

**Conflicts Coordinator Report to the Montana Public Defender Commission
October 13, 2006**

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EXHIBIT 3

1. Overall job description: The Conflicts Coordinator, under the direct oversight of the Montana Public Defender Commission (PDC), is responsible for assisting conflict attorneys in securing payment for legal services directly relating to the delivery of case resources. [*Standards for Counsel, III., F., 1.*]

2. Functions of Conflicts Coordinator:

- A. Files written financial reports monthly and as directed with the PDC. [*Standards, III., F., 2.*]
- B. If requested by the PDC, provides reports to the PDC to assist the PDC in evaluating the work of attorneys providing conflict services. [*Standards, III., F., 2.*]
- C. Handles only administrative functions unrelated to the direct provision of legal services to clients. [*Standards, III., F., 5.*]
- D. Verifies, approves or denies bills for services or resources for conflict cases submitted to the Conflicts Coordinator. [*Standards, III., F., 6.; Commission Minutes 07/31/06*]
- E. Verifies, approves or denies all expenditures requested by conflict counsel, only to ensure compliance with State disbursement procedure and promote sound fiscal practices. [*Standards, III., F., 7.; Commission Minutes 07/31/06*]

NEW

3. Report to the PDC for September 2006:

A. Financial Report:

All of the numbers used in this portion of this report are preliminary and are estimates. The numbers are stated only for the internal use of the Public Defender Commission and the Office of the State Public Defender.

The Conflicts Coordinator case and claim totals are based upon a hand count of paper records maintained by the Conflicts Coordinator. Total Public Defender System case and claim totals, if presented, are also preliminary in nature and were furnished by the OPD Director of Administration Freebourn and OPD Financial Manager Law for use in this report.

The case numbers and costs stated in this report contain known inaccuracies, such as double counting cases where two claims were submitted by different attorneys for work on the same case in a month. Another example is that the cost per month was arbitrarily assigned to a month where a claim was submitted for work over one or more months.

Assumptions:

Work performed by contracted attorneys in July was submitted on a claim for payment during August and that work performed in August was submitted on a claim for payment during September.

Some conflict case claims are submitted and paid through RDPD / Contract Manager approval.

i. OPD Case Counts Through 9/30/06

	CONTRACT		CONTRACT/CONFLICT		TOTAL	
	9/30/2006		9/30/2006		9/30/2006	
DC	2,067	32.5%	223	37.5%	2,290	33.0%
DN	1,155	18.2%	188	31.6%	1,343	19.3%
DI	150	2.4%	-	0.0%	150	2.2%
DG	41	0.6%	-	0.0%	41	0.6%
DJ	355	5.6%	30	5.1%	385	5.5%
DA	42	0.7%	-	0.0%	42	0.6%
LC	2,542	40.0%	153	25.8%	2,695	38.8%
OTHER	-	0.0%	-	0.0%	-	0.0%
TOTAL	6,352	100.0%	594	100.0%	6,946	100.0%

ii. July 2006

Setup, planning organization.....	29.15
Travel, meetings out of town	35.35
Staff assignable work	0
Admin-claims, approvals, troubleshooting.....	<u>5.70</u>
CC hours	70.20
@ \$60.00	\$4,212.00

Mileage \$ 382.70
 Overhead stipend..... \$ 100.00

iii. August / September 2006 – Administration of July / August claims

	<u>July</u>	<u>August</u>
Total conflict cases on 9/30/06.....	594	594
Conflicts Coordinator cases	373	417
% of conflicts cases through CC	63%	70%
Conflicts Coordinator claims	43	60
Attorneys, Misc. Provider, costs.....	\$ 76,958.00	\$ 128,982.00
	<u>July</u>	<u>August</u>
CC case administration hours	61.55	39
CC admin cost per case	\$ 10.17	\$ 5.82
(61.55/373=.165hr @ \$60 = \$9.90+\$.27)		
(39/417=.093hr @ \$60 = \$5.58+\$.24)		
CC total cost per case	\$ 13.22	\$ 6.72
(79.05/373=.211hr @ \$60 = \$12.66+\$.27+\$.29)		
(45.4/417=.108hr @ \$60 = \$6.48+\$.24)		
Planning, organization hours.....	6.95	6.4
Travel, meetings out of town hours	10.55	0.0
Staff assignable work hours	10.70	7.75
Admin-claims, approvals, troubleshooting hours	50.85	31.25
CC hours billed.....	79.05	45.40
@ \$60.00	\$4,743.00	\$ 2,724.00
Mileage	\$ 106.80	0.0
Overhead stipend.....	\$ 100.00	\$ 100.00

B. **Evaluation of conflict attorney work.** No evaluations or reports have been requested. I expect to work with Larry Murphy, Contracts Manager, to develop billing practices guidelines to further address what expenses are separately allowable and how and for what purpose attorney (and under what circumstances staff) time may be charged. For example, when will the OPD will pay for a second chair at a trial? Another example related to trials is whether or not other staff or investigators will be paid to manage exhibits or witnesses.

At the July 31 meeting, coordinating evaluation of attorney work with Jim Wheelis, Chief Appellate Defender, was discussed. I have not taken action on this item yet. In the August Report I stated that I would start this discussion with Jim Wheelis, Eric Olson, Larry Murphy and Randi Hood in September. I have not yet started the discussion.

C.-E. Conflict case administration.

i. Goals:

- a. Establish a *system* for administration and oversight of conflict cases that is independent of case supervision by Office of the State Public Defender (OPD) to ensure independence of action by conflict case counsel and to prevent inadvertent disclosure of conflict client confidences and case strategy.
- b. The conflict case system should create the least additional work for conflict client counsel as is possible while achieving the prior goal. Payment for services should be at least as fast as will occur for cases administered by the OPD. Authorization for non-attorney services should occur within one business day for tasks expected to cost less than \$2,000, and within two business days for tasks expected to be \$2,000 or more.
- c. To ensure timely and efficient delivery of services to the clients by having a short path to assignment of conflict attorneys and speedy authorization of needed services.
- d. To organize the system for administration and oversight of conflict cases so that it integrates with the OPD to allow for a consistent presentation of case load, resource deployment and needs analysis by the OPD.

UPDATED ii. Actions taken:

- a. I reviewed materials from several states with state wide public defender systems and how those states implement conflict case management. I looked at Iowa, Colorado, and Georgia in some detail.
- b. I've answered questions from counsel, met with attorneys, reviewed invoices submitted for payment, considered and acted on requests for preapproval of case expenses. When I thought it necessary, I have questioned counsel about the

work reflected on their invoices. These functions took most of the time spent in September.

- c. I reviewed the paper records in my office for the preliminary financial information presented above and requested information from OPD personal.

NEW

4. Conclusions and observations about Conflicts Coordinator position after about 100 days of operation:

A. Conflicts are not being identified. The common understanding in public defender systems is that between 10% to 15% of the total case load are conflicts cases. The preliminary case numbers in this report show about 8.5% of the *total contract* cases are identified as conflicts cases. Even if the total contract case numbers are inflated by inactive cases, the percentage of identified conflicts cases to the total number of FTE OPD and contract cases must be far lower than expected. The place to address this issue is at intake. Long term planning for the administration of conflicts cases should anticipate a case load based on the number of active total system cases.

B. Conflicts System as set up and evaluation of bottlenecks.

- i. *Payment of some or all conflict case bills is delayed at the Central Office at the Contract Manager position.*

When I receive a claim, I examine the billing detail, make calls to answer my questions and otherwise correspond with conflicts attorneys to address the issue is presented. I usually check the math and look at the costs claimed for compliance with overhead cost stipend policy as implemented. If a bill is adjusted I inform the conflict attorney and send them a copy of the adjusted claim form. This process takes 1 to 5 business days.

An example of a bill question is a claim for 36 hours of reviewing an appellate transcript. I called the attorney about this extraordinary amount of time spent. This was a case where the federal court ordered a new trial after an unsuccessful state appeal from a 5+ day trial. The claim was for new trial preparation. Another example is asking conflicts counsel to verify that travel time has not been double billed.

When I approve a claim, I scan the completed claim form and email it directly to Sandra Law, Financial Manager. At that point, the Financial Manager has only the approved summary claim form. All of the supporting detail is at the Conflicts Coordinator office.

As I envisioned it, the approved conflicts case claim would go directly to the accounts payable unit, the required case information entered, and the claim would be paid. Before the claim can be paid the case and cost information must be entered by Accounts Payable Unit from the summary claim form and presumably there is some processing delay varying by when the claim is submitted for payment. Claims submitted at the beginning of the month should incur a longer delay than claims submitted after the 10th of the month.

What actually happens is that some or all of conflicts case summary claim forms go from the Financial Manager to the Contracts Manager where they apparently incur up to a 10 day additional delay before the claim is released for payment.

- ii. *Preapproval of experts and investigators over the \$2,000.00 authority limit incurs additional processing time.*

Any PD system attorney that wants to spend over \$200.00 for a task in a case is required to have preapproval from the RDPD, the Contracts Manager or the Conflicts Coordinator. Between \$200.00 and \$2,000.00 the authorization comes directly from the RDPD or the Conflicts Coordinator. When the authorization exceeds \$2,000.00 the Contracts Manager or a PD Commissioner must authorize the expense and there is to be a discussion of lower cost alternatives with the attorney before approval is given.

Commissioner approval for costs exceeding \$2,000.00 adds at least one business day to the process because of PD Commissioner availability and alternative follow-up.

- iii. *Information about policies, procedures and authority is not shared or usefully distributed.*

This problem has at least three aspects.

First, *the administrative components of the OPD appear to be understaffed. It appears that OPD personnel have had more to do than can they could get done in the time available.*

An example of this is entry of basic case information such as the OPD numbers and case information. The RDPD assigns a conflict attorney after the RDPD receives an appointment from the court. A Notice of Appearance is filed with the referring court for the conflict case attorney. The OPD number and case information may not be assigned at the same time to reduce the delay in client representation. By the end of the first month the conflict case

attorney has to have the OPD number in order to complete the summary claim form for payment. The OPD number is not uniformly available from the Regional offices because of unreturned phone calls or other processing delays. When I get a request for OPD numbers I usually forward them to Larry Manley at the Accounts Payable Unit at the Central Office. Larry turns these requests around in less than a day. How to find out the OPD number for a conflict case is learned information, and it has not been usefully distributed. If the Regional office sent the OPD number to the conflict attorney in a routine way, the additional time to find out the information would be saved.

Second, as policy changes the information about the changes is not regularly distributed.

An example of this is the modification of the \$25.00 overhead stipend provision in the standard attorney contract (Memorandum of Understanding). The stipend provision has been modified to allow for reimbursement or payment of toll calls from jail and large project photocopying projects but dissemination of this change has been piecemeal at best.

Third, information about who does what at the OPD and in the PD System is not readily available.

Because I am the "Conflicts Coordinator" I get asked about whether or not a situation presents a conflict. It is my understanding that is a question properly put to the Training Officer, Eric Olson. As roles in the PD system are defined, that information should be disseminated in a way that is readily accessible.

C. Evaluate the workload for the Conflicts Coordinator position.

i. *How much time does it take and for what functions?*

About 30% of the identified conflicts cases are bypassing the CC position and passing through the RDPD offices and the Contract Manager. This occurs because of inattention by the conflicts attorneys, the RDPDs or intentionally. Inattention is a training or procedural issue. Intention is an expediency issue.

With only two month's data, and rough estimates at that, as structured the CC position is probably half-time or less for the administrative functions. If other duties are added, such as participation in attorney evaluation, policy formation or implementation, information coordination and dissemination, then the CC position is would definitely take half-time.

- ii. *What parts of the position should be done by attorneys or by staff?*

None if the CC position is located apart from the OPD Central Office. The parts of the job that could be done by support staff, such as an assistant or paralegal, occur in small increments over the month. I think assigning support staff would be less efficient and less cost effective than just having the CC perform the functions such as filing, scanning and email. If the CC is moved to the Central Office then the analysis may be different.

NEW D. Re-evaluate system design based upon:

- i. Policies and procedures being proposed and implemented by OPD at the Regional and Central Office levels.
- ii. Reported problems.
- iii. Additional information from other state systems design and operation and state and national standards. Examine how multiple conflicts are handled.

System design

Colorado's public defender system has full time public defender offices. Conflicts cases are administered through the separate Alternate Defender office. The Alternate Defender has a separate budget and administration. The Alternate Defender office is essentially a contracted attorney administrator.

Iowa's public defender system has full time public defender offices. Conflict case administration is done from the central public defender office, but the administrators are considered separate and the conflicts cases are handled by contracted and non-contract attorneys. Conflicts case administration is separately budgeted through Iowa's Indigent Defense Fund. There are two conflict case administrators. Iowa's population is roughly 2 million. The Indigent Defense Fund processes about 60,000 claims per year.

In Georgia portions of the state opted out of the public defender system. The public defender system is staffed with FTE attorneys and contracted attorneys. In urban areas there are separate FTE conflict offices. Where there are not FTE conflict offices then contract attorneys are used. Conflict attorney oversight occurs by office and as a separate part of the central bureaucracy.

For all three systems, where contract attorneys are used for conflict cases oversight separation exists only to separate the oversight of conflict attorneys from the direct oversight of regular FTE attorneys. I don't see separation of oversight between contract attorneys that have clients in conflict with each other. This is what I call the multiple conflict problem.

In practice, there is little confidential client information exchanged between the conflict attorney and the CC. There has been little time or inclination to connect what could be confidential information between cases through the contact between conflict attorneys and the CC position. The discussion tends to be centered on the appropriateness and cost options of preapproval requests. A policy or standard addressing disclosure of case information to other attorneys and OPD administrative personnel should adequately address this issue.

Georgia has used a consulting firm to assist with the analysis of when it is cheaper to create a separate conflict case office staffed with FTEs than to use contract attorneys. When the Montana has enough reliable data it may turn out that separate conflicts offices would be cheaper to run in the more populated regions. But because of the multiple conflict problem there will always be a need for outside conflicts attorneys.

The separation of conflicts attorneys, by contracting with outside counsel or by creating separate FTE conflicts offices, from the regular public defender staff is the primary method of preserving client confidences. A non-disclosure policy or standard for administrators and separation of the day to day conflict case administration from the regular OPD offices is probably sufficient.

How to Organize Conflict Case Administration

As long as contracted attorneys are used for conflicts cases, and the administration of those cases is separate from the regular OPD FTE supervision, the organization of Conflicts Case administration depends upon what else is to be accomplished.

Consolidating administration of all contract attorneys at the Contract Manager position would integrate all claims processing at a central point instead of the present 3 points of administration (CC, RDPD and Contract Manager). But then the Contract Manager must be "fire walled" from other Central Office personnel, especially when Central Office personnel are tasked with client representation. Consolidation might also require greater financial autonomy for the RDPDs, taking the Contracts Manager out of the authorization role for regular PD FTE case costs over \$2,000.00.

Separate independent administration of conflict cases from the OPD under the oversight of the PD Commission is the cleanest method of administration, but it does not address the multiple conflicts problem. It does allow a "back channel" to the PD Commission for troubleshooting and an alternate view in policy and procedure discussions. The CC position as an employee of the PD Commission and not an employee of the OPD allows dissatisfied participants, clients, OPD employees and contract attorneys a place to vent their frustrations. For example, I've been told that some contract counsel pad their time as a way to circumvent the stipend policy. To follow up on this kind of information and

function effectively in this role the CC must be included in policy and procedure discussions and have sufficient authority to resolve problems and ensure collaboration in policy and procedure formation. Separate administration of conflicts cases from other contract cases requires additional coordination but it also shares the administrative work load.

Other Significant Objectives to Consider

- ❑ There is insufficient back up for the Contract Manager and Conflicts Coordinator. There should be a backup person designated and with authority to make preapproval decisions in a timely way in the absence of either the Contract Manager or Conflicts Coordinator.
- ❑ Conflict attorney performance evaluation should be a part of the administration function. A significant point of evaluation is the time spent and billed. This will require additional time for either the Contract Manager or Conflicts Coordinator to participate and someone to cover their jobs if they are traveling.
- ❑ Billing standards should be expanded from those stated in the standard contract. Objective criteria should be established for review of contract attorney claims. An appeal process for claims denial should also be put in place.
- ❑ Make working with the contracted attorneys a separate priority. If additional funding for increased compensation for contracted attorneys is sought, do not raise the contract rate across the board. Use incremental increases for what the contracted attorney brings to the table. Consider higher compensation based on the support staff the attorney has at his or her disposal. Consider compensation for use of the contracted attorney's support staff. Consider compensation for use of technology such as on-line research, on-line access, and computer assisted time and billing.
- ❑ When a conflict attorney is disabled or their services terminated, who will make and implement that decision? Some one should go through their open OPD cases and see that the cases are appropriately placed. The RDPD shouldn't be that person.
- ❑ There is insufficient time or staff to meet all the duties of Central Office personnel. Long call back, or no call back, delays are still reported. The ability to timely respond is critical to contract lawyers. Delays increase their personal cost of representation and dissatisfaction with the OPD.
- ❑ Policy, procedure and contact information should be published and revised more quickly. The OPD website could be put to more effective use. I'm guilty of not revising and getting the information I have posted to the site, mostly because I have not made time to do it. That is my fault

because the PD Commission has not stated any restraints on the time I'm allowed.

- Troubleshooting or ombudsman function. This is another aspect of the policy, procedure and contact information problem. When there is a new problem where will it be heard? The Chief Public Defender can't respond to everything.

5. Recommendations.

- Continue the CC position long enough to get reliable FTE and contracted attorney caseload data. Harry Freebourn is probably in the best position to address when that will be.
- Plan to fund the position for at least ½ time for a while. Any time not spend in administration can be used to address "big picture" planning and implementation. This position should be participating in the contract attorney evaluation process. That process is going to take time away from routine administration. Identify the PD Commission's priorities for the position. When the OPD case management system is placed in service, conflict checking may improve and the number of conflicts cases increase.
- Share, publish and solicit comments from contracted attorneys, FTE attorneys and the OPD regional staff on the "big picture" tasks. These tasks include: brief bank implementation; job functions and oversight responsibility; website content and use; office policies and procedures; expert database and information; client grievances; contract attorney claim disputes; and contract attorney performance criteria to name a few. I expect that there will not be a lot of input, but input from participants concerned with these items will expand the options to consider.
- Allow 45 days or more to implement a change in the way conflicts cases are administered. The time to transfer files, repost contact information and provide notice of the change will be relatively short. About a week to 10 days. It will take longer to develop written policies and procedures (even if they are borrowed from another state), written changes in job functions and the existing forms and have them in place before any change occurs.

6. Proposed Work for Next 45 days:

- A. Work with Larry Murphy, Contract Manager and Randi Hood, Chief Public Defender on a transition plan and the policies and procedures needed to implement the plan. Alternatively, work with Larry and Randi to implement policies and procedures to address bottlenecks, and problems. Either way, identify points of disagreement for the PD Commission's consideration.

Get permission from Iowa, and other public defender systems, to use and adopt their materials, policies and procedures.

- B. Continue present system of administration for conflicts cases.
- C. Follow-up as directed by the Commission.
- D. Work with Larry Murphy on billing practice guidelines to further address what expenses are separately allowable and how and for what purpose attorney and (under what circumstances staff) time may be charged.
- E. Work with Larry Murphy, Jim Wheelis, Eric Olson and Randi on attorney performance review guidelines, and policy or procedure for initiating an attorney performance review.

[end]