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REPORT TO THE PUBLIC DEFENDER COMMISSION

William F. Hooks, Chief Public Defender

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Program 1 Update

Sheila Newman, Regional Deputy for Region 11 (Miles City), is leaving OPD and relocating to Washington State to be closer to her family. Sheila has served the clients of Region 11 with good humor, tenacity and a strong commitment to the core values of public defense, and we will miss her. Joe Zavatsky, who has served in Miles City as staff attorney and benefitted from Sheila's mentoring and guidance, accepted my offer to become the new Regional Deputy.

In addition to our 11 regions, Program 1 has a Major Crimes Unit, comprised of four attorneys and two support staff. The MCU is available to provide representation in complex and high profile cases throughout the state. I am pleased to announce that Tom Bartleson, one of the current MCU attorneys, is the new supervisor of the Unit.

Our Region 6 covers six counties and 22,500 square miles along the High-Line. For years the attorneys, based in Havre, had to travel 150 miles one-way to handle cases in Glasgow. We now have a branch office in Glasgow, and veteran staff attorney Casey Moore is representing clients in the eastern part of Region 6. Casey's presence will relieve workload stress in Region 6 and help address contract attorney issues.

In Region 4, based in Helena, we have added a case manager to our staff. Lisa Benevides provides traditional social work services to our clients and greatly aids our attorneys in providing comprehensive representation.

Update on Proposal to Change "Judge Substitution" Rule

Section 3-1-804, MCA permits a party to a case pending in district court to substitute a judge assigned to the case. No reason need be given in support of the notice of substitution. If the notice is timely filed, a different district court judge is called in to take over the case. A filing fee is imposed on some, but no filing fee is required in criminal cases or by parties who have qualified for representation at public expense.

Over the years, the district court judges have found application of this rule to be problematic. Some believe the rule has been abused, and have faulted OPD attorneys. In 2011, judges in our Region 3 (Great Falls) complained about the substitution practices used by some of our staff attorneys.¹ In 2012, the Montana Judges Association (MJA) asked the Law and Justice Interim Committee to disapprove the rule. The Committee declined to do so. A bill was introduced in the 2013 Legislature, seeking to amend the rule by imposing a

¹ The matter was brought to the Commission's attention and addressed by the Commission. See, Minutes of the August 29, 2011 and October 24, 2011 Public Defender Commission meetings.

requirement that a motion for substitution contain a statement describing why the substitution was necessary, and increasing the filing fee from \$100 to \$1,000 for those who could pay. The proposed bill died in committee. In the fall of 2013, attorneys in Region 2 (Missoula) filed a petition for writ of supervisory control with the Montana Supreme Court, seeking relief from certain practices which they believed judges were using in response to substitution notices. The Court declined to grant relief on the petition.

In February, 2014 the MJA submitted to the Montana Supreme Court a Petition for revision of the judge substitution rule. The judges proposed five amendments to the rule:

- Increase the required filing fee to \$500;
- Require that all parties file the fee, including public entities;
- Shorten the time limit for filing to ten days in all cases;
- Exclude certain types of cases from the rule; specifically child dependent/neglect cases, youth court cases, and mental health commitment cases; and,
- Require that both the attorney and client sign the motion for substitution, and require the client to sign an acknowledgment which informs the client of the adverse consequences that may result from substituting a judge.

OPD opposed the proposed rule change, as did several other interested parties. The Montana Supreme Court stayed the proceedings on the proposed rule change, and a working group was convened to discuss the proposal and see if common ground for reform could be achieved. In addition to OPD, the group is comprised of district court judges and representatives of Montana Legal Services Association, Montana Defense Trial Lawyers Association, Montana Association of Criminal Defense Lawyers, Montana Trial Lawyers Association, Attorney General's Office, and the Montana State Bar.

On August 19, Public Defender Commission Chairman Fritz Gillespie and I attended the initial meeting of the working group. Discussion during the August meeting and subsequent comments suggest there are aspects to the proposal on which it is likely some agreement or consensus can be reached. OPD and other participants are in disagreement with the district judges on other key aspects of the proposed rule change. Additional meetings are set for November 7 and November 24. I propose that we consider adopting an agency-wide policy that will establish a protocol for assessing whether to file a motion to substitute a judge in cases in which OPD staff attorneys have been assigned. The following discussion addresses the proposed policy and contrasts aspects of the MJA position.

1. The authority to make a decision on whether to substitute a judge rests with the attorney, not the client.

OPD disagrees with the judges on a fundamental issue: is the decision to substitute a judge one the client must make, or is it a decision left up to the attorney? The Public Defender Commission adopted a standard which assigns this decision to the attorney.² Some of the judges believe the decision is for the client to make.

² PDC Standard VI.9:

D. Counsel should consider the advisability of disqualifying or substituting the presiding judge. This consideration should include any information about the judge's history in aligning himself with the prosecution on bail issues, motion rulings,

I find support for OPD's stance in Montana Supreme Court and U.S. Supreme Court decisions, Rule 1.2 of the Rules of Professional Conduct, and American Bar Association Standards. The draft policy included for your review will put this Standard into practice. This draft policy would apply in those cases in which the attorney believes that substitution might be in the client's best interests. It makes clear that the decision rests with the attorney, not the client; requires the attorney to discuss the proposed substitution with his or her supervisor; adds a provision which requires that the attorney consult with and advise the client of the ramifications of substitution, and makes clear that we should not utilize a "blanket" substitution policy in which a judge gets substituted in every case.

2. The client should not be required to sign an acknowledgement to be filed with the substitution papers. We oppose having the client sign or acknowledge the substitution notice, for several reasons. Foremost, it is the attorney's decision. The physical separation we often have from our clients would make a requirement that the client sign a document difficult to implement. It would be impractical to come up with a list of considerations that would include all possible consequences which might arise from a decision to substitute a judge.

Still, the attorney has an obligation to discuss the matter with the client. Use of a form which must be completed in any case in which substitution is contemplated will help ensure that we are substituting judges appropriately, and will rebut accusations that attorneys are not adequately supervised on such matters. In theory, no reason need be given when a judge is substituted. In practice, some judges believe the rule is used for improper purposes. As you will see, the form includes language stating that the document memorializes attorney-client discussions and is therefore privileged. We want to encourage attorneys to be candid in stating reasons why substitution of a particular judge in a given case is appropriate. This gives us internal control, and will demonstrate that we carefully consider these requests by staff attorneys.

While the draft policy does not address the other proposed rule changes, OPD objects to these other changes as well. The judges want to require any party who seeks to substitute a judge to pay a \$500 fee. In cases in which counsel is assigned by an agency – OPD and county attorneys specifically – the agency would be responsible for paying the filing fee. This demand is opposed by every other participant of the working group. From OPD's perspective, we are not in any position to assume additional expenses. Further, imposing on the agency the duty to pay the fee upon filing a substitution notice would create the potential for conflict between client and attorney. Assuming (as the PDC Standard articulates) that the decision on substitution rests with defense counsel, s/he will make the final decision, after consultation as necessary with the client. A disgruntled client could later claim that the attorney failed to give adequate advice, or declined to file a

trial rulings, any routine refusals of plea bargains, the client's experience with the judge, and any specific dislike of counsel, other public defenders, or public defenders in general.

- a. Prior to filing a motion to disqualify or substitute the judge, counsel shall consult with the managing attorney in his office and/or his or her Regional Deputy Public Defender.
- b. The decision to disqualify a judge shall only be made when it is a reasoned, strategic decision and in the best interest of the client. The final decision rests with counsel.

substitution notice, not for strategic or tactical reasons, but in order to save resources for an underfunded agency.

OPD opposes a ten-day time limit in which to file the motion. Demands imposed by heavy workloads, and the physical separation we often have from our clients, would make it difficult to have the necessary review and discussion and get a notice filed within this time period. We also oppose removing DN, Youth Court and mental commitment cases from application of the rule. Everyone should have the benefit of the same rule.

Stakeholder Activity

On August 26, I took part in a policy workshop hosted by the Montana Department of Corrections, the National Governors Association, and the Pew Charitable Trusts, to discuss strategies for improving policies and practices.

In September, I participated in the Montana Board of Crime Control business meeting and retreat in Fort Benton.

During the annual State Bar Conference on September 25, I attended a meeting of the Past Presidents Committee and spoke on the proposed Resolution in support of adequate funding for OPD.

Along with Kristina Neal, I attended a one-day conference sponsored by the Casey Family Programs and the Child and Family Services Division of DPHHS, on issues related to federal funding of child welfare programs. Topics included reforms in the dependent/neglect programs.

In November, I will make a presentation during the Limited Court Clerks' Conference, and I will assist with training sessions for judges during the Courts of Limited Jurisdiction Certification Conference.