

OFFICE OF THE STATE PUBLIC DEFENDER



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To: Montana Public Defender Commission
From: Larry Murphy, Contract Manager
RE: Report to the Commission

1. MOUs and Updated Attorney's Summary of Education of Education and Experience

As of October 1, 2010, I have received 174 signed MOUs. These are the new MOUs which were distributed to current and prospective contract attorneys in May, 2010. This MOU commenced on July 1, 2010 and is in effect for a term of two years. The same is attached hereto as Exhibit 1. All but five have completed the Self Evaluation form, which is being used as part of OPD's ongoing proficiency determination of the contract attorneys.

As of October 1, 2010, I have received 57 updated Attorney's Summaries of Education and Experience. Requests for the same were made in late August and early September, 2010 pursuant to Commissioner Taylor's request. I suggest that Standard IV, 5 entitled "Proficiency Determination of Contract Attorneys" be modified to require that each contract attorney annually provide OPD with a copy of their CLE affidavit submitted to the State Bar, rather than requiring an updated Summary.

2. Proficiency Determinations and Standards Compliance

I would also suggest that the language in paragraph 5 B be modified to require the Contract Manager in conjunction with the Chief, the Regional Deputy, and the Training Coordinator to conduct the proficiency determinations. A copy of the proposed modification is attached as Exhibit 2.

The above Proficiency Determination Standard and OPD's Policy #135 require that each contract attorney be observed in court, and that other relevant information may be obtained from various sources which would also be considered in the determination. Currently, the Regional Deputies are primarily doing the observations, although the Chief, the Contract Manager and the Training Coordinator occasionally observe a contract attorney. I have requested and received self-evaluations from most of the contract attorneys. During my review of the monthly contract claims, I will notice that a contractor has researched a legal issue and filed a motion. I have been asking for copies of the same to evaluate the writing skills of the contract attorney. A well written brief will be forwarded to Eric Olson for possible inclusion in OPD's brief bank. The claims themselves and the services provided to clients are evaluated by me on a monthly basis and considered in the determination. I

can also determine from an examination of the claims if a contract attorney is taking cases to trial and how often. Occasionally, either I, the Chief, Regional Deputy or Training Coordinator receive complaints from clients, judicial personnel and others about an attorney. Typically, a discussion is held between me and the Regional Deputy and a resolution is determined which is then communicated personally to the contract attorney either jointly or by one of us. On occasion we have ceased offering cases to the offending contract attorney; more often suggestions are made and the issue is resolved.

The Standards Compliance Policy is #136. It requires the Training Officer or his/her designee to conduct random compliance checks by reviewing three cases randomly selected with each of ten public defenders on a monthly basis. Public defenders include both FTEs and contract attorneys. Eric Olson and I have discussed this and I have agreed to do the compliance checks with our contract attorneys. OPD employs and/or contracts with approximately 300 public defenders. It is my intention to select one case in each area which the contract attorney works, i.e. DC, DN, DJ, DG and DI, and review, either in person or by phone, the same with a minimum of five contract attorneys per month. The above Policy states that three recently closed cases should be reviewed with each attorney. This requirement will make the compliance check extremely burdensome if the attorney is practicing in the five areas listed above. I would suggest that a minimum of one case in each area of practice would suffice.

Therefore, it is my intention to do a proficiency determination on each attorney contracting with OPD on a biannual (every two years) basis and that said determination consist of the following:

- a. An observation by either me, the Chief, the Training Coordinator or the Regional Deputy, combined with input from any other internal or external source;
- b. An audit of open and closed cases which will be completed on an annual basis;
- c. A review of the self-evaluation form;
- d. The monthly review of contract attorney claims; and
- e. A Standards compliance check with a personal review of cases in areas serviced by the attorney.

3. Miscellaneous Issues

- a. CLE requirement for contract attorneys
As the Commission is aware, the contract attorneys as a group have resisted the Standards requirement of the specified number of annual CLE hours for each area in which they practice. This requirement was discussed at the last Commission meeting and has not yet been resolved. I have suggested either reducing the number of required CLE hours or waiving this requirement unless an attorney is determined to be less than proficient in an area of practice.
- b. OPD's 45 day rule on filing claims
We created a rule which is included in the MOU requiring that a contract attorney submit his/her claim within 45 days of the last day of the month for which he/she is billing, e.g. a claim for services provided in the month of August must be received by either the Regional office or the Central office by the 15th of the following October. Most contract attorneys have

followed this rule; however, we occasionally receive a claim late. In this case we send a warning letter advising that the next time we will not pay the late claim. We begin this process again each fiscal year which means that we allow one late claim per fiscal year with only a warning letter. We also have discretion to allow a late claim in extraordinary circumstances, e.g. attorney was hospitalized. Periodically however, we receive a number of claims from an attorney (sometimes as many as 4 months) submitted at one time. We'll pay the earliest claim and send a warning letter, then deny any other claim that is not timely received. This has caused some confusion and dismay. Fortunately these are few and far between.

c. Specialty Courts

All contracted services for Specialty Courts are paid within the \$60/ hour rate. I still require attorneys who are being paid a flat fee for their service to itemize their time on a monthly basis and I calculate the rate they are being paid by dividing the hours itemized into the flat rate.

The Commission has decided that OPD should not be providing either an FTE or contract attorney in those Specialty Courts where the client has been sentenced to that Court. This happens primarily in DUI Courts, although there are two DUI/Drug Courts wherein a client can enter a plea and be diverted into a treatment court before sentencing. In these Courts, if the client successfully completes the treatment, he/she is allowed to withdraw a guilty plea and the case is dismissed. If the client is unsuccessful, he/she is terminated from the treatment court and goes to sentencing. The Commission needs to direct OPD as to the starting date for when our services in these post-sentencing courts will terminate.

d. Withdrawal from a case by a contract attorney

Recently OPD had a problem where a contract attorney moved to withdraw from a case shortly after receiving the written Judgment. Thereafter, the client contacted the Regional Deputy asking how his appeal was progressing. When the RDPD contacted the contract attorney he was told that the client was advised of his right to appeal and never indicated he wanted to appeal. This created an issue as the appeal time was running, and ultimately ran, and there was no one to file the appeal. I suggest that we adopt a Policy which will require a contract attorney to remain on an assigned case until the time for filing an appeal has elapsed.