

**MONTANA PUBLIC DEFENDER COMMISSION**  
Montana State Capitol Building Rm. 172  
Helena, Montana 59620

**MINUTES**

**June 17, 2010**

*Approved at the August 30, 2010 Meeting*

**Call to Order**

The Montana Public Defender Commission meeting was called to order by Chairman Mike Sherwood at 8:05 a.m.

**Commissioners Present**

Mike Sherwood, Missoula; Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; Majel Russell, Billings; Kenneth Olson, Great Falls; James Taylor, Missoula

**Commissioners Absent**

William Snell, Billings; Terry Jesse, Billings; Caroline Fleming, Miles City; Jennifer Hensley, Butte. Commissioner Tara Veazey, Helena, has resigned.

**Liaisons Present**

Laura Bailey, liaison for union support staff and investigators (by phone); Eileen Larkin, stand-in liaison for non-management appellate defender staff and attorneys; and Laura Simonson, liaison for union attorneys.

**Interested Persons**

Niki Zupanic, Public Policy Director of the American Civil Liberties Union of Montana (ACLU); Brent Doig, Office of Budget and Program Planning; Pat Gervais, Legislative Fiscal Division; Roland Mena, Executive Director, Montana Board of Crime Control (MBCC)

**Approval of Minutes** (\*Action Item)

Commissioner Gillespie moved to approve the minutes of the April 23, 2010 meeting as submitted. Commissioner Taylor seconded and the motion carried unanimously.

**Public Defender Program Report**

***Chief Public Defender Report*** (exhibit 1)

Chief Public Defender Randi Hood reported that her caseload is down to one, a DUI set to go to trial in late July. She went on to say that the new employee orientation project is progressing nicely and that filming has started and should be finished by mid-July. The training manual still needs to be written.

Chief Hood said that Montana will receive \$100,000 under the John R. Justice (JRJ) Loan Forgiveness Grant Program, to be equally divided between prosecutors and public defenders. The grant requires the Governor to designate a state agency to manage the money and develop the plan for distribution. The Governor has appointed the Montana Board of Crime Control. Chief Hood has assigned Administrative Director Harry Freebourn, Training Coordinator Eric Olson and Region 4 Deputy Public Defender Jon Moog, as OPD's representatives to the JRJ working group.

Chief Hood reported that she has been in contact with Stephanie Baucus from the U.S. Department of Justice who has been assigned as liaison with public defender systems in several western states. Chief Hood and Mr. Olson will contact her regarding grant possibilities that Ms. Baucus may have information about.

Chief Hood said she and Mr. Freebourn initiated a review of the indigence determination process to see how each region was applying the agency's policy and procedures. As a result, they are expanding the current policy to deal with the issue of verification of income. The addition to the policy will be introduced at the support staff training next week.

Chief Hood explained that Mr. Olson will develop and administer standards compliance monitoring. Commissioner Taylor asked if the review was just for in-house attorneys or if it involved contract attorneys as well, and asked how soon it would be implemented. Chief Hood said there is no reason the same plan can't work for contract attorneys. She said the in-house process had already begun and it would take less than a year for Mr. Olson to talk to all the attorneys.

Chief Hood and Mr. Freebourn met with the Legislative Finance Committee on June 15. In that meeting Pat Gervais, analyst with the Legislative Fiscal Division, presented information on OPD's cost control. Her report dealt with indigency determination, removing jail time from some crimes, reviewing the kinds of cases OPD handles, and caseload limits for managers. Chief Hood said she addressed the same issues with the committee. Based on questions from the committee, her office will be providing data on the number of cases OPD handled for violations of local ordinances, as well as data on the number of cases handled in which the crimes charged are part of the discussion related to removing jail time.

Chief Hood reported that the student intern program was working very well. The records management grant has student workers in Butte, Helena and Missoula; in addition, there are both paid and volunteer legal and support staff interns in Billings, Missoula, Bozeman, Helena and the Appellate office.

Beginning in early July, the Central Office management team will be developing a continuity plan for the agency. They will also develop continuity plans with management in the regions. Chief Hood will present a plan to the Commission at the next meeting.

### ***Time Tracking***

Chief Hood reported that time tracking has greatly improved. Commissioners Taylor and Petaja asked if Chief Hood would develop a form that would help the attorneys fill out their time throughout the day. Chief Hood said she would amend the time tracking policy to make it more contemporaneous, and would make a form available for the attorneys to make time tracking on a daily basis easier.

### ***Training Report (exhibit 2)***

Chief Hood discussed the training report since Mr. Olson was conducting mental health training in Warm Springs; she said that he would be at the meeting in the afternoon. Chief Hood outlined future trainings including a mandatory support staff training June 22-23 in Butte. Brian Smith will conduct JustWare training, and the changes in indigency determination will also be covered. The annual OPD Statewide Training Conference is scheduled October 20-22 in West Yellowstone. Chief Hood also reported that she attended a forensic training on May 11 with the State Crime Lab.

Commissioner Russell asked if there is an appropriate session that the county attorneys might be invited to. Chief Hood said there is a DN Practice Workshop planned for September, funded by a small grant through the Court Administrator's Office, to bring together the players in a DN case. The proposal was meant to bring in county attorneys. A district judge will be

part of the steering committee and will hopefully open the door to getting those participants involved.

The Commissioners discussed changes to the agenda to include Chairman Sherwood's report and election of officers. Commissioner Taylor made a motion to adjust the agenda and rename "Change of Chair" to read "Election of Officers." The motion was seconded by Commissioner Russell and carried unanimously. Commissioner Petaja made a motion to approve the agenda as amended. Commissioner Taylor seconded. Motion carried unanimously.

### **Public Defender Program Report (continued)**

#### ***Contract Manager Report***

Larry Murphy, OPD Contract Manager, reported he had one active case but will have no active cases after July. He went on to say that he attended the ABA Conference on Indigent Defense and briefed the Commission on the highlights. The essence of the symposium was case weighting and time tracking and its usages.

Mr. Murphy discussed the contract attorney liaison issue. He voiced his concern about the difficulty of getting the contract attorneys to select a liaison. He said that Lisa Kauffman had asked him if she could be their representative. Mr. Murphy said other than suggesting to the contract attorneys that they should select a liaison he didn't think it was his job to organize them. Chairman Sherwood reviewed the history of the email requests to contract attorneys asking for permission to share emails. The Chairman then said he unilaterally told Ms. Kauffman he could not recognize her as liaison if the contract attorneys had not chosen her. Discussion continued as to whether the Commission had a management responsibility organizing the contract attorneys. Commissioner Taylor suggested sending an email to all contract attorneys setting a deadline, and that if it is not met the Commission will contact the Montana Association of Criminal Defense Lawyers (MTACDL) to appoint a non-voting liaison to represent them. Continuing on, Mr. Murphy reviewed and answered the questions on Lisa Kauffman's list of contractor complaints (exhibit 3). Commissioner Taylor made a motion to send out an email to the contract attorneys that if they do not appoint a liaison by majority vote by August 1, the Commission will ask MTACDL to select a contract attorney as their liaison. Commissioner Petaja seconded the motion. The motion carried unanimously.

### **Fee Schedule Exceptions (\*Action Item) (exhibit 4)**

Chief Hood asked for the Commission's approval to allow OPD to pay contract attorneys outside of the rate schedule in unusual circumstances. This would allow for flat fee contracts to service specialty courts. Commissioner Gillespie motioned to table the fee schedule item until later when the Specialty Courts item was addressed. Commissioner Petaja seconded. The motion carried unanimously.

### **Commission Liaisons**

Laura Simonson, union attorney Liaison, presented the Commission with the letter (exhibit 5) Chairman Sherwood had asked her to write addressing his concerns in his April 20, 2010 letter. Commissioner Petaja pointed out that all of the issues in Ms. Simonson's letter were discussed in the Labor Management Committee (LMC) meeting. He recalled that the LMC decided to work on guidelines as to what would be appropriate to bring to the Commission. He also pointed out that they had consolidated the issues into a shorter version that would be available after the LMC minutes were completed. After the Commission reviewed her letter, Chairman Sherwood said he would respond to Ms. Simonson in writing.

Laura Bailey, union support staff Liaison, reported she has not had any recent input from anyone.

Eileen Larkin addressed the Commission as stand-in liaison for the Appellate office in Lisa Korchinski's absence (Ms. Korchinski was attending the Mental Health Conference). She reported that there was a recommendation to make JustWare time tracking separate from administrative work. She went through Chairman Sherwood's letter of June 14, 2010 reciting reactions she had received. She went on to say that with regard to Chief Hood's performance evaluation, those that work with Chief Hood on a daily basis should have the opportunity to provide input. She then referred to the ACLU letter (exhibit 6) saying the ACLU should be more supportive of the Public Defender Commission (PDC). She thanked Chairman Sherwood for his service on the Commission as chair.

### **Chairman Sherwood's Report**

Chairman Sherwood produced a written report (exhibit 7 and attachment) to the Commission saying that the American University (AU) evaluation was included in that report. He went on to suggest that the Commission should recognize AU's work with a letter or plaque thanking them. He made a motion for the Commission to assign Commissioner Taylor, Commissioner Gillespie, Chairman Sherwood, Chief Hood and Mr. Freebourn to make a decision as to what might be an appropriate way to formally thank American University and then present their conclusion at the next Commission meeting for approval. Commissioner Petaja seconded. The motion carried unanimously.

### **Public Comment**

*Niki Zupanic, Public Policy Director of the American Civil Liberties Union of Montana (ACLU)*

Ms. Zupanic addressed the letter written by Scott Crichton, Executive Director of the ACLU, to the PDC (exhibit 6). Chairman Sherwood explained that he had made a place in the agenda to address the ACLU letter and questioned whether it was written on behalf of the ACLU. Ms. Zupanic stated that the letter was written on behalf of the ACLU even though it was not on ACLU letterhead. Ms. Zupanic asked if she could have the opportunity to address the Commission when the agenda item "Discussion Regarding ACLU Letter" was on the table. Chairman Sherwood agreed.

*Chase Naber, former Assistant Public Defender and current Assistant Appellate Defender*

Ms. Naber addressed the Commission with concerns about data entry into the case management system being a time burden, and suggested that hiring data entry people at minimum wage would alleviate the problem. She also voiced concerns about public defender offices being underfunded and having high caseloads. She went on to suggest lobbying the State Legislature to decriminalize minor crimes and to provide more money for support staff.

*David Duke, Regional Deputy Public Defender, Region 9 (Billings)*

Mr. Duke addressed the Commission saying that since the visit from the Central Office personnel to the Billings Regional Office the reporting numbers for attorney time entries are up to 77%. He said he was contacted by the County Attorney office wanting to hire one of Region 9's staff. He said that people are leaving the public defender system for more money and felt the agency would continue to lose attorneys because of low wages. Chairman Sherwood asked Mr. Duke if he would review the letter Ann Marie Simeon presented to the Commission via Gary Quigg at the April 23 meeting and let the Commission know if he agrees with the letter. Commissioner Taylor complimented Mr. Duke saying he had brought a lot of stability to the region and the Commission appreciated that.

*Jenny Kaleczyc, Assistant Public Defender (Helena)*

Ms. Kaleczyc addressed the Commission saying there was a need for more secretaries to support the public defenders. She said that the attorneys in the system have too many cases and are understaffed.

*Ed Sheehy, Regional Deputy Public Defender, Region 2 (Missoula)*

Mr. Sheehy addressed the Commission saying that, based on his homicide experience, he has been in Roundup providing assistance to Doug Day, Region 7 Deputy Public Defender. He went on to say he does a lot of mentoring. They have a process in the Missoula Office where there are lead attorneys for

felony, lower courts and civil matters who assign cases when Mr. Sheehy is traveling. Mr. Sheehy reported that he is proactive in having his region do their timetracking. He added that in his opinion Chief Hood has done a herculean task in establishing the Public Defender System.

*Eileen Larkin, Assistant Appellate Defender (Helena)*

Ms. Larkin addressed the Commission showing support for the agency and for the Chief Public Defender.

*Brendan McQuillan, Assistant Public Defender (Helena)*

Mr. McQuillan questioned whether the only way OPD can get more money is to accurately report time since there is a constitutional mandate to exist. He said that the issue of insufficient resources is more serious and that to deflect this to a management issue is not very effectual. Chairman Sherwood said without concrete data to back up the claim of the OPD being understaffed the Commission's ability to present the OPD's needs to the legislature is compromised.

#### **Discussion Regarding the ACLU Letter (exhibit 6)**

Chairman Sherwood discussed the ACLU letter written by Scott Crichton and asked in what context the Commission should respond. Commissioner Petaja expressed disappointment that Mr. Crichton was not present to discuss the letter given the serious allegations in the contents. He made a motion to table discussion of the letter until Mr. Crichton could address the letter personally. Commissioner Gillespie seconded the motion. During discussion Ms. Zupanic addressed the Commission expanding on the letter. Commissioner Taylor felt the Commission should respond to the letter. Commissioner Russell suggested the Commission needs more specific details to be able to respond to the letter. Ms. Zupanic said that in order to give that information it would require the ACLU to reveal those that wish to remain anonymous. No vote was taken on Commissioner Petaja's motion.

#### **Montana Board of Crime Control**

Chairman Sherwood introduced Roland Mena, Executive Director of the Montana Board of Crime Control (MBCC). Mr. Mena discussed the student loan repayment program and stated that as Chief Hood noted earlier, his agency was appointed by the Governor to administer the program. Applications are due July 27 and information is available on the MBCC website. Mr. Freebourn said that as of today, there are 39 OPD attorneys who believe that they qualify for loan forgiveness under this program.

Mr. Mena went on to say that the Board was interested in keeping juveniles out of the system. He distributed a flier introducing Dr. Ed Latessa, who will speak at the DPHHS Auditorium on juvenile defenders August 25 (exhibit 8).

#### **Specialty Courts**

Mr. Murphy gave a presentation to the Commission explaining the numbers and types of specialty courts in Montana (exhibit 9). The Commission discussed the specialty courts at length. The issues for the OPD include funding, the waiver of confidentiality required by specialty courts, conflicts, and whether clients involved in specialty courts qualify for OPD services on the basis of being indigent.

The Commission agreed if there is no indigency and no continued risk of incarceration, then no statutory authority for the OPD exists to serve clients in specialty courts.

Commissioner Gillespie said the Commission needed more information as to how the specialty courts were being conducted. Mr. Freebourn suggested contacting Jeff Kushner from the Supreme Court Administrator's office as a good source of information on the various courts. Commissioner Gillespie said the FTEs were also a good source. Sherry Staedler, Region 5 Deputy Public Defender (Butte), and

Jana McGill, Assistant Public Defender in Butte, briefed the Commission on how the specialty courts were conducted in their region.

Commissioner Taylor repeatedly expressed concerns about the waiver of confidentiality that is required in specialty courts and suggested getting an opinion from the State Bar Ethics Committee.

Commissioner Petaja made a motion that the Commission direct OPD to no longer provide counsel for DUI courts because it is beyond the scope of the agency's statutory mandate to provide services when there is no legitimate defense purpose since these are post-conviction courts. Commissioner Sherwood seconded. After further discussion it was clarified that the motion relates to only DUI specialty courts. The motion carried unanimously and it was agreed that the Chair would sign the directive to the agency on behalf of the Commission.

### **Legislative Update**

Chief Hood provided the Commission with the Legislative/Budget Meetings and Timelines (exhibit 10). She also presented the Commission with the proposed 2011 Legislation submitted to the Office of Budget and Program Planning as placeholders (exhibit 11). She explained the proposed legislative changes under Title 47. Commissioner Petaja made a motion to approve the seven proposed items. Commissioner Taylor seconded the motion. The motion carried unanimously.

### **Budget/Finance Report**

#### ***Executive Planning Process***

Mr. Freebourn reviewed the steps in the Executive Planning Process (exhibit 12) as well as the Budget Items worksheet (exhibit 13). He explained the case load trends and noted that the legislature will also want to see net cases, case durations, and case costs.

Mr. Freebourn then discussed decision packages (DP). He explained that changes to the decision packages were based on the Commission's acceptance or rejection of the decision packages at the last meeting. He reviewed the amended decision packages and showed how they differed from the April Commission meeting.

Mr. Freebourn assured the Commission that he would continually refine the DPs, and after the FY 10 books are closed he will have a better caseload trend to look at. Currently it appears that the new case inflow is stabilizing. Mr. Freebourn asked the Commission if there were holes in the budget that should be filled. There were no comments from the Commission.

The Commission discussed the decision packages. DP 1 will be adjusted to reflect two support staff with the remainder of the requested FTE being attorneys. Mr. Freebourn will look at the ratios between attorneys and support staff and between investigators and attorneys. Discussion continued on DPs 6 (Operations Manager to serve present law) and 9 (eliminate all caseloads for agency managers) and whether DP 6 should be added back in. Mr. Freebourn said that DP 6 had not been approved by the PDC as a separate package in April, but it may be included as part of DP 9. Chairman Sherwood said the Commission would be better able to address DP 9 after the closed session with Chief Hood. Mr. Freebourn clarified the change in DP 9, saying the Commission approved it with the stipulation that the costs be updated using current caseloads under the management caseload limit policy. Commissioner Petaja said that eliminating DP 6 was one of the objections the ACLU letter addressed.

Mr. Freebourn introduced Brent Doig from the Governor's Office of Budget and Program Planning. Mr. Doig said he appreciated the process the agency is going through and he encouraged the Commission to ask for what is needed to maintain operations. He commended OPD for always giving his staff the information necessary to support budget requests.

### **Appellate Report**

Chief Appellate Defender Joslyn Hunt said the Appellate team has a new member, Garrett Norcott, and two volunteer interns, Jacob Johnson and A.J. Miller. She reported the Appellate Defender Program (ADO) had 15 new cases in June (exhibit 14). Of the 15 cases three were assigned by the Montana Supreme Court, a practice that is increasing in frequency. She is conducting interviews for two more permanent positions.

Chief Hunt reported that the ADO is awaiting decisions in both the Sellers case and the St. Dennis case. St. Dennis is set for oral argument on July 28. Chief Hunt and office manager Sarah Braden met with Chief Justice McGrath about proposed cost saving measures, and he requested that the cost saving measures be formalized in a letter. She will update the Commission as information becomes available. At the April 23 Commission meeting, Chairman Sherwood asked the ADO Liaison to gather information reflecting the number of appeals, and Chief Hunt presented a rough approximation.

### **American University (AU) Recommendations**

Mr. Freebourn addressed the Commission with regard to the AU recommendations. Chief Hood appointed internal teams to match up with the Commission's committees to work on the AU Recommendations so they could get them across the finish line. Mr. Freebourn provided an outline of the matchups between the teams and the committees (exhibit 15). He recommended that the team members make appointments with the committee chairs to discuss items and to produce joint options or resolutions for presentation as soon as possible to the full Commission. He asked if the Commission would give them that directive. Chief Hood said she felt that they had accomplished a lot of the recommendations in the AU report and wanted to connect with the committees and compare notes to determine what the next step is. Commissioner Petaja pointed out there was an overlap of tasks between the Personnel Committee and the Collective Bargaining Committee, and perhaps a joint meeting of those two committees would clear up some of the confusion. Chairman Sherwood made a motion requesting OPD to have each of its team leaders contact the chair of the subcommittees that have been identified (a list of those committees is available on the web site) for purposes of progressing on the 32 AU recommendations and preparing a status report by the next Commission meeting. The motion was seconded by Commissioner Petaja, and it carried unanimously.

### **Stenographers**

Chairman Sherwood said stenographers are concerned that judges and prosecutors are looking at eliminating court reporters and going digital. Chairman Sherwood asked if a court reporter could contact the OPD and talk about the fiscal logistics and if it is at all workable. Chief Hood said the Appellate office has a relationship with these people already. Chairman Sherwood suggested it would be feasible for OPD offices to hire stenographers to do witness statements for people, and he will have someone contact Chief Hunt.

### **Agency Information Project**

Brian Smith made a presentation to the Commission (exhibit 16) on opening cases and the Case Weighting System (CWS) report. Mr. Smith said he and Mr. Freebourn are part of the Information Project group that is coordinating with the Improve Agency Information team. He told the Commission that OPD is having mandatory staff training in June with 3 hours dedicated to JustWare training. As part of the Information Project, Mr. Smith is asking all stakeholders "what information is needed from the agency?" He asked the Commission what types of information they were looking for. The Commission did not respond.

Mr. Smith explained how cases are opened and closed and that there is a certification process requiring attorneys to certify which cases have been closed. It has been effective. The report for the net number of cases closed is due to the Legislative Finance Committee on September 30.

## **Old Business New Business**

### *Fee Schedule Exceptions (\*Action Item)*

Chairman Sherwood made a motion that the Commission adopt a resolution authorizing the Chief Public Defender to, under extraordinary circumstances, and only in specialty court situations, pay outside the rate structure with the understanding that if in any fiscal year cumulative costs reached \$10,000 for the specialty court expenses, there would be a need for further authorization. The motion was seconded by Commissioner Gillespie, and it carried unanimously.

Chairman Sherwood tabled the Commission Attendance Policy and Changes to Operating Procedure action items.

## **Set Future Commission Meeting Dates**

Chairman Sherwood asked OPD staff to schedule the next meeting between August 14 and 31.

Chairman Sherwood moved to adopt a policy that if by August 1, 2010 there is not full compliance with input on JustWare by any region, that OPD would consider termination of the manager in that region. The motion was not seconded.

## **Election of Officers**

Chairman Sherwood abstained from serving a second term as Chairman. Commissioner Petaja moved to nominate Commissioner Gillespie as Chairman of the Public Defender Commission. Chairman Sherwood seconded. Commissioner Gillespie agreed to serve as Chair. Motion carried unanimously.

Commissioner Petaja moved to nominate Commissioner Olson for Vice Chairman. Commissioner Sherwood seconded. Commissioner Olson accepted the nomination. Motion carried unanimously.

## **Public Comment**

### *Matthew McKittrick, Regional Deputy Public Defender, Region 3 (Great Falls)*

Mr. McKittrick addressed the Commission expressing support for the strong leadership of the OPD Central Office. He went on to say that he appreciated the exchange of information with other attorneys' experiences. He also said that he would pass along to his staff that the Commission isn't pressing JustWare frivolously but that the information is needed to comply with legislative needs.

Commissioner Gillespie told Mr. McKittrick that the AU report said that the agency doesn't have any mechanism for collecting data, and he felt that the OPD now has reliable information coming in that can be taken to the legislature.

### *Jon Moog, Regional Deputy Public Defender, Region 4 (Helena)*

Mr. Moog addressed the Commission expressing his support for Chief Hood. Chairman Sherwood thanked him for coming.

## **Closed Session**

Chairman Sherwood stated that the following portion of the meeting relates to matters of individual privacy. As Commission Chairman, I have determined that the demands of individual privacy clearly exceed the merits of public disclosure. As such, this portion of the meeting will be closed.

The Commission went into closed session at 7:15 p.m., and ended the meeting in closed session at 8:30 p.m.