MONTANA PUBLIC DEFENDER COMMISSION

Wingate Hotel
Helena, MT

December 7, 2012

Draft Minutes

Commissioners Present
Margaret Novak, Chester; Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; Ann Sherwood, Pablo; Brian Gallik, Bozeman; Kenneth Olson, Great Falls

Commissioners Absent
Christopher Daem, Billings; William Snell, Billings; Majel Russell, Billings

Staff Members Present
William Hooks, Chief Public Defender; Wade Zolynski, Chief Appellate Defender; Kristina Neal, Conflict Coordinator; Larry Murphy, Contract Manager; Eric Olson, Training Coordinator; Harry Freebourn, Administrative Director; Mori Woods, Investigator Supervisor; Peter Ohman, Regional Deputy Public Defender (RDPD), Bozeman; Dave Stenerson, RDPD, Missoula; Sherry Staedler, RDPD, Butte; John Putikka, RDPD, Kalispell; Matt McKittrick, RDPD, Great Falls; Jenny Kaleczyc, RDPD, Helena

Liaisons
Cathy Huston, liaison for union support staff and investigators, and Eileen Larkin, liaison for non-management appellate defender staff and attorneys, were in attendance. The union attorneys were not represented.

Interested Persons
Brent Doig, Budget Analyst, Office of Budget and Program Planning (OBPP); Niki Zupanic, Public Policy Director, American Civil Liberties Union of Montana (ACLU)

1. **Call to Order**
   The Montana Public Defender Commission meeting was called to order by Chairman Fritz Gillespie at 9:10 a.m.

2. **Approval of Minutes of August 27, 2012 Meeting** (*Action Item)
   Commissioner Olson moved to approve the minutes as amended and posted prior to the meeting, correcting a public comment omission on page 8 in an earlier draft. Commissioner Gallik seconded and the motion carried.

3. **Commission Liaison/Executive Board Reports**
   Appellate defender liaison Eileen Larkin was present but had no report.

   Support staff and investigator liaison Cathy Huston said that wages and turnover are still of concern, and she wants to make that point each time she comes before the Commission. Support staff training is scheduled for April, and Diane Stenerson is forming a committee to work on the agenda with Training Coordinator Eric Olson. Inconsistencies in office procedures will be addressed.

   Ms. Huston said that the investigators and the administrative support staff are interested in forming separate bargaining units because their interests and needs are very different from each other.

The investigators have submitted a proposal to seek legislation allowing them to carry concealed weapons at work. An outline of the proposal was distributed at the meeting, and additional details were provided to Chairman Gillespie and Chief Public Defender Bill Hooks. Senator Matt Rosendale from Glendive has agreed to sponsor the bill.

Commissioner Novak moved to support the investigators' legislation and also asked the Commission to look at allowing attorneys to carry firearms on the job. Commissioner Petaja asked to make these two separate motions and seconded the motion to support the investigators. Commissioner Novak agreed.

Discussion included the investigators' role in providing security within OPD offices and being asked to accompany attorneys in certain circumstances. There is an assumption that investigators are trained to protect the rest of the workforce. Investigators are also frequently in risky situations in the field. Although most investigators have a concealed weapons permit, they are not allowed to carry firearms in a state office or a state vehicle.

The question was called and the motion carried with Commissioner Sherwood opposed.

Chairman Gillespie asked if there was a separate motion regarding attorneys carrying firearms. No motion was made, and the issue was tabled.

4. Commission Questions/Comments on Reports

A. Public Participation Guidelines

Governor Schweitzer's annual public participation reminder is informational and no Commission action is required. Chairman Gillespie mentioned a recent news article discussing abuses of the public's right to participate in government activities, and he wants to make sure that all information is posted on the OPD website at least 72 hours in advance of making decisions.

With that in mind, Commissioner Novak said the Commission should reconsider the motion regarding investigator firearms since it was not included on the posted meeting agenda. She moved to schedule a conference call meeting and provide for public comment before voting on the issue again. Commissioner Petaja seconded and the motion carried.

B. Chief Appellate Defender Report

Chief Appellate Defender Wade Zolynski provided highlights from his report. He is working on an appellate case weighting system as well as standards and policies. Turnover continues to be a problem, for both attorneys and staff. Commissioner Petaja thanked Chief Zolynski for his thorough report. Commissioner Olson noted that the discrepancy in pay levels between the appellate office and the attorney general's office is appalling, and said that he hopes this information will be brought to the legislature. Chief Zolynski said the agency is also working with the private contractor Communication and Management Services (CMS) to illustrate those differences through a pay and classification study.

Commissioner Novak asked if the pay issues should be addressed legislatively or if it is a policy matter. It seems to be an ongoing problem. Mr. Freebourn said that there are decision packages to increase the pay to a more competitive level compared to prosecutors and other state agencies for both programs. Pay parity is also a new goal in the strategic plan.

Mr. Freebourn said that in Washington there is a statute that creates pay parity on an annual basis instead of going through a budget process. Commissioner Olson asked what the process would be to put forth a

similar statute in Montana; it would be appreciated by all of OPD's attorneys and would be a good move towards creating parity. Mr. Freebourn said he would investigate, noting that there are some precedents in statute setting pay for judges and the highway patrol. He will also discuss the idea with Paula Stoll and Timm Twardoski because it would be a bargaining issue.

C. *Conflict Coordinator Report*

Conflict Coordinator Kristina Neal said the most pressing issue is the phenomenal increase in cases in all parts of the agency. It has been very challenging to make appointments, but she and the regional deputies have been heavily recruiting new contractors, with some success. The contractor rate is the biggest problem because it is so low that contractors treat OPD cases almost as their pro bono work.

Ms. Neal is now working full time and recently hired an administrative assistant. She currently has no legal back up though, and having another attorney would alleviate that problem. She and Mr. Freebourn have discussed creating a separate program which would help insure the independence of the conflict office.

Ms. Neal described the appointment process that she goes through 15-20 times per day. She also provided information on how DN case assignments are made and counted. Each child in a DN case has their own case, with one attorney usually representing the interests of all of the children, although that is determined on a case by case basis. The parents cannot, however, be represented by one attorney—each parent, including multiple fathers, is assigned their own attorney.

Chairman Gillespie asked RDPD Matt McKittrick why he has double the number of DN cases in Great Falls compared to other regions. Mr. McKittrick said that the local DPHHS office is very aggressive. They have had some success in dismissing petitions at the show cause level except in the Ninth Judicial District. The high number of DN cases makes it difficult to find quality representation. His existing contractors are at capacity, but he has been able to recruit a few new ones, albeit young and in need of training.

Chairman Gillespie asked if Ms. Neal receives monthly status reports from conflict counsel as required in the MOU. She does not, and Chairman Gillespie asked Contract Manager Larry Murphy to comment. Mr. Murphy said that it would be impossible for them to review a monthly report on every case that is contracted out; there are just too many cases. He said that he and Ms. Neal review the monthly billing, sometimes request briefs, and do periodic audits to determine why certain cases are open longer than average. This is how they ensure effective assistance of counsel without monthly status reports.

D. *Chief Public Defender Report*

i. Legislative Update

Chief Public Defender Bill Hooks reported that he and Mr. Freebourn met with three members of the Butte legislative delegation yesterday. They had a very good discussion, including a review of OPD's proposed legislation which garnered some interest from the legislators. He hopes to have sponsors lined up next week. Details of the proposed legislation are included in Chief Hooks' written report. The session activity sheet, including OPD bills, bills with fiscal impact, and other bills of notable interest will be updated regularly and provided to the Commission.

Chairman Gillespie expressed concern that LC 536, allowing the conflict coordinator to hire an attorney to do postconviction work, doesn't specifically address the purpose of ensuring that the conflict office can meet its ethical obligations by adding another FTE. He is concerned that legislators will get hung up on the PCR issue and not understand the ethical implications leading to defeat. Mr. Freebourn said that the challenge will be to make the conflict issue understandable to everyone. Commissioner Novak suggested creating a one page lexicon explaining some of the terminology.

ii. Pay Issues

Chief Hooks noted that parity of resources with prosecution and law enforcement is one of the ABA's 10 Principles of Public Defense. The agency has been overwhelmed with DN cases, and it is his understanding that in Lewis and Clark County, the county attorney is handling them by hiring additional attorneys, including one of OPD's well-trained attorneys for much more money.

CMS submitted a draft report of their findings regarding job descriptions and classifications yesterday. They have some proposals to change job descriptions to more accurately reflect what staff are doing and to address pay issues. They noted the agency's high turnover rate and that OPD attorneys are by far the lowest paid attorney workforce in the state.

Commissioner Sherwood asked if the State Bar would support the parity issue. Chief Hooks said that although he can't speak for them, he has discussed it with the Bar leadership and he thinks their lobbyists would be receptive. The Bar's 2011 salary survey shows what attorneys are making outside of state government so they are aware of the pay issue.

Commissioner Gallik wondered if district court judges would also be supportive. Chief Hooks said that he told the judges if things don't change there was a good chance OPD would be refusing cases within the year. The judges deal with the same caseloads, but they have an easier time getting resources. He is trying to show that it is not only the public defenders' burden—it is in the interest of judges for the system to work better with more manpower in the public defender office. The grants that judges are getting to establish new treatment courts further increase OPD caseloads.

Chief Hooks said that people who question what the agency does and whether it is worth it need to understand that OPD represents everyone, not just criminals—parents and kids in DN cases, kids in youth court, and people who are involuntarily committed. The "breaking point" has been identified, and if additional resources are not provided this session, the agency will start refusing cases region by region.

The Commission suggested that the agency make better use of the press to show that inadequate defense costs the state more money. Mr. Freebourn said that the media are more interested in corruption than in the good work OPD does. However, he is optimistic about the upcoming session; the agency asked for a lot of people to relieve caseload stress and funding for increased pay. Commissioner Gallik said that he has been involved in funding schools for 25 years and his experience is that you have to sue, despite whatever good public relations you can generate. Chief Hooks hopes there are other options to pursue, but it can't be ruled out.

5. Financial Audit Update

Legislative Auditor Zac Yates arrived to discuss the financial-compliance audit for FY 11-12. The three audit objectives were 1) to ensure that the financial schedules are fairly stated; 2) to obtain an understanding of internal controls and make recommendations for improvement; and 3) to monitor compliance with selected policies.

The audit identified an error in accrued liabilities which caused the general fund balance to be overstated in FY 11. In addition, the report contains four recommendations to implement internal controls related to reviewing recorded liabilities, securing payments received by mail, transferring uncollectable accounts receivable to a collection agency, and documenting pay decisions. Mr. Yates invited questions about the audit process or findings.

Recommendation 3, regarding accounts receivable and collections, was discussed in some detail. Issues include OPD's position as the last priority in receiving client payments, the fact that OPD receives some (older) payments directly while current fees are paid to the courts, the difficulty in tracking assessments, whether it is feasible for the Department of Revenue and/or an outside collection agency to take on past due accounts, and the philosophical issues of assessing fees against indigent clients and collection agencies profiting at the expense of poor people.

Mr. Yates appreciated the opportunity to present the audit results to the Commission and thanked the office staff for their utmost professional courtesy.

6. Public Comment

Jenny Kaleczyc, Helena RDPD, said that many of her clients are homeless or in prison and even if a collection agency is able to find them there is nothing to be garnished. It is a waste of resources to try to get money from them. Commissioner Sherwood and Chairman Gillespie agreed. Chairman Gillespie is alarmed by a report that the Fourth Judicial District in Missoula is now assessing $800 for every felony. The courts are supposed to conduct a meaningful inquiry into whether clients are able to pay, and the public defender should advocate for the client if they are unable to pay.

Eileen Larkin commented on her own behalf, not as the appellate liaison. She said there was a lot of discussion about pay disparity and the contract with CMS earlier, but she didn't hear any discussion about managers' pay. They are grossly underpaid as well and she hopes the Commission will address this.

4. Commission Questions/Comments on Reports (continued)

E. Contract Manager Report

Mr. Murphy reported that there are currently about 195 contract attorneys with active MOUs, including four new people in the last week. Approximately 20 previous contractors declined to sign a new MOU; some retired, and some just don't want to work for OPD anymore.

Commissioner Petaja noted that the Commission set contractor rates at the August meeting, and he wondered what is currently being done in terms of improving the hourly rate for attorneys. Mr. Freebourn said that the Commission approved a decision package to increase the contract attorney rate, but the governor's office included a 2% increase for all contractors in the executive budget instead.

The Contracts Process Committee was scheduled to meet in November to work on a process for developing future rates, but the meeting was postponed due to weather. Staff members are collecting information regarding hourly rates and retainers, overhead information, etc. from private attorneys. This information will assist in developing a new rate for competent contract counsel when the Committee meets again. Mr. Freebourn reminded the Commission that the intent is to separate the justification for the new rate from the financing issue.

F. Training Report

Training Coordinator Eric Olson said that the high rate of attorney turnover led to rescheduling the trial skills boot camp from February to November. There is a concerted voice asking for more trial skills training, but he hasn't been able to offer a second level when so many people need the initial boot camp.

Comprehensive practice manuals for felony and misdemeanor cases have been distributed, and Mr. Olson would be happy to send disks to any Commission members who are interested. Other practice manuals are in development, including a DN manual. Unfortunately DN practice is in disarray statewide (not just OPD, but all players) so that will be on hold.

Upcoming events include an updated employee orientation video in January, the third tier of the capital defense training in late May, a post-legislative session training and an appellate training in the summer.

Chairman Gillespie asked Mr. Olson to comment on the plea agreement sessions offered at the annual training in October. Mr. Olson said they focused to a significant degree on communication with the client. Renowned speaker Abbe Smith from Georgetown University presented; they reviewed case principles and talked about the reality of life on the ground. Pleas were also discussed at the third cultural communications training held just prior to the conference.

G. *Capital Defense Coordinators' Report*

Mr. Olson distributed a document responding to the Commission's request to justify the increased rates for capital defense that were approved at the August meeting. There is additional information in regard to the investigators in particular.

Commissioner Petaja voted against the original proposal because he is concerned about morale within the employee workforce, and because Mr. Murphy was not present to provide input at that meeting. He stands by his vote of dissent for those reasons. Furthermore, he is concerned that a capital defense rate has been set for paralegals without ever having established a regular paralegal rate.

H. *2015 Biennium Budget*

Chief Hooks, Chief Zolynski, Chairman Gillespie and Mr. Freebourn met with Governor Schweitzer's office following the August Commission meeting, and the approved results of that meeting are in the blue column on the budget items worksheet. The objective was to get the Commission's priorities into the Governor's target budget. The chiefs made many difficult decisions, including eliminating important positions such as social workers, additional investigators and IQ personnel, to hit the target. The green area will be updated as the session moves forward. Nothing is final until the last day.

Budget analyst Brent Doig said that there is already talk about adjusting the base down when the session begins. Mr. Freebourn noted that the differences in the pay ladder numbers for each program are due to finalizing the numbers (the April and August figures were estimates). Mr. Doig said that there is an ambitious pay plan proposal for 5% each year of the biennium to make up for the wage-freeze years, but there is no way to know how it will go.

Commissioner Novak asked how the agency will respond the next time the IQ issue comes up when the 11 additional support staff positions have been eliminated from the budget. Chief Hooks replied that a best-practice region has been identified, and the IQ specialist from that region is helping to develop a new streamlined process. A training manual will be created and an agency-wide help desk will be established to answer questions. Part of the goal is to have data specific to each region to formalize the hardship determination procedure (how much does a certain type of case cost in a certain region) so that each determination is consistent with the agency's mission.

I. *Financial and Operating Status*

Mr. Freebourn went through the graphs and noted that $400,000 in capital defense costs are included in the figures. The net case growth was 12% in FY 12; so far FY 13 is not growing at the same rate, but additional resources are still needed to serve a 31,000 client base established in the prior year. There are 17-20,000 active cases on any given day.

5. Financial Audit Update and **6. Public Comment** were addressed earlier.

7. **FY 2012 Draft Governor's Report** (*Action Item)
The Commission's annual report to the Governor, Supreme Court and Legislature is required by statute, although some of the material is optional. Chairman Gillespie made minor revisions to the mission statement and is working on the assessments and collections section of the report. He will circulate the assessment piece to the Commission for review when it is complete.

The report is scheduled to be published in late December. Commissioner Sherwood moved to adopt the report subject to Chairman Gillespie's final modifications. Commissioner Gallik seconded and the motion carried.

8. **Proposed Standards for Representation of Children and CASA/GALs** (*Action Items)
The proposed standards for representation of children were presented at the August 8 Standards Committee meeting, but were subsequently preempted by a Supreme Court decision. Following a lengthy discussion, a group consisting of upper management and members of the DN workgroup determined that the decision was a fact driven case and wouldn't interfere with the standards as drafted.

Proposed Standard 22 was developed from source documents from the ABA and the National Association of Counsel for Children (NACC). The goal is to advocate for the expressed wishes of the child, just as for an adult. There are challenges in working with preverbal children or those with diminished capacity, which are addressed on page 5. The NACC believes this standard is consistent with the national model. Mr. Olson reviewed some minor editing changes to be made on the final draft, including eliminating the reference to a specific number of training hours on page 2. Trainers and supervisors need to remind attorneys that it is their job to advocate for the child's wishes, and not to do what they think is best for the child.

Proposed Standard 23 relates to representation when an attorney is appointed for the GAL/CASA as per the statutory change approved during the last session. Even though OPD currently doesn't have many of these cases, the consensus was that it is important to have a standard to show what the responsibility is when representing the GAL/CASA vs. the responsibility when representing the child—namely, the best interest of the child in the former case vs. the child's expressed wishes in the latter.

Mr. Olson asked the Commission to approve these standards, both of which have been reviewed and endorsed by the DN workgroup, which includes a wide variety of members from all DN stakeholders.

Chairman Gillespie asked Regional Deputy Public Defender Peter Ohman to comment on the proposed standards. Mr. Ohman asked when the child would be appointed their own attorney; in Bozeman they take an ad hoc position that they wait until the child can communicate. Mr. Olson said the standards were developed from the position of how to proceed once the appointment has been made, not when/if an appointment *should* be made, which is outside the scope of the standards. Commissioner Novak asked if a bibliography could be included in the standards. Mr. Olson could put one together, but that is not something that was previously included as part of any existing standard.

Chief Hooks is working on a proposal to modify the standard limiting involvement in ancillary proceedings. Clients can benefit from attorney involvement under a variety of currently prohibited circumstances, for instance possibly avoiding a youth court case. Chairman Gillespie said that might also be helpful in assisting clients asking the court to modify the portion of their sentence related to fines and other costs due to a change in circumstances. Since OPD's representation ends at judgment there is currently no authority to represent the client unless reappointed by the court.

Commissioner Sherwood moved to adopt both of the proposed standards with the provision that Mr. Olson will do the final editing. Commissioner Olson seconded and the motion carried.

9. Strategic Plan/Case Caps

Strategic Planning Committee chair Ken Olson briefly outlined the previous work of the Committee in revising the strategic plan. The Commission approved the new goals and objectives included in the plan at the last meeting. The final piece before approving the plan in its entirety address case caps.

The revised case weighting system (CWS) for Program 1 was approved by the Labor Management Committee in November. Case weights for Program 1 will now be calculated in hours instead of units, and adjustments were made to the weights for certain case types. The revised CWS will be used to help determine when a region is saturated.

Mr. Freebourn thanked the Strategic Planning Committee for their work; even if the final plan is not approved prior to the session, it will be a good legislative resource and much of it will be incorporated into the legislative presentation.

Chief Hooks distributed an outline for addressing the topic discussed throughout the day—too many cases and not enough resources. The goal is to distribute the limited available resources in an ethical way, recognizing that the right to counsel commences at the beginning of the case, not just at trial, and that there are both constitutional and statutory rights to counsel.

The attorney's ethical obligations apply to all, from the newest attorney up to the chiefs and the attorney members of the Commission. Excessive caseloads may give rise to a conflict of interest, which is an ethical problem for the individual attorney and for management. The attorney has a duty to withdraw if they feel they are in danger of violating the rules of professional conduct for any reason, including excess caseload. There is an existing policy for a staff attorney to take their concerns up the chain of command if they have too many cases.

Chief Hooks said that OPD caseload standards are in line with ABA guidelines, which don't recognize a specific number of cases, but instead address workload. The CWS attempts to measure workload by considering not only case types but also factors such as travel. He cautioned that although the revised weightings were developed by good reporters, they may have been reporting the amount of time required to complete a specific type of case in an already overburdened system, thus institutionalizing poor practice due to high workloads.

The average staff attorney case weight in FY 12 was 176, compared to the "red flag" mark of 150. One response is to evaluate whether we are doing the best we can with what we've got, so he continues to develop best practices region by region. He has also looked at the ABA 10 Principles for benchmarks. Those benchmarks include the addition of the private bar, but OPD contractors are overloaded as well. Another is to screen for eligibility so that we are only representing people entitled to our services, which we do and are trying to do better. The Region 8 IQ specialist is working on a streamlined form and process. Commissioner Petaja commented that he participated in the previous change to the IQ form which was developed in response to complaints that we were getting insufficient information in making eligibility determinations. He cautioned that going back to a one-page form could result in renewed criticism regarding a lack of data. Chief Hooks replied that he is not tied to a one-page form, and will ensure that the needed data is collected. Finally, the ability to comply with other ABA principles including continuous representation and continuing education and mentoring are seriously impacted by the high turnover rate.

This leads to the need to develop a region by region plan for Program 1 to decline to accept new cases. The

triggering condition for each region and a relevant time period for monitoring the situation will be defined. The RDPD will notify the chief, and if the crisis continues at the end of the monitoring period, the courts and the prosecutors will be notified and asked to help identify solutions to avoid having to refuse cases within a set time period. The goal is to involve as many stakeholders as possible in the discussion.

Program 1 may decide to stop representation in certain types of cases first, such as treatment court or civil cases that are not constitutionally mandated. There are multiple DN models in other states that could alleviate some of the caseload burden, and Mr. Olson has been asked to consult with the DN workgroup regarding the possibilities. Criminal cases, the agency's core purpose, would be the last type of case to be refused, with felonies prioritized over misdemeanors.

Chief Hooks noted that the discussion outline is not a formal proposal and he asked the Commission for comments. Chairman Gillespie asked if there was a timeline for adopting a program. Chief Hooks replied that this will be a critical component of his meeting with the RDPDs next week and they will begin to develop regional plans. He hopes to have a protocol in place so that he can tell legislators what will happen if there are insufficient resources. Commissioner Petaja would like to see definitive language on case caps for the strategic plan so that the Commission can vote on it and ensure that Chief Hooks has the authority he needs to discuss the issue at the Capitol. Commissioner Novak asked if that language could be approved at the conference call meeting next week. Chief Hooks will know what the next step is when the session ends and resource allocations have been finalized. The Commission thanked Chief Hooks for his work; they understand the issues and their importance.

Commissioner Olson stated his personal opinion that he appreciates the extremely hard work everyone has done to improve the agency, but he is not optimistic about OPD's chances of receiving adequate funding in the session. He thinks the only way to get funded appropriately is through another lawsuit, whether brought by the ACLU or someone else. He believes it is inevitable. Commissioners Gallik and Petaja agreed.

10. Old Business/New Business

A. Eligibility Determination and Cost Recovery (Progress Notes) -- already addressed.

B. Specialty Courts (Progress Notes)
Chief Hooks said that specialty courts continue to burgeon and now number 29. The court administrator is eager to keep OPD in these courts because the judges are very invested in them. They are chameleon like, changing their focus, overlapping case types (family treatment courts) and every new court is free to make their own rules. The agency can't make a concerted plan without more information.

11. Public Comment

There was no additional public comment.

12. Set future Commission meeting dates

The next meeting will be Friday, December 14 by conference call to act on the investigators' firearms proposal. The public location will be the Helena OPD office.

Another meeting will be scheduled in February before the transmittal break which starts on February 28. The office will distribute contact information for the Joint Appropriations subcommittee members to the Commission.

13. Adjourn

Commissioner Petaja moved to adjourn, Commissioner Sherwood seconded and the motion carried. The meeting adjourned at 4:30 p.m.