MONTANA PUBLIC DEFENDER COMMISSION

State Capitol, Room 152
Helena, Montana

July 23-24, 2009

DRAFT MINUTES

Thursday, July 23

Call to Order
The Montana Public Defender Commission meeting was called to order by Chair Tara Veazey at 8:50 a.m.

Commissioners Present
Caroline Fleming, Miles City, Mike Sherwood, Missoula; Tara Veazey, Helena; Stephen Nardi, Kalispell; Jennifer Hensley, Butte; Kenneth Olson, Great Falls; and Richard (Fritz) Gillespie, Helena. Commissioner Jim Taylor, Missoula, attended portions of the meeting via video-conference from China.

Commissioners Absent
Vic Miller, Harlem; Majel Russell, Billings; and Bill Snell, Billings

Interested Persons
Scott Crichton, American Civil Liberties Union of Montana (ACLU); Niki Zupanic, ACLU; Sheri Heffelfinger, Legislative Services Division; Pat Gervais, Legislative Fiscal Division; Judge Sheldon Singer and Jim Hennings, representing American University

Introductions
Chair Veazey introduced two guests, Jim Hennings and Judge Sheldon Singer, participants on the American University (AU) evaluation team. The Commission had requested technical assistance from AU in the form of an evaluation of the new statewide system. Mr. Hennings and Judge Singer were present to discuss the team's findings.

The Commission members introduced themselves, and Administrative Director Harry Freebourn gave an update on Commission vacancies. Commissioner Nardi has resigned; his replacement will be nominated by the State Bar. Commissioner Fleming is up for reappointment; her position is nominated by the Speaker of the House. Commissioner Miller's position is nominated by the President of the Senate, and Commissioner Russell's position is appointed by the Governor. Commissioners Fleming, Miller and Russell are interested in reappointment.

Chair Veazey presented Commissioner Nardi with a plaque of appreciation and thanked him for his exemplary dedication to public defense in Montana.

Election of Officers (*Action Item)
Chair Veazey said that she had agreed to be the chair on a temporary basis and isn't interested in continuing in that role. Commissioner Nardi nominated Commissioner Taylor as chair.

Commissioner Fleming seconded. Commissioner Taylor declined the nomination because he will be in China until at least November.

Commissioner Hensley nominated Commissioner Sherwood as chair. Commissioner Nardi seconded. Commissioner Sherwood asked for time to consider the idea and Chair Veazey agreed to delay a vote until tomorrow.

Approval of Minutes (*Action Item)
Commissioner Hensley moved to adopt the minutes of the March 26, 2009 and March 31, 2009 meetings as submitted. Commissioner Gillespie seconded. Chair Veazey asked staff to draft a response to Dan Donovan's letter, but said that no change to the minutes was required. The motion carried.

Orientation
Impetus for Enabling Legislation –Scott Crichton, Executive Director, ACLU
Mr. Crichton provided a refresher course on the genesis of the public defender system (exhibits 1-4). He has been engaged in the process for over a decade and has a unique perspective shaped by the litigation which was set aside to collaborate in creating a model indigent defense system.

The quality of indigent defense had been an issue since Mr. Crichton started at the ACLU in 1988, and eventually the ACLU filed a class action law suit. With the trial scheduled for May of 2004, the Law and Justice Interim Committee approached the ACLU and asked to work together for a new system via the next legislative session.

In exchange for the ACLU agreeing to stay the trial, the Attorney General's office agreed to advocate for the new public defender system; they were a very significant ally and they continue to be supportive. The Montana Advocacy Program was also an important advocate for the statewide system. Senator McGee was designated as primary sponsor of the bipartisan bill. There was a very short turnaround from the legislation being passed to appointment of the commission and hiring staff. It was a remarkable achievement in a very short time period.

Mr. Crichton said that the legislation was unique in that it comports with the ABA 10 Principles of a Public Defense Delivery System. He encouraged anyone who hasn't read the National Legal Aid and Defender Association report assessing Montana's indigent defense services under the old system to do so. Commissioners Nardi, Sherwood, Olson and Gillespie described the old system of awarding contracts for public defender services based on low bids. The attorneys served at the pleasure of the judges and funding was always an issue.

Commissioner Gillespie asked if the ACLU can still go back to court and reopen the litigation? Mr. Crichton said they can't, and that is one reason the ACLU has made OPD funding one of their highest priorities in the last two sessions.

Review of Enabling Legislation –Sheri Heffelfinger, Legislative Services Division
Ms. Heffelfinger was the lead staff for the Law and Justice Interim Committee (LJIC). She thanked the Commission for all their work and distributed the committee's final report and the draft bill including amendments (exhibits 5-6).

The ACLU lawsuit forced the LJIC to undertake additional study regarding public defense. The committee held about 10 meetings including all stakeholders and outside consultants. Getting a handle on caseloads and costs was key but almost impossible, and there were big gaps in data despite the efforts of the court administrator and others. There was great hope that cost savings would be realized by implementing a streamlined statewide system. The committee's report explored various options and models for the new system, and there was thoughtful consideration given on all of these topics including eligibility for services. The discussion of where to locate the Commission within the state's structure was critical. To maintain independence it needed to be separate from the Judiciary, and so it had to be part of the Executive branch. This resulted in attaching the new agency to the Department of Administration.

Ms. Heffelfinger was asked how the Commission could maintain it's independence and have a voice in criminal legislation when, during the last session, the Governor's office prohibited all executive branch agencies from testifying on any bills the Governor had not taken a stance on. Ms. Heffelfinger said that as a member of the Legislative branch, she couldn't comment on the Executive branch or it's directives.

Review of Major Initial Program/Commission Decisions
Commissioner Nardi discussed the formation of the 11 regions. The Commission took into consideration judicial districts, basic geography, and cultural homogeneity when drawing regional boundaries. The biggest decision was to staff the regional offices with state employees instead of exclusively using contractors. There was some data available on the cost break to have offices vs. contractors. In addition, Chief Public Defender Randi Hood traveled the state talking to judges and attorneys to determine the best service delivery method. She discovered that in some areas with very high numbers and no county offices service provision was poor. She also discovered that not all of the existing offices were doing the same range of cases, so there was a significant ramp up to doing all of the work required by statute in all areas of the state.

Review of Standards
Chair Veazey said that development of the Standards was very time consuming, with a significant volunteer effort by both the Commission and the public, especially the ACLU staff and Beth Brenneman from the Montana Advocacy Program. There was opportunity for public comment throughout the process. She suggested that it is time to review the Standards and get feedback from others now that they have been in effect for some time.

American University Draft Report
Chair Veazey apologized for the misunderstanding regarding public distribution of the draft report. When the meeting agenda was originally drafted it was assumed that there would be a final report to be distributed and discussed. However, when the draft report was received last week, the Commission and staff were invited to provide comments and identify any incorrect information. Because specific employees are identified in the draft report, Chair Veazey thinks that they should be redacted before distribution to respect the employees' individual right to privacy guaranteed by Montana's constitution. She consulted with the Department of Administration legal counsel regarding whether or not the draft report was considered a public document and was advised that it was not. However, today the legal counsel for Legislative Services gave a different opinion. Chair Veazey suggested as a compromise that the

recommendations at the end of the report be distributed today, and that the full draft report with names redacted be ready for distribution by July 27. Commissioner Sherwood moved to adopt the compromise. Commissioner Nardi seconded. The motion carried. Chair Veazey reiterated her unequivocal support for the public's right to know, and her profound respect for the ACLU, contract attorneys and legislative staff.

Public Comment

Valencia Lane, Legislative Services Division staff attorney, said that she understands the chair's dilemma, but believes the draft report to be a public document. Although she appreciates the chair's compromise in this situation, she wanted to speak to the broader public policy issue that her agency believes they have a right to the document. Ms. Lane expressed concern that too much information will be redacted, and Chair Veazey offered to work with Ms. Lane and the Department of Administration attorney to ensure that only private information is redacted.

Mr. Crichton agreed with Ms. Lane, and is also sensitive to the dilemma. The ACLU's position is that the right to comment on a draft shouldn't be limited to a few.

Evaluation Findings by American University

Chair Veazey distributed the draft recommendations (exhibit 7) and invited Judge Singer and Mr. Hennings to walk through them.

Judge Singer said that what is sometimes lost in a project like this is that there is an emphasis on defects. He said that the team recognizes the hard work that was involved in creating the agency, and that Montana has established as close to a model as he has seen. There are many things to be proud of, including the work of the Commission and staff in launching the agency. He said that they also recognized the difficulties the Commission faced in working from a blank page due to inadequate information from the previous entities, and thinks they did extraordinary work in both quantity and quality.

However, Judge Singer said, exemplary Standards and legislation create an obligation to fulfill expectations. Although the report being discussed today is a draft and is open to criticism, he thinks the recommendations are appropriate.

Mr. Hennings said that it was an interesting process. Although he doesn't agree with Judge Singer on every point, the entire team is in agreement as to the substance of the draft report. He especially praised the Commission's work on the Standards.

Judge Singer and Mr. Hennings proceeded to discuss the 32 recommendations in depth. Key issues that were raised repeatedly are identifying outcomes, improving the information management system, reducing caseloads for managers, morale, communication and conflict issues.

Mr. Hennings said that the AU team knows that not all of the recommendations will be adopted, but it will be up to the Commission to address the issues. Chair Veazey said that the report will be a great roadmap for moving forward and expressed the Commission's appreciation.

Due to time constraints, Chair Veazey suggested that strategic planning be deferred until another meeting, following receipt of the final report. The discussion of the recommendations will continue until 5 p.m. today.

Public Comment
No public comment was offered at this time.

Chair Veazey asked for comments from the Commission, including agenda items for tomorrow. Commission members expressed their appreciation for the work of the AU team, and said that many of the recommendations are issues the Commission has identified in the past. Commissioner Nardi has mixed feelings about leaving now that he can see what the next level might be and is envious of the group going forward.

The meeting recessed at 5:10 p.m. until Friday morning.

Friday, July 24

Chair Veazey called the meeting back to order at 8:30 a.m.

Commissioner Nardi and Mr. Hennings were not present.

Evaluation Findings by American University, Continued
Chair Veazey devoted the first hour to further discussion of the draft recommendations and invited Chief Hood's comments. Chief Hood said that the draft report contains some very valuable recommendations, some of which have been started already simply as part of the evolution of the system. She will meet with the rest of the management team to determine costs of implementing the various recommendations, and will bring those costs to the next meeting, including a time frame for implementation.

Commissioner Sherwood asked Judge Singer if there is a way to prioritize the list of recommendations. Judge Singer said the information system should be the top priority, including disposition information.

Public Comment
Tammy Hinderman from the Appellate Defender's Office asked the Commission to seriously consider recommendation number 7 regarding conflicts. She expressed concerns regarding doing research/briefs for the regional offices and contract attorneys. One of her biggest concerns is that she is unsure of her role in respect to trial attorneys, especially when she is asked for advice. If the case later comes up for appeal, it would have to be contracted out as a conflict. She is also disgruntled over not being part of the collective bargaining unit. It is especially difficult for attorneys that were previously in the union. It creates problems with recruitment and retention as well as morale.

Commissioner Hensley said that a significant part of the history that hasn't been mentioned so far is that OPD had a Native American coordinator for the first couple of years, funded by a federal grant. She would like to see the return of this position. She also found it interesting that there was no mention of Native American issues in the AU draft report, especially in regards to client services. She would like to discuss this in the future.

Commissioner Hensley thinks there should be a seat on the Commission for a staff attorney and maybe a contract attorney as well. She suggested asking the legislature to make that change, and bring them on as non-voting members in the interim. Commissioner Sherwood said that hasn't been very successful nationwide, but that asking for participation as informal members has a better result. Commissioner Fleming has concerns regarding conflict of interest in having a staff member on the governing board. Ex-officio staff and contract members will be discussed under New Business.

Committee Meetings
Committee meetings were conducted as part of the meeting of the whole. The minutes have been recorded separately.

Budget Director's Remarks
State Budget Director David Ewer thanked the Commission for their service. He is aware of the conundrum of resources and mission because he hears it from various areas. The challenge of being the budget director is to work with staff with many missions—to provide public education, health and safety. He knows that OPD is facing reductions in resources with an increase in crime—demands go up, resources go down, and his office has tried to offer advice and suggestions when they can.

Commissioner Sherwood said that public defense is unique because the agency is complying with a constitutional mandate. Mr. Ewer responded that he is aware of all the constitutional mandates for public defense, public education, clean water and more. However, he thinks there is some elasticity in meeting the constitutional mandate. He wants to meet not just the letter but also the spirit of these protections, but we have to make adjustments when the real world struggle is less money and more clientele. Chair Veazey said that the Commission is constantly trying to find the best practices—not trying to create a Cadillac, just trying to meet the constitutional mandate. They also understand the multiple demands of state government as a whole and know that they are interrelated. Poor education leads to increased case load down the road. She thanked Mr. Ewer's staff, especially Brent Doig for his help and availability to both the Commission and the staff.

Mr. Ewer said that OPD is still in the early days of establishing itself in the eyes of the legislature, and he advised keeping narrowly to the mission and letting others worry about advocacy. Commissioner Hensley asked if advocacy isn't part of making the system better for the clients? Mr. Ewer replied that it becomes "in the eye of the beholder" and comes down to politics, which has consequences. He urged the Commission to vet proposed legislation through his office.

Public Comment
Mr. Crichton has concerns about the "deprivation of liberty" that was the basis of the ACLU lawsuit and the eventual inclusion of abuse and neglect cases as the bill finally passed. Since DN costs were never part of the original budget, is there a creative opening to make distinctions between those two services if curtailing services due to budget constraints eventually comes to pass? Mr. Crichton asked what percent of costs and staff time are spent on abuse and neglect? Chair Veazey would like to see that breakdown at the next meeting. It will be helpful if hard

choices have to be made in the future. Commissioner Fleming was asked for her opinion and she said in her view the focus should be on criminal cases unless other resources are provided.

Judge Singer's Closing Comments
Chair Veazey thanked Judge Singer and the AU team again for their efforts on behalf of the Commission. Judge Singer restated that the report is a draft, and he eagerly looks forward to all comments. He thinks there were so many negatives that the positives were overlooked and he wanted to reiterate that what the Commission and staff did to get this system going was remarkable. Judge Singer said that he really enjoyed this project, he thanked everyone for the hospitality, and wished Montana the best of luck.

Public Defender Program Report
Chief Public Defender Report
Chief Hood said that this is a busy time for the system because it is traditionally the time of year when there is quite a bit of turnover. About 20 new lawyers will attend trial skills "boot camp" in a few weeks.

The Chief reported a general morale problem with attorneys in the system, partly due to the fact that HB13 provided no salary increase for those state employees making more than $45,000 per year. This is the first time in quite a few years that there hasn't been an across the board pay increase. She plans to tour the state to assure people that their jobs are secure, but also let them know that, in order to help alleviate the projected budget deficit, the agency will take a hard look at current needs when a vacancy occurs. Chair Veazey asked if it would be helpful to have a local Commission member tour with Chief Hood to address head-on some of the morale issues that were identified in the AU report and give people an opportunity to air their concerns. Chief Hood thought that was a wonderful idea. She also invited the Commission to attend boot camp, and will provide a boot camp agenda by email.

Budget and Legislative Report (Mitigation Plan)
The agency has been working on a mitigation strategy to address the anticipated budget deficit. OPD has applied for some grants in an effort to increase funding. SB 263 will also generate some income, but it is doubtful that it will be significant; only $30,000 was collected in FY 09 and the $144,000 fiscal note OPD attached to the bill was completely unfunded. The requested funds were to pay for the time it takes attorneys to advise their clients about the SB 263 ramifications, and for the costs of accounting for any fee assessments and collections. OPD will need to find other ways to fund these activities.

Another potential source of funding is that OPD represents incapacitated persons in guardianships, regardless of indigency status. Some of the clients in those cases have liquid assets, and OPD will start billing the guardians when appropriate. A policy is being developed, but it isn't expected to generate significant income.

Payroll is projected to be about $400,000 short because of the increased vacancy savings from 4% to 7%. This is approximately equal to the 8 new FTE that were approved by the legislature. Since OPD has experienced a case load growth rate of about 5% per annum, these new FTE will need to be put on staff to handle the increase.

Leave without pay (LWOP) is being discussed, but must be negotiated with the union. Chief Hood and Mr. Freebourn are on LWOP status for yesterday and today, because they think it is important to be willing to step up and do it themselves if they are considering asking other employees to take LWOP. The Commission appreciated Chief Hood's and Mr. Freebourn's dedication but had several issues with them working while on LWOP status, including that it skews the true cost of competent staff and the implications for worker's comp liability if people on LWOP are at work.

Chair Veazey said that the Commission wished to give a strong message that they are incredibly appreciative of the work everyone in the agency did to come in under budget this year, and the incredible personal commitment that Chief Hood and Mr. Freebourn demonstrated by working while on LWOP. However, it sets a terrible precedent and the staff were instructed not to do it again. Commissioner Fleming moved that in the future if the Chief chooses to take LWOP, she must actually take leave and not work. The motion died without a second.

Staff continues to look for ways to reduce expenditures for operating costs, including scanning bills instead of mailing them and combining offices. Reduction in services will be a last resort. However, participation in specialty courts (DUI, mental health, drug courts) is on the rise and Chief Hood is looking for ways to limit OPD's involvement. Specialty courts can require a significant amount of time because judges want public defenders to be part of the treatment team, even for clients that don't qualify for OPD services. Helping to define OPD's role from the beginning, possibly as part of the grant application process, may help to limit services or provide funding for the services that public defenders are providing.

There are two other areas of potential service reductions. One is developing a protocol for participation in meetings related to dependent neglect (DN) cases. Roughly $2 million was spent on DN cases last year, and there could be significant savings if attorneys don't need to attend every social work meeting. The second involves increasing the number of cases where jail time is not on the table. Chief Hood met with the Council of Courts of Limited Jurisdiction to identify cases where they might only give fines instead of jail time, relieving OPD of the responsibility to represent those clients. She received positive feedback, and will be drafting letter a to them. Ultimately, legislation addressing this issue might be appropriate.

Separate Conflict Office—Costs and Benefits (exhibit 8)
This cost analysis is related to Post Conviction Relief cases only. They have a long life and ebb and flow. It seems that contracting out is most cost effective right now, but that may change as case numbers change. This issue is also part of the larger conflict discussion.

Major Crimes Unit
Chief Hood is reorganizing existing staff to create a major crimes unit in response to the large number of homicides recently—42 this year vs. 29 the previous year. Contracting out major cases involves significant costs as well as loss of control. The new unit will consist of four attorneys and two support staff from within the system. The regional offices have endorsed the concept wholeheartedly. This will also provide a mentoring experience for young attorneys who will have the opportunity to serve as co-counsel on major cases. Chief Hood said this reorganization will raise the level of practice as well as represent cost savings.

Training Coordinator Report
The FY 09 and proposed FY 10 training reports are available (exhibits 9 and 10). Commissioner Hensley said that there is also good training information on the website, and she offered continued kudos to Training Director Eric Olson.

Appellate Defender Program Report (exhibit 11)
Chair Veazey asked that the Chief Appellate Defender attend the next meeting. She would like to hear his thoughts on the AU report, and he will be a valuable contributor to the general discussion regarding conflicts.

New/Revised Policies
New policies related to Mentoring, Media and Public Participation (exhibit 12) have been developed. Staff are notified of new policies by email, and policies are on the website. Chair Veazey suggested that new policies also be mentioned prior to training sessions, and Chief Hood concurred.

Public Comment
No public comment was offered at this time.

Commission Discussion
Report to Governor, Supreme Court and Legislature
This annual report is due before the end of the year, and a draft will be available prior to the October meeting for approval at that meeting. Chair Veazey would prefer to review it at one meeting and approve at the next.

Chief Performance Review
The Personnel Committee will develop an evaluation tool for review at the next meeting.

Revisit Committees and Committee Assignments
Commissioner Gillespie joined the Collective Bargaining Committee, Chair Veazey joins the Personnel and IT Committees, Commissioner Olson joined the Contracts Committee, and Commissioner Taylor, with Commissioner Sherwood as backup, joined the Standards Committee.

The Commission discussed the possible need for additional committees. A committee to facilitate additional work product in response to the AU report may be needed.

Commissioner Sherwood has an idea for an "architectural committee" to address participation in the legislative process as well as how to handle ethical violations by prosecutors or judges. There is a long standing fear of retaliation by the defense bar. What about watchdog functions? Chair Veazey thinks that is too big a conversation to have on the committee level, and needs the involvement of the whole Commission. Commissioner Sherwood moved to establish an interim committee to explore the Commission's ability to facilitate exposure of corrupt practices. Chair Veazey seconds. The motion carries. The committee will consist of Commissioners Olson, Gillespie, Taylor and Sherwood, and will be called the Judicial Systems Committee.

Set Next Three Commission Meeting Dates
The Commission talked about the possible need for more frequent meetings to address the recommendations in the AU report. Some Commissioners would be available to meet on a monthly basis, and some preferred the two-day versus one-day meeting format. Chair Veazey said that changing the format of the meetings will help ensure that the Commission doesn't fall into micromanaging with more frequent meetings. She said that the Commission needs to decide what information they really want and need, which will also reduce the amount of staff time required to prepare for meetings.

The process and time frame for providing the Commission's response to the AU recommendations were discussed. Chief Hood will provide her draft response to the Commission next week. The Commission will then meet by phone to develop a concise response on behalf of the entire Commission. The focus will be correcting inaccuracies and identifying issues that have already been resolved. Cost estimates for implementation of other issues identified in the report are not as time sensitive. A conference call meeting to develop the response was scheduled for July 30 from 8 a.m.-12 p.m. The meeting will be open to the public at the Helena Regional Office and the Butte Central Office. Agenda items are the response to the AU report; a plan to address the recommendations; and scheduling future meetings.

Controlling Commission Costs (carpooling; car rentals)
Chair Veazey has been renting a car to travel on Commission business if it is cheaper than the standard mileage reimbursement. The cost effectiveness of rental versus personal cars depends partly on the distance traveled and is not feasible in all communities. She encouraged Commission members to do the calculation to determine the best method of transportation if car rental is an option from their departure city. The Commission declined to establish a policy setting the maximum reimbursement based on the cheapest option.

Old Business/New Business (*Action Items)
Commission Training
Commission training originally scheduled for January still needs to be rescheduled. It would be best to plan it for a Helena meeting so that the trainer, John Moore, can bring staff members to assist at minimal cost. The four-hour training will be included on a future agenda once meeting dates are set.

Election of Officers (*Action Item)
Commissioner Sherwood was nominated as chair by Commissioner Hensley yesterday, with Commissioner Nardi seconding. After consideration, Commissioner Sherwood said that he would be willing to serve unless someone else is interested. No one else volunteered, and the motion carried. Commissioner Veazey nominated Commissioner Gillespie as vice chair. Commissioner Fleming seconded, Commissioner Gillespie accepted the nomination and the motion carried.

The meeting adjourned at 4:55 p.m.