

# MONTANA PUBLIC DEFENDER COMMISSION

State Capitol, Room 172  
Helena, MT

October 3, 2016

## MINUTES

*(Approved at the January 20, 2017 Meeting)*

### **Commissioners Present**

Richard E. "Fritz" Gillespie, (Chair), Helena; Ann Sherwood, Pablo; Bonnie Olson, Marion; Brian Gallik, Bozeman; Mark Parker, Billings; Larry Mansch, Missoula; Mike Metzger, Billings; Roy Brown, Billings. Commissioners Terry Jessee, Billings and Margaret Novak, Chester, attended by conference call.

### **Commissioners Absent**

Maylinn Smith, Missoula

### **Staff Members Present**

Bill Hooks, Chief Public Defender; Chad Wright, Chief Appellate Defender; Kristina Neal, Conflict Coordinator; Scott Cruse, Chief Administrator; Wendy Johnson, Contract Manager; Peter Ohman, Training Coordinator; Carleen Green, Accounting Supervisor; Marsha Parr, Case Management Support; Cathy Doyle, Administrative Assistant; Kaydee Snipes, Region 6 Deputy Public Defender (Havre); Cyndi Thornton, Region 10 Deputy Public Defender (Glendive); Jennifer Streano, Region 2 Deputy Public Defender (Missoula); Jenny Kaleczyc, Region 4 Deputy Public Defender (Helena); Merry Marr, Lower Court Supervisor. Billings; Chris Abbott, Assistant Public Defender, Helena; Lisa Kauffman, Assistant Public Defender, Missoula Conflict office; Sherry Staedler, Region 5 Deputy Public Defender (Butte)

### **Interested Parties**

Jim Taylor, Legal Director, ACLU Montana; Timm Twardoski, Executive Director, AFSCME Montana Council 9; Malissa Williams, Office of Budget and Program Planning (OBPP); Greg DeWitt, Legislative Fiscal Division; Sheri Scurr, Legislative Services; Brian Smith, Missoula contract attorney

### **1. Call to Order**

Chairman Fritz Gillespie called the meeting of the Public Defender Commission to order at 8:40 a.m.

### **2. Introductions**

Chairman Gillespie introduced Scott Cruse, attending his first meeting since being hired as Chief Administrator. Mr. Cruse is beginning his seventh week with OPD.

### **3. Approve Minutes of August 15, 2016 Meeting (\*Action Item)**

Chairman Gillespie moved to adopt the minutes as drafted. Commissioner Gallik seconded and the motion carried.

#### **4. Software Presentations (case management and online billing systems)**

This item will be presented in more detail at the January meeting. Contract Manager Wendy Johnson distributed a screen shot of how the billing standards will work in the online billing system; the standard is highlighted if the claim exceeds the standard. It is then up to the approver (regional deputy or conflict coordinator) to decide whether or not to pay the excess. The billing standard will be specific to the case type, not the charges, so there will be an ability to change the standard from the beginning of the case for more serious charges within the case type.

The software developers are working on the preapproval section, which will be used by both contractors and FTE. It will be automated to route the request to the appropriate parties for approval, including the investigator supervisor and the mental health coordinator. All vendors will eventually be submitting claims online, and the preapproved amount will act as a hard cap for the non-attorney vendors.

Commissioner Gallik asked how travel hours relate to the billing standard. Ms. Johnson replied that they don't count toward the billing standard.

#### **5. Change to Application Form (\*Action Item)**

Chief Public Defender Bill Hooks said that this is a cleanup item related to presumptive eligibility. The change strikes SSDI from that section, because someone on SSDI might not meet the income standard. Applicants receiving SSI will still qualify for presumptive eligibility. Those receiving SSDI will need to complete the rest of the form.

Chairman Gillespie asked about the veteran status checkbox that was in a previous draft of the form. Chief Hooks said that adding all of the demographic information the Commission wanted to include was unworkable on the application form. Instead, Commissioner Sherwood and the Holistic Defense Committee developed an intake form to gather that information.

Commissioner Olson moved to adopt the change to the application form. Commissioner Brown seconded and the motion carried.

#### **6. FY 2016 Governor's Report (\*Action Item)**

This is a required annual report by statute. Mr. Cruse noted that case counts were generally up in FY 16, especially in the courts of limited jurisdiction. The biggest increase was in DN cases.

Chairman Gillespie pointed out that only 41 limited courts and 29 district courts assessed costs against OPD clients. He believes there is a perception that the agency should be generating more in assessments, but this shows that most courts understand that OPD clients can't afford to pay the cost of counsel.

Chairman Gillespie asked that the total number of new cases opened be reflected on the first three statewide maps. Commissioner Gallik moved to approve the report with that change. Commissioner Olson seconded and the motion carried.

#### **7. Legislative Issues**

##### **A. Report on Final Task Force Meeting**

The final meeting of the Task Force on Public Defender Operations was September 12. The Task Force advanced eight bills to be drafted for the session.

*B. Potential Legislation for 2017 Session*

Mr. Cruse reviewed the preliminary bill drafts that the Task Force approved. Chairman Gillespie noted that the Task Force intended to find ways to cut costs, and that underlies all of the proposed legislation. He expects the bills to look considerably different by the end of the session in April.

Commissioner Parker asked what the plan is to monitor and respond to bills during the session. Sometimes a bill can proceed very quickly and end up on the Governor's desk. Chairman Gillespie said the legislative plan is in development. Commissioner Parker asked that the full Commission be kept informed to the extent possible. Mr. Cruse will prepare for the session by introducing himself to as many legislators as he can beginning in November.

There was considerable discussion about the Task Force's bill draft to reorganize the agency (LCpd1a). The consensus was that the Commission should resist becoming an advisory body instead of a supervisory one. The independent commission was created to bring autonomy to the public defense system, compared to the previous arrangement controlled by the courts.

Jim Taylor, ACLU Legal Director asked to make public comment regarding LCpd1a. He said that a statutory change would be required to hire a department head instead of appointing one. He believes there is little or no support from legislators for keeping the agency structure as it is.

**8. Budget Issues**

*A. Financial Compliance Audit*

The audit fieldwork is complete. Mr. Cruse expects the exit conference to be scheduled for early November.

*B. 2017 Biennium Fiscal Update*

Mr. Cruse reported that on his very first day on the job he delivered a letter to the budget director forecasting a \$3.5 million deficit for FY 17, about 10% of the agency budget. That is the target for mitigation.

*C. Mitigation Plan (\*Action Item)*

The draft mitigation plan was developed in discussion with the other program managers. They are not in agreement on all of the proposals, but the proposals are a place to start the conversation. Mr. Cruse reviewed the estimated cost savings worksheet. He emphasized that these are just approximations; there are many variables in each of the proposals. Some of the proposals raise constitutional issues, and there would be opposition to many of them. Mr. Cruse said that there is a perception that the agency just needs to tighten its belt, but in his short time here he can see that is not the case.

Chairman Gillespie asked for comments from the other chiefs on how the proposals would impact their programs. Chief Hooks submitted three memos: one regarding the Major Crimes Unit (MCU), the second in support of modified FTE social work positions, and the third a summary of the recommendations made by the National Association for Public Defense. Chairman Gillespie will then take public comment before the Commission discussion begins.

Chief Hooks noted that the agency considered some of these same ideas two years ago when it looked like there would not be any supplemental funding. He urged the Commission to consider the driver of the shortfall—DN cases, which have escalated dramatically—and not hamper the agency’s day to day operations. Chief Hooks advocated for keeping the MCU as a major component of both the trial and conflict programs; filling vacant positions to prevent excess workload; filling the two modified social work positions; and looking at treatment courts on a court by court basis instead of withdrawing from all of them.

Chief Appellate Defender Chad Wright relayed his staff’s concerns about the mitigation plan. They are opposed to contracting for IT support; they have concerns about constitutional and statutory issues regarding limiting DN representation; and they need additional office space. Chief Wright also favors flexibility on overtime restrictions.

Conflict Coordinator Kristina Neal said that it is her understanding that contracting for IT support is off the table after looking at the numbers. She supports hiring the two modified social work positions and keeping the MCU intact, although restructuring might be in order over the long term. Ms. Neal said that appointments in DN cases are at the discretion of the court, and statutory changes are needed to provide uniformity.

Chairman Gillespie asked about the status of the soft caps, or billing standards. Ms. Johnson reported that she has a good starting point for an internal roll-out. She hopes to be ready for an external roll-out early in 2017 after getting feedback from Ms. Neal and the regional deputies. Although there may or may not be savings, the soft caps will provide cost certainty.

Chairman Gillespie invited the regional deputies and others to comment on the mitigation plan.

Kaydee Snipes, Region 6 (Havre) Deputy Public Defender, said the treatment court in her region is working very well. She understands they don’t work as well in every region, and she favors looking at maintaining involvement in individual courts. Ms. Snipes also commented on the MCU; the unit provided valuable mentorship to her as young attorney on cases including sex crimes and a homicide.

Jennifer Streano, Region 2 (Missoula) Deputy Public Defender, is ready to hire the social worker position and believes it will create long term cost savings. She said if DN costs are driving the deficit, the social worker will help control those costs by freeing attorney time.

Lisa Benevides, Region 4 (Helena) Social Worker, discussed her role in a DN case. She advocates for the client, refers them to services, and holds the Child Protective Service worker accountable by documenting everything. She also provides resource lists to the FTE attorneys so they can benefit from her expertise even if she is not assigned to their specific case.

Timm Twardoski, Executive Director, AFSCME Council 9, represents 186 OPD employees. He said that they have a good relationship with the agency, but he asked the Commission to be responsive in continuing conversations regarding the mitigation effort. As he looked at the mitigation plan, over half of the proposals deal with wages, working conditions, etc. To avoid unfair labor practices, the agency has an

obligation to talk to AFSCME through the Department of Administration if changes affecting the collective bargaining agreement are being considered. Mr. Twardoski distributed received written comments from staff regarding the MCU.

Lisa Kauffman, Assistant Public Defender, Missoula Conflict office, urged the Commission not to consider providing representation only at the termination stage of DN cases. She said that some putative fathers don't know they have kids and it's not always the case that they don't want to be found. She also advocated for using social workers from other regional offices for conflict cases.

Jim Taylor, ACLU Montana Legal Director, said that every one of the proposed solutions is crazy and violates statute and/or the constitution. He suggested including which laws and constitutional provisions each proposal would violate. Regarding DN cases, he would choose protecting kids over parents if he had to choose.

Chris Abbott, Assistant Public Defender, Helena, primarily handles felony cases. The proposal to reduce reliance on contractors causes the burden to fall on FTE. The effect can be insidious and hard to measure; you won't be able to see that attorneys are failing in the mission because they are entering guilty pleas more often or taking inferior plea deals. You also have to look at the risk of ineffective assistance of counsel. The only solution is to refuse cases to avoid ethical considerations. Mr. Abbot said that if the MCU is abolished, attorneys can't handle all those big cases along with their regular caseload, so that would have to be addressed. Chairman Gillespie said that it is not lost on the Commission that FTE attorneys are overburdened now.

There was no further public comment and Mr. Cruse was invited to close. He said that all of these are very difficult proposals to discuss. Some of them represent very small savings. Others, such as the social work positions, represent guaranteed savings by not hiring and potential savings in freeing attorney time if they are hired. He understands that it will create an added burden on existing FTE to cut back on contractors first, and said the modified attorney positions should be hired as soon as possible.

Commissioner Gallik asked if any of the proposals are lawful. Chairman Gillespie said there are statutory obligations not to exceed the appropriation, and there are statutory and constitutional obligations the agency has been tasked to fulfill on behalf of the state to provide public defender services. The agency is required by statute to have a mitigation plan, and that will be fulfilled. However, he expects the courts to quickly prevent implementation of the plan and require the agency to continue representation. This is an opportunity to make the best possible effort towards mitigation.

Commission members expressed their discomfort with various parts of the mitigation plan, and discussed the need for the legislature to change the law or fund the agency's mandates. Chairman Gillespie said that If the consensus is that we can't vote for proposals in the plan because they violate statute or constitution, we have no plan.

Commissioner Novak moved to eliminate permanent policy change #3 (abolish the MCU) from the mitigation plan. Commissioner Sherwood offered a friendly amendment to change the language to "reorganize the MCU." Commissioner Novak accepted the amendment and Commissioner Olson

seconded. Chief Hooks said that there is consensus among the program managers to take this item off the mitigation plan, and form a group to improve the organization of the MCU. That satisfied Commissioner Novak and the motion was withdrawn.

Commissioner Gallik asked if the proposals were going to be addressed one at a time. Commissioner Jessee said that if there is no chance for supplemental funding, the mitigation plan should be adopted as presented. Commissioner Sherwood said that items without a dollar value should not be adopted; she suggested looking at the document with the estimated cost savings instead of the 19 item memo. The general consensus was to discuss each of those items separately; Commissioner Jessee was opposed.

*Item 1:* Commissioner Parker moved to freeze all hiring. Commissioner Jessee seconded. Members questioned the logic of freezing all hiring and not hiring the five modified positions in item 1 without looking at item 10, which includes hiring modified FTE, saying you have to look at the whole package. The membership discussed the potential value of hiring additional FTE attorneys instead of using contractors as a cost saving measure, and noted that adding FTE is usually not popular with legislators. There is currently no way to monetize the value of social workers, and the contractor/FTE cost analysis is out of date.

Commissioner Novak offered a substitute motion to hire two modified FTE social work positions and freeze hiring on the other three modified positions in item 1. Commissioner Mansch seconded and the motion carried 6-4.

*Item 2:* Commissioner Olson moved to adopt overtime restrictions. Commissioner Parker seconded. The motion failed 9-1.

*Item 3:* Commissioner Brown moved to use the Commission's unobligated discretionary funds to offset the shortfall. Commissioner Olson seconded. The motion carried unanimously.

*Item 4:* Commissioner Gallik moved to take the proposal to cease representation in post conviction treatment courts off the table. Commissioner Parker seconded and the motion carried 9-1.

*Item 5:* Commissioner Sherwood moved to adopt the proposal to stop using contract investigators in Regions 9, 1, and 2, and to hire two modified FTE investigators in Missoula and Billings. Commissioner Parker seconded. The motion does not include restricting investigations to only felony cases. The motion carried 9-1.

*Item 6:* Ms. Johnson will continue to develop soft caps, but there is no idea what the estimated savings will be. Commissioner Parker moved to strike this item from the mitigation plan. Commissioner Gallik seconded and the motion carried unanimously.

*Item 7:* Commissioner Novak moved to discontinue representation of putative or unknown fathers in DN cases. Commissioner Parker seconded. Ms. Neal estimates that 25% of DN cases include putative fathers. The motion carried 9-1.

*Item 8:* Commissioner Parker moved to strike the proposal to represent only one person in DN cases from the mitigation plan. Commissioner Jessee seconded.

Chairman Gillespie offered a substitute motion to discontinue using contract attorneys in DN cases, and hire modified FTE to continue the current level of representation at less cost. The implementation date would be immediate. Commissioner Novak seconded. Ms. Neal said that this could be accomplished in some regions but not all, for instance in the case of multiple parents and a child (not all regions routinely appoint for children). Mr. Cruse said that if the agency is going to reduce reliance on contract attorneys, it would apply to this as well. The motion was withdrawn.

*Items 9 and 10:* Commissioner Olson moved to consolidate items 9 and 10. Commissioner Parker seconded and the motion carried. Commissioner Parker moved to adopt the proposal to discontinue assigning misdemeanor cases to contract attorneys, and hire modified part-time attorneys as a cost efficient alternative. The motion carried unanimously.

*Item 11:* Commissioner Parker moved to adopt the proposal to discontinue using contract attorneys in district court cases in certain regions, and add modified part-time FTE attorneys as a cost efficient alternative. Commissioner Gallik seconded. The number of modified FTE needed is unknown. The estimated savings assumes no additional cost for office space or technology. Commissioner Jessee reiterated the concern about how to justify hiring additional FTE to save money to the legislature. The motion carried unanimously.

*Item 12:* Commissioner Brown moved to strike the furlough option from the mitigation plan. Commissioner Parker seconded. The motion carried unanimously.

The Commission discussed two additional items from the September 22, 2016 draft mitigation plan that were not included on the Estimated Cost Savings worksheet.

*Item 16:* This item would modify duties to accommodate the increased caseloads resulting from the previous actions. Commissioner Parker moved that the Commission make no recommendation on this item since these are management decisions. Commissioner Brown seconded and the motion carried.

*Item 17:* Suspending assignment of all misdemeanor cases, including FTE, was the emergency plan developed during the 2015 legislative session. Commissioner Parker moved to strike the item from the mitigation plan. Commissioner Sherwood seconded and the motion carried.

*D. Use of Discretionary Funds (\*Action Item)*

This was addressed in Item 3, above.

**9. Public Comment**

There was no additional public comment.

## **10. Committee Reports**

### **A. *Holistic Defense Committee***

Commissioner Sherwood drafted an intake form that will track demographics as well as collateral consequences. The idea is to use the intake form in any pilot project should that occur, or if any office wants to use it. She hasn't yet distributed it for public comment.

Commissioners Smith and Sherwood proposed some revisions to LCpd06 at Representative Dudik's request. Those changes include more flexibility in the core team, including a resource advocate. They were not incorporated into the draft bill the Task Force voted on.

### **B. *Contract Steering Committee***

The Contract Steering Committee met on September 19. Ms. Johnson updated the committee on several items, but no Committee action was necessary. Draft minutes are posted to the website.

### **C. *Personnel Committee—Performance Evaluation Process***

Chairman Gillespie said the Committee will review the evaluation process and get it in motion for this cycle. Performance evaluations will be on the agenda in January. He asked if the Commission had any recommendations regarding the evaluation process, and there were none at this time.

## **11. Biennial Review of Contractor Compensation Rates (\*Action Item)**

The Commission is required to review and approve compensation rates for contractors biennially. Ms. Johnson said that proposed rates for attorneys, investigators and mental health professionals are unchanged due to budget constraints. The mental health fee schedule has been reformatted, but the rates are the same. It also identifies the preapproved amount as a hard cap.

Fees for two new provider types are proposed—administrative support and non-court reporter transcription. Program 3 has FTE attorneys, but no FTE support staff, so they sometimes need to contract for support services. Court reporter transcription rates are defined in statute, but other transcriptionists currently do not have a set rate. Ms. Johnson proposes a rate per minute for that service.

Commissioner Parker moved to adopt the fee schedule as recommended by staff. Commissioner Mansch seconded and the motion carried unanimously.

## **12. Public Comment**

There was no additional public comment.

## **13. Old Business/New Business (\*Action Items)**

### **A. *Election of Officers (\*Action Item)***

The Commission is required to elect officers annually. Commissioner Parker moved to nominate Chairman Gillespie as chair and Commissioner Sherwood as vice-chair. Commissioner Jessee seconded. There were no further nominations and the motion carried unanimously.

- B. *Change to Application Form (\*Action Item)*
- C. *FY 2016 Governor's Report (\*Action Item)*
- D. *Use of Discretionary Funds (\*Action Item)*
- E. *Mitigation Plan (\*Action Item)*
- F. *Approve Contractor Compensation Rates (\*Action Item)*

Action was previously taken on items B-F.

- G. *Set Meeting Dates for January, April, July and October 2017 (\*Action Item)*

Commissioner Jessee moved to schedule the quarterly 2017 meetings for Fridays: January 20, April 21, July 21 and October 20. Commissioner Sherwood seconded and the motion carried unanimously.

Chairman Gillespie asked if there was any further business. Commissioner Jessee said that LC 351 is not available yet, but it is based on the public inebriation issue in Billings and the agency should monitor its progress. It could affect OPD since it may be a jailable offense if there is no other alternative.

Commissioner Olson asked for an update on the strategic plan at the next meeting. Chairman Gillespie replied that discussion of the strategic plan will be an agenda item at each regular Commission meeting.

Chairman Gillespie said that on behalf of the entire Commission, this has been an extremely painful process. He hopes that staff from program managers to support staff know that there is no part of this plan the Commission wanted to adopt, and they appreciate the effort and sacrifice everyone makes.

#### **14. Adjourn**

Commissioner Parker moved to adjourn at 4:50 p.m. Commissioner Olson seconded and the motion carried.