

MONTANA PUBLIC DEFENDER COMMISSION

Jorgenson's Inn
1714 11th Ave., Helena, Montana

December 17-18, 2009

MINUTES

(Approved at the February 5, 2010 meeting)

THURSDAY, DECEMBER 17

Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Mike Sherwood at 11:00 a.m.

Commissioners Present

Mike Sherwood, Missoula; Terry Jessee, Billings; Charles Petaja, Helena; Bill Snell, Billings; Jennifer Hensley, Butte; Richard (Fritz) Gillespie, Helena; Caroline Fleming, Miles City; and Jim Taylor, Missoula

Commissioners Absent

Majel Russell, Billings; Kenneth Olson, Great Falls; Tara Veazey, Helena

Interested Persons

Scott Crichton and Frank Jones, American Civil Liberties Union of Montana (ACLU); Brent Doig, Office of Budget and Program Planning

Training

John Moore from the Professional Development Center led a training session with topics including individual liability, board involvement in labor relations and chain of command, Robert's Rules of Order, the public's right to know and communications, and open meetings. He was assisted by Greg Martin and Jane Rhodes.

Chairman Sherwood and Mr. Moore had a difference of opinion regarding the Commission's mandate to "supervise and direct" under 47-1-105. Chairman Sherwood believes the Commission is not limited to the list of responsibilities contained in the statute but has a more affirmative duty, while Mr. Moore's position is that the list defines *how* the Commission is to supervise and direct, from the general to the specific. They did, however, agree that the Commission is responsible for ensuring that the Chief Public Defender performs her statutory duties (47-1-201).

Public Comment

Frank Jones from Big Arm introduced himself. He is the former executive director of the National Legal Aid and Defender Association (NLADA). He is delighted to have opportunity to attend the commission meeting and will attend on Friday as well.

Scott Crichton expressed concern about the timeline for issues identified in the American University (AU) report. It has been six months since the draft report was issued, and he is apprehensive about the future of the public defender system with the next legislative session only a year away.

Chairman Sherwood said that customer satisfaction should be part of the long term evaluation of the system and he asked Mr. Crichton about the volume and nature of the complaints that the ACLU is currently receiving. Mr. Crichton said that they do track the confidential complaints that they receive, and they look for patterns. He offered to ask the legal staff in his office what information the ACLU can comfortably share with the Commission.

The meeting recessed at 4:00 p.m. until Friday morning. The Commissioner members left for the Capitol for a joint meeting with the Law and Justice Interim Committee.

FRIDAY, DECEMBER 18

Chairman Sherwood called the meeting back to order at 8:45 a.m.

Commissioner Russell attended by telephone conference. Commissioner Petaja was absent.

Approval of Minutes (*Action Item)

Commissioner Fleming moved to adopt the minutes of the October 14, 2009 meeting as submitted.

Commissioner Jessee seconded. The motion carried.

Public Defender Program Report

Chief Public Defender Report

Chief Public Defender Randi Hood said that much of the information that the Commission requested previously has been posted to the website. She is available to answer any questions regarding that information.

Chief Hood has been working to address management and morale issues. An orientation program for new employees is being developed. The initial focus will be for attorneys, and the sessions will cover topics from entering a payroll timesheet to doing initial client interviews. The entire program will be filmed and made available on each new employee's desktop. New hires will spend most of their first week watching the training sessions, being introduced, shadowing, etc. The hope is to take care of mundane issues up front and make the employee more comfortable in knowing what the expectations are for their position.

Each regional deputy public defender prepared a management plan for their region prior to the December 3-4 management training session. The training generated several ideas geared toward public

perception and funding issues. Tasks were assigned to specific teams, and time frames have been established to facilitate follow through.

Commissioner Snell noted that it is important that each attorney know the client and their individual circumstances. Chief Hood said that although not specifically in the facilitator's report (exhibit 1), providing better client services is part of the goal. The orientation program will include a segment on the types of clients OPD serves, noting that many of them have mental health and substance abuse issues. Each office will have a resource listing for whom to call in that area for mental health or other services. Commissioner Snell added that cultural implications are important as well. Chief Hood replied that another round of cultural sensitivity training is due, and she is working with Training Coordinator Eric Olson to identify the form it will take this year.

Commissioner Jessee said that he sees a training need for both FTE and contract attorneys in working with mentally ill clients; some attorneys don't know what the next step is and people end up sitting in jail for long periods of time. Chief Hood agreed that this should be addressed in training, and if there are particular problems in a region, specific training for those people can be provided. She said that contractors must continue to be encouraged to attend the trainings. She also noted that overpopulation at Montana State Hospital is contributing to the problem regarding fitness to proceed because often the client has to wait for the opportunity to be admitted.

Chief Hood said that the performance appraisal process has been modified by Human Resource Officer Barb Kain and OPD personnel attorney Jon Moog, as recommended in the AU report. Evaluations are an ongoing process, and the initial ones will be complete within the next month. The evaluation form has a broad statement asking about compliance with the Standards, but a checklist addressing specific requirements identified in the Standards will become part of the process. Commissioner Taylor expressed his concern regarding the evaluation form because it appears that attorneys are being weighted the same for lawyer skills and safety issues. Chairman Sherwood asked if it was possible to ask the courts to provide input on Standards compliance. Chief Hood said that she has had contact with at least one judge in each region as part of the evaluation process, but she has had a better response from judges she knows. Chairman Sherwood would like to explore whether judges would be responsive to an inquiry from him; he is interested in both district courts and courts of limited jurisdiction.

Chief Hood's latest question to her deputies regarding Standards compliance relates to dependent neglect cases. They have begun discussions with some courts based on the finding that not every judge is appointing separate attorneys as required.

The Billings office was reorganized about a year ago to add a supervisor for attorneys doing misdemeanors. This has provided the misdemeanor attorneys with more mentoring opportunities, and Chief Hood has initiated discussions in two other large offices (Missoula and Kalispell) regarding instituting a similar plan there.

Chief Hood is considering using liaisons in each region as a way of getting some legitimate feedback to track Standards compliance and to establish relationships with other stakeholders (e.g. judges). It is not intended to be a process to seek and resolve employee complaints, because the union is the vehicle for handling that. The commissioners discussed creating a Commission presence by visiting offices and allowing employees to put a name and face to the Commission members, as Commissioner Jessee is doing in Billings. Some commissioners are worried about the risk of interfering with the chain of command or the temptation to micromanage, as well as their ability to provide the same access to Commission members for every individual office. The topic was tabled for further discussion at a later time.

Administrative Director Harry Freebourn discussed the Missoula vs. Billings comparison (exhibit 2). Basically, business is done differently in those two regions with higher FTE costs in the Missoula region and higher contractor costs in Billings. Commissioner Taylor noted that the information should be viewed not just by population but by case counts because many of the Big Horn County felonies occur on the reservation and thus go through the federal court system. The Yellowstone County district court contractor case costs are very high compared to the FTE costs for the number of cases handled by each, and Chief Hood said that part of that difference is due to contracting out the conflicts, but she also suspects that some contractors are overbilling. Contract Manager Larry Murphy has begun auditing some contractors in that area. An in-depth analysis of contractor costs is also underway.

Appellate Defender Program Report

Chief Appellate Defender Joslyn Hunt reviewed her written report (exhibit 3). The Standards for appellate attorneys need to be revised to reflect the statutory process for postconviction relief. The caseload continues to grow, but it was at a slower rate during October and November. The new case count report (exhibit 4) will help identify caseload trends.

Conflict Discussion

Chief Hunt's brief and attachments (exhibits 5-7) detail the conflict of interest issues and her assessment of the situation. In summary, her analysis is that each OPD regional office is a separate entity and there is no per se conflict from region to region. She also sees no conflict regarding contract attorneys overseen by Mr. Murphy, even though he reports to Chief Hood. However, Chief Hunt said that the appellate office is a separate issue. Having the appellate division report to the Commission may still give the impression of impropriety, but perhaps to a lesser extent than having the Chief Public Defender oversee the appellate office. Chief Hunt does not believe that the agency is in a per se conflict situation now, but she would like the Supreme Court to make a decision. There is currently a case before the Supreme Court relating to conflicting a case out to a different regional office; briefs are due January 11. Commissioner Gillespie expressed his hope that the Supreme Court will issue an opinion on all three of the issues that Chief Hunt's brief addresses. The brief was a group effort by the Appellate Defender Office, and Chief Hunt said that all of the appellate staff are comfortable with it. Chairman Sherwood

thanked Chief Hunt and said that the Commission would await the Supreme Court decision before considering any further action.

Public Comment

Gary Quigg from the Billings public defender office distributed information regarding the caseload management report to the Commission (exhibit 8). The attorneys and staff in the Billings office believe there is a problem with the case weighting system (CWS) and how it currently reflects the workload in their office. Chief Hood thanked Mr. Quigg and the Billings staff for doing this additional work on the CWS; she wanted them to know that she has no interest in using any information that isn't accurate, and she will ensure that the Central Office staff work with them to verify the accuracy of the data.

Todd Chatman, assistant public defender, said that the huge amount of contract costs in Billings shows the lack of resources there. He also noted a large number of cases/per attorney in Helena according to the CWS report.

Koan Mercer, assistant appellate defender, had three comments and two reasons that he came to speak. Comments:

1. Mr. Mercer was involved in the initial design of the CWS, and it was designed to track caseloads for individual attorneys, not to compare the workload between offices. If it is to be used to compare offices, a separate worksheet with one total number for each office (as if the entire office is one attorney) should be maintained to eliminate the back fill problem in the comparison.
2. He said that time reporting is not a big deal and attorneys should be required to comply if they want to be paid. He also said that attorneys should be taking their accumulated time to sentencing to comply with the requirements of SB 263.
3. Based on contract attorney costs it appears that contractors are spending more time per case. Mr. Mercer wondered if that indicated that contractors are over-working or FTE are under-working cases.

Mr. Mercer's reasons for coming came to address the Commission are 1) to request that the appellate defender office have a liaison to the Commission as has been discussed for union attorneys and staff and contract attorneys; and 2) to inform the Commission that he will ask to be removed from a case at the client's request. Since they are at the beginning of the case, he will argue that he has a per se conflict and ask for a decision from the court. All of the appellate attorneys believe they are within the rules, but they look forward to a decision.

Scott Crichton, Executive Director of the American Civil Liberties Union of Montana, thanked the Commission for their accessibility.

On a point of personal privilege, he wanted it made clear however that he does not sue people. The organization for which he works does, and he serves at the discretion of his board of directors.

He also wanted to set the record straight that while he works with attorneys on his staff and those who volunteer to work as ACLU cooperating attorneys, he himself is not an attorney. He does not supervise attorneys' legal work as he is not qualified and it would be unethical for him to do so.

Chairman Sherwood said that he would like to make a formal request to the ACLU asking for a regular and formal critique of the public defender system. Mr. Crichton will take the request to his office for discussion.

Frank Jones is a member of the ACLU of Montana board of directors, and he offered some observations. He thinks that the Commission is dealing with all of the AU issues more thoroughly than most states, and he congratulated the Commission on their efforts. He said that the NLADA board included client representatives and that can be helpful with funding because as long range plans are discussed, developing a constituency is important. He encouraged the Commission to make sure that people know what they are doing and that they get support for that work. Public information is very important and offices with the community behind them, especially if there are members that will testify before the legislature, can gain power in securing funding. Commissioner Hensley thanked Mr. Jones for a great suggestion in bringing issues and perspectives to the board.

Executive Session

Chairman Sherwood stated "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 meeting was reopened at 1:45 p.m.

Public Defender Program Report (continued)

Budget and Legislative Report

Mr. Freebourn discussed the agency mitigation plan (exhibit 9). He was aware at the end of the last legislative session that the agency would probably have a shortfall during the biennium, and the "run rates" are indeed showing a projected shortfall. However, the figure is now closer to \$1 million compared to the original projection of \$1.45 million, due primarily to the stabilization of contractor costs. The additional 3% vacancy savings, plus the 2% across the board reduction, account for \$800,000 of the \$1 million projected deficit. State revenues continue to drop however, and if they fall below a certain trigger point, the Governor will call for further reductions from all agencies. There is no plan in place for that, and it would probably result in service reductions. If further cuts are required, agencies will have 20 days to respond.

The Judgments, Assessments and Collections Report (exhibit 10) was distributed to the Law and Justice Interim Committee yesterday, but it was not discussed at the joint meeting. A modified FTE has been requested to assist in handling the collections. The agency did not receive the funds requested for the FTE in the fiscal note; so far the cost of collecting (one FTE) is about the same as the amount assessed. Mr. Freebourn noted that the figures in the report don't include the lower court assessments and collections. The same judges that were assessing public defender fees prior to the new legislation are still assessing them. Those that weren't previously assessing fees are not doing it now, and most aren't expected to start, with the possible exception of Yellowstone County.

Mr. Freebourn briefly reviewed the FY09 and FY10 financials (exhibits 11-12). He clarified that the agency is \$1 million short for each fiscal year of the biennium, for a total of at least \$2 million.

Chairman Sherwood asked when the next Commission meeting should be scheduled to address the budget issues. Mr. Freebourn suggested approximately 45 days, to allow for the Office of Budget and Program Planning (OBPP) to provide additional information.

The population figures that Commissioner Veazey requested are included as exhibit 13. These are the same figures that legislative staff use.

Mr. Freebourn provided a document showing requested and actual funding for the 2011 biennium budget, and an outline for 2013 to begin the next biennium budget cycle (exhibit 14). He reviewed the proposed decision packages on the 2013 outline and asked for direction from the Commission. The initial budget submission will be made to OBPP in May, and adjustments can be incorporated until late summer or early fall.

The Commission would like to encourage contractors and clients to participate in the next legislative session. Chief Hood said that a team was formed at the management training session to raise awareness of who public defenders are and what they do. Commissioner Hensley would like to be involved in that effort.

The Major Crime Unit budget is included as exhibit 15 per the Commission's request.

Mr. Freebourn informed the Commission that the next scheduled meeting of the Law and Justice Interim Committee will be February 8, and the Legislative Finance Committee will meet on March 4. The first net cases report is due to the LFC on January 1.

Commission General Discussion

Legislative Policy

Chairman Sherwood asked Mr. Olson to report on the strategic plan for legislative issues at the next meeting.

Public Defender Commission Information Requests to OPD

Information requested by the Commission has been distributed by email as it is available and has also been posted to the website. Chairman Sherwood will notify Mr. Freebourn if there is anything missing from the checklist and will renew those requests for the next meeting.

Ex Officio Members

The Commission discussed the possibility of adding ex officio members to the board. Issues raised included chain of command, conflict of interest, reimbursement, and the current availability of various opportunities for input including open meeting participation through attendance and public comment. There was also discussion regarding the differing roles between “ex officio members” and “liaisons to the board.”

There was some support for liaisons with time allotted on the agenda for them, rather than ex officio members sitting at the table. The intent is to solicit information and bounce ideas from the represented groups, and not to deal with personnel issues.

Chairman Sherwood moved to extend the ability to send a liaison to Commission meetings to four different groups. They will have an agenda slot, and be paid per diem. The four groups are contract attorneys, non-union Appellate Defender Office employees, an executive board member representing support staff and investigators, and an executive board member representing FTE attorneys. Commissioner Taylor requested clarification—will employees have to take leave at their own expense? Yes, that is the intent. Commissioner Hensley seconded. The motion carried with Commissioners Snell and Fleming opposed. Ms. Kain noted that there would still be employees that would not be represented by a liaison including office managers, Central Office staff and other non-bargaining employees.

Native Court Worker

This discussion was tabled until the next meeting.

Standards Certification

Commissioner Hensley moved that OPD establish a position of managing public defender, whose position would be above the regional deputy public defenders and below the Chief Public Defender, and whose sole purpose is to manage the regional deputies without carrying a caseload. Commissioner Jessee seconded.

Discussion: Commissioner Hensley said that the 17 direct reports that the Chief currently supervises is too many for one person. Commissioner Taylor asked if the motion is to amend the strategic plan? Commissioner Hensley said that her motion is to create the position, even if it requires amending the strategic plan. Commissioner Taylor commented that all managers have too big a caseload, and it needs

to be addressed on the next agenda. Commissioner Gillespie supports the motion but said that with a projected \$2 million shortfall, budget implications should be addressed before making a decision.

Commissioner Hensley amended her motion to refer the issue to the Personnel Committee to determine the financial impact, and to develop a skeleton job description in conjunction with Ms. Kain. Commissioner Gillespie seconded the amended motion. The motion carried unanimously.

Old Business/New Business (*Action Items)

NLADA Management Training

The Commission discussed sending a commissioner and/or Chief Hood to the NLADA management training in light of the AU finding that the system lacks management expertise. The item was tabled until the next meeting.

*FY 09 Report to Governor, Legislature and Supreme Court (exhibit 16) (*Action Item)*

Mr. Freebourn would like to update the Billings numbers when they are corrected and include them in the final report. Chairman Sherwood moved that he be authorized to release the report after the final numbers have been circulated to the Commission for review by email. Commissioner Hensley seconded. The motion carried.

Chief Performance Review Process

Commissioner Fleming wasn't aware that she chaired the Personnel Committee. The committee will work on this prior to the next meeting, and she will notify Chairman Sherwood if an executive session will be needed.

Set Future Commission Meeting Dates

The next meeting will be February 5, 2010 in Billings.

Chairman Sherwood made assignments to the subcommittees by email and they should be ready to discuss at the next meeting.

Commissioner Taylor said that the initial appearance issue in Flathead County has been resolved based on Steve Nardi's motion, but in the first eight days no OPD attorneys have shown up to do them. Chief Hood will investigate.

Public Comment

No public comment was offered at this time.

The meeting adjourned at 3:35 p.m.