

June 11, 2010

Dear Members of the Public Defender Commission,

On July 1, we will be marking the 4<sup>th</sup> anniversary of the beginning of operations for the Office of Public Defender. Some of you will remember the initial 2006 meeting in Butte where Governor Schweitzer proudly proclaimed the promise of this new agency as the Public Defender Commission held its inaugural meeting.

Come July 15th, we will mark the one year anniversary of the Commission's receipt of the draft of the American University Evaluation of the Montana Public Defender System.

While there is some progress worthy of note, there are also some very serious problems identified in the AU report that are still of concern to the American Civil Liberties Union. These problems are adversely affecting the quality of representation provided by the Office of the Public Defender and if the Commission does not remedy them in a timely manner, we will need to consider whether to take steps to compel a remedy.

The ACLU welcomed the American University review. It was disappointing to hear that the evaluators saw the staff as uncooperative and that some on the staff saw the evaluators as less than competent. It is also disconcerting that some staff and Commission members have been dismissive of the validity of the AU report or have tried to call into question the credentials and qualifications of the evaluators themselves. Most disturbing to us is that the Commission appears to be noncommittal in addressing the most glaring criticisms in the report.

The initial refusal of the Commission to share the draft, followed by the Chairman's August 21, 2009 thirty-five page rebuttal, demonstrated to us that the Commission was unwilling or incapable of hearing what we interpreted as credible, professional peer review. The Study Team's response to the August memo, along with the memo itself, together comprises what is called "Appendix C" to the AU Technical Assistance Report. This part of the document deserves a thoughtful re-reading by all concerned.

In particular, we draw your attention to this part of their conclusion:

"Rather than insisting on solutions to problems, too often the Commission accepts explanations that are unreasonable or lays blame on allegedly uncontrollable circumstances or other people. For example, K lawyers did not appear at the legislative sessions in support of staff efforts to raise the hourly rate; the computer system, i.e. JUSTWARE, is not providing the needed information; managers are not at fault for the \$60,000 K lawyer bill; it is irresponsibly expensive to provide early representation to clients; a few perennial malcontents are the source of the complaints; management staff is too busy (representing their own clients) to provide proper guidance to staff, and so on. Rather than questioning these explanations, Commissioners appear to protect management rather than attempt to motivate performance."

The late fall 2009 meeting of the Commission led us to believe that perhaps at long last something would be done to address the major concerns. But the patterns of behavior of both management and the Commission persist.

- From the minutes of the October 14, 2009 meeting, the Commission was assured by staff that job descriptions were in place for all employees. We were advised at the time by some line staff attorneys that this was simply not factually accurate.
- The December 17-18, 2009 meeting included an executive session from which emerged a proposed new staff position for a deputy to the Chief, which we were told was intended to handle all of the duties that the chief was either incapable or unwilling to handle.
- The February 5, 2010 meeting came and went with zero discussion of this new position, but with further ambiguous commitment to evaluating the chief's performance.
- In the March OPD newsletter, the chief announces her return from a 6 week trial in Billings, and the information officer admits OPD still cannot "keep track of, and report on relevant/important case related information".
- Prominent on the agenda for the April 23, 2009 meeting in Billings, an item scheduled for discussion early afternoon promised a personnel committee report on the chief's performance review process, and the operations manager budget and job description.\*

For a number of reasons, I think we can all agree conceptually that it is imperative the OPD demonstrate it is doing everything it can do to be responsive to the critique provided by the AU team of evaluators. Again, quoting from Appendix C of their report:

"The Agency appears to be substantially underfunded. But as this now stands, blame for that should not be placed on the economy or legislative parsimony. Simply stated, management has not made a convincing case for adequate funding. No concrete evidence that the Defender Agency is efficiently representing clients has been presented, although it may well be the case. Without answers to these questions, a responsible legislature would be remiss to generously fund the Agency, or even fund it at all."

Given the state of the economy, and the prospects for a zero growth budget in the 2011 legislature, it seems clear that the Public Defender Commission must demand accountability both in terms of taking seriously the management questions that are apparent from the AU review and of the imperative need for accurate and defensible numbers for caseloads, case type, etc., none of which seems to be readily available as data that is reliable and useable. For whatever reasons, the OPD management seems incapable of ensuring that staff attorneys and cooperating attorneys understand why it is imperative that they enter case load data in a timely and attentive manner. It is most troubling that the Legislative Fiscal Division finds the data unreliable. We expect that as a Commission you will insist on specific and measurable steps to remedy this dilemma in an expeditious manner.

There seems to be an incredibly high turnover rate of line staff attorneys which is deleterious for a number of reasons. It appears that retaining quality staff is not a high priority for management. Exit interviews, if they are not part of the existing protocol they need to be in order to get to the root of what is behind the resignations and/or terminations. Job descriptions and meaningful evaluations are basic components to a well managed organization. Assertions from management about compliance with your expectations for evaluations with employees and contract attorneys need to be supported by verifiable documentation.

Based upon conversations we have had with various OPD staff, former and present, we think there are serious issues that are still being ignored. Administrative support staff appears to be inadequate for the task at hand. How much administrative work do attorneys have to do themselves because their support staff are stretched too thin or are not up to the task? Investigative staff seems to be in short supply. What is the logic of having the Helena office serviced by an investigator based in Great Falls?

We have been told that conflicts issues are not limited to those that are currently being litigated, but apply to abuse and neglect cases as well, and are internally overlooked, dismissed or ignored. What steps have been taken by the Commission to ensure that measures instituted in the name of cost cutting are not at cross purposes with the organization's mission?

The ACLU is calling on the Commission to aggressively focus on the management issues as its highest priority. At a minimum, we believe it is imperative that you no longer permit the Chief Public Defender to carry a caseload. Do what you must to comply with the relevant requirements in the enabling legislation, but the Chief must be required to fulfill the administrative tasks and provide the vision and leadership that is central to this system's very survival. If she cannot do this, or is unwilling to do this, we believe that the Commission should consider the hiring of a Chief Public Defender who can.

We also think the Commission itself must become more energetically engaged and actively involved between now and the convening of the 2011 legislature in seeing that the Promise of Gideon is more ambitiously fulfilled here in Montana.

Respectfully,

Scott Crichton, Executive Director