide more explanation for justifying an increase in FTE support staff.

¶30 **Required and Recommended Data Collection.** *M.C.A. §47-1-105(9)* requires OPD to collect and report, among other things, this information:

“(f) the number of new cases in which counsel was assigned to represent a party, identified by region, court, and case type;

“(g) the total number of persons represented by the office and the office of appellate defender, identified by region, court, and case type;

“(h) the annual caseload and workload of each public defender, except for the chief public defender, and the office of appellate defender, identified by region, court, and case type.”

¶31 *“The Commission must become considerably more assertive in demanding relevant information from staff.”*⁶⁵ The AU team said, *“The Commission must become more aggressive in demanding comprehensive, reliable reports of Agency activity.”*⁶⁶ The comments say, *“This recommendation is the foundation for most management functions in a unified statewide agency”* and *“is the foundation of most of our recommendations.”*⁶⁷ The AU team offered their perceptions about their overall concept of management, the data needed for effective management, and the uses to which the data should be put.⁶⁸ The PDC was told it must insist upon an adequate data collection and retrieval system in each office that can be accessed immediately by management. The AU team said, *“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.”*⁶⁹

¶32 The AU team described its belief about the data that should be collected: *“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.”*⁷⁰ *“At a minimum, budget submissions should be supported by documentation describing the Agency’s accomplishments presented in concrete terms.”*⁷¹ The commentary to recommendation 4 thought the information should be categorized by types of cases and track case progress, case dispositions, and caseloads and workloads for each attorney. This data would capture the results of substantive and dispositional motions, dismissal of charges, amending charges to lesser included offenses, pleas, trial rates, acquittals and convictions on charges, and sentences.

¶33 **Difficulties in Data Collection.** Providing support for PDs representing their clients competes with collecting the data recommended by the AU team. The PDC frequently

⁶⁵ 10/2009 AU report, recommendation 23, p. 65, <http://publicdefender.mt.gov/resources.asp>.

⁶⁶ *Id.*, pp. 18-20, and recommendation 6, p. 56, <http://publicdefender.mt.gov/resources.asp>.

⁶⁷ *Id.*, p. 57.

⁶⁸ *Id.*, pp. 24-26.

⁶⁹ *Id.*, p. 57.

⁷⁰ *Id.*, pp. 30-32, and recommendation 1, p. 55.

⁷¹ *Id.*, recommendation 4, p. 56.

hears from within the agency that OPD is collecting data not necessary for performing its mission of providing effective assistance of counsel for clients. The AU and the ACLU teams did not agree that OPD is collecting unnecessary data. Others point out that the data is not being collected and entered uniformly and consistently. Whatever past comments were, the current PDC has no doubt about the importance of the data suggested for assisting OPD management in agency operations and for demonstrating shortfalls of necessary resources. The dilemma has been finding ways to do both. Time constraints on PDs and support staff trying to do both have hampered success in either. Some cause may arise out of a lack of emphasis on collection by managers who do not take advantage of the information the data provides, perhaps coupled with varying degrees of resistance from those who consider the data unnecessary or who are fearful of what the data might reveal. On the one hand, PDs have frequently testified before the PDC about generating compensatory time filing and doing other support work that take away time from representing their clients. More limitations on the quantity, consistency, and uniformity of data collected across the regions are low pay, turnover, and varying levels of training and experience the new personnel have. On the other, the PDC knows there are shortcomings in collecting data about case progress and dispositions.

¶34 There was a carryover of 17,469 active cases from FY 2011⁷² that at some time will need data collected about case progress and dispositions. Comparing the number of cases opened so far in FY 2012 with past years, OPD is estimating the new cases filed will increase by about 2,500 over last year into the 30,000 range. Many of these are an increase in new cases in the courts of limited jurisdiction and in abuse and neglect cases.⁷³ Multiple counts will often be charged within many cases. Not all cases, particularly lower level misdemeanor cases, require all of the process activities about which the AU team recommended OPD collect data. Still, for an accurate assessment of what and how well the PDs are doing, someone must record whether an activity in the progress of each case happened, whether there was a plea or trial, and the disposition of each charge. Therefore, data collection will remain time consuming and will increase as OPD improves at collecting case process and dispositional information

¶35 **Data Collected. Time Tracking.** The AU report provided insight into the importance of a time tracking system and noted the lack of field implementation of OPD policy 215⁷⁴ requiring that attorneys track their time on case activities.⁷⁵ The OPD case management system has a time-tracking feature that is recommended for efficient time tracking. OPD records now indicate that about 90% of the lawyers are filling out time records at any given time while the remaining 10% cite trials, workload, vacation, and sick leave for interrupting input.

⁷²See p. 5 of the “Operating Report,” item 8.A, on the agenda of the February 10-11, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/02102012.asp>.

⁷³See p. 5 of the “Operating Report,” item 6.B, on the agenda of the April 13, 2012 PDC meeting at <http://www.publicdefender.mt.gov/meetings/04132012.asp>. There were 27,644 new cases filed in FY 2011; 9,987 in district courts and 17,677 in the courts of limited jurisdiction. FY 2010 saw 27,660 new cases filed; 9,939 in district courts and 17,721 in the courts of limited jurisdiction. FY 2009 saw 27,898 new cases, 10,028 in the district courts, and 17,870 in the courts of limited jurisdiction. The 26,556 new cases in FY 2008 separated out as 9,646 district court cases and 16,910 courts of limited jurisdiction cases. In its first year of operation, FY 2007, OPD undertook 25,621 new cases, 10,891 cases in the district courts, and 14,730 cases in the courts of limited jurisdiction, in addition to the cases inherited from the local public defender offices OPD superseded.

⁷⁴See OPD policy 215, <http://publicdefender.mt.gov/resources.asp>.

⁷⁵10/2009 AU report, p. 25, <http://publicdefender.mt.gov/resources.asp>.

¶36 OPD policy 210. Since the AU report, OPD has expanded its case management software so more data can be captured more efficiently than by processing paper. OPD policy 210⁷⁶ provides for entry of (1) specific county, (2) specific court, (3) court docket number, (4) specific charges by statute, (5) violation type (felony or misdemeanor), (6) basic client information, (7) charging history, (8) involved parties to the violation, (9) attorney assignment, (10) date of appointment, (11) all calendared events, (12) judgment and sentencing details, and (13) “any other information deemed useful by OPD” into the case management system. Items 6, 7, and 8 are needed for identification of conflicts. These items are discussed in more detail in the section on conflicts beginning at ¶159.

¶37 Caseload Data. OPD is confident about the material accuracy of the data collected for the first five items, (9) and (10) even though the AU and ACLU reports leave a different impression. The ACLU team wrote that “Attorneys in each of the five offices with whom we met were nearly uniformly unaware of what their yearly caseloads are.”⁷⁷ From this information, the ACLU team concluded “that OPD has failed to collect and track data on yearly caseloads”⁷⁸ The ACLU conclusion is simply not correct even though attorneys told the team they didn’t know what their yearly caseloads are. The first 5 items, (9) and (10) listed in OPD policy 210 are required so OPD can comply with *M.C.A. §47-1-105(9)(f)-(h)*. Since FY 2008, OPD has included the weighted caseloads of each attorney in its annual reports.⁷⁹ OPD could not have prepared that section of the annual reports without collecting and tracking the data on attorney caseloads. After a claim arose that the caseloads OPD reported didn’t match with regional caseload data, a procedure was adopted whereby each attorney is sent a monthly email listing the assigned cases on record in the central office. The information in the email must be changed or confirmed by the signature of the lawyer and signed off by the supervising attorney.⁸⁰ Due to the foregoing it is somewhat surprising that in 2011 attorneys uniformly didn’t know what their yearly caseloads were unless their expectation was seeing an annual summary of the number of cases assigned and processed rather than their weighted caseloads.

¶38 **Premises and Assumptions**. OPD has not done a comprehensive study for determining the time consumed in collecting the data recommended and has not had the budget to pay for having one done by an outside source. However, some prudent estimates can be made from existing data with some assumptions. First, the PDC concurs with the AU team comment, “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.”⁸¹ Second, using FY 2011 statistics, the caseload distribution across the 11 regions is taken into account so the allocation of data collectors can be apportioned to the regions according to the percentage of new cases each is likely to open and process.⁸² Third, given the agency history, FTE calculations are based on

⁷⁶ See OPD policy 210, <http://publicdefender.mt.gov/resources.asp>.

⁷⁷ 10/2011 ACLU report, p. 5, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

⁷⁸ *Id.*

⁷⁹ See the “Caseload and Workload” section of the OPD annual fiscal year reports to the Governor, Supreme Court and Legislature at <http://publicdefender.mt.gov/resources.asp>.

⁸⁰ See OPD policy 108, <http://publicdefender.mt.gov/resources.asp>.

⁸¹ 10/2009 AU Report, p. 57, <http://publicdefender.mt.gov/resources.asp>.

⁸² See the “Regional Statistics” section and page 1 of “Case Counts” section of the OPD *Fiscal Year 2011*

30,167 new cases per year given the agency's experience in FY 2012. Fourth, rather than 2080 hours per year, 1,514 productive-hours annually is used in the calculations.⁸³ Fifth, the person dedicated to data collection and entry will be available for helping with eligibility determinations or supplementing support of the PDs if data collection and input takes less than full time. Sixth, sentencing judgments entered by district courts will provide the information the staff person can use for dispositional data; however, documents provided to OPD by the courts of limited jurisdiction are not as uniformly informative so more time will be consumed by data collectors in gathering dispositional data. Seventh, an informal survey among OPD staff now entering data indicates the time needed for entering the first 10 items of information listed in policy 210⁸⁴ is on average about half of an hour in other than complex cases. Data entry in complex cases requires more time that can take an hour or longer. Eighth, the time needed for gathering and entering the data about case processes and dispositional information commonly takes another two to three tenths of an hour. 25,098 cases were closed in FY 2011 and 17,469 active cases were carried over.⁸⁵ Thus, eight tenths (0.8) of an hour over the life of each case will be used.

¶39 **Resources Needed for Data Collection and Entry.** Across eleven regions and the major crimes unit somewhere in the neighborhood of 24,000 hours of time is needed for data collection and entry in the roughly 30,000 new and carried over and closed cases a year. Almost 16 FTE support staff dedicated only to data entry are needed if productive-time is set at 1,514 hours. 16 FTEs represent more than a fourth of the current support staff.

¶40 **Caseloads. Caseload Initiation.** OPD has no control over the number of new cases filed in any fiscal year, or the number of charges alleged in each. The number of new cases and the nature of the charges filed lie exclusively within the discretion of law enforcement and the prosecutors in criminal cases. Also, courts order OPD to appoint counsel in other situations like proceedings under the Montana Youth Court Act (DJ), abuse and neglect cases under *M.C.A. §41-3-422, et seq.* (DN), appointment of a guardian or conservator under the Uniform Probate Code (DG), and in various commitment proceedings (DI).⁸⁶ Courts may order OPD to assign counsel on applications for sentence review pursuant to *M.C.A. §46-18-901, et seq.* as well.⁸⁷

Report to the Governor, Supreme Court and Legislature at <http://publicdefender.mt.gov/resources.asp>:

15.76% Region 1 (Kalispell - 12,967 sq. mi.): 4,361 new cases filed in 20 courts; 1,510 in 4 district courts (DC), 2,851 in 16 courts of limited jurisdiction (LC);

17.46%: Region 2 (Missoula - 6,212 sq. mi.): 4,831 new cases filed in 13 courts; 1,477 in 3 DC, 3,354 in 10 LC;

11.26%: Region 3 (Great Falls - 11,501 sq. mi.): 3,116 new cases filed in 21 courts; 1,642 in 5 DC, 1,474 in 16 LC;

09.56%: Region 4 (Helena - 6,309 sq. mi.): 2,644 new cases filed in 11 courts; 796 in 3 DC, 1,848 in 10 LC;

05.69%: Region 5 (Butte - 14,638 sq. mi.): 1,573 new cases filed in 20 courts; 693 in 6 DC, 890 in 14 LC;

02.80%: Region 6 (Havre - 22,586 sq. mi.): 774 new cases filed in 22 courts; 416 in 6 DC, 358 in 16 LC;

01.88%: Region 7 (Lewistown - 14,720 sq. mi.): 520 new cases filed in 24 courts; 281 in 7 DC, 239 in 17 LC;

08.14%: Region 8 (Bozeman - 7,263 sq. mi.): 2,251 new cases filed in 17 courts; 772 in 3 DC, 1,529 in 14 LC;

23.74%: Region 9 (Billings - 11,473 sq. mi.): 6,568 new cases filed in 17 courts; 1,907 in 4 DC, 4,661 in 10 LC;

01.87%: Region 10 (Glendive - 15,184 sq. mi.): 517 new cases filed in 27 courts; 285 in 8 DC, 232 in 19 LC;

01.84%: Region 11 (Miles City - 22,700 sq. mi.): 509 new cases filed in 21 courts; 268 in 7 DC, 241 in 14 LC.

⁸³ See ¶¶ 22-23 and 29, *supra*.

⁸⁴ See OPD policy 210, <http://publicdefender.mt.gov/resources.asp>.

⁸⁵ See p. 5 of the "Operating Report," item 8.A, on the agenda of the February 10-11, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/02102012.asp>.

⁸⁶ *M.C.A. §47-1-104(4)*.

⁸⁷ *M.C.A. §47-1-104(4)(a)(iv)*.

¶41 As an example of caseload initiation, *M.C.A. §41-3-425(4)* and *§47-1-104(4)(a)(iii)* provide for the courts to order OPD to immediately assign counsel, pending a determination of eligibility, for a parent, guardian, or other person with physical or legal custody of a child or youth in any removal, placement, or termination proceeding and as required under the federal Indian Child Welfare Act. So far in FY 2012 there has been a surge in the number of these DN cases initiated. Frequently, OPD is assigning multiple attorneys to represent various members of the child's family, all but one of whom will be contract conflict lawyers. Compounding this caseload burden on OPD, one district court is routinely ordering the appointment of a PD for the guardian *ad litem* pursuant to *M.C.A. §41-3-425(3)(a)*. In another judicial district the court appointed special advocate/guardian *ad litem* (CASA/GAL) program is petitioning the court for similar appointments of PDs for representation of the CASA or GAL representing the child. The CASA/GAL program in multiple judicial districts is monitored by the court administrator's office in the Supreme Court.⁸⁸ OPD has no doubt about the importance of close supervision over the delivery of protective care for the abused and neglected children in Montana and the value of the CASA/GAL program. However, it is interesting to note that not a single "defender" was among the distinguished members of the court assessment program advisory committee in 2005.⁸⁹ OPD does not yet have representation on panels overseeing DN cases that might offer some relief from the burgeoning caseload.

¶42 Treatment or "specialty" courts are another example of caseload drain on OPD resources. Again, the PDC and OPD have no quarrel over the importance and value of these courts providing alternatives to punishment and deterrents to recidivism. But there is an expectation that OPD will provide the defender member of the court team despite questions about the eligibility of some of the clients for OPD services or when the client's participation is postconviction. Most of the models for these courts anticipate a PD on the court team but the funding for the PD on the team is not incorporated into the court's budget.

¶43 The office of the appellate defender (OAD) does not determine what its workload will be either. Upon court order OAD appoints lawyers in proceedings for postconviction relief, and in *habeas corpus* proceedings.⁹⁰ OAD does not initiate those applications.⁹¹

¶44 OAD, when ordered, handles appeals for those who are financially qualified.⁹² The appellate caseload is determined by the decision of the accused to appeal, a decision reserved to the accused even if the attorney representing the accused at the time does not believe there is merit.⁹³ Malpractice occurs if a notice of appeal is not timely filed when the client instructs the attorney of his or her intention to appeal. Many of those appeals arise from OPD cases in which the person was represented by a PD at the trial level. However, OAD does not participate in the

⁸⁸ See http://courts.mt.gov/cao/ct_services/default.mcp.x.

⁸⁹ See pp. 2-3, http://courts.mt.gov/content/cao/docs/cap_reassessment.

⁹⁰ *M.C.A. §47-1-104(4)(a)(v)* and *(vi)*.

⁹¹ *Dyer v. Mahoney*, 2008 MT 117, ¶5, 342 Mont. 495, 496-97, 182 P.3d 737, 738; *Dillard v. State*, 2006 MT, ¶¶13-16, 335 Mont. 87, 91-92, 153 P.3d 575, 578.

⁹² *M.C.A. §47-1-104(4)(c)*.

⁹³ See American Bar Association Standards for Criminal Justice, 4-5.2 (2d Ed. 1980); *Strickland v. Washington*, 466 U.S. 668, 688-89, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

decision to appeal. OAD is also ordered to do appeals for financially eligible persons who were represented by paid private counsel at the trial level. The representation in this last category of appeals arises when the retainer agreement limited the representation by private counsel to proceedings through the trial level or the attorney was given court approval to withdraw.

¶45 **Eligibility Determination.**⁹⁴ The courts order OPD to assign counsel according to the provisions of *M.C.A. §47-1-104*,⁹⁵ some of which are not determined by financial eligibility as set out in subsection (4)(b). OPD has an opportunity at limiting the caseloads only on the basis of financial ineligibility in criminal cases for which there is the possibility for incarceration and other specified cases delineated in subsection (4)(a) and on appeals as provided in subsection (4)(c).

¶46 The ACLU team reported client harm in the Billings office from "... overly zealous eligibility screening, with those who should be qualified told that they do not;" apparently, on the basis of an attorney stating that "... eligibility screening is being done without regard to undue hardship for clients in an effort to reduce caseloads and that clients who should qualify for services are being improperly denied."⁹⁶ It is unclear who else holds the opinion of that attorney or how the lawyer would know since individual PDs are prohibited from performing eligibility screening.⁹⁷ Others looking at the screening of applications in several regional offices, including the Billings office, found spotty documentary verification of the applicants' qualifications. Contrary to the opinion of that lawyer, there seems to be a very widespread perception that PDs are representing clients who are financially ineligible for OPD services.

¶47 The widespread perception may come from a lack of appreciation of applicants being qualified because "the disposable income and assets of the applicant and the members of the applicant's household are insufficient to retain competent private counsel without substantial hardship to the applicant or the members of the applicant's household."⁹⁸ The two factors are (1) what income and, especially assets, are readily disposable; and (2) whether the disposable income and assets are sufficient to *retain* competent private counsel. Often, the retainer required by private counsel is greater than what the person can timely gather.⁹⁹ Of course, applicants

⁹⁴The third of the American Bar Association's "Ten Principles of a Public Defense Delivery System" says, "Clients are screened for eligibility, and defense counsel is assigned and notified of appointments, as soon as feasible after clients' arrest, detention, or request for counsel." See http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet_authcheckdam.pdf

⁹⁵*Office of State Public Defender v. Whitefish City Court*, 2008 MT 79, ¶16, 342 Mont. 141, 145, 188 P.3d 43, 45; *Rios v. Harris*, 2006 MT 256, ¶¶7-8, 334 Mont. 111, 113, 148 P.3d 602, 604.

⁹⁶10/2011 ACLU report, pp. 10-11, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

⁹⁷*M.C.A. §47-1-111(6)(e)*.

⁹⁸*M.C.A. §47-1-111(3)(b)*.

⁹⁹The February 5, 2009 *Amended Judgment and Commitment in State v. Stout*, cause no. DC-07-94 in the Montana Twenty-first Judicial District Court, Ravalli County, provides an example. Stout was convicted for the deliberate homicide of her husband and in the *Judgment* was committed to the Montana state prison for women for the rest of her natural life [p. 2]. She had served 128 days in jail prior to her sentencing [p. 4]. The district court ordered her to reimburse Ravalli County \$14,570.99 for the costs of prosecution and trial and to reimburse OPD \$57,127.00 for the costs of representation [pp. 3-4]. Stout was the beneficiary of a \$500,000 insurance policy on the

qualify for OPD services if the “applicant’s gross household income ... is at or less than 133% of the poverty level set according to the most current federal poverty guidelines”¹⁰⁰

¶48 Regardless of whose perception is correct, a review of the eligibility determination process¹⁰¹ is underway for making improvements in the way qualification determinations are made for OPD services. Policies and procedures are established by the PDC for eligibility determination.¹⁰² Changes in current policies and procedures will be made in all likelihood. Certainly, there should be a shift from verification in 10% of the applications randomly selected to verification in all instances when the disposable income and assets exceed 133%. Statutory amendments may be sought.

¶49 In addition, the courts can and do overrule OPD determinations that the person is not financially eligible for the services of a public defender pursuant to *M.C.A. §47-1-111*. In FY 2011, 1,254 applications were denied by OPD. In 130 instances the courts overturned the agency determination and ordered OPD to continue representing the client. The Leachman case out of region 9 (Billings) is an example that received some press about the court reversing the OPD determination that Mr. Leachman was financially ineligible.

¶50 Last session SB 187 amended *M.C.A. §47-1-111* to add, “The court shall advise the defendant that the defendant is subject to criminal charges for any false statement made on the financial statement.” to subsection (2)(a); and to subsection (2)(b), “The affidavit must clearly state that it is signed under the penalty of perjury and that a false statement may be prosecuted. The judge may inquire into the truth of the information contained in the affidavit.”¹⁰³ The indigency questionnaire (IQ form)¹⁰⁴ was modified to comply with the requirements of subsection (2)(b) before SB 187 passed.

¶51 Individual PDs are prohibited from performing eligibility screening.¹⁰⁵ OPD policy 105¹⁰⁶ directs RDPDs to appoint indigence determination specialists (IDS) from support staff.

life of her husband [p. 6] that she can never collect because she cannot benefit from the criminal act for which she was convicted. Her husband listed the jointly owned family home for sale at \$795,000 with a debt against the property for \$204,300 [pp. 7-8]. Although the property was jointly owned, Stout did not acquire her husband’s interest in the property for the same reason she could not collect the proceeds of the insurance policy. Without considering all of the market variables in selling the home, on paper Stout had an equity interest of \$295,350 (\$590,700 ÷ 2). She does retain a \$125,000 interest in the homestead exemption. Pursuant to *M.C.A. §47-1-111(3)(b)*, Stout qualified for representation by OPD because she did not have sufficient disposable income and assets to hire private counsel despite all of the equity she appeared to have on paper. Any private counsel would have been a fool to take a mortgage against the family home to secure payment of a fee when at a foreclosure sale the \$204,300 debt on the property plus the full \$250,000 homestead exemption, at a minimum, would have priority for payment ahead of the fee mortgage. Neither does OPD have the ability to collect the \$57,127 if for no other reason than OPD cannot pay the \$468,871 that has priority ahead of its lien.

¹⁰⁰ *M.C.A. §47-1-111(3)(a)*.

¹⁰¹ See OPD policy 105, <http://publicdefender.mt.gov/resources.asp>.

¹⁰² *M.C.A. §47-1-111(6)*.

¹⁰³ See http://data.opi.mt.gov/bills/2011/sb0199/SB0187_x.pdf.

¹⁰⁴ See <http://publicdefender.mt.gov/forms/pdf/IndigencyQuestionnaire.pdf>.

¹⁰⁵ *M.C.A. §47-1-111(6)(e)*.

¹⁰⁶ See OPD policy 105, <http://publicdefender.mt.gov/resources.asp>.

The IDSs are supposed to review the information submitted, require missing information, provide reasonable assistance, verify the information, assure the IQ form is signed, and then make a decision on the applicant's eligibility.¹⁰⁷ The RDPD is designated to determine eligibility if the IDS cannot for whatever reason.¹⁰⁸ Currently, no one at OPD headquarters has direct supervisory control over IDSs, nor is anyone designated as an IDS contact for resolving questions and issues that arise. The person in the training office who has provided training on the process recently is available as a consultant.

¶52 There is an opinion that letting RDPDs participate in eligibility determinations is a violation of *M.C.A. §47-1-111(6)(e)*. There does not seem to be a violation if the RDPD is not the attorney representing the client. Conversely, a violation becomes pretty clear when the RDPD fills both roles. Deleting *M.C.A. §47-1-111(6)(e)* would eliminate any violations but could enhance the perception that the agency is representing ineligible and would increase the risk of providing ineffective assistance of counsel because decisions about client eligibility can have an adverse affect on attorney caseloads. There is wisdom in prohibiting PDs from performing eligibility screening of the clients they represent. The prospect of individual bias in the decisions is reduced and greater uniformity in the determination is promoted. An alternative is prohibiting RDPDs from having caseloads and amending the language in *M.C.A. §47-1-111(6)(e)* to allow their participation. Another alternative to having RDPDs in the process is adding someone, probably an FTE at the central office level, who would train IDSs, monitor eligibility determinations, and be a consultant for resolving issues. Of course, isolating the eligibility process from RDPD influence raises structural chain-of-command issues and concerns about micromanagement. Another factor for consideration is, practically speaking, who submits the motion to rescind the order for the appointment of a PD when the applicant is determined to be ineligible or fails to provide the information requested for making the determination? Who from OPD advocates when the applicant asks the court to overrule a denial?¹⁰⁹ Requiring that the IDSs be attorneys not carrying a caseload would answer those questions but at a greater cost to the agency.

¶53 The PDC and OPD management have long known of the perception that PDs are representing clients who are financially ineligible. They have also been well aware of the competition between indigency determinations, helping PDs represent clients, and data collection as well as being aware of the acute shortage of support staff to do all of those things proficiently. In trying to strike a balance between that competition and improving verification of income and assets, the PDC directed that the IDSs verify information on the IQ forms in 10% of the applications randomly selected.¹¹⁰ The PDC, as it is sure taxpayers likewise, would prefer verification of 100% of the information on which eligibility is determined. The state is charged constitutionally with providing effective assistance of counsel for all who qualify. At the same time, it is not fiscally responsible for ineligible people to have PDs. Caseload stress likely would be reduced by more efficient eligibility screening. Identifying the hardship eligible who can pay at least a portion of the costs of their representation would improve. Despite the obvious benefits

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *M.C.A. §47-1-111(1)(d)*.

¹¹⁰ *Id.*

of 100% verification of information, greater uniformity, and better consistency in the determinations, achievement of these important goals will suffer as long as there are insufficient support staff resources.

¶54 Representation of someone who has not submitted a completed questionnaire is not acceptable regardless of the demands on the time of those making the determination. Neither is the lack of verification of applicant information in so many cases. It is the responsibility of the applicant to provide requested information. Failing to supply the information runs the risk of being denied services. However, denying services at a critical stage of a proceeding poses ethical and constitutional issues.

¶55 While deliberating over changes to the process, training has been conducted for the indigence determination specialists in the regions for assuring that the process is fair and more consistent statewide.¹¹¹ More training will be conducted as changes are made. Time and resources permitting a user manual for IDSs will be developed.

¶56 **Cases Initiated Drive the Weighted Caseloads.** The sheer number of cases already open and new cases entering the system determine the workload of the agency at any given time. The notion expressed by some about the workload being driven by indigent clients on a free ride loses its luster in light of the basis for the ACLU evaluation in 2011. The study was undertaken due to an increase in the number of complaints it received, the majority of which focused on the lack of communication or access to counsel and pressure from counsel to plead guilty.¹¹²

¶57 The impression about clients driving the workload is undermined further by a careful reading of the AU and ACLU reports and when consideration is given to the realities of client representation. Evaluation of the charges in light of the evidence and the law is the first and is the ongoing task of the attorney assigned the case. As the OPD standards¹¹³ set out, effective representation fundamentally and minimally requires the gathering, examination, and study of the evidence the prosecution is going to use against the accused; communicating with the client; gathering evidence the defense should offer; interviewing witnesses (many of which should be done by an investigator for practical and ethical reasons); analysis of the merits of the plea to be entered, filing motions, going to trial or entering a plea to a charge, perhaps of some lesser included offense;¹¹⁴ and advising the client on a recommended course of action founded on a thorough evaluation and understanding of the facts and the law. Reserved for the accused client to decide are what pleas to be entered, whether to accept a plea agreement, whether to waive a jury

¹¹¹ See p. 2 of the "Training Report," item 6.F, on the agenda of the April 13, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/04132012.asp>.

¹¹² 10/2011 ACLU report, p. 1, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

¹¹³ See "Standards," <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>. PDC standards can also be found in the "Standards" section of the OPD *Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp>.

¹¹⁴ There is no doubt that the plea bargaining process is a critical stage during which the accused is entitled to effective assistance of counsel. *Missouri v. Frye*, ___ U.S. ___, 132 S.Ct. 1399, 1406 (2012); *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 1384 (2012); *Padilla v. Kentucky*, 559 U.S. ___, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010); *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

trial, whether to testify, and whether to appeal.¹¹⁵ OPD workloads are not driven by indigent clients on a free ride.

¶58 The appellate caseload at OAD continues to grow rapidly.¹¹⁶ The postconviction relief cases have maintained somewhere in the mid-teen range since FY 2009.¹¹⁷ Although the number of new appeals opened each year have hovered in the 190 range, the ending balances at the end of each fiscal year have grown from 58 (FY 2009), to 161 (FY 2010), to 250 (FY 2011) to 329 through March, FY 2012.¹¹⁸ This is attributed to the relative experience level of recent attorneys replacing more experienced lawyers leaving for better paying jobs bearing lighter workloads. Efficiency will improve as confidence builds through experience if the current attorneys are not lured along the paths of their predecessors.

¶59 One observer has commented that OAD is filing frivolous appeals to justify their jobs. That observation has no merit.¹¹⁹ “The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*.”¹²⁰ Similar to the duties of the trial counsel, the appellate attorney must communicate with the client; gather, examine, and study the appropriate portions of the record on appeal; analyze the merits of the issues the client wants presented; and thereafter inform the client of the lawyer’s opinion about the merit and the potential for success on each issue. If the appellant does not agree there are frivolous issues, the attorney may move to withdraw if his professional judgment is that none of the issues have merit, but not without filing an *Anders* brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief must be furnished the client within time sufficient for raising any points the client chooses.¹²¹ Of course, the lawyer should vigorously advocate for the client on any issue believed by the attorney to have merit in law and fact. Further, the court’s opinions on issues do not measure whether the appeal was frivolous. An informal poll of recently retired justices confirmed that virtually none of the issues raised by OAD were frivolous.

¶60 Tracking Caseloads. At several places in its report the AU team left the impression that data on FTE attorney caseloads did not exist, could not be found by management, or was not used by managers.¹²² The AU team reported that a “large amount of data appears to be collected.”¹²³ The ACLU team was shocked that OPD has failed to collect and track data on

¹¹⁵ See American Bar Association Standards for Criminal Justice, 4-5.2 (2d Ed. 1980); *Strickland v. Washington*, 466 U.S. 668, 688-89, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

¹¹⁶ See p. 2 of the “Appellate Defender Report” at <http://publicdefender.mt.gov/meetings/04132012.asp>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See ¶¶ 43-44, *supra*.

¹²⁰ *Anders v. State of California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967).

¹²¹ *Anders*, 386 U.S. 741, 83 S.Ct. 1398, “... this Court has consistently held invalid those procedures ‘where the rich man, who appeals as of right, enjoys the benefit of counsel’s examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.’”

¹²² For example, see 10/2009 AU report, p. 27, <http://publicdefender.mt.gov/resources.asp>.

¹²³ *Id.*

yearly caseloads.¹²⁴ As pointed out in paragraph 37, *supra.*, from the outset OPD has tracked the caseloads of the FTE attorneys so it could meet its reporting requirements set out in *M.C.A. §47-1-105(9)(f)-(h)*. To whatever extent early reports of weighted caseloads may have been imprecise, if so, OPD is confident in the accuracy of the caseloads reported since the implementation of the requirement for the FTE attorneys to verify their active caseloads.

¶61 Measuring Caseloads. Every case does not take the same amount of time, skill, and effort as all the others. The PDC and OPD developed a rudimentary case weighting system when the agency was created. To that the AU team recommended, “*The case weighting system should be refined to provide a meaningful reflection of the work entailed in handling different types of different cases.*”¹²⁵ Since the AU study the attorney labor-management committee has spent many hours developing a much more expansive case weighting system¹²⁶ that is more in line with the discussion by the AU team.¹²⁷ The ACLU report cites attorney dissatisfaction with the current weighting system because it doesn’t take certain things into consideration.¹²⁸ Hopefully, the attorneys will have their representatives on the labor-management team make proposals for bringing about other meritorious adjustments in the case weighting system.

¶62 Standards for Measuring Case Overloads. The AU team cited¹²⁹ a study recommending the maximum annual caseload levels should not exceed 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 non-capital appeals per attorney per year.¹³⁰ The OPD suggested caseload standard¹³¹ is intended to be similar in that the annual assigned caseload after being weighted through the case weighting system should not exceed 150, or a monthly one-twelfth fraction of 12.5.

¶63 OPD Case Overloads. The AU team gave a detailed accounting of the types of specific staff attorney complaints regarding their caseloads.¹³² The root of each complaint was that there are not enough hours in the day to do all of the things necessary for providing effective assistance of counsel for all of the clients assigned in the attorney’s caseload. The ACLU report devotes considerable emphasis on case overload problems.¹³³ 260 open misdemeanor cases at any given time are too many for the most seasoned attorney! 150 open felony cases are too many! 30,000 new cases and 17,500 cases carried over are far too many for 115 FTE lawyers

¹²⁴10/2011 ACLU report, p. 2, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

¹²⁵10/2009 AU report, recommendation 2, p. 55, <http://publicdefender.mt.gov/resources.asp>.

¹²⁶See the “Caseload and Workload” section of the OPD *Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp>.

¹²⁷10/2009 AU Report, pp. 40-42, <http://publicdefender.mt.gov/resources.asp>.

¹²⁸10/2011 ACLU report, pp. 5-6, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

¹²⁹10/2009 AU report, p. 41, <http://publicdefender.mt.gov/resources.asp>.

¹³⁰See National Advisory Commission on Criminal Justice Standards and Goals, Courts, 13.12 (1973); American Council of Chief Defenders Statement on Caseloads and Workloads (2007). A study of *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, 16-17 (American Bar Association Standing Committee on Legal Aid and Indigent Defendants 2011) by professor Norman Lefstein is also worthwhile.

¹³¹See “Standards” part V and “Suggested Caseloads,” <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>

¹³²10/2009 AU report, pp. 52-53, <http://publicdefender.mt.gov/resources.asp>.

¹³³10/2011 ACLU report, pp. 5-6, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

and managers to carry!! To a large degree the caseload of every FTE lawyer is so great that illnesses, maternity leave, and family emergencies cannot be absorbed by the rest of the workforce. The PDC is uncomfortably aware that these problems are ongoing and agency wide. These complaints are not unique to a single region where the allocation of resources is an ongoing issue. Taking lawyer-hour resources from one region for relieving the pressure in another only compounds the stress on the lawyers and staff in the losing region. The FY 2011 annual report shows that many FTE attorneys frequently exceeded 12.5 monthly and that many exceeded the 150 mark annually.¹³⁴ Not nearly so many exceeded the benchmarks in FY 2010.¹³⁵

¶64 “An emergency lawyer should be available 24 hours, seven days a week to ensure immediate provision of counsel in compliance with Commission standards.”¹³⁶ “Effective representation should be available to an eligible person upon request of the person, or someone acting on the person’s behalf, to a court, a public defender office, or contract counsel as soon as the person is under investigation, arrested, charged with a criminal offense, becomes a party to any litigation in which the person is entitled to public legal representation, or when the interests of justice require representation.”¹³⁷ This standard is consistent with the third of the American Bar Association’s “Ten Principles of a Public Defender Delivery System.”¹³⁸ The AU team recommendation and the OPD standard address U.S. Supreme Court decisions holding that a person is entitled by the Sixth Amendment to an attorney during these early stages of a proceeding: post-arrest interrogation,¹³⁹ line-ups,¹⁴⁰ other identification procedures, e.g., one person “showup,”¹⁴¹ and at an initial appearance.¹⁴² Despite resistance from law enforcement, prosecutors and some courts, OPD has made strides toward accomplishing the recommendation, particularly at the initial appearance stage. However, having someone on call in every region will put more pressure on the lawyers to do their jobs, especially in the rural areas where there may be a lot of distance between the FTE lawyer and where the person is being held. Having a contract attorney on call has its set of issues, not the least of which is compensation.

¶65 Causes of Difficulties in Caseload Assignments. Although the AU team thought a large amount of data appeared to be collected, it found that the managers and attorneys in the offices either didn’t know the information existed or didn’t use it.¹⁴³ The AU team could not

¹³⁴ See the “Caseload and Workload” section of the OPD *Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp>.

¹³⁵ See the “Caseload and Workload” section of the OPD *Fiscal Year 2010 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp>.

¹³⁶ 10/2009 AU report, recommendation 14, p. 60, <http://publicdefender.mt.gov/resources.asp>.

¹³⁷ See “Standards,” III.2.A, p. 7, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>.

¹³⁸ See http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

¹³⁹ *Brewer v. Williams*, 430 U.S. 387, 399-401 97 S.Ct. 1232, 1239-40, 51 L.Ed.2d 424 (1977); *Miranda v. Arizona*, 384 U.S. 436, 479-81, 86 S.Ct. 1602, 1630-31, 16 L.Ed.2d 694 (1966).

¹⁴⁰ *United States v. Wade*, 388 U.S. 218, 236-37, 87 S.Ct.1926, 1937, 18 L.Ed.2d 1149 (1967).

¹⁴¹ *Moore v. Illinois*, 434 U.S. 220, 231-32, 98 S.Ct. 458, 466, 54 L.Ed.2d 424 (1977).

¹⁴² *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 213, 128 S.Ct. 2578, 2591-92, 171 L.Ed.2d 366 (2008).

¹⁴³ 10/2009 AU report, p. 27, <http://publicdefender.mt.gov/resources.asp>.

determine whether there was a lack of desire to manage, a lack of knowledge as to how to manage, or there was a lack of time to manage.¹⁴⁴ OPD has provided five management training sessions since the AU study, so lack of knowledge should by now be considerably less relevant. However, newer managers have missed some of those training sessions so it will be incumbent on OPD to get management training for them. The lack of desire to manage is largely a subjective determination the new CPD must make based upon objective evaluations of such things as the extent to which the manager is using available data and how well an office is functioning. Time constraint repeatedly cited by the AU and ACLU teams is certainly a factor in why some managers inexplicably underutilize the available data in varying degrees. All of that said, managers nonetheless know attorneys are exceeding the benchmarks that could jeopardize the effectiveness of the representation provided but are resigned and compelled to assign more cases to FTE attorneys because of budget constraints.

¶66 Case Overloads Solutions. Without doubt, the greatest problem OPD has is finding a solution for increasing caseloads that are overwhelming the workforce. Ridding OPD of the DN cases came up last legislative session. The cases remained with OPD when it became clear the cost for representing only the children projected by another vendor was in the neighborhood of the OPD budget for representing all parties. Distributing all of the DG, DI, DJ and DN cases, *i.e.*, the “civil” cases, and the postconviction relief cases elsewhere has been suggested without volunteers stepping forward to take them. The burdens of administration and cost probably would shift back to the courts and the counties; something not likely to happen without considerable push back. Reductions in the OPD budget and the FTEs should not be reduced if those cases are dispersed because the rest of this overview repeatedly justifies a need for more FTEs and a bigger budget to accomplish the mission.

¶67 *“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.”*¹⁴⁵ The agency was able to obtain a separate fund for capital defense cases. Other contingency funds could be proposed. Likely though, those are not consistent with the process contemplated in title 17.

¶68 OPD has a special revenue account created by *M.C.A. §47-1-110* to be “... used only for the operation of the system.” Deposits into the account come largely from clients paying for at least some of the cost of their representation by OPD. Records show 3,149 OPD client accounts receivable totaling \$1,006,293 at the end of FY 2011 that grew to 3,926 clients owing \$1,203,048 during the first half of FY 2012.¹⁴⁶ \$80,080 was deposited into the OPD special revenue account during the first two quarters of FY 2012 from payments by 1,804 clients, paying on average \$44.39 each.¹⁴⁷ Deposits into the OPD special revenue account grew from \$60,674 in FY 2010 to \$123,994 in FY 2011.¹⁴⁸ These statistics show increasing deposits that may approach \$160,000 for FY 2012. But predicting and depending on sums certain is for the brave

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*, recommendation 18, p. 63.

¹⁴⁶ See p. 8 of the “Operating Report,” item 8.A on the agenda of the February 10-11, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/02102012.asp>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

hearted considering that many of those owing are incarcerated, some for a long time, and the ability of others is driven often by tumultuous and tenuous circumstances in a less than robust economy.¹⁴⁹

¶69 OPD has been criticized for not doing enough toward recovering the costs of representation. Last session SB 187 added another purpose for the agency at subsection (6) to “ensure that clients of the statewide public defender system pay reasonable costs for services provided by the system based on the clients’ financial ability to pay.”¹⁵⁰ SB 187 also amended *M.C.A. §46-8-113(1)* to provide:

Subject to the provisions of subsections (2) and (3), as part of or as a condition of a sentence that is imposed under the provisions of this title, the court shall determine whether a convicted defendant should pay the costs of counsel assigned to represent the defendant as follows:

- (a) If the defendant pleads guilty prior to trial:
 - (i) to one or more misdemeanor charges and no felony charges, the cost of counsel is \$250; or
 - (ii) to one or more felony charges, the cost of counsel is \$800.
- (b) If the case goes to trial, the defendant shall pay the costs incurred by the office of state public defender for providing the defendant with counsel in the criminal trial. The office of state public defender shall file with the court a statement of the hours spent on the case and the costs and expenses incurred for the trial.

This amendment has raised assertions by prosecutors that the \$250 and \$800 are mandatory assessments if a client pleads guilty. In at least one jurisdiction the prosecutor threatens a plea agreement will not be made unless the accused agrees to pay \$250 or \$800 regardless of the person’s ability to pay. A May 1, 2012 Montana Supreme Court decision signals that the accused cannot be ordered pay any amount of the costs of representation beyond his or her ability to pay.¹⁵¹ What impact a decision like *Moore* will have on the amount clients are ordered to reimburse OPD is to be seen.

¶70 Last session a contingency fund for death penalty cases was appropriated. OPD is grateful. There was a death penalty case pending in Flathead County. The Smith case continues. This fund has allowed OPD to pay the costs of those cases without invading the funds needed for other cases. The death penalty aspect of the Flathead County case was withdrawn. But OPD doesn’t know when the next case might arise. For instance, notice was given of the possibility that the death penalty might be sought in the Arnold case in Sidney. That has triggered preliminary steps OPD is obligated to take as the appointed counsel for the defendants. Now the county attorney has announced the death penalty will be sought.

¹⁴⁹See the “Assessments and Collections” section of the *OPD Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp> which has an extensive review of the business of recovering the costs of representation as well as the cost effectiveness and impracticality of aggressive collection practices.

¹⁵⁰*M.C.A. §47-1-102(6)*.

¹⁵¹*State v. Moore*, 2012 MT 95, ¶11, ___ Mont. ___, ___ P.3d ___, 2012 WL 1514449.

¶71 The AU team also urged an approach more consistent with title 17: “*Management staff should develop a plan for situations in which case overloads occur, particularly when they coexist with budget shortfalls.*”¹⁵² Even after six years of existence, predicting the numbers and kinds of cases that will be filed, over which OPD has no control, is a crap shoot at best. The increases in the DN and misdemeanor cases during FY 2012 provide examples.

¶72 Looming on the horizon in eastern Montana is the sharp growth in drug trafficking, prostitution, assaults, and gun crimes brought about by the production boom in the Bakken oil fields. The press frequently reports about the pressure the surge in crimes is putting on the criminal justice system. The media has reported recently about the rising concerns about what will happen out of the increase in oil production in the Glacier County area. OPD is tracking the situation carefully but cannot make many predictions yet about how heavily this shoe will drop. But there are housing and other resource shortages in eastern Montana that spread the oil field workers and suppliers beyond the region 10 area of Glendive to Plentywood into at least the region 11 area out of Miles City. Region 10 has 3 FTE lawyers and region 11 has 2 FTE lawyers. Each region has an investigator. Ten contract attorneys in region 10 and seventeen in region 11 were signed up at the end of FY 2011 to help handle the carryover cases and the 1,026 new cases opened in that fiscal year. But the cases those attorneys are accepting have been dwindling because the other legal work the boom is creating is more attractive and lucrative than the representation of indigent clients.

¶73 The AU team suggested that management must be prepared to quickly submit a supplementary budget request.¹⁵³ By its nature that suggestion presumes a legislature in session to act on the request promptly and does not take into account Montana’s 90 day biennium sessions where more than a year can pass before a request could be approved. OPD has received supplemental appropriations in the past by following the process required by *M.C.A. §17-7-101, et seq.* Likely, the pressure of the ever increasing caseload will compel agency management to seek yet another supplemental during the 2013 session. The spike in DN cases in the last half of calendar year 2011 is a good example of delayed funding that won’t be available for OPD management until sometime in late spring or early summer 2013. What the oil boom may cause is to be seen.

¶74 Refusal to Accept More Cases. “*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 more cases.*”¹⁵⁴ The second of the American Bar Association’s “Ten Principles of a Public Defender Delivery System” says “Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.”¹⁵⁵ The commentary following this principle contemplates that members of the private bar, OPD’s pool of contract attorneys, will be available to relieve the caseload pressure off of FTE lawyers when the rendering of quality representation becomes a

¹⁵² 10/2009 AU report, recommendation 15, p. 61, <http://publicdefender.mt.gov/resources.asp>.

¹⁵³ *Id.*, p. 62.

¹⁵⁴ *Id.*, recommendation 16, p. 62.

¹⁵⁵ See http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

concern. The commentary further notes that there should be sufficient state funding so this goal can be accomplished.

¶75 The overload “complaints” reported by the AU and ACLU teams are better described as candid, legitimate expressions of the different ways the lawyers are concerned that they may not meet their ethical obligations in providing effective assistance of counsel. The AU team referred in its commentary after recommendation 1 to OPD standard V.1.A, the first sentence of which says, “Caseload levels are the single biggest predictor of the quality of public defense representation.”¹⁵⁶ The AU team referenced the May 16, 2006 American Bar Association formal opinion 06-441 as authority for the ethical obligation of a PD to turn down the assignment of more cases than allow the lawyer to effectively and timely provide representation.¹⁵⁷ This opinion also describes the ethical obligations of those with supervisory authority over the PD. OPD standards V.1.A and V.1.B incorporate the essence of ABA opinion 06-441.¹⁵⁸ OPD standard V.1.B lays out the current plan which is in reality no more than a plan for seeking supplemental appropriations:

The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation.¹⁵⁹ Whenever the Chief Public Defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will, by reason of their excessive size and complexity, interfere with the rendering of quality representation, or the breach of professional obligations, the Chief Public Defender is required to inform the Montana Public Defender Commission, which in turn will inform the Law and Justice Interim Committee, the Legislative Finance Committee, and the Office of Budget and Program Planning and shall take all reasonable steps to alleviate the situation.

¶76 Current case overloads and budget constraints hampering the assignment of contract attorneys have brought about serious consideration of OPD refusing more new cases. The safety valve for assigning case overloads to contract attorneys is virtually exhausted without causing budget overruns. At present, the PDC and OPD management have not settled on the way new cases will be refused. However, a lot more attention is being paid to published opinions regarding ethical obligations such as the May 16, 2006 American Bar Association formal opinion 06-441¹⁶⁰ and the April 2003 “Ethics Opinion 03-01”¹⁶¹ issued by the American Council of Chief

¹⁵⁶ See PDC Standards V.1.A, p. 21, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>.

¹⁵⁷ 10/2009 AU report, p. 62, <http://publicdefender.mt.gov/resources.asp>.

¹⁵⁸ See <http://dpa.ky.gov/NR/rdonlyres/0A05F4ED-79D7-40C8-BC9A-1AD7D8E33421/0/ABAFORMALOPINION.pdf>.

¹⁵⁹ See the fifth of the American Bar Association’s “Ten Principles of a Public Defense Delivery System” at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

¹⁶⁰ See <http://dpa.ky.gov/NR/rdonlyres/0A05F4ED-79D7-40C8-BC9A-1AD7D8E33421/0/ABAFORMALOPINION.pdf>.

¹⁶¹ See <http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf>.

Defenders, National Legal Aid and Defender Association. Options are being considered. None are relished. 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 acceptable levels.

¶77 **Training.** In 2009, the AU team complimented OPD for “an excellent statewide training program”¹⁶² and thought the “program is well thought out and is surprisingly mature considering it recent inception.”¹⁶³ The opinions of the team were that the material provided was excellent, the instructors knowledgeable, and they were impressed by the use of video technology and the suite of recorded training sessions that were being developed for sending to the individual OPD offices.¹⁶⁴ “Every continuing education training program should continue to be recorded and the recordings made available to lawyers.”¹⁶⁵ This continues to be done when the topic is worth preserving, the replay will be coherent, and the presenters have not asserted proprietary right to their work product. In 2011, the ACLU team seemed equally appreciative of the OPD training office doing what it could with the resources available.¹⁶⁶ A history of the training can be viewed in the training reports submitted at PDC meetings at <http://publicdefender.mt.gov/meetings.asp>.¹⁶⁷

¶78 The AU team noted a disparity between the training policy for FTE attorneys and contract lawyers and suggested the contract lawyers should receive the same training opportunities the FTE attorneys get.¹⁶⁸ The team thought contract lawyers should not have to pay attendance fees and that their expenses should be reimbursed.¹⁶⁹ The contract attorneys are welcome at training sessions without paying an attendance fee and they have access to the recorded training programs. However, so many other demands on the OPD budget do not permit the reimbursement of their expenses.

¶79 “Each program should have systematic feedback and evaluations from attendees.”¹⁷⁰ “The Training Director should regularly survey staff and contract lawyers to determine what training they believe is needed.”¹⁷¹ Once done, it was suggested that programs then be planned, scheduled, and published a year in advance so the lawyers could set aside time for attendance.¹⁷² Attendees are given evaluation sheets 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.¹⁷³ People can submit proposals anytime on the

¹⁶²10/2009 AU report, p. 16, <http://publicdefender.mt.gov/resources.asp>.

¹⁶³*Id.*, p. 33.

¹⁶⁴*Id.*

¹⁶⁵*Id.*, recommendation 10.d, p. 58.

¹⁶⁶10/2011 ACLU report, p. 8, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

¹⁶⁷The training history may also be reviewed in the OPD fiscal year reports at <http://publicdefender.mt.gov/resources.asp>.

¹⁶⁸10/2009 AU report, pp. 33 and 35 at <http://publicdefender.mt.gov/resources.asp>.

¹⁶⁹*Id.*, p. 35.

¹⁷⁰*Id.*, recommendation 9, p. 58.

¹⁷¹*Id.*, recommendation 8, p. 58.

¹⁷²*Id.*, p. 35.

¹⁷³For example, see p. 3 of the “Training Report” at Agenda Item 6.F on the agenda of the April 13, 2012

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.

¶80 That said, OPD knows less experienced, undertrained lawyers are being thrust into the breach while trying to find the time for training and mentoring so client harm is avoided. The ACLU team found that there is a lack of training for attorneys handling abuse and neglect cases (DN), involuntary commitments (DI), juvenile (DJ) cases, and the Indian Child Welfare Act (DN).¹⁷⁴ Of course, that should not happen if for no other reason than the risk of client harm.¹⁷⁵ Currently, there is a big increase in DN cases and in misdemeanor cases. These increases heaped onto already large caseloads and attorney turnover contribute to managers assigning cases to less experienced, undertrained lawyers when trying to fill court orders for PDs. Finding continuing education programs focusing on the specific subject areas identified by the ACLU team is difficult for lack of widespread demand. Courses may only be available outside of Montana if not put on by OPD. Funding is not sufficient to send many if any PDs to out of state training.

¶81 Further, local differences in practice and procedure make standardized training for “civil cases” difficult. As a result, this has necessarily become a collaborative responsibility of the training office and the RDPDs. The training office endeavors to fill the need for the civil case training in a variety of ways, including conducting regular quarterly updates involving all offices and utilizing funding and resources provided from other entities and agencies, *e.g.*, the court administrator's office, Department of Public Health and Human Services, Department of Corrections, the National Juvenile Defender Center, and the National Association of Counsel for Children, to conduct or augment regional training activities. Currently, the OPD-founded Montana uniform practice DN workgroup is engaged in several projects designed for identifying practices that will help bring more consistency and clarity to DN practice around Montana. More information about the DN workgroup can be found on the OPD website.¹⁷⁶

¶82 “*The Training Director should be responsible for developing and implementing through the Public Defender managers two introductory programs: ... an orientation program for all new staff ... [and] an initial skills program for the attorney staff*”¹⁷⁷ OPD has developed an orientation DVD which introduces newly hired attorneys to the fundamental rules, standards, and policies that apply to public practice. The training department works closely with the RDPDs to conduct this orientation program. Furthermore, working in conjunction with and at the direction of the CPD, the training office and the RDPDs are moving toward full implementation of a uniform support staff orientation program. Orientation procedures for support staff have been a regular training topic at leadership conferences since the inception of the agency in July 2006 and have been part of the support staff training agenda since the statewide support staff

PDC meeting at <http://publicdefender.mt.gov/meetings/04132012.asp>.

¹⁷⁴10/2011 ACLU report, pp. 8-9, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

¹⁷⁵See the sixth of the American Bar Association's “Ten Principles of a Public Defense Delivery System” at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

¹⁷⁶See <http://publicdefender.mt.gov/training/DN1.pdf>.

¹⁷⁷10/2009 AU report, recommendation 10.b, p. 58, <http://publicdefender.mt.gov/resources.asp>.

conference in July 2010. The training office has developed an orientation program specifically for support staff personnel and anticipates fully implementing that program effective July 1, 2012, immediately following the June, 2012 annual support staff conference.

¶83 The AU and ACLU teams put the greatest emphasis on local training and mentoring for newly hired lawyers.¹⁷⁸ What the teams learned from the workforce is a desire for mentoring rather than lectures.¹⁷⁹ They want meaningful on the job training.¹⁸⁰

¶84 The most effective mentoring occurs in conjunction with training at the local level while the staff is working. As noted by the AU team, mentoring is profoundly hindered by the caseloads managers and more experienced attorneys carry.¹⁸¹ The PDC and OPD could not agree more with the suggestion of the AU team that an entry level training program of a week or two for new hires should be a priority.¹⁸² Throughout the PDC standards are minimal training requirements before a contract or FTE lawyer is assigned cases.¹⁸³ However, the luxury of such an entry level program is lost in the demands of the caseloads left by attorneys taking new jobs offering a lighter workload at more pay.

¶85 The agency puts on an annual boot camp for more recent hires knowing full well that some of those lawyers will have been representing clients for months. The training director and his staff do not have the capacity to intercede as the instructors in a local training and mentoring program in each region as new employees are hired. Working in collaboration with the RDPDs, the training department augments the localized mentoring by conducting periodic standards compliance interviews¹⁸⁴ and through the use of a semi-annual standards verification instrument. The training office is also studying the viability of an independent centralized mentoring program that will be dependent upon the availability of resources.

¶86 The brief bank now online can help reduce the risk of client harm but it is not a substitute for relevant training at the local level. Trial books recommended by the AU team would go a long way toward reducing the risks posed.

¶87 Needs like these will continue to suffer and the shortcomings in local training and mentoring will remain as long as the demand is too great on people already with too little time and who are saddled with too much to do. The natural tendency for a managing lawyer is to give attention to his or her clients before giving greater attention to training and mentoring. The solution is reducing or eliminating manager caseloads so they have the time to be leaders for one-on-one mentoring; for on the job training; an occasional lecture when more than one lawyer needs help; or going to court for the purpose of watching and evaluating performance rather than

¹⁷⁸ *Id.*, pp. 34-35; 10/2011 ACLU report, pp. 8-9, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

¹⁷⁹ 10/2009 AU report, p. 34, <http://publicdefender.mt.gov/resources.asp>.

¹⁸⁰ 10/2011 ACLU report, p. 8, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

¹⁸¹ 10/2009 AU report, p. 34, <http://publicdefender.mt.gov/resources.asp>.

¹⁸² *Id.*

¹⁸³ See PDC standards, pp. 23, 50, 52, 54, 56, 61, 63, 70, 77, 82, 88, 95, 97, and 100, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>.

¹⁸⁴ See OPD policy 136, <http://publicdefender.mt.gov/policies.asp>.

focusing on the representation of clients. In some instances, the manager could help the PD in any of the aspects of a case such as preparing a client or witness for testimony, or being second chair and doing an opening statement or examining a witness. Training is another example of how reducing manager caseloads can offer great strides toward realizing the true potential of OPD.

¶188 *“The Training Director and the Appellate Division are developing a brief bank. That activity should continue and periodically be updated.”*¹⁸⁵ OPD now has a brief bank on line for the FTEs, contract lawyers, and some others. The brief bank is a collection of ideas and assistance for PDs. The brief bank is commendable because it is very well organized. Yet, it has its limitations because it presents arguments perhaps made successfully in one jurisdiction that won’t be accepted in another until decided by the Montana Supreme Court. Without doubt, the brief bank will lose its value unless concepts rejected by the courts are edited with commentary or purged.¹⁸⁶ This goes hand-in-hand with another AU team recommendation that *“A monthly newsletter summarizing recent noteworthy decisions from higher courts and of any Agency policy and procedures should also be prepared and distributed.”*¹⁸⁷ The appellate office sends a weekly update of noteworthy decisions, but catching all can fall through without someone dedicated to that task. The AU team anticipated that additional staff might be necessary for the training director to implement recommendation 10.¹⁸⁸

¶189 *“The training office should prepare and distribute a separate trial book applicable to each category of cases, e.g. misdemeanors, felony, appellate, juvenile, etc.”*¹⁸⁹ It is one thing to maintain a brief bank or to have introductory programs, but “trial books” are summaries of statutory cites; court decisions (especially Montana, but maybe federal and other state jurisdictions); rules, e.g., in the “civil” cases OPD handles; and any other relevant, useful information such as practice tips and reminders. Federal judges have a benchbook with this kind of information that is continuously updated by the administration to the federal bench. The “benchbooks” and the “DUI Manual” found on the Montana Supreme Court website under the tabs for the district courts and the courts of limited jurisdiction are excellent examples of trial books OPD lawyers can find useful.¹⁹⁰ But they are not complete substitutions for want of practice tips and updates.

¶190 OPD would very much like to fulfill recommendation 10.a of the AU team. OPD strives to find funding grants for quicker development of the trial books, so far without success.

¹⁸⁵ 10/2009 AU report, recommendation 10.c, p. 58, <http://publicdefender.mt.gov/resources.asp>.

¹⁸⁶ The OPD dynamic defender development group monitors and updates the OPD brief bank and the standards verification instruments. The OPD brief bank is accessible by OPD attorneys and support staff personnel, private lawyers with a memorandum of understanding on file with OPD, and by others approved by the OPD brief bank administrator.

¹⁸⁷ 10/2009 AU report, recommendation 10.e, p. 59, <http://publicdefender.mt.gov/resources.asp>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*, recommendation 10.a, p. 58, <http://publicdefender.mt.gov/resources.asp>.

¹⁹⁰ See <http://courts.mt.gov/lcourt/default.mcp.x>. The “2010 Bondbook” and the “Rules of Evidence Training” are additional resources helpful for OPD lawyers that OPD does not need to duplicate. Other “trial books” such as manuals specific to Montana law on abuse and neglect (DN) cases and juvenile law (DJ) cases would be very helpful but are not yet available.

Meaningful trial books kept current with practice tips and cites to relevant and developing law are incredibly time consuming propositions to start up and then require committed updating to remain useful. The lack of time, personnel, and money have slowed their development.

¶91 The training department's criminal case and trial preparation notebook¹⁹¹ has been the model for training during the OPD boot camp for new attorneys for several years. This notebook was not widely circulated largely out of concern that what works best in one jurisdiction does not necessarily work well in another. More recent discussions have brought about a renewed effort at producing an agency-wide prototype of a trial book for criminal cases that should be available for review in May 2012.¹⁹²

¶92 Presently, the current and former OPD mental health consultants and several OPD attorneys working cooperatively with the training department, are engaged additionally in developing models for use in specific practice areas statewide. These include a uniform DN practice manual, a juvenile delinquency resource guide, and a civil mental health law guidebook. These and additional trial books will be developed as resources permit. While it is a recurring theme throughout this overview, the commitment of FTEs for the development and maintenance of these resources is essential for fulfilling the AU recommendations and toward more effectively representing clients.

¶93 **Performance Evaluations.** At the April 13, 2012 meeting the PDC was informed unequivocally by attorney representatives that they want meaningful evaluations. Periodic evaluation of the workforce for competence and efficiency is the tenth of the American Bar Association's "Ten Principles of a Public Defense Delivery System"¹⁹³ incorporated by the PDC into the "Standards"¹⁹⁴ adopted as OPD was being created. The importance of the relationship between staff evaluations and meaningful training programs was emphasized by the AU team.¹⁹⁵ Likewise, without commentary by the AU team, "*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.*"¹⁹⁶

¶94 Regarding the AU team's recommendation 28, first, 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

¹⁹¹The notebook was drawn from a prototype developed by former Colorado public defender training coordinator Steve Rench, a nationally prominent criminal defense lawyer and lecturer for many years.

¹⁹²See p. 2 of the "Training Report" at Agenda Item 6.F on the agenda of the April 13, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/04132012.asp>.

¹⁹³See http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

¹⁹⁴Compare the ABA's "Ten Principles of a Public Defense System" with the purposes of the "Standards," p. 5, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>.

¹⁹⁵10/2009 AU report, p. 34, <http://publicdefender.mt.gov/resources.asp>.

¹⁹⁶*Id.*, recommendation 28, p. 66.

public defender services.¹⁹⁷ 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. At the same time, a more formal regional strategic plan could be a useful tool for the CPD in the performance evaluations of the RDPDs. That said, the regions have developed initial regional strategic plans that were submitted to the CPD and the Chair of the PDC. These were posted to the agency's website. There were no comments as to the effectiveness, or the lack thereof, of these plans. Presently, the RDPDs also prepare a proposed budget. They also submit field reports periodically on structured subjects that update and less formally touch on traditional strategic plan subjects. However, some revisions in the current program may be appropriate for effective use in the performance evaluation process of RDPDs.

¶95 *"The Commission must command accountability from staff for implementing its promulgated standards and policies and for providing competent, efficient representation."*¹⁹⁸ *"A meaningful system should be developed for evaluating the work of the lawyers."*¹⁹⁹ The comments described the OPD guide for evaluation of staff as impractical, permitting only subjective conclusions, incapable of being applied uniformly, and ignoring the more important criteria of case processes, dispositions, and input from clients.²⁰⁰ Recommendation 11²⁰¹ complemented recommendation 3 in calling for an evaluation procedure based primarily on objective data that promotes professional development. The AU team was critical of courtroom observations, interviewing others who observed a PD's work, and conferences with the PDs as being "entirely subjective, anecdotal and impressionistic."²⁰² The team noted a perception among OPD employees "of unfair favoritism and fear of unwarranted retaliation for perceived criticism of management" that could be exacerbated by a continuation of subjective evaluations.²⁰³ The ACLU team reported that "Not one attorney found the evaluation system implemented by OPD to be effective, meaningful, or accurate; in some offices, attorneys indicated that evaluations were rarely if ever even conducted."²⁰⁴ The ACLU report gives examples of shortcomings in the evaluation of PDs.²⁰⁵

¶96 Having all of the case process and dispositional data available for objective performance evaluations will remain a continuing issue until data collection is no longer in competition with providing staff support for PDs in the representation of their clients or eligibility determination. The AU team found the heavy caseloads supervising attorneys carry as a reason why evaluations were not being done.²⁰⁶ Heavier caseloads than should be carried remain. The ability of supervisors in fairly and objectively evaluating performance is

¹⁹⁷ M.C.A. §47-1-202(1)(c).

¹⁹⁸ 10/2009 AU report, recommendation 22, p. 64, <http://publicdefender.mt.gov/resources.asp>.

¹⁹⁹ *Id.*, pp. 18, 27-33, and recommendation 3, p. 55.

²⁰⁰ *Id.*, p. 56.

²⁰¹ *Id.*, pp. 59-60.

²⁰² *Id.*, p. 59.

²⁰³ *Id.*, p. 60.

²⁰⁴ 10/2011 ACLU report, p. 7, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

²⁰⁵ *Id.*, pp. 6-8.

²⁰⁶ 10/2009 AU report, pp. 21, 29, and 63, <http://publicdefender.mt.gov/resources.asp>.

compromised to the extent there is little or no time for supervision.²⁰⁷ 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.

¶97 The fact reported²⁰⁸ that the OPD human resources person is not an attorney seems as irrelevant as the mental health professional not being a lawyer for the same reasons. All these matters aside, the ACLU report has prompted another review of job descriptions and the performance evaluation process. Currently 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. This should assist in evaluating the performance of contract lawyers, too.

¶98 In conjunction with reviewing the job descriptions, “*The Commission should insist that definitive lines of authority be established, published and included in job descriptions and be communicated to all staff.*”²⁰⁹ 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.

¶99 **Morale.** Among other factors, performance evaluations affect morale. The lack of meaningful performance evaluations can erode confidence and fuel deep feelings about favoritism, vindictiveness, and retaliation. Moreover, negative evaluations are not deserved when there is no opportunity for demonstrating what staff can do with the resources they need and want. Trying to do more with less can produce skewed and unfair evaluations, either direction, depending on the degree of empathy the evaluator has for the plight of the evaluated.

¶100 In 2011 the ACLU team reported, “Office morale in several locations was observed to be extremely poor and was both noted by staff and attributed to OPD management.”²¹⁰ This is a carryover from conclusions the AU team came to in 2009.²¹¹ Staff perception of resources not being distributed fairly, evenly, and consistently; the hiring process; favoritism, vindictiveness, and retaliation “‘promoting ‘a climate of fear and retribution’ and ‘management by intimidation;’” and salary discrepancies were commented upon by the AU team.²¹² Candidly,

²⁰⁷ *Id.*, p. 32.

²⁰⁸ 10/2011 ACLU report, p. 7, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

²⁰⁹ 10/2009 AU report, p. 18, and recommendation 26, p. 65, <http://publicdefender.mt.gov/resources.asp>.

²¹⁰ 10/2011 ACLU report, p. 3, also pp. 11, and 13, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

²¹¹ 10/2009 AU report, pp. 17, 48 and 63-64, <http://publicdefender.mt.gov/resources.asp>.

²¹² *Id.*

some share a belief that the state's assumption of county operations in 2006 has fed into some of the staff perceptions reported. The assumption demanded that county employees become state employees with state oversight, pay, and benefits. More than one former county employee has expressed dissatisfaction with becoming part of a statewide system rather than remaining locally managed and funded. Communication is also a factor.

¶101 Communication. *“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 proposed changes in these policies.”*²¹³ A newsletter is routinely published since the AU study that strives at accomplishing the AU team's recommendation. Recently, the PDC has been more deeply engaged in the policies and procedures of agency operations. For the examination of all who want, the minutes of all of the PDC meetings and the meetings of its committees are posted on the OPD website along with many of the materials considered including reports of OPD staff to the PDC. Attorney and staff liaisons attend the PDC meetings and participate when policies and procedures are discussed and changes are made. Presumably, they report to their constituents. RDPDs attending should disseminate what happened upon return to their regions. RDPDs are updated periodically at RDPD meetings about changes in policy and are encouraged to communicate these changes to staff. OPD requests that all employees read and understand all policies on an annual basis and certify that they have done so. Questions about policies have a central number for discussion and employees are encouraged to call.

¶102 Feedback from the regions, despite these lines of communication, has a lot of incorrect assumptions, conclusions, and statements in among baseless rumors. While lack of articulation can be a contributor, the lack of understanding conveyed by the feedback pretty clearly supports a premise that the information distributed by management is often being ignored or manipulated. Repeated admonishments about the critical need for uniformity and consistency in performing the administrative functions of the agency statewide is appearing to have been widely ignored at a yet to be determined impact on the agency. Nonetheless and no doubt, better communication from management should reduce anxiety and promote a better understanding of why things are being done the way they are. Renewed effort will examine more and better dissemination of information.

¶103 Favoritism, Vindictiveness, and Retaliation. *“Special effort should be made to remove the fear of retaliation from management for publicly noting Agency problems.”*²¹⁴ Realities are that likely there will be some amount of tension between management and the workforce, the PDC and OPD management know decisions are made with which the workforce has varying levels of approval or disagreement, and the agency cannot function if run by a committee of the whole. Responding to some of the comments in the ACLU report²¹⁵ about evaluations and favoritism or retaliation is difficult without more information that has not been forthcoming.

²¹³10/2009 AU report, recommendation 19, p. 63, <http://publicdefender.mt.gov/resources.asp>.

²¹⁴*Id.*, recommendation 21, p. 64, <http://publicdefender.mt.gov/resources.asp>.

²¹⁵10/2011 ACLU report, pp. 3-4,7-8, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

¶104 Concerning the investigator hired in Billings²¹⁶ though, the vacancy was properly announced. There were three applicants who were interviewed by the regional deputy and the chief investigator for OPD. The person hired was considered best qualified by the interviewers notwithstanding the favoritism card played by some of those interviewed by the ACLU team.

¶105 Concerning the comment that multiple attorneys believe the RDPDs serve at the pleasure of the CPD, they do.²¹⁷ Likewise, the CPD and the chief appellate defender (CAD) serve at the pleasure of the PDC.²¹⁸ All can be fired at will regardless of how well others perceive a chief or a regional deputy has been performing. Of course, the PDC expects there be just cause for taking action against anyone as well as when doing something beneficial.

¶106 As to the expression of OPD reaching over local and regional heads to fire personnel or managers being demoted,²¹⁹ neither with OPD explanation according to the ACLU report, it is not possible to respond without knowing the details of each instance. Continuing perceptions of vindictiveness and retaliation were reported by the ACLU team without providing specifics.²²⁰ Complaints about a lack of transparency in hiring and firing were reported.²²¹ Personnel say they are fearful for their own jobs because support staff are fired without the workforce knowing until after the fact.²²²

¶107 The privacy of applicants and employees is protected by the Montana Constitution.²²³ OPD policy 535²²⁴ preserves that guarantee at paragraph 3.3.1: “Information requested by ... co-workers or the general public concerning issues relating to an employee (including, but not limited to, information relating to payroll, benefit payments, recruitment and selection, performance appraisal, disciplinary action, grievances, reduction in work force, disabled person’s employment preference, veteran’s employment preference, or medical information) must be treated as confidential information which may require authorization from the employee, a constitutionally valid legal order, or specific statutory authority to release the information.” Nothing more need be said about the degree of transparency there should be in hiring and firing decisions at OPD.

¶108 Generally, however, (1) there must be “just cause” for any adverse action taken against any employee as required by *A.R.M. 2.21.6505, et seq.*; (2) appropriate action should be considered with regard to local or regional heads who bestow something not deserved or who fail to take action when just cause exists for discipline or termination of an employee; and (3) there are avenues for recourse available to employees against whom inappropriate disciplinary action

²¹⁶10/2011 ACLU report, pp. 3-4, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

²¹⁷*M.C.A. §2-18-103(21)* and *§47-1-201(3)(a)(iv)*.

²¹⁸*M.C.A. §2-18-103(21)-(22)* and *§47-1-105(1)(a)-(b)*.

²¹⁹10/2011 ACLU report, pp. 3-4, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

²²⁰*Id.*

²²¹*Id.*, p. 3.

²²²*Id.*

²²³*Mont. Const.*, Art. II, §10.

²²⁴*See* OPD policy 535, <http://publicdefender.mt.gov/policies.asp>.

has been taken. For example, a grievance procedure is available to all eligible OPD employees.²²⁵

¶109 Equally important, people should not be fearful of retaliation for offering constructive criticism. On the other hand, continuously questioning, disagreeing, or arguing over well-nigh every decision or course of action; refusing or ignoring directions from management; or stirring up dissension in the workplace borders on insubordination. Mostly, what is said about retaliation in the reports are conclusory accusations without details. Retaliation can go undetected because it isn't usually done in the open. However, the identities of the sources of several of the staff criticisms reported in the AU and ACLU reports are not very well concealed. Delving into what is behind many of the criticisms noted has revealed information of unflattering conduct by the alleged subjects of retaliation that cannot and will not be revealed here or later for privacy reasons.

¶110 Another consideration in evaluating morale is that some lawyers come to OPD with a higher expectation than they should of successfully defending every client. Some of those attorneys evaluate their success in terms of the dismissal of charges or acquittal of the others and, thus, are more prone to becoming demoralized and lose confidence when dismissals and acquittals don't often happen. Statistically, all accused, not just indigent clients, plead or are convicted of over 90% of the charges brought against them. 97% of federal convictions and 94% of state convictions are the result of guilty pleas.²²⁶ Becoming disenchanting can be expected unless their mentoring brings about the realization that success is measured not just by wins and losses, but in how well the rights of all were protected by the way the rights of the accused were protected, were the charges dismissed or reduced when they should have been, was a plea negotiated when it should have been,²²⁷ was everything done at trial that could and should have been done through preparation and skill, and was there professional advocacy for a just sentence fitting all of the law and factual circumstances.

¶111 Disparity in Resources. That, "There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system" is the eighth of the American Bar Association's "Ten Principles of a Public Defense Delivery System."²²⁸ One of the purposes the PDC had for adopting the "Standards" was so "Counsel for a client entitled to public legal representation has parity of resources with

²²⁵ *A.R.M. 2.21.8010, et seq.*

²²⁶ *Missouri v. Frye*, __ U.S. __, 132 S.Ct. 1399, 1407 (2012), Justice Kennedy citing, Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf> (all Internet materials as visited Mar. 1, 2012, and available in Clerk of Court's case file); Department of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, *Felony Sentences in State Courts, 2006–Statistical Tables*, p. 1 (NCJ226846, rev. Nov. 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>.

²²⁷ *Id.*: "Because ours 'is for the most part a system of pleas, not a system of trials,' *Lafler, post*, at 1388, 132 S.Ct. 1376, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is."

²²⁸ See http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

opposing counsel and is included as an equal partner in the justice system.”²²⁹ Unfortunately, parity of resources between the prosecutors and indigent defense counsel has not been achieved in Montana.

¶112 Prosecutors rely on the ranks of law enforcement as a resource far greater than the resources OPD has for the investigation of leads, collecting evidence, and interviewing witnesses as a case progresses. Too few OPD investigators do not have enough time for working all of the cases that should be, nor do they have enough time for exhaustive work ups of complex cases. Preapproval for “client costs” such as forensic testing of evidence and experts from the OPD central office apparently heightens anxiety among the lawyers at the regional level. Prosecutors send evidence to the state crime lab for forensic testing and frequently draw from law enforcement for experts, but hire as needed. An order that the convicted pay the costs of prosecution has a higher priority than the OPD client paying for the costs of representation.²³⁰ Also, the prosecutorial costs can be absorbed in the next mill levy which seems to be a less formal process than complying with the requirements of title 17.

¶113 Caseloads. With the current OPD caseload there are too few FTE lawyers and not enough money for paying contract attorneys to regularly and frequently meet and communicate with clients, interview all of the witnesses, study the evidence, conduct legal research, evaluate the case, brief substantive and dispositive motions, appear in court, negotiate a plea agreement appropriate for the case or prepare for and go to trial, and prepare for sentencing upon a change of plea or conviction. According to the ACLU team, there are attorneys working more than 40 hours a week who do not report their overtime.²³¹ They should be reporting the time over 40 hours so OPD and everyone else has a better idea of how much time their caseloads are really taking. Knee-jerk triage more often than desired decides where shortcuts are taken and effort is devoted. Looming deadlines in caseloads left from turnover starts new lawyers with less confidence than could be instilled through orientation and training. To a large degree the caseload of every FTE lawyer is so great that illnesses, maternity leave, and family emergencies cannot be absorbed by the rest of the workforce. The ACLU team reported examples of client harm it perceived ranging from extended incarceration, not mailing discovery to clients because the postage is too expensive, not accepting collect calls from incarcerated clients if the PD is not in the office, missed court dates, bad advice, and standing in for the appointed PD by PDs who do not know the client before the hearing.²³² The workforce worries about whether they are meeting their ethical obligations and whether their careers will be marred by disciplinary action.

¶114 Pay. FTEs are paid considerably less than their counterparts. Public defender attorneys are paid thousands of dollars less annually than the prosecutors they work against every day. OPD conducts a salary survey of city, county and state attorneys every two years in the cities in which it has offices to determine the average market. The 2010 survey showed a market value of \$64,729 for prosecuting attorneys, compared to \$58,762 paid to OPD attorneys with 5 or more years of experience, which is approximately 61% of the 2010 Market Analysis of \$95,987.

²²⁹ See PDC standard I.1.H, p. 5, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>.

²³⁰ M.C.A. §46-18-251.

²³¹ 10/2011 ACLU report, p. 6, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

²³² *Id.*, pp. 11-14.

Further, OPD attorneys with over 10 years of experience are paid \$70,514 which is approximately 73% of the same analysis (Attachment D). OPD management salaries have remained the same since the agency's inception six years ago. The third chief appellate defender was recently hired at the same salary as the first chief in 2006. OPD is currently conducting a new salary survey to prepare for the 2013 legislative session. Staff is leaving at an alarming rate and exit interviews show 1 of 9 support staff and 14 of 18 line attorneys in programs 1 and 2 going elsewhere since July 1, 2011, have left for more money and lighter workloads. The attorney turnover rate is 15% as of March 31, 2012; 83% of the departing attorneys have 5 years or less of experience.

¶115 The AU team found low morale among the contract lawyers because of an inadequate fee schedule.²³³ Private attorneys taking federal appointments receive \$125 per hour compared to the \$60 OPD rate. Lawyers have testified before legislative committees that PDs were being paid \$60/hour or more decades ago. Lawyers on the PDC have testified before legislative committees the \$60/hour does not cover their office overheads. Some have quit seeking appointments out of their perception of unsupported reduction in fees²³⁴ even though the contract manager has given examples of abuses by some of the contract lawyers.

¶116 There should be no doubt in the mind of anyone that the morale of the OPD staff is poor. The OPD lawyers, FTEs and contract, along with the staff, want to do more for their clients. They have pleaded for more resources, relief from high caseloads, and pay on par with the prosecutors and others employed by the state. Frustration grows into resentment as management continually fails at delivering. OPD management gets the blame.²³⁵ Blame is deserved to the extent of demonstrable favoritism, vindictiveness, or retaliation. This overview is directed at overcoming blame the PDC and OPD management must bear for not advocating the past situation more clearly and passionately and for not better explaining the situation as management sees it. Blame is not deserved, however, to the extent the PDC and OPD management are prevented from supplying needed resources and competitive salaries for the workforce by limitations mentioned at the beginning of this overview.

¶117 **Contract Attorneys.** Contract attorneys have been considered an integral part of OPD from the outset. From the beginning OPD was anticipated to be “a system that utilizes state employees, contracted services, or other methods of providing services in a manner that is responsive to and respectful of regional and community needs and interests.”²³⁶ The PDC was charged with establishing standards “... for a statewide contracted services program that ensures that contracting for public defender services is done fairly and consistently statewide and within each public defender region and that contracting for appellate defender services is done fairly and consistently statewide.”²³⁷ The chief contract manager was identified as the person overseeing the contracting program.²³⁸ “The state office and each regional office, in a manner

²³³ 10/2009 AU report, p. 22, <http://publicdefender.mt.gov/resources.asp>.

²³⁴ *Id.*, p. 23, <http://publicdefender.mt.gov/resources.asp>.

²³⁵ 10/2011 ACLU report, p. 3, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

²³⁶ M.C.A. §47-1-102(4).

²³⁷ M.C.A. §47-1-216(1)

²³⁸ M.C.A. §47-1-216(2)

consistent with statewide standards adopted by the commission pursuant to this section, may contract to provide public defender ... services necessary to deliver public defender services within each public defender region.”²³⁹ The CAD does the same for the delivery of appellate defender services.²⁴⁰

¶118 OPD “... is required to deliver public defender services in all [208] courts in this state.”²⁴¹ The supreme court website indicates that in addition to the supreme court, there are 56 district courts, 61 justice courts, 84 city courts, and 6 municipal courts.²⁴² Within that structure are an ever growing number of treatment/specialty courts. PDs also represent clients before the sentence review commission.²⁴³

¶119 The courts are scattered to every corner of Montana from Eureka to Ekalaka and Broadus and from Plentywood to Lima and West Yellowstone.²⁴⁴ On the courts’ schedules, regular times are set at which PDs appear with or on behalf of their clients, often passing downtime waiting their turn on the docket. There is not an office in every community where a court sits. OPD has 11 regional offices plus satellite offices in Polson, Hamilton, and Anaconda. While there is some inconsistency among state maps, it is 89 or more miles one way from Kalispell to Libby.²⁴⁵ Eureka is 63 or more miles from Kalispell. Butte to Dillon is 65 miles with another 49 more to Lima. From Virginia City, Butte is 72 miles. Ennis is another 14 miles past Virginia City. There are 91 miles between West Yellowstone and Bozeman but only 61 miles east to Big Timber. Columbus is 41 miles west of Billings, Red Lodge is 60 south, and Hardin is 46 miles east. Hysham is 74 miles west of Miles City, Broadus is 79 miles south, Ekalaka is 116 or so east, and east to Baker is 81 miles. Going north from Glendive it is about 138 miles to Plentywood, 102 to Wolf Point, and 148 to Scobey. Centrally, Stanford is 45 miles toward the west of Lewistown. It is 75 miles from Lewistown to Roundup and another 35 miles or so onto Melstone. Harlowton is 57 miles away; Ryegate about 75; and Lavina is in the range of 91 paved miles via Harlowton or close to 100 thru Roundup. 114 or so miles separate Lewistown and White Sulphur Springs to the southwest. Along the High Line, it is 70 miles east from Havre to Glasgow with stops that can be made in between if court schedules coincide. Havre to Fort Benton is 75 miles. 88 miles separate Great Falls and Shelby, plus another 24 miles from Shelby to Cut Bank. Choteau is 55 miles from Great Falls. Going from Helena to Boulder covers 27 miles with about another 38 miles to Whitehall. Between Helena and Townsend are 32 miles. The map at <http://nris.mt.gov/gis/gisdatalib/downloads/hwymapmdt.pdf> has estimated travel time at 60 mph between various points. It is easy to see why contract attorneys are essential to operations in the rural regions and in remote areas of other regions in addition to their importance even where the caseloads are concentrated.

²³⁹ M.C.A. §47-1-216(3).

²⁴⁰ *Id.*

²⁴¹ M.C.A. §47-1-104(1).

²⁴² See http://courts.mt.gov/jud_branch.mcp.

²⁴³ M.C.A. §46-18-901 *et seq.* and §47-1-104(4)(iv).

²⁴⁴ See <http://courts.mt.gov/locator/default.mcp>.

²⁴⁵ See <http://nris.mt.gov/gis/gisdatalib/downloads/hwymapmdt.pdf>;
<http://www.mdt.mt.gov/travinfo/docs/2011-2012-mt-highway-map.pdf>.

¶120 Providing effective assistance of counsel that is delivered cost effectively are two beacons guiding OPD management. The network of 207 courts spread out everywhere, operating independently on their own schedules, illustrates why FTE attorneys cannot cover all of the cases. Contracting with attorneys in private practice can be cost effective in relatively active courts remote from the regional office and in rural regions where there are few FTEs, court dockets conflict, and when a lot of windshield time will be wasted by an FTE driving back and forth across the region.²⁴⁶ Having contract attorneys available allows OPD to have counsel for all who qualify when conflicts arise. Some cases require certain experience and proven skills the FTEs in the area do not have. Funds available, the stress of case overloads on the FTEs can be relieved by contracting cases out even where OPD has offices with several FTEs. As to the latter situation, cases should be assigned to contractors when the overloads come from an unexpected spike in new cases. Seeking approval for additional FTE lawyers should be strongly considered when the current caseloads in the office stay above acceptable levels because presently FTEs are more cost effective than contract lawyers.

¶121 At the end of FY 2011, OPD had MOUs with 199 individual contract lawyers,²⁴⁷ some of whom take cases in more than one region. In addition, this number fluctuates for a variety of reasons including changes in their practices or moving to some other location. They are scattered disproportionately throughout the state.²⁴⁸ In FY 2011, 7,276, or 26%, of the 27,664 new cases were assigned to contract lawyers at a direct cost of \$5,256,546.²⁴⁹

¶122 Contracting. Contracting with attorneys for public defender services is exempt from the Montana Procurement Act.²⁵⁰ However, “Contracting for public defender and appellate defender services must be done through a competitive process” minimally involving considerations of attorney qualifications, attorney access to support services, attorneys caseloads, caseload monitoring, reporting protocols, the supervision and evaluation of performance

²⁴⁶ See OPD policy 130, <http://publicdefender.mt.gov/policies.asp>.

²⁴⁷ See the “Staffing Report” section of the OPD *Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp>.

²⁴⁸ See the “Regional Statistics” section of the OPD *Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp>:

Region 1 (Kalispell - 4,361 new cases):	17.5 FTEs,	24 contract attorneys;	(4 DC, 16 LC - 12,967 sq. mi.);
Region 2 (Missoula - 4,831 new cases):	22.5 FTEs,	47 contract attorneys;	(3 DC, 10 LC - 6,212 sq. mi.);
Region 3 (Great Falls - 3,116 new cases):	12 FTEs,	26 contract attorneys;	(5 DC, 16 LC - 11,501 sq. mi.);
Region 4 (Helena - 2,644 new cases):	11 FTEs,	13 contract attorneys;	(3 DC, 8 LC - 6,309 sq. mi.);
Region 5 (Butte - 1,573 new cases):	9 FTEs,	7 contract attorneys;	(6 DC, 14 LC - 14,638 sq. mi.);
Region 6 (Havre - 744 new cases):	2 FTEs,	10 contract attorneys;	(6 DC, 16 LC - 22,586 sq. mi.);
Region 7 (Lewistown - 520 new cases):	2 FTEs,	18 contract attorneys;	(7 DC, 17 LC - 14,720 sq. mi.);
Region 8 (Bozeman - 2,251 new cases):	10 FTEs,	27 contract attorneys;	(3 DC, 14 LC - 7,263 sq. mi.);
Region 9 (Billings - 6,568 new cases):	19.75 FTEs,	38 contract attorneys;	(4 DC, 13 LC - 11,473 sq. mi.);
Region 10 (Glendive - 517 new cases):	3 FTEs,	10 contract attorneys;	(8 DC, 19 LC - 15,184 sq. mi.);
Region 11 (Miles City - 509 new cases):	2 FTEs,	17 contract attorneys;	(7 DC, 14 LC - 22,700 sq. mi.).

²⁴⁹ See p. 2 of the “Operating Report,” item 6.B, on the agenda of the April 13, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/04132012.asp>; ¶¶4-5 of the “FTE vs. Contractor Hourly Rates” section of the OPD *Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* at <http://publicdefender.mt.gov/resources.asp>.

²⁵⁰ M.C.A. §47-1-216(3): “All contracting pursuant to this section is exempt from the Montana Procurement Act, as provided in 18-4-132.”

processes, conflict resolution, and continuing education in accordance with PDC standards.²⁵¹ The intent behind the “competitive process” is for assuring contract attorneys are qualified, competent, and can provide effective assistance of counsel rather than for ensuring that lawyers in private practice in the area get a competitive share of OPD cases.

¶123 Qualifications. Only attorneys licensed and admitted to practice law in Montana may represent OPD clients. An attorney wishing to participate as a contract attorney submits an “Attorney’s Summary of Education and Experience” form²⁵² to the OPD contract manager for a determination of the attorney’s qualifications.²⁵³ On the form the attorney identifies when and from where the undergraduate and law degrees were achieved and in what year the attorney was admitted to practice before which courts, including Montana. Inquiry is made into whether the attorney has been formally disciplined by any court and is asked if a disciplinary action is pending. The attorney is specifically asked, “... have you ever been found by a court to have delivered ineffective assistance?” The attorney is asked how many years he or she has engaged in the active practice of law and to describe his or her employment experience including any as a judge, a U.S. attorney, attorney general, district/county attorney, city attorney, a PD, and as a private practitioner. How many civil and criminal jury trials in different courts is asked. The attorney identifies the number of felony cases in Montana in the previous three years. The attorney is asked to describe his or her experience in the “civil cases” in which OPD provides representation. As a demonstration of qualification to be a contract attorney, a description of three cases, preferably cases that proceeded to a jury trial, is sought. Inquiry is made into what special skills and interests the attorney may have. Applicants are asked to identify their current professional liability carrier. They are asked to indicate the case tracking system used for monitoring conflicts of interest. Identification of the judicial districts and counties where the attorney is willing to work is asked. References are requested. Finally, pursuant to the Montana rules of professional conduct 1.1, the attorneys are asked to self-evaluate and certify their competency to effectively handle different categories of cases in which OPD makes appointments.

¶124 Qualifications for representing indigent persons in capital cases is satisfied by getting a certification of training and experience that measure up to the standards issued by the Montana Supreme Court. Recertification is required periodically. Phase one of a capital defense training conference took place in Missoula on August 15-19, 2011, for the purpose of qualifying the attendees.²⁵⁴ Phase two is tentatively scheduled for the second week of July 2012 at the UM law school.²⁵⁵ It is primarily from that training that OPD can identify those who qualify for appointments in capital cases.

¶125 Training. In addition to being admitted to practice law in Montana, compliance with the PDC training standards offers proof of having the qualifications for providing effective

²⁵¹ *M.C.A. §47-1-216(5)*.

²⁵² See <http://publicdefender.mt.gov/forms/pdf/AttorneyExperienceSummary-R.pdf>

²⁵³ See OPD policy 130, <http://publicdefender.mt.gov/policies.asp>.

²⁵⁴ See p. 1 of the “Training Report” at Agenda Item 9.F on the agenda of the October 24, 2011 PDC meeting at <http://publicdefender.mt.gov/meetings/10242011.asp>.

²⁵⁵ See p. 3 of the “Training Report” at Agenda Item 6.F on the agenda of the April 13, 2012 PDC <http://publicdefender.mt.gov/meetings/04132012.asp>.

assistance of counsel. Throughout the PDC standards are minimal training requirements before a contract or FTE lawyer is assigned cases. Generally, a lawyer is supposed to “[c]omplete twenty hours of continuing legal education within each calendar year from courses, offered or approved by” OPD “[i]n order to assure that clients receive the effective assistance of counsel to which they are constitutionally and statutorily entitled,”²⁵⁶ Although sometimes less, an additional, one time, twenty hours of training specific to the types of representation other than criminal proceedings is supposed to be undertaken, and in some instances more.²⁵⁷

¶126 In the context of the difficulty there is in finding continuing education courses available and of the minimal requirements an attorney in private practice must have to be retained to represent clients in the kinds of cases OPD handles, it shouldn’t come as a surprise that the files on the contract attorneys do not demonstrate compliance with PDC standards. Yet, the lack of as much training as the standards call for does not necessarily prove the contract attorney is not competent to represent OPD clients. It does mean that closer supervision is needed until management is satisfied that the attorney is competent at handling the cases assigned.

¶127 Likewise, the incompetency of a contract attorney to represent OPD clients is not proven by a missing affidavit certifying achievement of the 15 hours of continuing education required annually for all Montana attorneys to retain their licenses. The market for private practitioners being retained for representation in the kinds of cases OPD handles is pretty limited. With some exceptions, those practitioners must depend on other kinds of cases for their livelihood. It follows that those practitioners will focus their continuing education on the more lucrative areas of their practice. Why wouldn’t they when they can bill private clients at two, three, or more times the \$60/hour OPD pays? OPD clients are not at greater risk of incompetent representation for the want of an affidavit in OPD’s files when in reality only the most foolhardy lawyer would sacrifice his or her entire private practice by failing to get the needed 15 hours of continuing education each year. In short order, the licenses of those who don’t are suspended until they come into compliance. Their names are published. OPD can be pretty confident the contract lawyers appointed have at least the 15 hours required for licensure even if there isn’t an affidavit in the OPD file.

¶128 The continuing legal education standards may be impractical and too onerous considering the availability of courses and conferences and in light of the fewer hours required for continued licensure in Montana. The basic 20 hours of continuing legal education required by OPD is 33% more ambitious than the 15 hours required annually for all Montana attorneys to retain their licenses.²⁵⁸ More hours for specialty training simply makes contracting with OPD less and less worthwhile. Ironically, the lawyers getting 15 hours of continuing education not necessarily grounded in criminal defense or at seminars about other than the OPD “civil cases” can be hired at several time more than the \$60 per hour OPD pays to represent clients in any of

²⁵⁶ See PDC standard VI.A.b, p. 23, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>.

²⁵⁷ See PDC standards, pp. 50, 52, 54, 56, 61, 63, 70, 77, 82, 88, 95, 97, and 100, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>.

²⁵⁸ See <http://www.montanabar.org/associations/7121/files/clerules.pdf>. By rule of the Montana Supreme Court, lawyers admitted to the Montana Bar must certify annually that they have attended 15 hours of approved continuing legal education to maintain their licenses to practice.

the kinds of cases OPD handles. The foregoing underscores the need for PDC to look at the propriety of the standards and the ways to go about lowering some continuing education requirements without unduly sacrificing the quality of representation OPD clients receive.

¶129 Memorandum of Understanding. A memorandum of understanding (MOU) is sent to the attorney if the contract manager is satisfied with the qualifications submitted on the “Attorney’s Summary of Education and Experience” form. The MOU is an agreement between OPD and the contract attorney wherein the attorney agrees to provide full and complete legal defense of cases assigned by OPD and accepted by counsel.

¶130 The MOU points out that OPD is under no obligation to assign any specific number of cases to the attorney. Nor is OPD under any obligation to appoint the contract lawyer in particular kinds of cases. Lacking developed skills, a person qualified as a contract attorney is not necessarily appointed in all types of cases OPD handles. Conversely, the MOU also points out that contract attorneys have the latitude of indicating the number of cases they will take at any given time, the types of cases they will take, and the locations where they will practice. A contract attorney can turn down an OPD offer of appointment on a case for any reason.

¶131 As an example, and whatever the perception is about the number of contract lawyers in Flathead County,²⁵⁹ OPD currently has MOUs with 27 lawyers in private practice who are willing to serve in region 1. Twelve have offices in Flathead County. Some of the lawyers outside of the county will take cases there, others will not. Some of the contract lawyers in Flathead County will only accept assignments of certain types of cases or limit the number of OPD cases they will carry at any given time. Some are not appointed to certain cases because they do not have sufficient background and experience.

¶132 “A contract lawyer should be prohibited from having an assigned client becoming a fee client in the originally assigned case.”²⁶⁰ “Contract attorneys may not take any money or benefit from an appointed client or from anyone for the benefit of the appointed client.”²⁶¹ This statutory prohibition is incorporated into the MOU as a matter of law.²⁶² Undoubtedly, a redetermination of indigency must be done if it becomes known an appointed client has sufficient funds to hire private counsel.²⁶³ An investigation into the circumstances would influence whether the provisions of *M.C.A. §46-8-113* for cost recovery should be applied and whether the person should be prosecuted for perjury or false swearing.

¶133 The attorney agrees to consider his or her caseload and ascertain that counsel has both the time and expertise to provide effective assistance before accepting an assignment. The attorney also agrees to determine whether a conflict exists before accepting a case and to notify OPD if a conflict is identified during the representation. These obligations come from the

²⁵⁹ 10/2011 ACLU report, p. 4, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

²⁶⁰ 10/2009 AU report, recommendation 13, p. 60, <http://publicdefender.mt.gov/resources.asp>.

²⁶¹ *M.C.A. §47-1-216(8)*.

²⁶² *Valier County v. State*, 123 Mont. 329, 341-42, 215 P.2d 966, 973 (1950); *City of Philipsburg v. Porter*, 121 Mont. 188, 192-93, 190 P.2d 676, 678-79 (1948).

²⁶³ *M.C.A. §47-1-111(3)*.

Montana rules of professional conduct²⁶⁴ that the attorney is supposed to consider before accepting any case regardless of the MOU.

¶134 OPD promises support services will be available. The attorney agrees to follow the preapproval process for “client costs” over \$200.

¶135 The attorneys agree to comply with the PDC standards. They promise they will contact the client within 48 hours and will meet with the client within 7 days. A promise is made to comply with OPD’s policies. Among other MOU items, the attorney agrees to maintain client confidences and protect confidential attorney-client information and work product; submit monthly status reports; submit monthly claims for payment; undergo audits and performance evaluations; and will retain records with provisions about file retention, destruction, and delivery if the MOU is terminated. There are provisions for terminating the MOU.

¶136 In executing the MOU, the attorney certifies he or she is an independent contractor and in compliance with *M.C.A. §39-71-401* regarding workers’ compensation.²⁶⁵ A promise is made to indemnify and hold OPD harmless from any and all claims, demands, or actions by third parties.

¶137 Conflicts Resolution. The process for conflict resolution²⁶⁶ is covered in OPD policies 116 and 119.²⁶⁷ As set out in the MOU, the attorney being offered the assignment of a case has an ethical duty²⁶⁸ to do a conflict check before accepting the case. The attorney must follow the procedures set out in the OPD policies if an unanticipated conflict arises after accepting the assignment. A contract attorney accepting a conflict assignment from the conflict manager has the same ethical duty to do a conflict check before accepting the assignment. The conflict manager must be notified if an unanticipated conflict arises after accepting the assignment.

¶138 Access to Support Services. Concerning attorney access to support services such as paralegal and investigator services,²⁶⁹ these services come within “client costs” requiring preapproval as provided in OPD policy 125.²⁷⁰ OPD does not have many FTE paralegal staff members. Demands for their services is too great within the agency for regular availability for helping contract attorneys. OPD does not contract with paralegals in the private sector because (1) there are not that many available who are well enough qualified and experienced and (2) their hourly rate that others will pay is more often than not greater than the \$60/hour currently being

²⁶⁴*M.R.Pro.C. 1.1 and 1.3.*

²⁶⁵Nonetheless, “a person under contract to the state,” *e.g.*, a contract attorney accepting an appointment for representation of an OPD client, is a public employee. *M.C.A. §2-2-102(7)(d)*. The contract attorney must comply by the applicable laws and abide by the rules of conduct for public employees when performing that contract, *i.e.*, representing the OPD client. *M.C.A. §2-2-121*. A “public employee” is a “public servant,” *M.C.A. §45-2-101(64)(a)*, subject to prosecution for official misconduct. *M.C.A. §45-7-401*.

²⁶⁶*M.C.A. §47-1-216(5)(g)*.

²⁶⁷See OPD policies 116 and 119, <http://publicdefender.mt.gov/policies.asp>.

²⁶⁸*M.R.Pro.C. 1.3.*

²⁶⁹*M.C.A. §47-1-216(5)(c)*.

²⁷⁰See OPD policy 125, <http://publicdefender.mt.gov/policies.asp>.

paid contract lawyers. Investigator availability for contractors has the same limitations as their availability for FTE attorneys previously discussed²⁷¹ even though the AU team chided, “Investigative staff must be increased so that this prioritization [of felony cases receiving priority over misdemeanors] is unnecessary.”²⁷²

¶139 “All lawyers should have authority to use automated legal research engines when necessary.”²⁷³ OPD had paid for a license package with Lexis that didn’t authorize enough licenses to allow access by all of the contract lawyers at the time the AU team did its study. Nor did OPD have funds sufficient for buying an expanded package of licenses that at the time was done in blocks of 50 licenses. Since then OPD has negotiated for enough licenses that it can make Lexis available for the contract lawyers.

¶140 Fixed Fee Contracts. “Contracts may not be awarded based solely on the lowest bid or provide compensation to contractors based solely on a fixed fee paid irrespective of the number of cases assigned.”²⁷⁴ It has been noted that OPD has some four contracts with lawyers that are for a set amount per day or per month. At first blush, these contracts may seem noncompliant with the quoted language from *M.C.A. §47-1-216(4)*. However, the prohibition is against contracts being awarded “... solely on a fixed fee paid irrespective of the number of cases assigned.”

¶141 Whether these contracts were let “solely” on a fixed fee basis and, therefore, are not within statutory compliance is a debate for a different time and place. As demonstrated historically, OPD has been reluctant in pursuing such contracts out of concern for client harm arising out of a lack of incentive for providing effective representation. Another consideration voiced is the development of inequities in the pay contract attorneys receive that could be above or below the current \$60/hour rate. Amending *M.C.A. §47-1-216* will be proposed at the next session for alleviating issues about such contracts. The proposed amendments would allow fixed fee contracts for representation in treatment/specialty courts and in DN²⁷⁵ cases. Under the proposal, those contracts could not be awarded without approval of the PDC and only if there are in place verifiable means for assuring effective representation.

¶142 Administrative Processes and Reporting Protocols. The administrative processes are explained on the OPD website in the “Contractor Corner.”²⁷⁶ Training opportunities and resources are announced. As a part of the competitive process, OPD needs the reporting protocols²⁷⁷ found online. In non-conflict cases, pre-approvals for “client costs” are submitted first to the RDPD by the contract attorney just as the FTE lawyers do. Forms are available at that site. If the preapproval requested will cost more than \$200, the request is forwarded to the contract manager for approval. Any preapproval request is sent to the conflicts manager in

²⁷¹ 10/2009 AU report, p. 67, <http://publicdefender.mt.gov/resources.asp>.

²⁷² *Id.*

²⁷³ *Id.*, recommendation 32, p. 67.

²⁷⁴ *M.C.A. §47-1-216(4)*.

²⁷⁵ *M.C.A. §41-3-101, et seq.*

²⁷⁶ See <http://publicdefender.mt.gov/contracts.asp>.

²⁷⁷ *M.C.A. §47-1-216(5)(e)*.

conflict cases. Preapproval requests are sent to the CAD in appellate cases. The contractor claim for payment process requires the contract attorney to submit bills to the RDPD assigning the non-conflict case, the conflicts manager in conflict cases, or the CAD in appellate cases by the tenth of the month following the date of service.²⁷⁸ The MOU requires the submission of monthly status reports on the progress of the case.

¶143 Data Collection and Caseload Monitoring. The competitive process also calls for knowing about the contract attorney's caseload, including the amount of other cases in which the lawyer is engaged,²⁷⁹ and for OPD to have a caseload monitoring process.²⁸⁰ The AU team thought the lack of statistical information being reported about the work of the contract attorneys weakened the ability of the contract manager to exercise supervisory authority.²⁸¹ Not reporting the dispositions of cases assigned to contract attorneys understated the work of OPD in the minds of the AU team.²⁸² That team thought the contract lawyers should be required to prepare the same closing documents as the FTE lawyers with the contract manager being added to the distribution.²⁸³ No one seemed to be collecting caseload data as far as the ACLU team said it could tell.²⁸⁴ The ACLU team expressed concern that OPD management is not ensuring the contract lawyers "are not over-stretched and possibly shortchanging their public clients" because in the team's opinion OPD is not tracking caseload data.²⁸⁵

¶144 What was said about data collection earlier and the disagreement OPD has with the impressions of the AU and ACLU teams won't be repeated but it is equally applicable to contract lawyers.²⁸⁶ A review of how cases are received, assigned, and processed offers clarification. Courts order OPD to appoint a PD at the regional level. At this stage the regional or satellite office collects and inputs the case identifying data about the first five items listed in OPD policy 210,²⁸⁷ *e.g.*, the court and docket number. The manager of that office makes the case assignment which provides the data for items 9 and 10 of policy 210, *i.e.*, what attorney was assigned on what date. That attorney could be a contract lawyer. If there is a conflict which would be identified as data for items 6, 7, and 8 is collected, the conflict manager makes the assignment but the regional or office manager knows who accepted the assignment through the case management system. What well may be missing in the case management system is the information about how the case progresses and the dispositional data for the reasons given earlier.²⁸⁸ But to say no one is tracking data for contract attorneys is not correct.

²⁷⁸ See <http://publicdefender.mt.gov/forms/pdf/ContractorPaymentProcess.pdf>.

²⁷⁹ M.C.A. §47-1-216(5)(d).

²⁸⁰ M.C.A. §47-1-216(5)(e).

²⁸¹ 10/2009 AU report, p. 23, <http://publicdefender.mt.gov/resources.asp>.

²⁸² *Id.*, p. 20.

²⁸³ *Id.*, p. 31.

²⁸⁴ 10/2011 ACLU report, p. 2, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

²⁸⁵ *Id.*

²⁸⁶ See ¶¶ 29-39, *supra*.

²⁸⁷ See OPD policy 210, <http://publicdefender.mt.gov/policies.asp>.

²⁸⁸ See ¶ 33, *supra*.

¶145 The regional and satellite managers have the information about which contract lawyers have what cases. Case status reports are routinely submitted to those managers. Monthly claims for payment are submitted to those managers before being forwarded to the contract manager for approval. If not included in the status report for some reason, the claim for payment has a description of the services rendered which gives those managers information about how a case is progressing and lets the manager know if substantive or dispositional motions were filed, whether prosecutorial evidence has been collected and evaluated, were there plea negotiations, and so forth. Again, as earlier conceded, the extent to which the data about case progression and case dispositions is being entered into the OPD case management system is questionable due to the competition for support staff time. The conflicts manager undertakes the role of the regional or satellite manager once a conflict case is assigned and should be receiving the same information the regional or satellite managers do.

¶146 Management Structure. The CPD hires the contract manager.²⁸⁹ The chief contract manager is charged with overseeing the contract attorney program.²⁹⁰ The contract manager office is staffed by the manager as a 0.75 FTE position and 1.0 FTE administrative assistant. The CPD, the RDPDs (and satellite managers), and the CAD are tasked with providing contract oversight and enforcement to ensure compliance with established standards.²⁹¹ Although not so identified specifically in statute, the conflicts manager is among those now providing oversight and enforcement of standards compliance because attorneys hired for conflict of interest cases report to the conflicts manager for those cases.²⁹² The conflicts manager is hired by and reports to the PDC.²⁹³

¶147 Supervision of Contract Attorneys. Supervision of the contract lawyers is another of the components of the competitive process.²⁹⁴ The AU team found little or no substantive supervision of the contract lawyers except for the review of fee petitions.²⁹⁵ The ACLU team observed that the contract attorneys in some regions did not appear to be meaningfully supervised.²⁹⁶ The AU team recognized that contract lawyers are considerably more difficult to supervise because some only occasionally take cases, they work out of their own offices, and they cover a vast territory.²⁹⁷ That some contract attorneys confine their practice to areas far from the regional office should have been added.

¶148 Part of supervision undoubtedly includes knowledge about the contract attorney's caseload and workload including the amount of private practice engaged in outside of the OPD work.²⁹⁸ It should not be assumed, as some appear to have, that the supervision of contract

²⁸⁹ M.C.A. §47-1-201(3)(a)(ii).

²⁹⁰ M.C.A. §47-1-216(2).

²⁹¹ M.C.A. §47-1-216(6).

²⁹² M.C.A. §47-1-118(3).

²⁹³ M.C.A. §47-1-118(2).

²⁹⁴ M.C.A. §47-1-216(5)(f).

²⁹⁵ 10/2009 AU report, p. 32, <http://publicdefender.mt.gov/resources.asp>.

²⁹⁶ 10/2011 ACLU report, pp. 7-8, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

²⁹⁷ 10/2009 AU report, p. 28, <http://publicdefender.mt.gov/resources.asp>.

²⁹⁸ M.C.A. §47-1-216(5)(d).

attorneys incorporates the same features as the supervision of FTE lawyers.²⁹⁹ There are sound reasons why the two cannot be the same.

¶149 One is that the depth of knowledge about the other cases in the contract attorney practice is not going to be the same as that the supervisor can have about the OPD cases. For reasons about confidentiality and attorney-client privilege, if for no other ethical reasons, there can be no expectation that the private practitioner is going to divulge from his or her other cases the kind of detailed data urged by the AU and ACLU teams. *M.C.A. §47-1-216(5)(d)* cannot be interpreted to mean OPD has the duty of collecting information about how the practitioner's other cases are progressing, what the attorney is doing in those cases, or the results. Even the justification for getting client information and the facts of those cases is doubtful.

¶150 The contract attorney program is dead if *M.C.A. §47-1-216(5)(d)* means OPD has the duty of collecting the same data about the contract attorney's cases as it does for OPD assignments. With the exception of attorneys depending exclusively on OPD for work, for ethical reasons, the private practitioner should refuse to provide the in-depth information OPD needs for weighing the entirety of the attorney's caseload. In fact, some contract attorneys are even questioning the right of OPD to review files in the cases assigned by the agency. Unless overridden by no one else in the area having the expertise of a contract attorney for particular types of cases, contracting with attorneys depending exclusively on OPD is not cost effective. OPD should be looking at getting approval for more FTE lawyers when such a situation arises.

¶151 By way of example, the federal defender program does not go through a data collection and case weighting process some suggest the OPD contract program should have. It is the ethical responsibility of the Criminal Justice Act (CJA) attorney accepting a federal appointment to evaluate his or her caseload before accepting an assignment. Those private attorneys are officers of the court just as contract attorneys for OPD are. All are ethically bound to provide effective assistance of counsel for their CJA or OPD clients and as well as for clients retaining the lawyer.

¶152 Besides, OPD is not aware of a case weighting system for civil cases. No one has suggested that there is one used anywhere. None has been found through an internet search. Developing a civil case weighting system would take years considering the arduous path OPD attorneys and management have followed in developing a case weighting system for the cases OPD handles.

¶153 Further, the network of courts spread everywhere, and operating independently of the others, also illustrates why supervision of contract attorneys is so difficult. The CPD and the contract manager cannot substantively or meaningfully provide supervision from the central office.³⁰⁰ Contract attorneys are used where it is impractical and inefficient for the FTEs, including the OPD managers, to go. Supervision in fact is remote. The supervisor must have the time for studying status reports and scrutinizing claims for payment for information about the case progression. Correspondence and phone calls are the primary means of communication.

²⁹⁹The AU team recognized that the supervision of contract attorneys is "somewhat unique" at 10/2009 AU report, p. 60, <http://publicdefender.mt.gov/resources.asp>.

³⁰⁰10/2009 AU report, p. 21, <http://publicdefender.mt.gov/resources.asp>.

Also, there must be time for the supervisor to visit contract attorneys in remote locations, review court and case files,³⁰¹ and interviewing others for getting a sense of how well the attorney is doing with assigned cases. Perhaps more than other reasons already given, the circumstances surrounding the supervision of contract attorneys underscores the need for reducing, if not eliminating, the caseloads carried by OPD managers without putting the burden of their caseloads on other FTE attorneys.

¶154 The PDC and OPD management will strive at improving the supervision of contract attorneys just as they will in other areas of management. More work will be done on achieving better uniformity and consistency across the regions. The burden of supervising the conflict lawyers and managing the conflicts program has fallen on the shoulders of a 0.5 FTE who, for ethical reasons, cannot rely on the RDPDs for assistance.³⁰² The management structure and the contract manager office will be studied again for determining what, if any, adjustments are needed for improving the administration of the contract program and in the supervision and performance evaluations of the contract attorneys.

¶155 Performance Evaluations of Contract Attorneys. The final component of the competitive process for contracting for attorney services is a program for the evaluation of their performance.³⁰³ The PDC is charged with implementing rules "... requiring evaluation of every contract attorney on a biennial basis by the chief contract manager based on written evaluation criteria."³⁰⁴ PDC standard IV.5.A³⁰⁵ says each private attorney providing contract or conflict services will undergo a performance evaluation biennially. They agreed they will be evaluated in the MOU. The standards says the evaluation will be done by the contract manager or the conflicts manager.³⁰⁶ The CPD, the training coordinator, and the RDPDs may assist.³⁰⁷ Who will participate in the evaluations is echoed in OPD policy 135.³⁰⁸ The standard and the policy should also include the CAD as an evaluator, in at least the appellate cases.

¶156 The PDC is supposed to limit the number of contract attorneys so that all may be meaningfully evaluated.³⁰⁹ The AU team was of the belief three years ago that there are too many contract attorneys for meaningful evaluation to be done in compliance with the OPD protocol.³¹⁰ Nonetheless, OPD is in need of more contract/conflicts attorneys in many areas of the state. The PDC must amend OPD policy 135 into compliance with the statutory biennial requirement.

³⁰¹ Some contract attorneys are questioning the right of OPD to review files in the cases assigned by the agency. This recently raised issue must be resolved.

³⁰² *State v. St. Dennis*, 2010 MT 229, 358 Mont. 88, 244 P.3d 292.

³⁰³ *M.C.A. §47-1-216(5)(f)*.

³⁰⁴ *M.C.A. §47-1-216(10)*.

³⁰⁵ See PDC standard IV.5.A, p. 20, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>.

³⁰⁶ *Id.*, PDC standard IV.5.B, p.20.

³⁰⁷ *Id.*

³⁰⁸ See OPD policy 135, <http://publicdefender.mt.gov/policies.asp>.

³⁰⁹ *M.C.A. §47-1-216(9)*.

³¹⁰ 10/2009 AU report, p. 21, <http://publicdefender.mt.gov/resources.asp>.

¶157 The AU team also recognized that contract attorneys are considerably more difficult to evaluate.³¹¹ So the team recommended, “*Special procedures should be developed for evaluating contract lawyers, relying primarily on the information provided in the periodically filed fee petitions and the proposed closing documents.*”³¹² In the commentary to recommendation 12 the AU team outlined its idea for going about proficiency evaluations of contract lawyers. Even with reduced or eliminated caseloads, the team thought staff obligations make it unlikely the RDPDs could participate heavily in contract lawyer evaluations.³¹³ The conclusion was that, primarily, the evaluations should be done by the contract manager with RDPDs submitting “noteworthy” observations and with oversight by the CPD who should not be actively engaged in the process.³¹⁴ The primary source of information should come from the claims for payment and the case closing documents in the team’s view.³¹⁵ The team forgot to mention the status reports. The thought was that the use of the documents generated by the contract attorney would likely identify most problems and thereby reduce the need for courtroom observations.³¹⁶ The benefits from the AU team proposal were (1) bringing more objectivity into the evaluation process and (2) reducing the evaluation burden to a more manageable level.³¹⁷

¶158 In many ways the contract attorneys are being evaluated in accordance with the AU team recommendation. The evaluation protocol includes observation of the attorney in court, gathering information from clients, the RDPDs, judicial personnel, and training faculty.³¹⁸ Someone, usually the contract manager, meets with the attorney.³¹⁹ The attorney is supposed to provide the continuing education affidavit submitted to the Montana bar.³²⁰ An “experience survey” is updated so the proficiency of the attorney in the different kinds of cases is current.³²¹ When the evaluation is complete the results are determined. If the attorney is found not proficient OPD will recommend remedial action the attorney can undertake.³²² A companion process is for the training coordinator along with the RDPDs to monitor compliance with the PDC standards pursuant to OPD policy 136.³²³ Training recommendations are made along with a training plan if the attorney is found not to be in compliance with the PDC standards.³²⁴ Some shortcomings in the evaluation process that have been noted will be addressed by OPD

³¹¹ 10/2009 AU report, p. 28, <http://publicdefender.mt.gov/resources.asp>.

³¹² 10/2009 AU report, recommendation 12, p. 60, <http://publicdefender.mt.gov/resources.asp>.

³¹³ *Id.*, p. 60.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ See standard IV.5.C, p. 20, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>; OPD policy 135 at <http://publicdefender.mt.gov/policies.asp>.

³¹⁹ See standard IV.5.D, p. 20, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>; OPD policy 135 at <http://publicdefender.mt.gov/policies.asp>.

³²⁰ See standard IV.5.E, p. 20, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>.

³²¹ See standard IV.5.E, p. 20, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>; Policy 135 at <http://publicdefender.mt.gov/policies.asp>.

³²² See standard IV.5.H, p. 20, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>; Policy 135 at <http://publicdefender.mt.gov/policies.asp>.

³²³ See OPD policy 136, <http://publicdefender.mt.gov/policies.asp>.

³²⁴ *Id.*

management and the PDC while reviewing the entire program for better and more efficient ways of conducting performance evaluations.

¶159 **Conflicts.** The PDC has devoted considerable time and effort at addressing conflicts. Emphasizing that the duty of loyalty to the client is paramount,³²⁵ PDC standard III.4 goes into great detail about the organization of OPD and the OAD, stresses how early detection of a conflict is essential, states unequivocally that the rules of professional conduct trump the standards to the extent the latter is interpreted as inconsistent with the former, and provides guidance regarding *pro se* conflicts and for those situations that do not present *pro se* conflicts.³²⁶

¶160 The AU team was bothered by the structure of OPD for addressing situations when conflicts arise.³²⁷ The team advocated for a trial and appellate office separated entirely from OPD that would be funded by the state separately from the OPD budget.³²⁸ Appointment of a private attorney as the conflict lawyer by the presiding judge, paid by the county, was an alternative proposed.³²⁹ The team recognized doing so would unfortunately defeat the objective of the independence of counsel.³³⁰ Ultimately, the AU team recommended, “A *separate Conflicts Office should be maintained for trial and appellate cases with the director reporting to the Commission, not the Chief Defender.*”³³¹

¶161 After the AU report, the PDC set about separating OAD from the influence of the CPD. The chief appellate defender began reporting directly to the PDC. A budgeting program for OAD separate from the OPD program was set up. Last session the transfer of the responsibility for the supervision of OAD from the CPD to the PDC was sanctioned by HB 97 amending several statutes. The PDC hires and supervises the CAD.³³² Among duties paralleling those of the CPD, the CAD directs, manages, and supervises “... all public defender services provided by the office of appellate defender, including budgeting, reporting, and related functions;”³³³ hires and supervises “... the work of office of appellate defender personnel ...;”³³⁴ and keeps a record of OAD services and expenses and submits records and reports to the PDC.³³⁵ This change in structure substantially reduces, if not eliminates, the potential for a conflict created by the CPD exerting undue influence over the CAD and OAD in the handling of an appellate case. However, when the OAD identifies a conflict of whatever nature, the CAD refers the appeal, the postconviction relief case, or the *habeas corpus* petition to the conflicts manager.

³²⁵ See <http://www.montanabar.org/associations/7121/files/rpc.pdf>. Adherence to the duty of loyalty to the client is ethically required by Montana Rules of Professional Conduct 1.10.

³²⁶ See PDC standard III.4, pp. 8-15, <http://publicdefender.mt.gov/forms/pdf/Standards.pdf>.

³²⁷ 10/2009 AU report, pp. 35-38, <http://publicdefender.mt.gov/resources.asp>.

³²⁸ *Id.*, p. 38.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ 10/2009 AU report, recommendation 7, p. 57, <http://publicdefender.mt.gov/resources.asp>.

³³² M.C.A. §47-1-205(2)(a).

³³³ M.C.A. §47-1-205(3)(a).

³³⁴ M.C.A. §47-1-205(3)(d).

³³⁵ M.C.A. §47-1-205(3)(f).

¶162 A conflicts manager position was created during the last legislative session.³³⁶ The conflicts manager is hired by and reports directly to the PDC. OPD policies 116 and 119³³⁷ have been revised to put the conflicts manager in charge of coordinating the assignment of counsel and tracking the progress of the representation.

¶163 Data collection items 6 (basic client information), 7 (charging history), and 8 (involved parties to the violation) in OPD policy 210³³⁸ are needed for identification of conflicts. For the timely identification of conflicts this data must be collected and entered into the case management system at the opening of the case and promptly as new information comes in as the case progresses. Client harm was reported by the ACLU team based on information they received. Conflicts checking at a stage in which major witnesses and victims are identified only by their initials³³⁹ is clearly a practice that will be discontinued if it has not been already. Other examples reported are inappropriate as well. An office never seeing a conflict it couldn't rationalize³⁴⁰ is believed to be a past practice in view of the 1,720 cases in which the conflicts manager assigned conflict counsel in the first two quarters of FY 2012.³⁴¹ Of course, new reports of bad practices will be investigated.

¶164 Issues. A fairly concentrated but also somewhat sparsely populated culture shows up in the OPD caseload more and more frequently. Prior offenders and witnesses become victims. Witnesses and victims become offenders. More so in Montana than in densely populated areas, there is a greater likelihood that offenders, victims, and witnesses will know each other or will have been associated in some way. A conflict almost always arises when a regional office is ordered to assign counsel and the office is currently representing an alleged victim or a potential prosecution witness. The same conflict can arise for the same reasons when the alleged victim or potential prosecution witness is a former client of that office, or for that matter a former client of OPD. The problem arises when privileged information, or maybe just prior knowledge about something about the former client, usually that client's character or credibility, would be useful in representing the new client.

¶165 Managing conflict cases is not without its problems. At the February 10, 2012 PDC meeting the conflicts manager reported that in some regions there has been such an increase in cases needing conflict counsel that the demand exceeds availability.³⁴² The example given was that there are only four or five contract attorneys in the region 3 (Great Falls) area who will routinely accept a limited number of appointments. The problem becomes clear when the availability of only four or five lawyers is put up against 43 new conflict cases in region 3 in December 2011 alone. Since December a Great Falls attorney has agreed to take appointment more frequently. That gain has been offset by appointments in 71 conflict cases in April 2012.

³³⁶ M.C.A. §47-1-118.

³³⁷ See OPD policies 116 and 119, <http://publicdefender.mt.gov/policies.asp>.

³³⁸ *Id.*

³³⁹ 10/2011 ACLU report, p. 11, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

³⁴⁰ *Id.*, p. 13.

³⁴¹ See the "Conflict Coordinator Report," Agenda Item 5.C, on the agenda of the February 10-11, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/02102012.asp>.

³⁴² *Id.*

¶166 Virtually all postconviction relief cases contain ineffective assistance of counsel claims. These claims raise sufficient concerns about conflicts that the CAD refers those cases to the conflicts manager for appointment of an attorney in private practice to undertake the representation. These cases are time consuming and can go on for an extended period of time. Thus, they are comparatively expensive. The number of these cases opened in a year varies. The appellate office had a carryover of 17 cases at the beginning of FY 2011 with a balance of 11 at the beginning of FY 2012 which has grown to 16 as of March 31, 2012.³⁴³ Under consideration is to seek another FTE in the conflict office whose primary responsibility would be providing services in the postconviction relief cases. This position could also be designated as the relief for the conflicts manager.

¶167 Currently, the costs associated with providing conflict attorneys are paid out of the program budgets for OPD and OAD. Under consideration is the creation of a third budget program so the costs of conflict cases are isolated from other operations for tracking and appropriation purposes.

¶168 The conflicts manager position is currently being filled as a 0.5 FTE position. The conflicts manager coordinates with OAD and the regions, pre-approves the appointment of conflict counsel, and then finds an attorney to appoint. The conflicts manager follows the progress of the conflict attorneys in their representation, resolving client complaints, providing advice and guidance to the attorneys and evaluating performance. The conflicts manager also undertakes record keeping and the front-end of processing claims for payment. Much needed, there currently is no support staff. No one independent of the CPD or CAD is available for filling in when the conflicts manager is ill or wants to take compensatory time or vacation. 1,720 cases needing the appointment of conflict counsel, sometimes more than one in a case, followed with oversight, is much more than a half time person can be expected to handle. Experience so far in FY 2012 dictates that the conflicts manager position must be full time with support staff assistance in handling the administrative functions. There has to be relief available for the conflicts manager when ill or on leave.

¶169 **Staff for PDC.** While the ACLU report does not address this subject directly, “The Commission itself should evaluate and assess what statutory provisions have been adequately satisfied and where it has fallen short.”³⁴⁴ The AU team suggested, “*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.*”³⁴⁵ At the time of the AU report, *M.C.A. §47-1-202(1)* provided for the CPD acting “... as secretary to the commission and provide administrative staff support to the commission.” The AU team thought the provision for the CPD serving as the secretary should be deleted because, in the team’s view, the ability of the PDC to supervise properly was made difficult by the relationship of the CPD serving as the secretary for the PDC. They emphasized that neither the CPD nor any other OPD staff member should hold any position on the PDC.³⁴⁶

³⁴³ See p. 2, of the “Appellate Defender Report,” Agenda Item 4, on the agenda of the April 13, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/docs/04132012/.pdf>.

³⁴⁴ 10/2009 AU report, recommendation 29, p. 66, <http://publicdefender.mt.gov/resources.asp>.

³⁴⁵ *Id.*, recommendation 25, p. 65.

³⁴⁶ *Id.*

¶170 The commissioners serve without compensation. Saddling a commissioner with the time consuming burden of planning and coordinating PDC and committee meetings, publishing and posting timely agendas, compiling and distributing information that will be considered, recording proceedings before the PDC and its committees from which minutes are prepared, along with incidental duties is too much for anyone to expect of an uncompensated commissioner. Creating and funding a secretary working just for the PDC would come from the OPD budget and thereby diminish the OPD workforce. Those administrative activities have always been done extremely well by OPD staff. The PDC does not need a “secretary” for administration other than for relieving stress on OPD staff.

¶171 PDC Staff Composition. The implication of AU recommendation 25 is that the PDC cannot rely on the CPD, CAD and OPD staff for candid and impartial reporting on the condition of the agency. Everyone surely recognizes that information will be presented in varying degrees of accuracy due to the perceptive filters of the reporters. 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. If the need for a PDC staff is based on a real, objective basis for believing the CPD, CAD and OPD staff are misleading the PDC, a PDC staff must be 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. Such a PDC staff must be capable of accurately appraising the performance of the attorneys in the representation of their clients, evaluating the capability and effectiveness of management and fiscal accountability at all levels, and assessing the uniformity and consistency of compliance with statutes, rules, regulations, standards, policies and directives in the administration of the agency. The recent search for the new CPD establishes that one person with all of those capabilities will not likely be found in Montana. A lawyer capable of evaluating the quality of representation can assess the level of case and attorney management but probably will not be qualified at auditing the fiscal and administrative components. If true, another staff person would be needed for evaluating the latter functions. Support staff will certainly be needed for assisting those PDC staff members.

¶172 Issues in Funding PDC Staff. During the 2011 session AU recommendation 25 was addressed in SB 187. Ultimately, *M.C.A. §47-1-202(1)* was amended to read in *M.C.A. §47-1-202(1)(a)* that the CPD “act as secretary to the commission and provide administrative staff support to the commission until the commission can hire its staff as provided in 2-15-1028(6)(b).” *M.C.A. §2-15-1028(6)(b)* provides, “New staff positions for the commission may be added only when the public defender account established pursuant to 47-1-110 has received sufficient revenue pursuant to 46-18-113(1)(a) and (1)(b) (sic.)³⁴⁷ to maintain a balance in the account that would sustain any staff position approved by the commission for at least 1 year.”

¶173 Funding three or four PDC staff positions from the OPD special revenue account is highly doubtful.³⁴⁸ The last two OPD fiscal reports to the Governor, Supreme Court and

³⁴⁷Should be *M.C.A. §46-8-113(1)(a) and 1(b)*.

³⁴⁸The February 5, 2009 *Amended Judgment and Commitment* in *State v. Stout*, cause no. DC-07-94 in the Montana Twenty-first Judicial District Court, Ravalli County, provides an example why. Stout was convicted for

Legislature have an “Assessments and Payment of Costs for Assigned Public Defenders” section that analyzes the difficulties associated with recovering the costs of representation from indigent clients. In the materials for the February 10, 2012 PDC meeting is a statement of the assessments and collection of fees and costs since agency inception which shows 3,149 OPD client accounts receivable of \$1,006,293 at the end of FY 2011 that grew to 3,926 clients owing \$1,203,048 during the first half of FY 2012.³⁴⁹ \$80,080 was deposited into the OPD special revenue account during the first two quarters of FY 2012 from payments by 1,804 clients, paying on average \$44.39 each.³⁵⁰ Deposits into the OPD special revenue account grew from \$60,674 in FY 2010 to \$123,994 in FY 2011.³⁵¹ While these statistics show increasing deposits that may approach \$160,000 for FY 2012, more experience is needed before the PDC can rely on a special revenue balance “that would sustain any staff position approved by the commission for at least 1 year” as is currently required by statute. \$160,000 will not sustain a staff of the size and with the qualifications needed by the PDC if the CPD and administrative staff of OPD are supplanted.

¶174 Unless amended or repealed, *M.C.A. §2-15-1028(6)(b)* prohibits the PDC from adding new staff positions for the commission until there is a sufficient balance in the special revenue account to sustain a salary for at least one year. There is a rapidly approaching legislative session by which time the PDC will not have enough reliable information to predict whether there be an adequate balance in the account during the next biennium to hire a staff. *M.C.A. §2-15-1028(6)(b)* must be amended or repealed and funds appropriated if the PDC is going to have a staff before the FY 2015 biennium.

Conclusion

¶175 The ACLU team made several recommendations about action the PDC and OPD should take.³⁵² This overview should demonstrate why there must be further debate and more

the deliberate homicide of her husband and in the *Judgment* was committed to the Montana state prison for women for the rest of her natural life [p. 2]. She had served 128 days in jail prior to her sentencing [p. 4]. The district court ordered her to reimburse Ravalli County \$14,570.99 for the costs of prosecution and trial and to reimburse OPD \$57,127.00 for the costs of representation [pp. 3-4]. Stout was the beneficiary of a \$500,000 insurance policy on the life of her husband [p. 6] that she can never collect because she cannot benefit from the criminal act for which she was convicted. Her husband listed the jointly owned family home for sale at \$795,000 with a debt against the property for \$204,300 [pp. 7-8]. Although the property was jointly owned, Stout did not acquire her husband’s interest in the property for the same reason she could not collect the proceeds of the insurance policy. Without considering all of the market variables in selling the home, on paper Stout had an equity interest of \$295,350 ($\$590,700 \div 2$). She does retain a \$125,000 interest in the homestead exemption. Pursuant to *M.C.A. §47-1-111(3)(b)*, Stout qualified for representation by OPD because she did not have sufficient disposable income and assets to hire private counsel despite all of the equity she appeared to have on paper. Any private counsel would have been a fool to take a mortgage against the family home to secure payment of a fee when at a foreclosure sale the \$204,300 debt on the property plus the full \$250,000 homestead exemption, at a minimum, would have priority for payment ahead of the fee mortgage. Neither does OPD have the ability to collect the \$57,127 if for no other reason than OPD cannot pay the \$468,871 that has priority ahead of its lien.

³⁴⁹ See p. 8 of the “Operating Report” at Agenda Item 8.A on the agenda of the February 10-11, 2012 PDC meeting at <http://publicdefender.mt.gov/meetings/02102012.asp>.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² 10/2011 ACLU report, pp. 14-15, <http://publicdefender.mt.gov/meetings/docs/10242011/ACLUreport.pdf>.

discussions among the stakeholders and interested parties before implementing the recommendations by the ACLU team. For instance, with regard to delegating more expenditure authority to the regions the PDC and OPD management are not concerned about a region exceeding its annual budget. The concern is over the regions collectively exceeding the budget appropriated by the legislature. Different strategies than those recommended may be in order.

¶176 The AU team recommended that “*The Commission itself should evaluate and assess what statutory provisions [M.C.A. §47-1-104 (1), (2), (3) and §47-1-105] have been adequately satisfied and where it has fallen short.*”³⁵³ In large part this overview is an extension of that ongoing evaluation and an objective, verified assessment of what has been done toward compliance with the AU team and other recommendations, along with conclusions about what it will take to achieve the true potential of OPD.

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³⁵³ 10/2009 AU report recommendation 29, p. 66, <http://publicdefender.mt.gov/resources.asp>.