

# MONTANA PUBLIC DEFENDER COMMISSION

Red Lion Colonial Inn

Helena MT 59601

**January 10, 2011**

*Approved at the February 28, 2011 Meeting*

## **Commissioners Present**

Ray Kuntz, Red Lodge; Margaret Novak, Chester; Terry Jessee, Billings; Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; Kenneth Olson, Great Falls; Bill Snell, Billings; Caroline Fleming, Miles City attended by teleconference

## **Commissioners Absent**

Majel Russell, Billings; Jennifer Hensley, Butte; Jim Taylor, Missoula, has tendered his resignation

## **Liaisons**

Laura Simonson, liaison for union attorneys, and Lisa Korchinski, liaison for non-management appellate defender staff and attorneys were in attendance. Laura Masica, liaison for union support staff and investigators, had nothing to report and did not attend.

## **Interested Persons**

Scott Crichton, Executive Director, American Civil Liberties Union of Montana; Timm Twardoski, Executive Director, American Federation of State, County and Municipal Employees

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

The Montana Public Defender Commission meeting was called to order by Chairman Fritz Gillespie at 8:00 a.m.

### **2. HB 97, Supervision of Appellate Defender**

Chairman Gillespie asked the Commission to revisit their October 8, 2010 motion to separate the appellate office. He wants to be sure of their position on HB 97, scheduled to be heard this morning. The current version of the bill removes the responsibility for hiring and supervision of the chief appellate defender from the chief public defender and places that authority with the Commission. It also places budgetary supervision of the appellate office with the Commission. However, former Commissioner Jim Taylor did not think that the bill as drafted met the Commission's intent to fully separate the appellate office. As a result, Chairman Gillespie requested further direction from the Commission prior to the bill hearing.

Chairman Gillespie reported that to provide for full separation, including administrative functions, the Department of Administration (DOA) estimated that there would be a one-time cost of \$54,000 and ongoing costs of \$119,000 per year. That estimate does not include moving the appellate office to a new location separate from the Helena regional office.

Commissioner Novak moved to amend the October 8, 2010 motion to adopt the requirements of HB 97. Commissioner Jessee seconded. During discussion, it was clarified that HB 97 would not create a separate agency, but would result in a different reporting structure under the Commission (only creating a separate agency would incur additional costs). Chairman Gillespie noted that the Governor's office would not support the expense of creating a new agency. The Commission members said that HB 97 is a good first step in removing the potential for conflict, but noted that formation of a separate commission might be necessary in the future.

Chairman Gillespie invited public comment prior to voting on the motion. Lisa Korchinski, liaison for the appellate defender office said that the entire appellate team supports HB 97. However, they are concerned that Chief Appellate Defender Joslyn Hunt would have to reapply for her job and they are opposed to that possibility.

Commissioner Kuntz asked Chief Hunt if HB 97 would establish sufficient professional independence for her office to handle ineffective assistance or other claims against trial attorneys. Chief Hunt said that her office has always felt that they had professional independence, but this would memorialize it in statute. It will also provide further insulation from potential conflicts and any fear of retaliation.

The question was called and the motion carried. Chairman Gillespie, Chief Hood and Chief Hunt left for the Capitol and Commissioner Olson assumed the chair.

### **3. Approval of Minutes**

Commissioner Petaja moved to approve the minutes of the October 8, 2010 meeting as submitted. Commissioner Jessee seconded and the motion carried.

### **4. Commission Liaisons**

Appellate liaison Lisa Korchinski had no further comments.

Union attorney liaison Laura Simonson said that the case weighting system does not address workload as required by statute, especially if there is travel involved. Also, she would like to see the Labor Management Committee reevaluate the performance evaluation forms. Another minor issue is the use of investigator resources; some employees were not aware of the policy adopted in August requiring the regional deputy to approve use of investigators, causing conflict between some investigators and attorneys.

### **5. Committee Reports**

#### *A. Legislative*

Administrative Director Harry Freebourn presented on behalf of Chairman Gillespie.

#### *i. HB 96, Recovery of Costs*

This bill is also being heard this morning. OPD represents clients in guardianship cases regardless of indigency status by statute, and the bill would allow charging for services in certain cases. Commissioner Petaja suggested amending HB 96 to require an application fee of \$10 for all types of cases. Mr. Freebourn said that there are two other bills that haven't been introduced yet where this might be included.

#### *ii. HB 97, Supervision of Appellate Defender*

This item was discussed previously, but Mr. Freebourn noted that if the appellate office became a separate agency at some point, OPD's existing budget may be reallocated to offset some costs.

#### *iii. LC0380, Access to Jails*

This would allow public defenders to make an initial contact with people accused of a serious crime, even if they are not assigned a public defender.

#### *iv. LC0382, Flat Fee Contracts*

The agency was unable to find a sponsor for this bill, but the provisions might be included in one of the two bills referred to earlier. Possible uses for flat fee contracts include specialty courts and DN consortiums.

#### *v. Law Student Draft Legislation*

Mr. Freebourn deferred this until Chairman Gillespie returns.

vi. Other Legislation

The budget hearings start tomorrow and commissioners are encouraged to attend. OPD is part of the supplemental process and is requesting \$850,000, down from original projections of about \$3 million due to mitigation efforts that were implemented immediately.

So far there are only two bills with fiscal impact, but there will be more to come. Mr. Freebourn will distribute a legislative update on a regular basis throughout the session.

*B. Budget*

Mr. Freebourn again presented on behalf of Chairman Gillespie.

The first quarter financial information was distributed. So far, it is right on schedule based on approval of the supplemental appropriation.

The operations report will be provided routinely. Mr. Freebourn answered questions about the report, and will make a change to show both open and closed cases, instead of just the net. He noted that this is only a snapshot of a single point in time, and he hopes to produce it quarterly to provide multiple reference points to assess the resource need.

There was a lengthy discussion regarding assessments and collections, including the possibility of requiring a \$10 application fee, the inconsistency in how courts assess fees, and the lack of cost-effectiveness in processing collections. Commissioner Jessee said that the legislature is very interested in fee collection, and the agency must show that a process is being developed. Commissioner Kuntz said that fundamentally and as matter as policy OPD is in the business of representing the indigent. The agency is not in the position of representing the state in civil collection efforts against clients, or in representing people who can afford a lawyer, but is fulfilling a constitutional obligation. He said that by policy, the Commission needs to be steadfastly opposed to squeezing money from the indigent to fund the indigent defense system. The Commission agreed that OPD is not obligated to enforce assessments; that is up to the county attorney. They also agreed that clients should not be going to prison for failure to pay attorney fees.

Mr. Freebourn reviewed the governor's approved budget, especially in regard to the request for additional FTE. Funding for the two pay ladders and an increase in the contract attorney rate are not included in the budget. Public comment regarding the importance of those items is expected at tomorrow's budget hearing.

*C. Contracts Process*

Commissioner Petaja reported that the committee discussed two issues—AU recommendation #12 regarding evaluation of contract attorneys, and transparency in the contracting process. Contract Manager Larry Murphy is currently in the process of doing proficiency determinations. All self-evaluation forms have been returned and peer review by regional deputies is underway.

The majority of the committee meeting centered on transparency and fairness in the contracting process. Commissioner Petaja said that the Memorandum of Understanding (MOU) clearly states how cases are assigned, and includes a prohibition of discrimination. Each of the criteria in the statute is included in the MOU. He does not recommend adopting any additional formal protocol regarding case assignments for contractors, and suggested that discretion in assigning cases remain with the regional offices.

Mr. Murphy has been asked to draft a webpage that will outline the factors in making case assignments

for the committee's review. Furthermore, Commissioner Petaja does not believe that a new system to address complaints is warranted since only two have been received to date.

Mr. Murphy reviewed his written report, focusing on proficiency determinations and standards compliance. He will provide a copy of the current MOU to all commissioners. Currently, there are signed MOUs with approximately 190 contract attorneys. Any that didn't sign the FY 11-12 MOU are finishing old cases but are not being assigned any new ones.

Mr. Murphy is trying to improve access to the system for contractors, especially in regard to requests for help on cases and access to the brief bank. He and Chief Hunt drafted a policy regarding contract counsel's responsibility in the appeal process, requiring them not to withdraw until the appeal time has expired or the case has been referred to the appellate office. The new policy will be communicated to all contractors and included in the next iteration of the MOU.

#### *D. Personnel*

Commissioner Jessee said that the committee approved the conflict manager job description and a vacancy announcement has been prepared. It is expected to take about six months to fill.

Evaluations for both Chief Hood and Chief Hunt are complete and Commissioner Jessee will forward the documents to the Human Resource office to be placed in their confidential personnel files. His only concern about the process was that there was no place in the documentation for comments by commissioners and he would like to make that change for the next round of evaluations. Commissioner Kuntz recommended that a documented process be developed that includes an evaluation schedule and a formalized vote regarding retention or discharge rather than just an evaluation and consensus.

Commissioner Jessee reviewed the status of the AU recommendations. Most items are complete. Item 14, emergency attorney on call 24/7, was rejected until funded. He would like to see this item addressed in the future. He continues to have concerns regarding resource allocation between regions, particularly Regions 2 (Missoula) and 9 (Billings). Mr. Freebourn said that the new case weighting system suggests that Billings has a resource problem. Of the 16 new FTE requested by the agency, the preliminary plan is for two attorneys and one support staff to go to Billings. He also noted that the two regions have a different resource mix because Billings has many contractors compared to Missoula. Additional FTE won't help in some of the remote areas without offices, and contractors will still be needed.

## **6. Public Comment**

Scott Crichton, Executive Director of the American Civil Liberties Union, Montana said that the Commission must be careful not to lose the rudder in trying to accommodate legislators. The American University study did not find fault with the architecture of the public defender system or the standards adopted by the Commission, and in fact, were quite complimentary. Their recommendations were intended to improve management, not to change the structure of the system. Mr. Crichton recommended that the Commission be proactive in trying to prevent system changes that might impact the independence of the public defender system from the legislative and judicial branches, or affect the agency's ability to deliver services.

Assistant Appellate Defender Eileen Larkin spoke on her own behalf, and not on behalf of the appellate office. Ethics Advisory Opinion 050621 prohibits an attorney from notifying the court that a client has failed to report under the "call-in bond condition" unless the client has given consent for the attorney to release this confidential information. This prohibition will likely apply in regard to an attorney reporting to the court that a client failed to make payments assessed at sentencing. As an appellate attorney, she would be looking at an ineffective assistance of counsel claim against the

attorney, the chief and the Commission if such a fact pattern were presented on appeal. This may be an ethical violation and if the legislature enacts such a law, it would likely end up being decided by the judiciary.

Mr. Freebourn introduced Dave Stenerson, new regional deputy public defender in Missoula; Kyle Belcher, IT supervisor; Marsha Parr, case management support; Megan Coy, Legislative Audit Division; and Commissioner Kuntz's daughter Nina.

Commissioner Novak requested a moment of silence in honor of the Tucson victims, per President Obama's request.

Commissioner Petaja agreed with Mr. Crichton that the current structure of the public defender system and the Commission should be defended. He suggested that tightening up the application form would help prevent the appearance that the agency serves people who are not entitled to services. He also encouraged commissioners to attend monthly meetings of their local judges if possible, noting that the judges in his district are pleased with the work of the agency. Commissioner Jessee agreed and said that if anything the courts in his area would like to see more attorneys. Commissioner Kuntz said that public perception of the agency is an issue of persuasion. As with juries, some people already know what they know, and some are open minded. Those legislators need to be identified with the intent of having a productive conversation.

Chairman Gillespie returned during lunch and chaired the remainder of the meeting.

## **7. Public Defender Program Report**

### *A. Chief Public Defender Report*

Chief Hood reported on several management changes. Cyndi Thornton replaced Olivia Norlin as regional deputy public defender in Glendive; she has been practicing in that area for many years and is a long-time resident. Dan Minnis, most recently the OPD presence in Cut Bank, has taken the regional deputy position in Havre. He previously worked in legal services on the highline, so he is well known in that area. As Mr. Freebourn mentioned, Dave Stenerson is the new regional deputy in Missoula. He has many years of experience in criminal law, and is moving from the managing attorney position in the Hamilton office.

Legislative issues are taking a large part of Chief Hood and Mr. Freebourn's time. She will do very little traveling during the session so that she can be available as an informational witness as needed. She and Mr. Freebourn are actively following legislation with potential fiscal impact, including several DUI and medical marijuana bills.

A double homicide in Kalispell is being evaluated by the attorney general's office as a potential death penalty case. Noel Larrivee will complete his certification as a death penalty qualified attorney in March and head the trial team. Ed Sheehy, the only other death penalty certified OPD attorney aside from Chief Hood, will lead the mitigation team. They are in the process of trying to identify a mitigation expert. The assumption is that it is easier to dismantle a team than to assemble one once the determination is made. This might be an appropriate topic for the budget hearing tomorrow. All expenses related to this case will be tracked separately. The costs could be handled as a one-time appropriation, or it could be part of the supplemental process during the next session. Chief Hood will do some research, but estimated that \$500,000 would probably cover the costs through the initial appeal.

The fifth management training session is scheduled for February and it will focus on healthy work environments. An outside trainer recommended by the Department of Administration will do field work in two offices and then develop a training program for all managers.

Chief Hood is working on performance appraisals for her direct reports. She distributed the second field report summary and said that she likes getting information from the regional deputies this way. People continue to do good work. The Top Ten challenges in the field still include the need for new resources; they are well thought out requests, and she hopes the legislature will provide some relief to meet the need.

Chairman Gillespie verifies the field reports, and he said that the segment on trials is very telling. As far as he can tell, reports of judges and prosecutors being upset with specious motions and “the cost of litigation” are not substantive. He asked the regional deputies to share with him the extent to which they talk to judges and prosecutors; he sees from the field reports that they have a rapport with judges and wants to be able to stand before the legislature and challenge those comments.

Chairman Gillespie asked about the challenges regarding the new district court judges. Chief Hood said that although the number of cases hasn’t changed, the scheduling is challenging. In Billings, there will be two law and motions on one day, and in Helena there will be three. The increase in specialty courts in many areas is also straining limited resources.

Chairman Gillespie invited public comment on Chief Hood’s report, and there was none.

#### *B. Training Report*

Training Coordinator Eric Olson reported that a federal grant awarded to the University of Montana will fund a capital training program for both defenders and prosecutors. A statewide inter-agency mental health law conference is scheduled for February. Mr. Olson is hoping to obtain mini-grant funds through the court assessment program for Indian Child Welfare Act training in April. The DN uniform practice work group continues to work with the goal of more efficiency and less confrontation amongst players in the DN arena. The standards compliance verification process is in development, and a recommendation will be presented for the Commission’s review at the next meeting. Mr. Olson distributed copies of the standards compliance checklists, which serve as a reminder of practice standards for particular types of cases; they will be especially useful for more technically challenging or less familiar case types.

Chairman Gillespie asked if revisiting the standards is part of the compliance verification program. Mr. Olson is not suggesting changes to the standards at this point, but it is important to maintain a dialog regarding practical implications, areas of difficulty, and standards that attorneys may not be in agreement with during the confidential interviews.

#### **8. Appellate Defender Program Report**

Chief Hunt said that although her attorneys are gaining more experience and turning cases around more quickly, the case base continues to grow. Performance evaluations were completed approximately five months ago, but she has begun doing them again using the new tool; it is more detailed and has a broader range. They should be complete by the end of the month.

*State v. 18<sup>th</sup> Judicial District* is discussed in detail in Chief Hunt’s written report. The decision establishes a new procedure, and relies on the presumption that all discovery is provided up front. Attorneys will be required to object to evidence presented inappropriately; Chief Hunt and Chief Hood will establish some practice points so that the record can be preserved.

Chief Hunt briefly discussed the *State v. Gieser* decision. The Court reversed this felony DUI conviction due to trial counsel's ineffective assistance. The opinion has good language about the prejudicial impact of erroneously admitted scientific-type evidence.

Commissioner Gillespie asked how he should respond to a possible assertion that there are specious appeals as well as specious motions? Chief Hunt said that the appeals they are seeing now are more complex than at the beginning of the agency, however, it is the client's decision to appeal. The appellate office cannot raise frivolous issues, so if they find no issues to appeal but the client is determined, they file an Anders brief. They do not file a brief for every issue at the client's direction, but instead they explain the issues that have merit to the client. They always inform the client that they have the right to challenge both trial and appellate counsel as ineffective assistance.

**9. Public Comment**

Commissioner Gillespie asked the regional deputies in attendance to comment on the record about their relationship with local judges and prosecutors. John Putikka (Kalispell), Dave Stenerson (Missoula), Ed Sheehy (former Missoula deputy), Matt McKittrick (Great Falls), Jon Moog (Helena), Sherry Staedler (Butte), Doug Day (Lewistown), Peter Ohman (Bozeman) and David Duke (Billings) presented a unified message. The regional deputies are in regular communication both informally and formally with their judges, and are available to take emergency or problem calls from them. The judges appear to be pleased with OPD and the level of expertise they bring to the court. The relationships with prosecutors and law enforcement are generally professional and respectful. Some courts are assessing public defender fees, and some are not because the client has already been determined to be indigent.

Some commissioners have heard complaints that cases are taking longer in DN and DI cases or that OPD makes too many motions, but the regional deputies said that this is because they are following the standards and doing things right. Good motion practice is important to representation. The appellate attorneys appreciate it when trial attorneys file motions because that is the basis for the record at the appeal stage.

**10. Old Business/New Business (\*Action Items)**

There was no old business to conduct.

*A. John R. Justice Loan Repayment Program*

Stacye Dorrington from the Montana Board of Crime Control (MBCC) discussed the JRJ loan repayment program. Montana received the minimum amount available to a state based on population. The MBCC took 15% to administer the grant and the balance must be shared equally between public defenders and prosecutors. A committee will meet to recommend awards in February, and the announcement will be made at the March meeting of the full MBCC board. The MBCC hopes that this will be a standing grant, but there are no guarantees that it will continue after this year.

*B. Public Participation Guidelines*

The Commission was reminded by the Governor's office that the public has a right to participate in agency decisions.

*C. Case Closing Document*

Chief Hood presented new versions of the case closing forms (one for criminal and one for civil). They have been streamlined and now include pre-populated fields to enable attorneys to complete the forms within a few minutes. They will be tested again and then implemented system-wide. Ideas for providing the forms to

contract attorneys were discussed; Chief Hood noted that individual contractors require different delivery systems, and we try to accommodate their preferences.

The Commission agreed that the closing form includes all of the information that they requested. They recognized that there will be an increase in contract attorney costs because they will bill the agency for the time spent completing the form, but said the information is essential to comply with statute. Commissioner Petaja made a motion to put the closing form into full force and effect on a trial basis. Commissioner Kuntz seconded and the motion carried. Staff will provide feedback on implementation at the next meeting.

*D. Legislative Presentation*

Mr. Freebourn distributed a handout on the legislative presentation. He described the hearing process, which will begin with the Legislative Fiscal Division report. Chairman Gillespie, Chief Hood and Chief Hunt will then discuss the items in the presentation. Many of the regional deputies will be in attendance and will be prepared to justify the budget request for more FTE.

Commissioner Jessee suggested that the summary of progress on the AU recommendations be slightly expanded to include specific actions that were taken to address each recommendation. Chairman Gillespie agreed, and Commissioner Jessee volunteered to draft a digest version.

*E. Set future Commission meeting dates*

The next meeting will be Monday, February 28 by conference call. There will be a limited agenda focused on legislation and budget items.

**11. Public Comment**

Mr. Crichton provided an update on the bill to abolish the death penalty. A large coalition including churches, the ACLU and the Human Rights Network are involved in the abolition effort. They continue to draw attention to the costs associated with carrying out the death penalty and the fact that it is an irreparably broken system. The hearing will be in early February.

**12. Adjourn**

The meeting adjourned at 4:25 p.m.