

MONTANA PUBLIC DEFENDER COMMISSION
CONTRACTS PROCESS COMMITTEE MEETING

Goodkind Building
139 North Last Chance Gulch, Helena, MT 59601

June 11, 2013

MINUTES

Approved at the July 11, 2013 Contracts Process Committee Meeting

Call to Order

Committee Chair Chuck Petaja called the meeting of the Contracts Process Committee to order at 9:10 a.m.

Committee Members Present

Ken Olson, Great Falls; Chuck Petaja, Helena

Agency Team Members Present

Wade Zolynski, Chief Appellate Defender; Bill Hooks, Chief Public Defender; Harry Freebourn, Administrative Director; Larry Murphy, Contract Manager; Kristina Neal, Conflict Coordinator

Interested Parties

Niki Zupanic, Public Policy Director, American Civil Liberties Union of Montana

Approval of Minutes of August 8, 2012 meeting (*Action Item)

Commissioner Olson moved to approve the minutes as drafted. Commissioner Petaja seconded and the motion carried.

Process for Developing Future Rates

A. Developing New Rates (Operation Expenses, Paralegal, other?)

Mr. Murphy provided a handout proposing paralegal rates as a cost-saving measure for the committee's consideration.

There is a statutory definition of "paralegal" and the education and experience criteria are included as Attachment A. Paralegals would be required to do substantive legal work to qualify for payment, either as an independent contractor as an employee in a contract attorney's office.

Commissioner Olson asked Chief Hooks to offer an opinion and explain how the use of paralegals could be incorporated regionally. Chief Hooks has concerns about using contract paralegals. OPD does employ some paralegals, and it would be important to look at what they do as FTEs compared to what services we would be contracting for. In law firms with a paralegal on staff, it would be difficult to ensure the agency is not being billed for tasks that should be considered part of the firm's overhead (e.g. making copies). If overhead is an issue,

we need to look at the hourly rate and try to revise that to incorporate the appropriate overhead. On the other hand, at least contracting with a paralegal for a particular case would require going through the pre-approval process, verifying the need as well as the anticipated cost. Contractor costs are skyrocketing (from \$500,000 per month to \$700,000 per month) so it is essential to understand what the agency is getting and to be able to provide appropriate oversight.

Commissioner Olson asked if the necessity for this service is anticipated to be primarily from contract lawyers, and Mr. Murphy said that he hadn't considered FTE needs at all. He estimates 25-30% of the contract attorneys have paralegals and his idea is to pay the lower rate to those firms as a cost-saving measure. Commissioner Olson said that using paralegals could be effective in a major case.

Mr. Freebourn clarified the requirement for the Commission to set rates. By administrative rule, the Commission determines appropriate compensation rates for contract attorneys and others providing services related to the provision of public defender services. There would need to be a Commission-established rate to contract with an independent paralegal for services, but paralegal services provided as part of a contract attorney's work should be part of the overhead.

B. Revising Existing Rates

Mr. Freebourn noted that the minutes from the previous meeting clearly reflect the process of separating the rate-setting from funding the new rates. In the past when the agency brought a proposed contractor rate increase to the Governor's budget office, OBPP asked how the proposed rate was determined and the answer has always been that it just needs to be higher than the current rate. Another issue from the perspective of the budget office is that rate changes have potential consequences for other agencies. It is time to go through a process that will justify the new rates, and then work on funding it.

Commissioner Petaja thinks that there is a good basis for a higher rate already, without undertaking a new information-gathering process. The federal rate, rates in other state agencies, and private bar rates are all known factors.

Chief Hooks has a survey from NACDL showing rates in other states, with a nationwide average of \$65 for felony cases. He suggested forming an informal working group including contract attorneys to identify overheads in various areas around the state. He would also like to find a better way to address attorney expenses than the existing \$25 stipend.

Mr. Freebourn agreed that we already know some of the existing rates for the groups listed in section 5 of the handout. He suggested adding another factor comparing FTE pay and weighting it based on potential disruption to the workforce. The other rates can be weighted based on who we are competing with (primarily the private bar) to establish a blended rate, which can then be discounted based on the fact that contractors know they will be paid promptly by the State. He came up with a rough estimate of \$88 per hour, which when documented and agreed upon is a starting place for closing the gap between the current and proposed rate.

The process of documenting the data that the new rate is based on, and inviting public comment prior to adopting it, will give more weight to the funding request in the next session. It should be similar to the method undertaken when developing rates for mental health services. Funding the mental health rates was not difficult because they are such a small percentage of the total business, but every \$1 increase in the attorney rate equals \$100,000 annually.

Commissioners Petaja and Olson agreed to establish the attorney rate before setting a paralegal rate. They would like Chairman Gillespie's input. Mr. Freebourn will gather the information on the attorney rate for the next meeting of this committee.

C. Case Caps

Chief Hooks said that as we go forward in gathering data from the private bar as part of the rate-setting process, we might come up with a template for developing soft caps on certain case types, similar to the federal system. There would be a recommended maximum for a given type or category of case, so that the contractor knows that is the most they can get for a case without asking for additional funding. He isn't convinced that this is a viable option, but he doesn't want to eliminate any ways to control costs.

Commissioner Petaja said that this could be especially useful in the misdemeanor area, (which is about 30% of the budget)—especially those lesser offenses that the agency proposed eliminating jail time for in SB 53. Commissioner Olson agreed, but Mr. Murphy cautioned against paying by the case, which was a large part of the ACLU lawsuit. The key word is *soft cap*—it is not an absolute limit, but the point at which a conversation needs to occur.

Ms. Zupanic said that flat fee contracts were indeed a major concern in the ACLU lawsuit because there is incentive to provide lesser services and less advocacy for the client. A suggested or soft cap raises similar concerns but is not exactly the same. If the agency were to develop an internal rubric that would raise a red flag for exceeding an expected cap, the question becomes what steps the agency would take and how would it impact the client services. They would not want to close the door on giving the agency a way to monitor spending on a certain case type in a certain region, but they do want to make sure it doesn't have a chilling effect on client representation. Chief Hooks said that the agency shares those concerns.

Public Comment

There was no additional public comment.

Old Business/New Business

Another meeting will be scheduled the week of July 8 to look at attorney and paralegal rates, and get input from Commission Chairman Gillespie.

Adjourn

The meeting adjourned at 10:40 a.m.