

MONTANA PUBLIC DEFENDER COMMISSION

MINUTES

Conference Call Meeting

Public Locations: Office of the State Public Defender, 44 West Park, Butte and
Region 4 Office, 139 N. Last Chance Gulch, Helena

February 5, 2010

(Approved at the April 23, 2010 meeting)

Call to Order

The meeting was called to order by Chairman Mike Sherwood at 10:04 a.m.

Commissioners Present

Mike Sherwood, Missoula; Terry Jessee, Billings; Kenneth Olson, Great Falls; Richard (Fritz) Gillespie, Helena; Jennifer Hensley, Butte; Caroline Fleming, Miles City; Charles Petaja, Helena

Commissioners Absent

Majel Russell, Billings; William Snell, Billings; James Park Taylor, Missoula; Tara Veazey, Helena

New Liaisons Present

Laura Bailey, union support staff and investigators; Laura Simonson, union attorneys; and Lisa Korchinski, non-management appellate defender staff and attorneys

Interested Persons

Niki Zupanic, American Civil Liberties Union of Montana (ACLU); Timm Twardoski, Executive Director of American Federation of State, County and Municipal Employees, Montana (AFSCME); Pat Gervais, Legislative Fiscal Division

Approval of Minutes (*Action Item)

Commissioner Jessee moved to adopt the minutes of the December 17-18 2009 meeting as submitted. Commissioner Petaja seconded. The motion carried.

Public Defender Program Report

Chief Public Defender Report

Chief Public Defender Randi Hood reported that in response to the Commission's concerns and those identified in the American University (AU) report, the Office of the State Public Defender (OPD) has been working on the JustWare system (JWS) to realize uniform and valid information. Brian Smith was brought on board as the focus person under the Central Office. Mr. Smith is very knowledgeable from an attorney perspective on the JWS. He will work with Eric Olson, the training coordinator, to continue to facilitate the spread of information to system people around the state.

Mr. Smith reported he is working on procedures and systems to certify accuracy of information. Several priorities he identified include level of time keeping, case counting, and the case-weighting system. He and Administrative Director Harry Freebourn visited Billings, Great Falls, Helena, Anaconda, Butte and Bozeman observing and collecting information. During the discussion several points were made: the case weighting system (CWS) is a labor/management tool and it is not clear at what level it can be automated because of its subjectivity. The JWS should be bigger, because it is just measuring raw cases; sometimes two or three cases in the JWS are counted as one in the case weighting system. Finally, the rules developed by Labor Management Committee (LMC) need to be applied uniformly.

Commissioner Gillespie suggested that since the JWS was developed nearly two years ago there should be sufficient data to identify the amount of time a given case takes. Time-tracking is critical to refining the JWS regardless of how unpopular it is. Chief Hood reminded the Commission that the LMC has agreed to review the information that is being produced out of the JWS regarding how long a case takes. The JustWare policy as adopted at the October meeting requires entering data weekly.

Chief Hood reported on management training which occurred before the December meeting with the trainer from Kentucky. One component of the training was to organize into teams to look at issues identified at the training. Chief Hood is on two teams that will meet in March. Other teams are also calling meetings and gathering background information. She will continue to report on their activities.

The management model in Billings where there is a lead attorney for misdemeanors and another for felonies is being implemented in Missoula and Kalispell. Chief Hood will continue to report back both from management standpoint and from attorneys' viewpoints. Managers' caseloads were sent by email and they are down considerably. Chief Hood reported that she has four cases, two of which are with Jon Moog and are both awaiting sentencing, a misdemeanor DUI and of course her homicide. By March 15 she should have very little on her agenda.

The issues in Kalispell are resolved, and the OPD is now doing early intervention. Eric Olson, Larry Murphy and Ed Sheehy were appointed as a committee to investigate why there wasn't compliance with the court order. Upon their recommendations, Chief Hood reorganized the Kalispell office.

Commissioner Petaja congratulated Chief Hood on her handling of the Kalispell issue. He went on to say he understands that part of the duties of the Commission is to establish caseloads in the Central Office. He asked if the Central Office would draft a policy for future caseloads for the Commission's review.

Performance Evaluations: All Chief Hood's direct reports have been evaluated. Attorney evaluations are complete except for Regions 1, 2, 5 and 9 and they are all more than halfway done. Generally people are scoring well. A few problems are being identified and addressed, although people are performing at a high level. Chief Hood asked how she should approach the evaluation of the Chief Appellate Defender due to the Commission's concerns regarding conflict of interest with the appellate office. Chairman Sherwood said the Personnel Committee would evaluate Ms. Hunt after she has been in her position one year.

Mr. Harry Freebourn and Chief Hood have been in discussions with the governor's budget office pertaining to the OPD budget and how to proceed. OPD has not been asked to make cuts in services at this point. She and Mr. Freebourn have tried to be forward thinking in how to control vs. cut services, and have found several areas where changes might be proposed. Dependent neglect (DN) cases cost about \$2 million of the \$20 million budget, and DN cases are the one place where there is no constitutional obligation, only a statutory one. The problem with DN cases is that they have a long duration and involve lots of meetings and various get-togethers. They are looking at forming consortiums in Missoula and Billings (two largest locations by caseload). Oregon and other states have pursued this route. DN attorneys informally band together and do the work for a flat amount and they can decide together which meetings are necessary. This may be a way to control costs without cutting services.

Another cost-cutting option is to decriminalize some charges during the next legislative session. Commissioner Gillespie reported he became aware of a publication entitled *Montana Supreme Court Bond Schedule, April 2006* that might be useful in identifying cases that could be decriminalized. Chief Hood thanked him and said she would look into it. She went on to say everyone she has talked to has been supportive of the idea. She plans to meet with the Attorney General and others to ask if they would be part of the process. This will decrease costs for county attorneys, prosecutors, courts, etc.

Commissioner Jessee turned the discussion to mental health incarcerations and open container ordinance violations saying open container violations in Billings are exasperating because they consume public defenders' time. Mentally ill people who should be diverted are arrested and they remain in jail for six months on misdemeanor charges because the city doesn't know what to do with them. Chief Hood sees positive fallout in taking jail time away from some minor offenses. Commissioner Jessee noted the jail is full of people in this situation. Chairman Sherwood outlined an existing program in Florida that addresses the problem of mentally ill people being jailed for long periods of time. He asked Commissioner Jessee to pursue funding and to talk to Dr. Laura Wendlandt regarding diversion of the mentally ill.

Chief Hood discussed the social worker grant in the Missoula office. Myshell Uhl is heading the effort. The challenge has been getting qualified applicants. The goal is to show that having a diversion social worker on staff is worthwhile in diverting both from jail and the Montana State Hospital.

Chairman Sherwood had asked for a summary report on numbers and natures of client and employee/contractor complaints. Chief Hood said that a spreadsheet is being maintained in the central office that deals with client complaints. Chairman Sherwood will send a request for information for the summary report as well as a request for information on the Major Crimes Unit.

Chief Hood reported that the manager training provided them with a deeper understanding of responsibilities and the need to cut down on case loads to manage properly. She feels they have progressed on that issue. The agency is also developing a new employee orientation program and plans to film it. The University of Montana School of Radio and Television provided the names of students who may be able to film as an independent study project. Hopefully filming will begin within next few weeks. A manual is being developed to go with the training videos. Human Resources Officer, Barb Kain and Eric Olson are working on the script.

Public Comment

There were no public comments.

Contract Manager Report

Contract Manager, Larry Murphy reported he is working on the Billings contractor cost analysis. He has pinpointed a potential cost savings in contract services for involuntary commitment (DI) cases by bringing them in-house. Billings spends \$60,000 per year for contract services for DI cases. David Duke, Billings Deputy Regional Public Defender, is working on bringing an FTE up to speed to handle all these cases. He hopes the transition to FTE will be completed within the next month or two, generating significant savings. Mr. Murphy and Mr. Freebourn will develop a cost analysis and the plan to bring DI cases in-house. Contract attorney morale is better. Chairman Sherwood asked Mr. Murphy to provide the Commission with a summary of contractor complaints.

Mr. Murphy reported that he is pursuing the possibility of consortiums, whereby a group of attorneys form an association which then bids with the OPD to contract for certain types of work. Mr. Murphy would oversee the consortium and make sure quality attorneys are used and that they are following OPD's standards. This may be useful in DN cases. After much discussion, Mr. Murphy said he will provide more details as they develop.

Mr. Eric Olson discussed specialty courts or "court ordered treatment monitoring programs" citing they use up manpower and have little funding. Judges are gaining 18 months jurisdiction by forcing offenders into these programs by threatening jail if they refuse. Commissioner Gillespie made a motion that the Public Defender Commission should make a policy decision on this matter. Commissioner Petaja seconded. The motion carried unanimously. Chief Hood will provide the Commission with all of the information on current and proposed specialty courts.

Mr. Murphy reported that the contract attorney audit procedure has been implemented. He will start with Contract Attorneys in Billings. The audit will be done region by region, statewide continuously. Chairman Sherwood requested a written summary of the audit process from Mr. Murphy.

Appellate Defender Report

Chief Appellate Defender Joslyn Hunt reviewed her written report (Exhibit 1). All of the appellate attorneys are carrying around five cases that require opening briefing and around five cases that require reply briefing. They consistently respond to inquiries from trial attorneys and provide feedback on any potential writ of supervisory control questions received. The Appellate Defender Office's (ADO's) caseload continues to grow, but the caseload is proceeding at a steady, manageable pace.

Chief Hunt reported that the caseload report (Exhibit 2) is incorrect and her caseload is actually higher than it shows. She has oral argument on one case and will handle another oral argument case in February. She is writing an amicus brief in response to the St. Dennis conflict brief, as well as a potential cert petition and a sentence review brief. She noted that contract attorneys have been key to ADO's ability to manage their caseloads.

Standards Discussion: A draft of the Standards for appellate attorneys is nearly ready for the appellate attorneys to review and then it will be forwarded to the Commission for their comments and approval.

Conflict Discussion

Colin Stephens, contract attorney, filed a brief on behalf of St. Dennis, arguing that the Office of the State Public Defender is one large law firm. The same argument was made on behalf of Sellers with regard to the ADO. The ACLU filed an amicus brief in the St. Dennis case, and Chief Hunt will file an amicus brief on behalf of ADO. She will report to the Commission once the brief is more fully developed. There has been no response from the Montana Supreme Court regarding the motion and brief in support in the Sellers case.

The ADO hired two new attorneys that have clerked for district court judges. They will be screened and assurances made that they will not be involved with cases from those courts.

Controlling Services

Chief Hunt has looked at Anders briefs filed since OPD's inception and there are about 123. She said there is a theme, related to revocations, and some DN Anders briefs. There is a need for discussions with trial attorneys to educate them to inform clients when an appeal is not appropriate. Lastly, Chief Hunt pointed out that DN case law states that they have a constitutional right to effective assistance of counsel in terminations and supports the consortium idea as a good way to handle DNs.

Chairman Sherwood asked Commissioner Fleming and Chief Hunt to create an evaluation form on Chief Hunt's position for the next meeting, and the Commission will do an evaluation when she has been in her position for a year.

Commissioner Petaja questioned Ms. Hunt about her budget and how many cases on appeal are revocations or probation violations. She said the budget is about \$ 990,000 per year and that about 15% of the cases were revocations or probation violations; the bulk of their work does not involve trials. Chairman Sherwood asked her to categorize by percentage of work at the ADO.

Training Report

Chief Hood delivered the training report for Mr. Olson (Exhibit 3). Training continues at about the same pace on Friday afternoons via video conference. Chairman Sherwood asked if anyone was planning to go to Kentucky for management training. Chief Hood responded that OPD had no funding for that but she is going to Washington D.C. (at someone else's expense) to attend the Department of Justice National Symposium on Indigent Defense on February 19. Chief Hood will report to the Commission at the next meeting. Chairman Sherwood said he plans to go to Kentucky. He asked for a motion that if there is any funding available that the tuition would be covered (around \$700). Commissioner Petaja so moved. Commissioner Gillespie moved to table the motion until Mr. Freebourn can determine if there is money available. Chairman Sherwood seconded and the motion carried.

Commissioner Gillespie asked Pat Gervais, Legislative Fiscal Division, if the OPD data she was getting was any better. Ms. Gervais said that the reports requested were delivered by January 1 as

required but have not been reviewed. The Legislative Finance Committee hasn't met, so she couldn't comment on the content but said information was provided in a timely manner.

Legislative Policy

At Mr. Olson's request, Commissioner Gillespie summarized their last meeting in Helena. He and Commissioners Gillespie and Petaja plan on attending the Montana Association of Criminal Defense Lawyers (MTACDL) meeting in Chico. Chairman Sherwood asked if MTACDL would be willing to do some lobbying and the response was yes.

Chairman Sherwood asked Mr. Olson if there was anything to add regarding training. A web based feedback form has been developed; it should have a good reliable database of comments within the next few months. Chairman Sherwood asked Mr. Olson to contact Commissioner Snell regarding cultural training.

Budget and Legislative Report

Mr. Freebourn said that the OPD is under an audit being conducted by the Legislative Audit Division (LAD), Vickie Rauser is the lead auditor and the Commissioners may be contacted by her. Chief Hood said Ms. Rauser complimented the agency's transparency. Mr. Freebourn and Chief Hood encouraged them to include an operations audit especially of the Case Weighting System, in addition to the financial audit. Ms. Gervais said that there is a performance audit unit within LAD. Chairman Sherwood asked Mr. Smith to look for someone other than the LAD to conduct the performance audit.

Law and Justice Interim Committee (LJIC)

Mr. Freebourn reviewed the legislative timeline (Exhibit 4).

There are two potential legislative items—SJR 29, Study retention of biological evidence in felony cases (DNA) and SJR#39—Study DUI laws and enforcement. The LJIC wants to see any potential legislation from our agency by mid-summer.

Legislative Finance Committee

The next meetings will be held March 4-5, June 3-4, October 7-8 and November 16.

OPD's budget shortfall could be on the agenda for the Legislative Finance Committee (LFC) meeting in March. Ms. Gervais is not sure if the OPD will be on the agenda or not. She went on to say that it is a public meeting, not "invitation only." Performance reports will be presented in written form at the March meeting.

Public Comment

Niki Zupanic, ACLU Public Policy Director said that the ACLU filed an amicus brief in the St. Dennis case and the brief is available on line on the Supreme Court's website, or the Commission can contact the ACLU for a copy. She said she is very pleased with concrete steps being taken by Brian Smith to address some of the ACLU's concerns. The ACLU received a formal request from Chairman Sherwood for a semi-annual evaluation, as well as a formal evaluation based on complaints received. Scott Crichton, Executive Director of the ACLU, Montana, will be following up on the request, although she has concerns about their ability to provide the evaluations, as well as whether such evaluations would be consistent with their mission. She

will follow up with a more comprehensive written response to the request. After some discussion Ms. Zupanic said they will consider how best to provide feedback to the Commission.

Budget and Legislative Report, (continued)

The original reason for scheduling this meeting was to discuss potential budget reductions. Mr. Freebourn explained the Governor's budget reduction process to the Commission. Regarding the OPD's budget, he believes that everything that can be done has been done to reduce the budget short of turning to service cuts. New decision packages, if any, are now due in late August. There will be future direction from the Office of Budget and Program Planning (OBPP) concerning this matter. Mr. Freebourn will put together a timeline for the Commission to prepare their budget submission for the next biennium.

Chairman Sherwood and OPD responded to the request for budget reductions that was due by January 29. Mr. Freebourn explained that they reduced the budget by \$3,500 along with some smaller dollar amounts of the Commission's budget, but the larger amount of \$950,000 was identified as potential cuts or reductions in service, but serves only as a place holder, there is no plan behind it. If the OPD is required to produce a plan, the Governor's office will notify us and the Commission will be gathered to address the reduction. Between the shortfall and the reduction about \$2 million would need to be addressed. There is no action planned now; however the Commission and the OPD should be thinking about how to best respond, if asked.

Chairman Sherwood identified a budget reduction of \$3,500 dollars, which was based on the decision not to send him to the mid-winter ABA SCLAID meeting and having at least one more meeting by phone instead of in person. He explained to Budget Director David Ewer that he wanted to discuss any potential service reductions before implementing. The only non-constitutional options are parents in DN cases and possibly specialty courts.

Mr. Freebourn reviewed the mitigation plan (Exhibit 5) and history of the projected shortfall (vacancy savings and across the board 2% reduction). The projected shortfall is down to about \$1 million, due primarily to the reduction in contractor costs. Contractors are used for overflow and conflict cases in most regions. He went on to say that the mitigation plan consists of four categories including: 1) other funding; 2) services reduction; 3) increased productivity; and 4) reduced expenditures.

Chairman Sherwood asked how much was being collected from clients. Mr. Freebourn will email this report. He explained that assessments are quite different from collections—first the statutes prioritize how payments are made; and second, the ability of the client to pay can result in slow collections. He went on to say that assessments need to build up for many years before any major results are realized.

Committee Reports

American University Recommendations (Gantt chart Timeline/Costs, Exhibit 6)

Chairman Sherwood said he hasn't heard anything back from committees following his email a couple of weeks ago regarding their work on assigned items in the American University Report. He suggested that phone meetings may be a good way for committees to meet. He commented that it has been five months since the American University report.

Chairman Sherwood asked about the progress of Chief Hood's evaluation. Commissioner Fleming reported she and Commissioner Jessee have been discussing the process. The challenge is finding a format specific to Chief Hood's position. Ms. Kain will get examples of evaluation questions from other agencies for Commissioner Fleming so she and Commissioner Jesse can formulate a survey to best determine the questions for the Commission for Chief Hood's evaluation.

Collective Bargaining Committee

Chairman Sherwood brought up a problem with liaisons saying he was advised that the Commission cannot talk to those employees about certain issues. He suggested having someone from the Commission and the OPD have a meeting with Timm Twardoski, American Federation of State, County and Municipal Employees (AFSCME) Executive Director, to discuss the problem and keep it from developing further. Mr. Twardoski will discuss this issue with the committee.

Chairman Sherwood requested a written report from everyone outlining their plan of attack regarding the Gantt chart tasks. He will put his request in written form and email it.

Mr. Freebourn reminded everyone that committees are a subdivision of Commission and if they have a meeting it is subject to public meeting laws.

Commission Liaisons

Appellate - Lisa Korchinski

Ms. Korchinski reported there were no concerns or complaints at this time. She sees the liaison as a listening position; she reviewed the Commission's letter regarding cost savings and has received some suggestions which she will summarize and send to Chairman Sherwood. She offered support to Chief Hunt in developing standards and case weighting.

Union Lawyers - Laura Simonson

Ms. Simonson reported several issues to present to the Commission. They include:

- Some attorneys are upset with new mandates regarding JustWare time tracking and the demand it places on their work schedule;
- Some employees are concerned about being hassled for working over a 40-hour week;
- Employees are upset over the lack of office supplies, including even the smallest of things like paper clips;
- Concern about the propriety of the mental health protocol and its negative impact on the effective representation of our clients;
- Difficulty in being reimbursed for mileage for the use of a personal car;
- Some FTEs feel that there is an overall lack of investigators and investigative services;
- Underpaid and overworked support staff;
- No credit for working more than a 40-hour week;
- The lack of information about proposed shifts in management and the long-term vision of both the OPD and the FTE regarding management;
- A concern about ongoing FTE vacancies and the suggestion that management positions could be used to put attorneys online and in the courtroom;
- The ethical dilemma presented by a reluctance to declare a conflict in cases;
- An exceptionally high caseload resulting, in part, from holding on to conflict cases;

- A lack of confidence or affection toward our in-house psychologist;
- The performance evaluations for frontline troops are too subjective;
- Rumors that attorneys will be asked to work nights and weekends without compensation;
- FTEs don't receive personalized business cards and have been reprimanded for using their own business cards.

Chairman Sherwood said he would respond in writing to the concerns after he has had time to consider them. He asked for input on guidelines to determine if any created by the Commission are unworkable and to report personal experiences in use of the mental health protocol, specifically, any situation that puts them at a disadvantage.

Union Support Staff and Investigators – Laura Bailey

Ms. Bailey reported that many of the attorney issues are similar to hers. She is trying to develop a process to organize suggestions to come to a general consensus. Chairman Sherwood asked if she also would provide comments regarding guidelines and the mental health protocol. Chairman Sherwood said he will get something out to the liaisons to disseminate.

Old Business/New Business (*Action Items)

Bylaws Discussion

Chairman Sherwood would like someone to take a serious look at bylaws and propose an attendance policy for the Commissioners. After discussion it was decided that Commissioner Gillespie will draft an attendance policy for discussion at the next meeting, but that the Commission did not need detailed bylaws.

National Legal Aid and Defender Association (NLADA) Management Training

Chairman Sherwood will attend the training to be held in Lexington, Kentucky.

Future Commission Meeting Dates

The next Commission meeting is scheduled for Friday, April 23 in Billings.

The meeting adjourned at 2:50 p.m.