

OFFICE OF THE STATE PUBLIC DEFENDER



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REPORT TO THE PUBLIC DEFENDER COMMISSION

William F. Hooks, Chief Public Defender

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Introduction

During the latter half of the 2013 legislative session, we focused primarily on issues related to pay increases and our request for funding for additional full-time attorneys, investigators, and legal support staff (FTEs). We asked for additional funding to hire 37 FTEs, but received authorization for bringing on only 8 FTEs. The legislature did not fund FTEs at the level requested by the public defender program but rather provided funds of approximately \$1.8 million for contract services. Following the session, we have been focused on addressing our pay issues, reviewing our operations on a system-wide basis and drafting an operating plan, and wrapping up numerous end-of-fiscal-year duties.

Pay Issues/Collective Bargaining Update

On June 5, 2013, Governor Bullock and the state employee unions, including AFSCME, reached a tentative pay and benefits agreement. The State accepted the unions' proposal for a 3% across-the-board pay adjustment effective the pay period that includes July 1, 2013 and a 5% across-the-board pay adjustment effective the pay period that includes November 15, 2014. Pursuant to state law, adjustments for those that are in collective bargaining units will not be provided until the State receives notice that the employee's collective bargaining unit has ratified a collective bargaining agreement. If notice is received after the effective date of the pay adjustment, the adjustment will be paid retroactively.

All of OPD's union and non-union employees will receive the 3% and 5% pay adjustment.

We have been meeting with the bargaining units for the support staff and investigators, and for the attorney work force. Our negotiations with the attorney work force also include allocation of the appropriation of the funds for the attorney career ladder, contained in House Bill 2.

As of the date of this report, negotiations with the bargaining units are on-going.

2015 Biennium Operating Plans

Over the past several months, we have gathered and analyzed data relating to staffing, case trends and contractor availability in each region and the Major Crimes Unit. For example, we have looked at five-year trends in the number of various types of cases filed (*e.g.*, felonies, involuntary commitments) in each district court and in lower courts in each region. We have reviewed the availability of qualified contractors in the regions. We also have reviewed the staffing levels in each office, to get a better understanding of areas of responsibility and staff ratios (*e.g.*, attorney-support staff ratios). This process helps identify our needs and allocate available resources, set budgets, address IT and office/lease issues, and develop long term plans.

Our plans are still in the formative stage as of the date of this report. Affirmative steps can't be taken until we resolve uncertainties about the best use of the legislative appropriations. If legislatively-appropriated funds are available to be used to hire FTEs, on a modified (non-permanent) basis, we will determine the number of FTE slots available, and assign those slots to the appropriate regional office, and in the necessary position (attorney, support, investigator).

I would like to expand our services in areas in which we do not have much of a staff presence. To that end, I have developed a plan to open an office in Glasgow. One attorney, supported by one administrative staff position, would be available to handle cases in the eastern half of Region 6. As it now stands, Region 6, based in Havre, has only two staff attorneys and an annual case load which exceeds 1000 cases. A Glasgow office also would be available to handle cases in the northern half of Region 10, based in Glendive. The three attorneys in Glendive are burdened with the need to cover cases in Plentywood, Scobey, and Wolf Point in addition to cases in Sidney and Glendive. We do not have a deep pool of contract attorneys in the region. The number and complexity of cases in this part of the state, fueled in part by the Bakken oil field boom, warrant opening an office in the area.

I am also considering changes to the central management operation. One contemplated change is a modification of the training function. Our training coordinator's job currently includes all stages of development of training, including Programs 1 and 2: annual conference; orientation/boot camp for new attorneys; training seminars; investigator training; support staff training ; IT training; capital defense training and coordination of one of our capital defense teams; standards verification; leadership/management training; maintenance of our brief bank; contractor training; dynamic defender development group; dependent/neglect work group; supervision of our Sentence Review Division staff, and oversight of the mental health protocol. I would like to remove some of these functions and assign them elsewhere, and expand the capabilities of our training function to continue to provide high-level, quality training.

Other changes are being contemplated, but plans are not finalized as of the date of this report.

Performance Audit Update

We are implementing several changes to the process and procedures by which we evaluate the eligibility of clients for our services.

In summary, when a court orders OPD to assign counsel, the appropriate office shall immediately assign a public defender qualified to provide the required services in criminal and civil cases, subject to a determination of indigence. These cases include cases in which a person is charged with a felony or a misdemeanor for which there is a possibility of incarceration. According to statute, a person is indigent if his or her gross household income is at or less than 133% of the poverty level set according to the most current federal poverty guidelines updated periodically in the Federal Register by the United States department of health and human services; or the disposable income and assets of the applicant and the members of the applicant's household are insufficient to retain competent private counsel without substantial hardship to the applicant or the members of the applicant's household.

If the person for whom counsel has been assigned is later determined to be ineligible for public defender services, OPD is required by statute to immediately notify the court so that the court's order may be rescinded. However, a person for whom counsel is assigned is entitled to “the full benefit of public defender services” until the court's order requiring the assignment is rescinded. Sec. 47-1-111(1)(b), (c), MCA; 46-8-101(2), MCA.

Sec. 47-1-111, MCA states an applicant must provide financial information and sign an affidavit, which states that it is signed under the penalty of perjury and that a false statement may be prosecuted. The judge may inquire into the truth of the information contained in the affidavit. Further, the judge must advise the defendant that the defendant is subject to criminal charges for any false statement made on the financial statement. The statute also provides that information disclosed in the application, financial statement, or affidavit is not admissible in a civil or criminal action except when offered for impeachment purposes or in a subsequent prosecution of the applicant for perjury or false swearing.

Any determination of eligibility for public defender services under Title 47 is subject to the review and approval of the court. The propriety of an assignment of counsel by OPD is subject to inquiry by the court, and the court may deny an assignment.

OPD Policy 105 requires that an applicant for public defender services must complete the application, also referred to as an indigence questionnaire or IQ form, sign it, and return it to the Regional Public Defender Office within ten days of appointment. The office will move to rescind the appointment if the required materials are not provided. Policy dictates that the IQ specialist in each region will verify income and assets for every tenth applicant seeking assignment of counsel under the “gross household income” factor, and will verify income and assets for all applicants seeking qualification under the “hardship” exception.

After considering the Performance Audit report and reviewing our processes, we revised the Application for Court-Appointed Counsel form which is provided to potential clients. Our goals are to make the process more efficient, while improving on consistency in the process and uniformity of application. Ms. Chris Thomas, the eligibility technician for our Region 8 office in Bozeman, is working on this project. Chris and Cathy Doyle have been traveling to regional offices, and Chris is reviewing processes and getting input for improving and refining our IQ systems.

We also are developing a response to situations in which a judge or prosecutor asks for information provided by our clients in the application, prior to any disposition of the case. Montana Supreme Court decisions support the position that a judge may not initiate an inquiry into a defendant's financial information if OPD determines the person is eligible; however, a judge may inquire into this information if OPD moves to rescind an appointment after concluding that the applicant is not eligible for public defender services. An administrative rule adopted by this Commission states, in relevant part, that "[a]ll information collected on the forms shall be treated as confidential except: (a) as required in 47-1-111 , MCA; or (b) when judicial review of the determination is requested by the applicant. At that time, the forms shall be submitted to the court for in camera inspection." ARM 2.69.301(5).

A different situation arises after the charges have been resolved and the client faces sentencing. Section 46-8-113, MCA requires that as part of or as a condition of a sentence imposed in a criminal case, "the court shall determine whether a convicted defendant should pay the costs of counsel assigned to represent the defendant as follows:

- (a) If the defendant pleads guilty prior to trial:
 - (i) to one or more misdemeanor charges and no felony charges, the cost of counsel is \$250; or
 - (ii) to one or more felony charges, the cost of counsel is \$800.

(b) If the case goes to trial, the defendant shall pay the costs incurred by the office of state public defender for providing the defendant with counsel in the criminal trial. The office of state public defender shall file with the court a statement of the hours spent on the case and the costs and expenses incurred for the trial.

The court may not sentence a defendant to pay the costs for assigned counsel unless the defendant is or will be able to pay the costs, or a portion of the costs. The court is required to take into account "the financial resources of the defendant and the nature of the burden that payment of costs will impose." In making this determination, the court may question the defendant as to the defendant's ability to pay those costs and shall inform the defendant that purposely false or misleading statements by the defendant may result in criminal charges against the defendant.

At this stage, it may be appropriate for defense counsel to advise the sentencing court of information contained in the client's initial application for services, as part of the inquiry into the client's ability to pay. Wade Zolynski has put together an outline of potential objections and legal

challenges to raise in sentencing proceedings relating to these reimbursement issues, and we will continue to work on issues relating to representation of our clients at this stage of the proceedings.

Ethical Caseloads and Refusal of Appointments

As of the date of this report, a Motion and a supporting Brief have been prepared in rough draft form. These documents are being edited and revised, and we will be working on supporting affidavits and other documents, in anticipation of filing the papers in Helena, for our Region 4 office.

In May, I submitted to the regional deputies a memorandum which addressed ethical issues faced by line attorneys and managers in dealing with excessive workloads. This memorandum discussed an approach to dealing with these issues in order to alleviate ethical concerns, based in part on this Commissions Standards and on a Formal Ethics Opinion (Opinion 06-441) issued in 2006 by the American Bar Association Standing Committee on Ethics and Professional Responsibility.

I also addressed in this memorandum the need to have timely discussions with staff about the problems created by excessive workloads, and for managers to take a consistent and uniform approach throughout the agency.

Human Resource Update

OPD received decisions from the Human Rights Commission in two cases, in which decisions and recommendations by Hearings Officers in favor of OPD were sustained on review. In one case, in which a client alleged that OPD had failed to provide adequate access to legal representation and denied the client government services because of a disability or perceived disability (PTSD), the Human Rights Commission found that OPD “went to extraordinary effort” to accommodate the client. Kristina Neal, OPD’s conflict coordinator, was responsible for facilitating and coordinating assignment of counsel and resources, and her efforts were indeed extraordinary.

Reminder of the Need to Maintain Confidentiality of Client Information

Wade Zolynski and I recently learned that a private citizen has made requests of OPD staff, asking that staff access and disclose client information entered in Just Ware, our internal case management system. All OPD staff have been reminded that information about our clients – in the trial courts and on appeal – is confidential. Staff also have been reminded of the provisions of Policy 535, which addresses the confidentiality of our clients’ personal information.

Legislative Interim Committees

State law establishes several interim committees, which are required to meet between the end of one regular legislative session and the beginning of the next session. Interim committees provide oversight for the various state agencies, perform interim studies as needed and as assigned by Legislative Council, and propose legislation for consideration at the next legislative session.

The Law and Justice Interim Committee is responsible for monitoring the activities of the Office of the State Public Defender, the Department of Corrections, the Department of Justice, and any entities that are attached to those agencies for administrative purposes. This Committee will conduct two studies of interest to OPD.

The Committee will study current court procedures in family law cases and alternative solutions to improve the administration of justice, as directed in Senate Joint Resolution 22. As part of this study, the Interim Committee may (1) evaluate the cost and effectiveness of Montana's current court processes in addressing domestic relations matters; (2) research family law models and approaches, legislative and otherwise, being used in other states; and (3) identify measures that will help improve the administration of justice and promote the non-adversarial resolution of family law disputes. This study may also include a review of dependent/neglect cases, and may also consider this Commission's recent actions to limit caseloads in certain judicial districts.

This Committee also will conduct an interim study of the operations of the Montana Board of Pardons and Parole. The initial meeting is set for July 10.

The Children, Families, Health and Human Services Interim Committee will conduct an interim study of state-operated public institutions serving individuals with mental illness, intellectual disabilities, and chemical dependency. I attended the initial hearing on June 25.

The Legislative Finance Committee is a permanent committee established in Title 5 of the Montana Code. This Committee meets during the interim between sessions to review fiscal issues. We will be reporting to this Committee on our FTE turn-over issues, and on expenditures of capital case funds.

Participation on Committees

The Chief Public Defender can play a key role in building networks and coalitions. To that end, I am a member of the Commission on Courts of Limited Jurisdiction. This Commission, which includes members of the judiciary and prosecutors, oversees training of lower court judges.

I also serve as one of eighteen members appointed by the Governor to the Montana Board of Crime Control. The Board is a state agency, which represents law enforcement, criminal and juvenile justice system stakeholders and citizens in facilitating programs and administering grant dollars dedicated to promoting public safety, crime prevention, and victim assistance throughout Montana.

I have accepted an invitation to participate in the Forensic Science Laboratory Advisory Board (FSLAB), as a function of the state crime laboratory. In order for the state crime laboratory to continue to receive federal funding, the state must have a board in place to conduct independent investigations of allegations of negligence or misconduct. The scope of the board may be expanded to serve as a conduit for communication with user agencies. A meeting of the Board is scheduled for July 12.

Gideon's Army

Finally, in April, Region 4 deputy public defender Jenny Kaleczyc lined up a special showing of the award-winning HBO documentary *Gideon's Army*. The documentary tells the story of three public defenders who “struggle against long hours, low pay and staggering caseloads so common that even the most committed often give up in their first year.” A crowd of almost 200, including legislators and judges, attended the screening, and the local newspaper printed an article which discussed the documentary and the plight of Montana’s public defenders.

Gideon's Army is highly-recommended viewing for anyone interested in public defense, and I urge everyone to tune in later this summer when it airs on HBO.