

MONTANA PUBLIC DEFENDER COMMISSION
STANDARDS COMMITTEE MEETING

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

June 11, 2013

DRAFT MINUTES

Committee Members Present

Ken Olson, Great Falls; Fritz Gillespie, Helena; Brian Gallik, Bozeman

Agency Team Members Present

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

Interested Parties

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

Call to Order

Committee Chair Fritz Gillespie called the meeting of the Standards Committee to order at 11:05 a.m.

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

Commissioner Olson moved to approve the minutes as drafted, Chairman Gillespie seconded and the motion carried.

Discuss Possible Standards Revisions

A. Standby Counsel

Chairman Gillespie suggested a review of OPD's standards for standby counsel following recent cases where a pro se defendant didn't understand the role of standby counsel. He has been in conversation with Conflict Coordinator Kristina Neal regarding the review. Ms. Neal said that the current standards are actually pretty good, but she will propose some minor revisions to make the role of standby counsel clear in relation to people who are representing themselves. The standby counsel is there primarily at the discretion of the court to assist with procedural matters, not to do research for the defendant or provide other services or supplies. She will add some language and present it to the Commission for approval at the July 15 meeting.

B. Ancillary Proceedings

Chief Public Defender Bill Hooks has concerns about the standard that allows for very limited representation in ancillary or collateral proceedings. He has had to decline several requests for involvement in ancillary proceedings in recent months due to the current standard limiting the scope of representation. In some instances the case could have a

much better resolution for the client if the OPD attorney can be involved in the collateral proceeding (DN cases for instance). Other situations that are currently prohibited are forfeiture proceedings and sentence relief or expungement for cases prior to the inception of OPD. Chief Hooks proposes to draft language to expand the scope of involvement in ancillary proceedings subject to a pre-approval process (for both FTE and contract attorneys), allowing management to make a decision in each specific case.

Chairman Gillespie cautioned that any expansion of ancillary representation must align with the agency's statutory obligations. Chief Hooks questioned whether the statute says only what the agency must take on and therefore limits what it cannot, or if it identifies the minimum requirements. Chairman Gillespie said that with the overwhelming caseload the agency currently has, taking on any new representation that is not statutorily required could draw criticism, and it should be a subject for discussion by the full Commission.

Chief Appellate Defender Wade Zolynski said that there are issues regarding ancillary proceedings in his area as well. There is confusion regarding whether ineffective assistance of counsel claims are postconviction or appellate proceedings. Cases with similar facts are sometimes decided differently. Chief Zolynski said that it would help to have clarification in the standards on how to proceed. Again Chairman Gillespie expressed concerns about statutory limitations on the agency's authority to handle collateral issues, even though they make sense. It might be necessary to pursue statutory amendments expanding the agency's role, which would be challenging.

Chairman Gillespie invited public comment. Niki Zupanic, ACLU Montana Public Policy Director, said that she shares the Chair's thoughts regarding the statutory limitations, and suggested that OPD would need to present any proposed legislative changes to expand the scope of services as being in the interest of more efficient representation. Chairman Gillespie commented that other partners in the criminal justice system should be included in the discussion in the interest of improving the system over all.

Chief Hooks, Chief Zolynski and Ms. Neal were asked to develop a draft standard for discussion by the full Commission for the October meeting. The issue will be discussed in general terms at the July meeting so that staff can have some input from the Commission before drafting the revisions.

Plan for Comprehensive Standards Review

There has not been a comprehensive review of the Standards since they were originally adopted, although certain standards have been amended in a piecemeal fashion over the years. Chairman Gillespie said that it would be appropriate to do a Standards and policy review to ensure that they are in agreement with each other, that they are in compliance with the new strategic plan and that they satisfy audit requirements. He believes that Standards should be aspirational, because they must be designed in the best interests of the client, not the agency. Policies, on the other hand, must be enforceable and enforced.

Chief Hooks, Chief Zolynski and Ms. Neal were tasked to work on a comprehensive review.

Appellate Standards

Chief Zolynski has been testing an appellate case weighting system based on NLADA and ABA standards since last fall. It will be ready to present to the full Commission at the July meeting. Appellate policies are still under development; the large loss of personnel in the last fiscal year required all of his energy just to keep the boat afloat.

Chairman Gillespie said that the Yarlott decision is not necessarily a standards issue, but it provoked a discussion of how the trial and appellate offices can work together to ensure that trial counsel preserve issues for appeal. He would like to see Ms. Neal and the two chiefs coordinate on current trends seen at the appellate office and how they relate back to the trial level, for both FTE and contract attorneys. Chief Hooks has had some preliminary discussions with the training department on how to disseminate this type of information quickly.

There was discussion of several issues related to children's representation in DN appeals. Some members of the private bar are asserting children's rights more aggressively, although they aren't necessarily in agreement with the OPD representation standards regarding the child's expressed wishes. Chief Zolynski said that if a child is to be represented at the appellate level, his office needs to retain the ability to assign the attorney because although there are a lot of DN attorneys around, very few of them have appellate experience. Standards are needed for representation of children in appellate proceedings, and a policy needs to be developed to ensure that contract attorneys follow the appropriate appellate referral procedure in all cases. Mr. Freebourn asked to be kept in the loop regarding any increased representation of children at appeal so that he can track the fiscal impact.

Chairman Gillespie asked that agency management have a well-reasoned standard ready for review by the Commission by the end of the year. It should allow the agency to maintain as much control as possible. In the meantime, Chief Zolynski will serve notices of appeal on children in DN cases, with instructions to trial counsel on following the existing appellate process.

Public Comment

There was no additional public comment.

Old Business/New Business

No future meetings of the committee will be scheduled at this time. The full Commission will be briefed at the July meeting.

Adjourn

The meeting adjourned at 12:15 p.m.