



OFFICE OF THE STATE PUBLIC DEFENDER STATE OF MONTANA

OUTLINE FOR DISCUSSION REGARDING OPTIONS TO ALLEVIATE CASELOAD AND WORKLOAD BURDENS

December 7, 2012

I.

OPD STAFFING AND CASE SUMMARY

In Fiscal Year 2012, OPD was staffed by 124.25 attorneys; 57 office support staff, and 19.5 investigators. Our turnover is almost 3 times that of other state agencies.

In the same time period OPD opened 30,912 new cases, which reflected an increase of 11.7% . We opened 11,456 new cases in district courts, which was an increase of 1,469 cases, and 19,456 new cases in lower courts, which was an increase of 1,779. At the end of FY 2012, we had 17,810 active cases. Our most recent data show that we have approximately 19,500 active cases.

OPD had an increase of 842 new dependent or neglect (“DN”) cases in FY 2012. On average, a DN case was open for 474 days before resolution.

II.

OPTIONS

First, we have to define the nature and scope of the dilemma posed by our burgeoning caseload and a fixed legislative appropriation.

The data show that our staff attorneys and supervising attorneys simply have too many cases. In FY 2012, the average staff attorney case weight was 176.85.

Our attorneys and staff do not have sufficient time in which to handle this caseload. We can reasonably expect 221 work days from our attorney staff, and

about 7.0 productive hours per day. Some of our attorneys and staff spend hundreds of hours traveling each year. Can we promptly meet with and interview our clients, and maintain necessary communication; fully investigate the facts and the law, and get full discovery from the prosecution; properly consider and file appropriate motions; maintain continuous representation throughout the case; adequately prepare for pretrial hearings, trials, sentencing hearings, and revocation proceedings;

The current situation threatens to put our attorneys in an ethical dilemma.

We also have to recognize that our attorneys are not, in most regions, provided adequate support staff. Our support staff provides valuable assistance, but we don't have enough of them. Attorneys throughout the region end up doing a lot of non-legal work in their cases. The following sets out the staff and case data by region:

<u>Region</u>	<u>Attorneys</u>	<u>Support Staff</u>	<u>Investigators</u>	<u>FY 2012 Cases</u>
1 – Kalispell	17.5	8.0	2.0	4,545
2 – Missoula	23.5	10	3.0	5,531
3 – Great Falls	12.0	6.0	3.0	3,607
4 – Helena	11.0	4.0	1.0	3,053
5 – Butte	9.0	4.0	1.5	1,634
6 – Havre	2.0	1.0	1.0	1,287
7 – Lewistown	2.0	1.0	0.5	462
8 – Bozeman	10.0	6.0	2.0	2,345
9 – Billings	19.75	10.0	3.0	7,140
10 – Glendive	3.0	1.0	1.0	662
11 – Miles City	2.0	1.0	1.0	646
Major Crimes Unit	4.5	2.0	0.0	

A. Can We Improve our Operations and Processes.

The first step is to consider whether OPD is managing its resources appropriately. The ABA's *Ten Principles of a Public Defense Delivery System* help set relevant benchmarks.

Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. The appointment process should never be *ad hoc*, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. ...

- OPD utilizes a contractor pool of 193 private attorneys, who handle cases by assignment on a contract basis. This permits us to relieve some of the stress on the system caused by excessive caseloads. However, even at \$60 per hour, a sizeable portion of OPD's budget goes to pay contract attorneys. In FY 2012, OPD paid private counsel \$5.8 million.
- Private attorneys also are available to take cases which pose a conflict to OPD staff attorneys. The contract and conflict systems are independent, and are administered by full-time attorneys. Our Conflict Coordinator assigns about 90 cases per week.
- We cannot substantially increase the number of cases we assign to private counsel. We don't have sufficient numbers of qualified private counsel in every region to take additional cases, and if we overburden those who accept assignments, we create the same excessive caseload problems, and pose the same risks to clients, as are faced by our staff attorneys and managers.

Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

- OPD screens persons for eligibility as soon as possible, and moves to rescind appointments if it is determined the client does not qualify. We attempt not to represent persons who are ineligible for our services. We have a project underway to study and improve our processes, and to clarify standards for "hardship" eligibility. We have 11 support staff to review applications and determine eligibility in almost 31,000 cases per year.

Defense counsel's ability, training, and experience match the complexity of the case.

The same attorney continuously represents the client until completion of the case.

There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

Defense counsel is provided with and required to attend continuing legal education.

- OPD has experienced substantial turnover in attorneys from both programs, and this has caused problems in our ability to effectively and efficiently provide services to our clients. We try to match our attorneys' ability and experience with case complexities. Inexperienced attorneys usually start out in courts of limited jurisdiction, treatment courts, and/or youth court. As attorneys gain in experience, they can move up to handling more complex felonies. Our pay schedule permits pay increases based on years of service with the agency and ability to take on complex cases. We provide our new attorneys with training, and conduct seminars, training and an annual conference.
- Due in large part to excessive caseloads, and a gross disparity in pay and benefits as compared to those received by prosecutors, we are losing attorneys. This means we are frequently short-staffed while vacancies are being filled, training inexperienced attorneys, promoting inexperienced attorneys to complex cases, and shifting attorneys between cases.

A manager can decide not to assign new cases to a lawyer burdened by an excessive caseload, and may be able to reassign that lawyer's cases to others within the agency. However, with our average case weight exceeding the "red flag" weight, and in light of turnover within the agency, this option is unavailable in most instances.

- B. Decline to Accept New Cases. We have an ethical duty to avoid excessive caseloads. We can develop a plan on a region-by-region basis, to identify the need to decline to accept new case assignments. This would require identifying the condition which would trigger the filing of an appropriate motion, and a plan for managing caseloads until the problem abated.

1. Triggering Condition. It would not be sufficient for a majority of attorneys in a region to have reached the “red flag” caseload for a month under our case weighing system. Cases could be reassigned, or unusual circumstances while led to a spike in new case filings might abate. Similarly, the fact that all attorneys in a region exceeded the recommended maximum would not be sufficient to trigger a motion to decline appointments.

We should create a matrix for each region to identify the breaking point in terms of case assignments, taking into account:

- case weight numbers
- staffing considerations
- types of cases involved
- availability of private counsel
- budgetary considerations
- travel considerations for counsel and staff

Next, we should define a relevant time period during which the problem continues. For example, if a region enters and remains in the crisis stage for a period of two months, the regional deputy will notify the chief public defender at the end of that period. The chief and/or the regional deputy will notify the judges in the region and the prosecutors in the courts in that region, notify them of the situation, offer to meet to discuss solutions, and advise them that if the region is still in the crisis stage at the end of the third month, the agency will move to halt additional appointments on those courts, and may need to move to withdraw from pending cases.

We also would need to determine a period of time – say, two months – during which the regional staff would have an opportunity to resolve pending cases and bring the caseload numbers down below the crisis point.

2. We could identify classes of cases, and in the event we need to file a motion asking that case assignments be halted, identify those classes as our first priority. A suggested priority list is as follows:

-treatment courts

-involuntary commitment proceedings

-DN cases. Six of our regions have staff attorneys who are assigned to DN cases, while five regions assign attorneys to all types of cases. Most of our regions represent one of the parents in the DN case, and send out other parents and/or children for assignment to conflict counsel. In some cases, however, our staff attorneys send out the parental cases for conflict assignment, and keep the children in-house. In either situation, we could decline assignments in DN cases. This model would free up staff attorneys to handle other cases. This model has several drawbacks, however, including: (1) we do not have a sufficient number of qualified private attorneys to absorb the increased need for counsel; (2) it likely would be more expensive, as private attorneys cost more per hour than staff attorneys; and (3) there would still be a need to address conflict situations, such as representation of both parents and children in a DN case.

-criminal cases. Assignments in criminal cases would be our last resort, given the constitutional provisions guaranteeing the right to counsel in criminal cases.

3. We could move to rescind appointments in pending cases, according to the above priority.