

# *Larrivee Law Offices, PLLC*

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## **TRANSMITTAL MEMORANDUM**

December 15, 2016

Montana Public Defender Commission  
44 West Park  
Butte, MT

**RE:** Contract / Conflict Attorneys  
Mitigation Plan Issues

**Summary:**

At the close of the PD Commission meeting conducted by conference call on November 30, 2016, I offered to act as a spokesperson for those attorneys working under a Memorandum of Understanding (MOU) with the Office of the State Public Defender. Several attorneys contacted me and have offered their written comments to the Commission under separate cover. Cathy Doyle was asked to make their comments available to the Commission as part of the meeting scheduled for December 16.

In addition, I want to present a brief summary of the work of those attorneys doing contract/conflict work. By way of background, I worked for OPD when it began July 1, 2006. I was the managing attorney in the Polson office in Region 1. I worked for OPD in a variety of positions until my retirement in April, 2015. As such, I have been in both a management position and working as a senior trial attorney for OPD. I have presented sessions at five of the ten OPD Annual Conferences and have been an instructor at four of the Boot Camp (now Trial Skills) training programs. Because of my background and criminal law experience, I have been counsel in 12 homicide cases in Region 1 and Region 2, including serving as lead counsel in the first capital murder case in Montana in 25 years (*State v. Tyler Miller*). (It should be noted that the 2011 Legislature allocated \$900,000 for the anticipated costs in the *Miller* and *Ronald Smith* capital cases as a separate budget item.)

Currently, there are approximately 240 contract/conflict attorneys, 80 mental health providers and 30 contract investigators with active MOUs. Numerically, there are more contract/conflict personnel working with OPD than FTEs. The contract/conflict attorneys, and related providers, are an integral part of the provision of OPD services throughout the State.

As the Commission is aware, OPD was never fully funded since its inception. The original budget numbers were inaccurate and everyone, including the original PD Commission, acknowledged that fact. The understanding was that after one or two years, or even two sessions of the MT Legislature, sufficient data could be acquired that would allow an accurate budget to be established and adjusted for increasing caseloads. In reality, the projected budget was never sufficient and the agency has operated at a deficit as a result. In 2008, I recall not buying supplies for the Polson office for 1 ½ months in May – June in order to limit the shortfall. While everyone recognizes the need to operate within a fixed budget, the reality of this agency is that it does not, and cannot, readily control its caseload. The 2005 Montana Legislature defined the scope of cases that require appointment of counsel. Criminal cases frequently involve multiple defendants requiring appointment of conflict counsel. DN cases always require multiple attorneys and last for many months. In 2008 – 2010, I would represent clients in Region 2 in order to avoid appointment of conflict counsel (e.g., *State v. Matt* and *State v. Allard*), even though I had a full caseload and management duties in Region 1.

To summarize these points, the types of cases require the appointment of contract /conflict counsel. The use of “mitigation attorneys” (adjunct OPD employees) may reduce the number of contract/conflict attorneys, but unless 100-150 of those attorneys are hired (with the accompanying cost), it will not solve the budget shortfall.

Second, the impact of the current plan to have all contract cases assigned to FTE attorneys is contrary to the whole concept of the case weighting system. The case weighting system was implemented to make caseloads manageable for each attorney. One of the reasons OPD was created was a recognition of the disparate caseloads (and corresponding ability to provide effective assistance as counsel). Again the reality is that you cannot expect a relatively new attorney (less than 5 years’ experience) to manage a caseload of 150 - 200 cases at a time. It can be said unequivocally that some of those clients will receive ineffective assistance of counsel. Eventually that type of caseload leads to burnout and the better young attorneys will simply leave OPD. Less than five years ago the attrition rate for attorneys leaving OPD was approaching 25 %. That means every time a lawyer leaves the agency, you have to start all over. You have to re-assign that attorney’s caseload to existing FTEs and the problem perpetuates itself. The use of contract attorneys is specifically designed to relieve that situation and is critical to the overall success of the process.

I work with young attorneys in Lake, Flathead, Sanders and Lincoln counties. They are hardworking and committed to OPD. That said, I can see the effect of the assignment of all (contract) cases to the FTEs is taking its toll on morale. Each and every FTE attorney is stepping up in response to the Mitigation Plan, but it is taking a toll. The budget shortfall is not the result of people not doing their job – it is just the opposite. The more that OPD does well, the more they are being asked to do. The increase in caseloads and the complexity of cases, coupled with an inadequate budget from the beginning, has been at the core of the deficit since OPD started. The solution involves several components:

1. The use of mitigation attorneys will have a positive effect on reducing costs, but it is unrealistic to think it will fill a \$2.5 million shortfall.

2. The 2017 Legislature has to be educated about the agency: its history, its work and its efforts to be cost effective. Educating 150 legislators, and the Governor's office, will require a concerted effort by more than just one or two Commission members. Certainly there are legal constraints to what OPD can do, but educating the individuals in key positions is critical to resolving this situation.
3. The Commission's endorsement of the FTEs at the last conference call was a welcome move. However, the other components also need to be supported and in turn, they need to be part of the mix in educating the legislature. There needs to be a coordinated, cohesive plan to present to this legislative session, and it needs to include the Governor's office.

In closing, I can safely speak for the 350 contract/conflict personnel by saying that we will work with the Commission, and OPD, in any way that we are asked. By working together, the agency can succeed and the clients who need us most can be served.

Sincerely,

A handwritten signature in cursive script that reads "Noel K. Larrivee".

Noel K. Larrivee

December 8, 2016

Public Defender Commission

Re: Contract Attorney Perspective

I. We believe it would be a mistake for the OPD to stop using contract attorneys.

Aside from throwing away the immense resource of knowledge and experience that is represented by the contract attorney pool, the OPD would lose all the benefits to itself of using contract attorneys, which include: 1. Contract attorneys provide a wide variety of representation styles for clients; 2. Contract attorneys bring a freshness and vitality of representation that comes with a more manageable caseload; 3. By using contract attorneys, the OPD presents a more diverse face to the community; 4. When contract attorneys are in the mix of representation, the courts have to respond to a wider variety of defense perspectives, which is healthy for the agency, as well as for clients.

II. We don't think the OPD has fully explored alternative methods of using contract attorneys more economically.

We see no evidence that the OPD has: 1. Considered whether contract lawyers would be willing to work for a lower hourly rate under certain circumstances; 2. Considered whether there are alternative sources of funding available (e.g. grants, etc.) to cover part of the hourly rates for certain types of cases; 3. Considered whether certain categories of cases could be handled by contract attorneys outside of the OPD budget, for example, representation of children in DN cases; 4. Considered whether contract representation of clients in lower court criminal cases could be done by contract attorneys under fee arrangements other than hourly or other than under the auspices of the OPD; 5. Considered whether criminal clients could be charged a small percentage of the hourly rate for contract attorneys, instead of trying to collect larger sums from clients at the close of their cases.

We have represented hundreds of indigent clients over decades in our practice. We have felt it to be both an honor and a privilege, and believe we have provided high quality representation. We have dedicated a substantial portion of our professional lives to representing individuals who could not afford to hire an attorney privately. We have structured our law firm to accommodate this type of representation, and hope to be able to continue with this part of our practice.

Sincerely,

  
William Boggs and Kathleen Foley



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December 18, 2016

Public Defender Commission,

Thank you for the opportunity to comment on the Commission's Mitigation Plan to address the Office of the Public Defender's budget shortfall. I represent parents and children in Dependency and Neglect (DN) matters in Regions 2 and 5 as a contract attorney. While I do not envy the difficult task of budgeting a large and underfunded agency, I write to encourage the Commission to place the rights and needs of the individual Montanans we serve first and foremost in the design and implementation of any budget-saving plan.

It caused me grave concern when I read that one mitigation strategy suggested at the October 3rd meeting was to limit representation to only one person in DN matters. Fortunately, the Commission wisely voted to strike that provision from the plan, but the suggestion alone leaves me with the fear that there is an inadequate understanding of just how important adequate representation is for every party in a DN matter. Additionally, it is every party in a DN matter's constitutional and statutory right to be represented by counsel. (See *A.S.A.*, 852 P.2d 127 and Mont. Code Ann. § 41-3-425.)

The parents and children (i.e. families) subject to DN matters are the most vulnerable and at-risk members of our society. Nearly every individual I have represented over the last four years suffers from some deep systemic issue that is often transgenerational. My clients struggle with poverty, homelessness, mental health issues, substance abuse, poor physical health, poor education, lack of family and community supports, and chronic unemployment. Many clients are experiencing every one of these conditions all at the same time. Many of my parent clients were the subject youth of a DN matter and spent much of their childhood in foster or group homes themselves. As a society and as attorneys, we must not turn our backs on these individuals and ensuring that each parent and child that is a party to a DN matter has representation is fundamental to that commitment. Parents and children in DN matters face the prospect of permanently and irreversibly losing their relationships with each other. That outcome is more devastating even than facing a loss of physical liberty or economic resources.



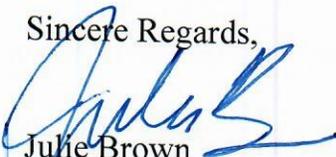
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Further, any mitigation or budget-saving plan that does not ensure adequate representation of all parties in DN matters will only result in more costs to the State of Montana in the future. Because there is a right to counsel in DN matters, this Commission should expect reversals of terminations appealed to the Montana Supreme Court by a parent that was not represented at the District Court. This Commission can anticipate further lawsuits akin to *White v. Martz* that challenged the public defense system in criminal cases. Perhaps the biggest costs will be those associated with future and repetitive societal and legal involvement with the families subject to DN matters. Providing adequate representation to all parties in DN matters is a key component of successfully intervening with a drowning family in a way that results in that family staying out of the system in the future.

Hiring contract attorneys in DN matters is essential. I have been assigned to DN matters that require four, five and even six attorneys at times due to the makeup of the subject family. In most DN matters, OPD cannot ethically represent each person that has a right to counsel as it would be a conflict of interest to attempt to do so. I am sure that there are creative solutions to save money while still appointing contract attorneys to represent parents and children in DN matters and I would be happy to brainstorm ideas (regarding travel to other counties, identifying areas of billing that could be trimmed, revising the manner in which cases are assigned e.g.) with my fellow contract DN attorneys and make suggestions to the Commission if given the opportunity.

Sincere Regards,



Julie Brown  
Attorney-at-Law