

# MONTANA PUBLIC DEFENDER COMMISSION

## **Draft Minutes**

The Broadway Inn  
Missoula, Montana

**July 17-18, 2008**

### **July 17**

#### **Call to Order**

The Montana Public Defender Commission meeting was called to order by Chairman Jim Taylor at 12:25 p.m.

#### **Commissioners Present**

Mike Sherwood, Missoula; Vic Miller, Harlem; Tara Veazey, Helena; Wendy Holton, Helena; Stephen Nardi, Kalispell; Jennifer Hensley, Butte; and James Park Taylor, Missoula.

#### **Commissioners Absent**

Caroline Fleming, Miles City; Gabriel Grant, Browning; William Snell, Billings. Dan Donovan, Great Falls, did not seek reappointment to the Commission.

#### **Interested Persons**

Scott Crichton, American Civil Liberties Union of Montana (ACLU); Brent Doig, Office of Budget and Program Planning

#### **Introduction of New Members**

There were no new members present.

#### **Election of Officers**

The Chair and Vice-Chair are elected for one-year terms. Chairman Taylor is unable to continue as Chair because he will be in China for a good portion of the next year. Commissioner Hensley moved to nominate Commissioner Veazey as Chair. Commissioner Holton seconded the motion. Commissioner Veazey said she was willing to serve on an interim basis, but would like to have a co-chair with a criminal defense background. She also said that all Commission members will be expected to do more in the absence of Commissioner Taylor. The motion carried.

Commissioner Taylor moved to nominate Commissioner Nardi as Vice-Chair. Commissioner Hensley seconded the motion, and the motion carried.

Chair Veazey read a letter from Governor Schweitzer ([exhibit 1](#)) thanking Commissioner Taylor for his service as the first chair of the Montana Public Defender Commission. Commissioner Taylor was also presented with a token of appreciation from the Commission and the OPD staff.

#### **Committee Formation**

The following changes to committee membership ([exhibit 2](#)) were made:

Commissioner Hensley joined the Contracts Process committee, and left the IT committee.

Commissioner Holton joined the IT committee.

Commissioner Taylor left the Collective Bargaining committee.

Chair Veazey joined the Legislative committee.  
The Caseload Standards committee will now be called the Standards committee.

Each committee will choose a chair and develop a statement of purpose ([exhibit 3](#)).

Commissioner Hensley moved to recess for committee meetings until 8:30 a.m. on July 18.  
Commissioner Taylor seconded. The motion carried and the meeting recessed at 1:00 p.m.

## **July 18**

### **Call to Order**

Chair Veazey called the meeting back to order at 8:35 a.m.

### **Approval of Minutes from the April 18, 2008 Meeting**

The following corrections were made to the minutes:

Page 2, paragraph 3, line 1: delete "in Helena"

Page 6, Public Comment, line 4: change to read "Department of Corrections has not identified it as a problem."

Page 7, second line from the bottom: change "Chairman" to "Commissioner" Veazey.

Commissioner Taylor moved to adopt the minutes as corrected. Commissioner Hensley seconded the motion. The motion carried.

### **Committee Reports**

#### *Budget Committee*

Committee Chair Hensley reported that there were no changes to the committee's purpose as drafted. She said the year-end figures look good and she will review the books with Administrative Director Harry Freebourn after fiscal year end closing next week.

The 2010-2011 biennium budget has been submitted to the governor's office, and a revised budget is expected in August. Chair Veazey noted that operating costs that include contract expenses decreased in FY 08 by almost \$1 million. Chief Public Defender Randi Hood said that is due to the hard work of everyone in the agency. Commissioner Taylor congratulated the staff for managing the budget without the need for a supplemental, *and* without sacrificing client services, and led a round of applause.

#### *IT Committee*

Committee Chair Holton said that the JustWare rollout had some difficulties, due in part to a lack of resources. Bob Simmonds has been hired to fill the case management user support position beginning August 1. The brief bank, which is being hosted free of charge by MontanaProBono.net, will be populated soon and will be available to both FTE and contract attorneys. Two additional videoconferencing sites are planned for the next biennium. The MetNet training sessions are working well and the hope is to video capture all of them for the training library. Commissioner Taylor asked about another FTE to support the IT function, and Mr. Freebourn said that one time funding may be available to address specific projects in the next biennium.

#### *Contracts Process Committee*

Chair Veazey reported on behalf of Committee Chair Sherwood. The dispute resolution process is in place, although it has not been used yet. Eight contract attorneys from various regions have agreed to serve as volunteers on the dispute panel.

Mr. Freebourn presented research on what other state agencies pay for attorney services. The Department of Justice bills attorney services for state agencies at \$84 per hour. Risk Management and Tort Defense pays external attorneys \$115 to \$160 per hour, depending on the attorney's level of experience. Mr. Freebourn also reported on rates in other states. The committee decided that the current budget proposal to increase contract attorney rates to \$75 per hour is justified, particularly due to Montana's unusual geographic makeup and status as a frontier state.

Contract Manager Larry Murphy reported that there are some contract attorneys in Eastern Montana that refuse to sign a Memorandum of Understanding (MOU) but continue to work for OPD. The Commission discussed whether or not contact with the local judges would be useful. Commissioners Veazey and Hensley stated that OPD should absolutely not be doing business with anyone that refuses to sign an MOU because it is not only about rates, but requires adherence to professional standards and training requirements. Chief Hood said that if training is an issue there are other ways to certify an attorney's proficiency. The committee discussed asking a small group of commissioners to travel to Eastern Montana to meet with the contractors to work this out. Training Coordinator Eric Olson suggested doing a training session for the Eastern Montana folks in conjunction with a commissioners' visit.

The MOU problem is also occurring with some mental health providers. Attorneys have favorite providers and not all of them agree to sign the MOU and follow the mental health protocol. It is important to be consistent in this area, too. Commissioner Hensley suggested bringing Mental Health Ombudsman Eve Franklin into the discussion with the mental health providers. Mr. Olson agreed and will update the Commission at the next meeting.

The committee took no action on the stipend issue, so the \$25 per month stipend will remain as is.

The committee discussed rejected claims and requests for pre-approvals. The Commission briefly discussed Commissioner Holton's request and will take action later in the meeting.

#### *Caseload Standards Committee*

Committee Chair Nardi asked to change the name of the committee to the Standards Committee since their work on the caseload standards is nearing completion. The Commission agreed, and this committee will become the standing Standards Committee.

Chief Hood reviewed the caseload management tool, which indicates that some attorneys are doing more work than others. Some regions are tweaking the weighting system and this will be discussed at the next Labor Management Committee meeting. Preliminary numbers indicate a significant increase in total caseload from FY 2007 to FY 2008. An analysis of the final numbers including case types will be forthcoming.

The committee is proposing a change to the representation standard for post-conviction proceedings to reflect a change in the law. The standard will require that when a court determines that an attorney is to be appointed in a post-conviction case, the Appellate Office will assign the case to a contract attorney. This will be discussed later under new business.

#### *Grants Committee*

The Grants Committee did not meet, but Mr. Olson gave an update on recent activity. A \$100,000 grant application for juvenile indigent defense has been submitted to the MacArthur Foundation. It

would involve a team of eight people involved in various parts of the justice system across the state working with three other states to develop “strategic innovations” in juvenile indigent defense. There is also a request pending with the Montana Board of Crime Control (MBCC) to fund attendance at the National Juvenile Defender Leadership Summit in New Orleans for three public defenders. Mr. Olson has a good relationship with the MBCC. They have provided OPD staff with training and are alerting OPD when they identify possible grant opportunities for the agency.

Commissioner Hensley asked about the Native American liaison grant. The position is currently vacant, and the Department of Corrections is trying to fill it. An update will be presented at the October meeting.

Chair Veazey is interested in seeking funding for racial disparity work, and Commissioner Taylor asked that Mr. Olson do some training on racial bias.

#### *Collective Bargaining Committee*

Committee Chair Holton said that contracts are in place with attorneys, investigators and support staff for this biennium. Negotiations for the next biennium will begin in the spring.

The Labor Management Committee (LMC) will expand to include investigators and support staff. Commissioners Holton and Miller plan to attend LMC meetings as guests. The LMC is a very productive group and they are currently working on several issues including flexible hours, confidentiality and the release of information, and case management. Attorney satisfaction will increase if the career pay ladder for is funded by the legislature .

#### *Legislative Committee*

Chief Hood summarized the potential legislation ([exhibit 4](#)), to be acted on under Old and New Business. The custodial questioning bill that failed in the last session has been changed to apply only to felonies in the hope that it will increase the likelihood of passing in the upcoming session. The bill requiring that discovery be provided at no cost to indigent defendants is intended to resolve payment struggles that have occurred in several regions. The committee suggested additional changes to the draft bill.

An issue in Regions 1 and 2 is limiting the ability of public defenders to have contact with clients at the earliest opportunity (prior to the initial appearance). Chief Hood is concerned that other counties may follow suit, and suggested that a change to the statute might be needed. In the meantime, the issue will be handled as it comes up in each area. Commissioner Nardi offered to join in the effort in Kalispell.

Chair Veazey drafted a letter asking for staff and contract attorney participation in the legislative process and asked that it be sent on behalf of the entire Commission.

Commissioner Sherwood said that he is defending cases that should never be charged under the ABA standard requiring both probable cause *and* a reasonable chance of conviction to bring charges. He asked if others were having similar experiences, and suggested that there might be a need to statutorily adopt case rulings requiring judges to review the affidavit.

#### **Discussion with Senator Shockley**

At Senator Shockley’s request, Mr. Freebourn reported on the collection of fee assessments. He noted that the numbers are much lower than they were in some counties prior to implementation of

the statewide system because receipts build over time as fees are assessed, and OPD started from zero. He also noted that in some counties courts simply do not assess fees. Chief Hood explained the indigency determination procedure and the appeal process. Senator Shockley would like to change the statute to require fee collection from indigent clients, including the ability to put a lien on assets. A lively discussion ensued regarding the policy implications of Senator Shockley's proposal. The Commission and Chief Hood put forth the opinion that OPD cannot be required to put clients in a position to violate probation by not paying fees, regardless of who is responsible for collection. The Commission noted that the agency was able to stay within budget without a supplemental request by being cost-effective, and that the small amount that might be collected under Senator Shockley's proposal is probably not worth the additional administrative costs. Senator Shockley said that if it really is not cost-effective to collect fees, it needs to be demonstrated. He closed by saying that the Commission and the agency are doing a good job, and that the situation is much improved since implementation of the statewide system.

### **Public Comment**

Jessie McQuillan announced the launch of the Montana Innocence Project. Ms. McQuillan is the Project's executive director, and she works with an 11-member board. The Innocence Project works to exonerate those who have been wrongly convicted, and they will accept both DNA and non-DNA cases. They also plan to advocate for public policy reforms and expect to be active during the upcoming legislative session. Chair Veazey invited Ms. McQuillan to attend the next meeting of the Commission's Legislative Committee in Lewistown.

Koan Mercer, Assistant Appellate Defender, commented on the fee collection discussion. He said that it is up to the judge to assess fees, and his role as a line attorney requires him to advocate for his client. Mr. Mercer thinks that more fees were included in judgments under the previous system because those fee revenues were going directly to the counties.

Scott Crichton said that in early discussions toward creating the statewide public defender system, one question was the number of FTE that should be devoted to collections; eventually the focus shifted to developing the mission of the new system and discussion of how to collect money from indigent clients was deferred. Mr. Crichton said that the impact of the economic crisis on caseload is related to incarcerating drug offenders. He asked if OPD can determine how much it costs to defend clients charged with drug offenses. Commissioner Taylor was also interested in the number of cases that are drug and alcohol related, and that information will be reported at the next meeting.

Scott Spencer, Assistant Public Defender in the Missoula office, said that it seems like every drug paraphernalia case also results in a felony possession charge for a minute quantity of drugs recovered from the paraphernalia. He suggested that legislative action may be needed to keep drug offenders out of the criminal justice system.

### **Committee Reports (continued)**

#### *Personnel Committee*

Commissioner Nardi reported that the Personnel Committee took no action and received no public comment. Their sole purpose is to hire and supervise the Chief Public Defender.

## Chief Public Defender Report

- *Public Defender Program Update*

Chief Hood reviewed the staffing report ([exhibit 5](#)). A number of new attorneys will start next month. The remote attorneys in Libby and Cut Bank each have a small office and are both very busy. Former Regional Deputy Matt Wald will be doing contract work for OPD. Six to eight modified FTE (“mods”) are being requested and include one for the appellate office, two in Kalispell, .5 to increase the Hamilton investigator to full-time, .5 in Lewistown, and one case management support position.

Charges are expected to be filed in August in what appears will be a death penalty case in Billings. Chief Hood will work with a team consisting of five attorneys, two investigators and support staff. Costs for this case will tracked separately. Commissioner Holton said this will provide a good education for the legislature and the public on the costs of pursuing the death penalty.

Chief Hood said that Executive Order 35-2008 ([exhibit 6](#)) is part of the Governor’s 20 x 10 Initiative. The overall goal is a 20% reduction in energy consumption by the year 2010. The Executive Order encourages the use of electronic meetings versus travel whenever possible to encourage energy efficiency. The Commission suggested various “green” strategies including using less paper and meeting by videoconference.

Development of the regional budgets is in progress, and Chief Hood expects to meet with each of the offices to discuss them.

- *Contract Officer Report*

Mr. Murphy briefed the Commission on Commissioner Holton’s request for pre-approval of costs for an expert in a case that she is handling pro-bono. Commission members are prohibited from contracting as public defenders by statute, so the question is whether it is appropriate for OPD to pay for third-party services for a Commissioner’s client. The governor’s chief legal counsel declined to take a position on the issue and suggested consulting with the Department of Administration (DOA). Following a lengthy discussion, the Commission agreed to 1) adopt an internal policy; 2) ask DOA to review the policy; 3) if DOA approves the policy, Commissioner Holton’s pre-approval request will be granted. Commissioner Holton answered questions but abstained from the decision-making process. Further action will be under Old and New Business.

*Training Coordinator Update*

Mr. Olson reviewed the final numbers for FY 2008 and the training schedule for FY 2009 ([exhibit 7](#)). The Annual Conference is coming up in October, and bias training is scheduled for April, 2009. The sessions have been well-received, as always.

- *Recording Jail Phone Calls*

Fred Hansen (Montana Association of Counties), Captain Dennis McCave (Montana Sheriffs and Peace Officers Association), and Colleen Ambrose (Montana Department of Corrections), joined the meeting by conference call. Captain McCave said that a notice went to all sheriff’s offices and detention centers encouraging them to work with public defenders to make sure that client/attorney calls are not inadvertently recorded ([exhibit 8](#)). To reduce the burden on OPD contract attorneys, Chief Hood will ask each public defender office to provide the local detention centers with the privileged numbers for their contract attorneys as

well as their own office numbers. Commissioner Taylor requested a master list of detention facilities, and Captain McCave agreed to send the list to Mr. Freebourn. The Commission was assured by Captain McCave and Ms. Ambrose that although a documentation exists that a call was made to a privileged number, there is no actual recording made of the call.

- *Appellate Defender Program Report ([exhibit 9](#))*  
Assistant Appellate Defender Joslyn Hunt summarized the report. Ms. Hunt said that the addition of a modified FTE will further reduce the number of cases that the appellate office contracts out.

### **Executive Session – Closed**

Chair Veazey stated, “The following portion of the meeting relates to matters of individual privacy. As Commission Chair, I have determined that the demands of the individual privacy clearly exceed the merits of public disclosure. As such, this portion of the meeting will be closed.” The meeting was closed from 2:00 p.m. until 2:30 p.m., then reopened to the public.

### **General Discussion**

- *Region 3 (Great Falls) Issues*  
The response to Cascade County Attorney Brant Light’s writ for supervisory control was filed by Judge McKittrick a week ago. Chief Appellate Defender Jim Wheelis, Regional Deputy Matthew McKittrick and Assistant Public Defender Vince Vanderhagen also filed a response.
- *Survey Results*  
Commissioner Taylor said that he received 140 responses to the survey he conducted regarding the public defender system. He said that the responses were so varied that he didn’t know what to make of them and he is glad an independent evaluation is in the works. The evaluation will be completed this year at no cost to the agency, and should help provide some valuable information to the legislature.
- *Law School Clinic Program*  
Commissioner Taylor said this issue has been resolved.
- *Commission Operating Procedures (Proxy Issue)*  
Commissioner Taylor dropped his request to attend meetings by proxy.
- *Standards Discussion*  
A change was proposed to Standard XI, relating to post-conviction proceedings ([exhibit 10](#)). A section will be added requiring the appellate office to appoint a contract attorney in post-conviction cases when a court has determined that OPD should provide representation.
- *Summer 2009 Commission Meeting*  
Commissioner Sherwood would like to have a meeting in Polson in July, hopefully in conjunction with the Standing Arrow Pow Wow in Elmo. Staff will explore the availability of facilities.

### **Public Comment—Contract Attorney**

Greg Jackson asked the Commission to reconsider his request for payment in the clemency case he has been working on. Mr. Jackson’s main points were that he was appointed by the court and has

never been “unappointed”; he has an ethical obligation to his client; and, ABA standards require him to do everything possible to save his client’s life. He answered questions from the Commission, and Chair Veazey said they would take action later in the meeting.

### **Old Business/New Business (Action Items)**

#### *Post-Conviction Relief*

Chair Veazey asked if there was a motion regarding the post-conviction relief proceedings. There was no motion and Chief Hood agreed to explore the issue further.

#### *Clemency Claim*

The Commission considered Mr. Jackson’s request. The question is not whether Mr. Jackson’s continued representation of his client is appropriate, but whether or not the public defender act allows the agency to pay for work outside of the agency’s jurisdiction. The case is complicated by civil issues as well as Canadian litigation. Mr. Freebourn suggested that Legislative Analyst Sheri Heffelfinger might be able to help identify the intent of the legislation establishing the statewide public defender system. Commissioner Hensley moved to pay Mr. Jackson’s claims for all services related to the clemency case, subject to the usual review by Mr. Murphy. Commissioner Sherwood seconded the motion. The motion failed and the issue will be tabled until the October meeting. In the interim, Chief Hood will urge Mr. Jackson to continue submitting claims within the 45 day time frame as required. Although they will be disputed until the Commission reaches a decision, they will not be denied for lack of timely submission. Mr. Freebourn will consult with Ms. Heffelfinger regarding legislative intent. Commissioner Taylor will consult with other death-penalty qualified attorneys for their opinion on the case.

#### *Proposed Legislation*

Commissioner Taylor moved to approve the custodial questioning bill as drafted. Commissioner Nardi seconded the motion. The motion carried.

Commissioner Nardi moved to approve the draft discovery bill with the following changes:

**46-15-322. Disclosure by prosecution.** (1) ~~Upon request,~~ the prosecutor shall make available to the defendant for examination and reproduction, without cost when the defendant is indigent as determined ~~represented~~ by the Office of the State Public Defender, the following material and information . . .

Commissioner Hensley seconded and the motion carried.

Commissioner Sherwood drafted the following policy in regards to Commissioner Holton’s request.

#### **Findings**

1. Current OPD Standards provide for compensation of private attorneys at OPD rates when a client who has been privately represented no longer has the resources to compensate his or her attorney.
2. Those Standards also provide for compensation of third parties for costs incurred in the case.
3. Attorneys that are Commission members should be encouraged to accept pro bono representation of indigent persons, without violating statute.
4. Pro bono representation of indigent persons by attorney Commission members ensures both quality representation for the client, and fiscal savings for the OPD system.
5. In order to implement these findings, the Commission now adopts the following policy, subject to the approval of the Department of Administration:

**Policy**

If a Commission member represents an individual who qualifies under OPD guidelines for representation by assigned counsel, and the Commission member agrees to do so without compensation, subject to the OPD pre-approval procedures, the OPD may compensate third parties for costs incurred by the client. Those costs shall include, but not be limited to, witness fees, expert consultation and witness fees, transcript preparation costs, and costs assessed by the prosecution for document and evidence production. Compensation shall be paid directly to the third party requesting compensation and not to the Commission member.

Before OPD pays any costs to third parties incurred by such a client, the Commission member representing the client shall be required to certify in writing that the Commission member will comply with all OPD Standards.

Commissioner Taylor moved to adopt the policy. Commissioner Nardi seconded. The motion carried with Commissioner Holton abstaining. The policy will be submitted to DOA for review.

The next meeting is scheduled for October 10 in Lewistown, in conjunction with the OPD Annual Training Conference.

**Adjourn**

The meeting adjourned at 3:35 p.m.

*Exhibits 1 – 10 have been posted with these minutes to the Office of the State Public Defender website at: <http://www.publicdefender.mt.gov/>.*