

OFFICE OF THE STATE PUBLIC DEFENDER



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STATE OF MONTANA

To: Public Defender Commission
From: William Hooks, Chief Public Defender
Date: September 30, 2016

Re: Summary of NAPD Recommendations and OPD Proposals

Vice-Chair Ann Sherwood asked for a summary of the findings of the representatives of the National Association for Public Defense (NAPD), with our assessment of the options and priorities. This Memorandum is submitted in response to the request. This may be of benefit in considering options identified in the proposed mitigation plan.¹

RELIANCE ON CONTRACT ATTORNEYS.

NAPD Recommendation. Fred Friedman has recommended that OPD limit or reduce its reliance on private, contract attorneys. Fred and Kevin Kajer, the Chief Administrator for the Minnesota public defender agency, offered the Minnesota system as an example.

OPD relies on contract attorneys to provide services at the trial and appellate levels, in criminal and civil cases. Use of a combination of staff attorneys and contractors is consistent with the American Bar Association's *Ten Principles of a Public Defender Delivery System* (2002) (ABA Ten Principles). Principle 2 states that "[w]here the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar."

Private attorneys who have a Memorandum of Understanding with OPD provide legal services in three critical areas:

- (1) in those areas in which OPD does not have an adequate full-time attorney presence to handle all cases;

- (2) when the workloads of full-time staff attorneys become excessive;
- (3) in conflict cases, in which staff attorneys have conflicts of interest which legally disqualify from involvement in a particular case. This is particularly necessary in DN cases.

Over-reliance on contract attorneys creates management challenges. OPD cannot compel contract attorneys to take particular cases. Supervision of contract attorneys necessarily must be limited, so as not to alter the attorneys' status as independent contractors.² In many areas of Montana, there simply aren't sufficient numbers of private attorneys.³ OPD often has to assign cases to attorneys who have to travel for the cases, and this drives up costs. Using contract attorneys to provide necessary legal services often is more expensive than relying on full- or part-time staff attorneys.

The Minnesota public defense agency utilizes a mix of full-time and part-time attorneys to provide public defense services around the state. Part-time attorneys receive the same benefits as full-time state employees, but may be a half-time or three-quarter-time attorney. These attorneys must take on a certain level of work as state public defenders, but they also are free to work in a private practice. A 2010 legislative report noted that Minnesota PD leaders "believe there are important advantages to using a mix of full-time and part-time public defenders. They assert that retaining part-time public defenders is more cost-effective than using all full-time attorneys, provides a flexible way to assign public defenders when another attorney has a conflict of interest in a case, and allows the state to attract and retain very experienced lawyers who would otherwise not be public defenders."⁴

OPD Opportunities.

Hiring more attorneys and staff, as full-time or part-time state employees, would in the long run be cost-effective. OPD could assign more cases to staff attorneys, even if they serve in a part-time capacity. We would have better supervision and oversight.

Hiring more staff attorneys might be viable in regions in which there is a robust number of private attorneys to hire, even on a part-time basis. However, in many areas of the state attorneys are few in number. OPD would need to make sure that attorneys are qualified to take on the type of work that would be required of a part-time defender. Attorneys may be induced to move to rural Montana and become part-time public defenders if OPD can offer a benefits package. In fact, in a January 26, 2016 Proposal to the Task Force on OPD Operations, we noted the lack of attorneys in rural Montana and told them that one solution to get

attorneys to move to rural Montana and open offices would be to provide health care as part of the compensation.

DEPENDENT/NEGLECT CASES.

NAPD Recommendation. NAPD recommends that OPD explore options for getting others to share in the expense of providing representation to parents in DN cases, and/or limiting the obligation to provide representation to all parents.

DN cases are initiated by an arm of the state (Child and Family Services, a division of DPHHS), and prosecuted primarily by county attorneys. The state can petition the court for various types of authority, from temporary legal custody of a child to termination of the parent-child relationship.

The number of filings state-wide is increasing substantially. By any measure, these cases are expensive, in part because these cases create conflicts between parents, and OPD has to rely extensively on private attorneys to provide representation.

In Minnesota, indigent parents have a statutory right to representation by an attorney in DN cases. However, the statute did not provide that courts had to appoint a state public defender. The state supreme court held that the trial courts could appoint private attorneys to represent indigent parents, and the counties were responsible for expenses in these cases, including attorney fees.⁵

The Minnesota state public defender started getting out of these cases in 2008-2009. According to recent information provided by Chief Administrator Kevin Kajer, there were 5,270 filings in 2007, 4,566 in 2008 and 3,855 in 2009. Thus, once the burden of paying for counsel for parents in DN cases was put on the counties, the counties filed fewer cases. In a two-year period, the number of filings dropped by approximately 27%. This number did not include Hennepin County, where the largest volume of cases was filed, and in which the county helps pay for the cost of state public defense in parental DN cases.

OPD Opportunities. The Minnesota experience suggests that one way to control the number of DN case filings, and the costs associated with these cases, would be to persuade the counties to bear part of the financial burden of providing legal representation to indigent parents. If counties have to help pay the expenses, the number of filings by county attorneys would likely decrease.

A second step the Commission may consider is an effort to control costs by limiting the scope of representation we provide in DN cases. We would need to make sure that we are not infringing on any right to counsel granted under the Indian Child Welfare Act.

The Montana Supreme Court held, in a case that pre-dated OPD, that parents have a constitutional right to due process, which includes the right to court-appointed counsel in proceedings brought to terminate parental rights. A trial court's denial of a parent's request for an attorney at a termination hearing was ruled to be reversible error. In re A.S.A., 258 Mont. 194, 852 P.2d 127 (1993). In a later case, the Court applied a "harmless error" standard in reviewing a father's claim that he was denied his constitutional right to counsel in a termination hearing. "The bottom line is there really is no way that an attorney would have made a difference under these circumstances and [father] cannot demonstrate prejudice where no reasonable court would have preserved his parental rights under the facts of record." In re P.D.L., 2004 MT 346, ¶19.

In 2005, when the Montana Legislature created OPD, it also made two critical changes that impacted parents' rights to counsel. First, the legislature granted to parents a statutory right to the assistance of counsel in all DN proceedings, and not just at the end stage, when the court considers whether to terminate the legal parent-child relationship. Second, it provided that courts should order OPD to assign counsel to eligible parents in any DN case. Now, sec. 41-3-425, MCA provides that a court shall order OPD to assign counsel for "any indigent parent, guardian, or other person having legal custody of a child or youth in a removal, placement, or termination proceeding[.]" Sec. 47-1-104 (4), MCA provides the same authority.⁶ So, unlike Minnesota's statutes, Montana's laws provide expressly that courts shall order OPD to assign counsel in DN cases. We can't shift to the counties the obligation to provide legal services to DN parents.

Delaying the initial assignment of attorneys to represent parents in DN cases may be a way to control costs. These cases are given a priority on court dockets, so delays in assigning counsel could mean that no attorneys show up for scheduled hearings or proceedings. This step would raise objections that the parents' constitutional right to the effective assistance of counsel in DN cases is violated. Courts would have to decide whether the statutory right to counsel in stages prior to the termination of parental rights hearing require the assistance of, and presence of, counsel.

In 2010, the Court held that an adjudication hearing, which comes before a termination hearing, is a "critical stage" and invokes the same due process rights that are essential during the termination proceeding. In re J.J.L., 2010 MT 4, ¶ 17, 355 Mont. 23, 223 P.3d 921. The concept of a "critical stage" typically involves the Sixth Amendment right to counsel in criminal cases.⁷ As noted, the Court earlier ruled that the absence of counsel at a termination hearing was, on the facts developed, harmless error and did not warrant a remedy.

In civil cases, some states seem to agree that the right to an attorney may not be absolute at stages that precede a termination hearing. *See, In re C.M.*, 48 A.3d 942, 945-950 (N.H. 2012)(plurality)("we conclude that, on balance, due process does not require that indigent parents have a per se right to appointed counsel in abuse or neglect proceedings under" state statutes, but parents do have a right to counsel in termination of parental rights proceedings.); R.V. v. Commonwealth, 242 S.W.3d 669, 672-673 (Ky. Ct. App. 2007)("We therefore hold, pursuant to both the due process clause of the Fourteenth Amendment to the United States Constitution and KRS 625.080(3) and 620.100(1), that the parental rights of a child may not be terminated unless that parent has been represented by counsel at every critical stage of the proceedings. This includes all critical stages of an underlying dependency proceeding in district court, unless it can be shown that such proceeding had no effect on the subsequent circuit court termination case.")

PRIORITIES IN PROVIDING LEGAL SERVICES

NAPD Recommendation. If the Commission determines that OPD should restrict or limit our involvement in cases, NAPD recommends that case priorities be defined. The following is a suggested list of case priorities, from the highest to the lowest priority cases. This list is adapted from the Minnesota Public Defender service priority list. Priorities are defined by the client status (in or out of custody); the case type, and a reference to the constitutional or statutory authority which provides a basis for the appointment of counsel.

In-custody clients

- Felony offenses
- Misdemeanor offenses
- Youth Court cases
- Sentence Review

constitutionally mandated defense services

Gideon
Argersinger
Gault
Ranta

In-custody clients

- revocation of sentence
(felony deferred/suspended)

statutorily mandated defense services

Secs. 47-1-104(4); 46-8-104; 46-18-203, MCA ;
Gagnon v. Scarpelli (whether probationers have a right to counsel must be decided on a case-by-case basis)

Out-of-custody clients

- Felony offenses
- Misdemeanor offenses
- Youth court cases
- Involuntary commitment

constitutionally mandated defense services

Gideon
Argersinger
Gault
In re K.G.F.; Article II, Secs, 4, 17; Title 53, ch. 21

Parental Dependent/neglect cases

In re A.S.A., Article II, Sec. 17 (Due Process Clause); Secs. 41-3-425; 47-1-104(4), MCA.

Out-of-custody clients

- Drug courts/post-conviction
- Revocation of sentence
(misdemeanor)
- Guardianship (person subject to guardianship)
- Children in DN cases

statutorily mandated defense series

Sec. 46-1-1103, MCA
Secs. 47-1-104(4); 46-8-104; 46-18-203, MCA
Sec. 47-1-104, MCA
Sec. 41-3-425, MCA

END NOTES

¹ The duty to develop a mitigation plan is set out in § 17-7-301(7), MCA. Subsection (a) provides generally that an agency may not make expenditures in the second year of the biennium that, if carried on for the full year, will require a "supplemental appropriation". Subsection (b) directs agencies to "prepare and, to the extent feasible, implement a plan for reducing expenditures in the second year of the biennium that contains agency expenditures within appropriations. The approving authority is responsible for ensuring the implementation of the plan. If, in the second year of a biennium, mandated expenditures that are required by state or federal law will cause an agency to exceed appropriations or available funds, the agency shall reduce all nonmandated expenditures pursuant to the plan in order to reduce to the greatest extent possible the expenditures in excess of appropriations or funding."

² In Dolan v. King County, 258 P.3d 20, 33 (Wash. 2011), the state Supreme Court held that the county exercised such control over public defense agencies' actions that the employees were government employees.

³ According to a recent article in the University of Montana Law Review, approximately 81% of Montana's active attorneys are located in the six most-populated judicial districts, based in Billings; Missoula; Bozeman; Kalispell; Great Falls; and, Helena. Less than 20% of Montana's active attorneys serve the state's remaining 16 judicial districts.

⁴ Evaluation Report, Public Defender System, Office of the Legislative Auditor (February 2010), at 24.

⁵ See, In re Welfare of Child of S.L.J., 772 N.W.2d 833 (Minn. App. 2009), affirmed by 782 N.W.2d 549 (2010)(court did not err in appointing private counsel at county expense, rather than state public defender, for parent in parental rights termination case who was entitled to counsel in ICWA); In re Welfare of the Children of J.B., 782 N.W.2d 535, 549 (Minn. 2010).

⁶ (4) A court may order an office to assign counsel under this chapter in the following cases:

(a) in cases in which a person is entitled to assistance of counsel at public expense because of financial inability to retain private counsel, subject to a determination of indigence pursuant to 47-1-111, as follows:

*

(iii) for a parent, guardian, or other person with physical or legal custody of a child or youth in any removal, placement, or termination proceeding pursuant 41-3-422 and as required under the federal Indian Child Welfare Act, as provided in 41-3-425;

⁷ "The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process." Iowa v. Tovar, 541 U.S. 77, 80-81 (2004); United States v. Wade, 388 U.S. 218, 224-225 (1967).