

# MONTANA PUBLIC DEFENDER COMMISSION

## MINUTES

Jorgenson's Inn  
1714 11<sup>th</sup> Ave., Helena, Montana

**October 14, 2009**

*(Approved at the December 18, 2009 Commission Meeting)*

### **Call to Order**

The Montana Public Defender Commission meeting was called to order by Chair Mike Sherwood at 8:55 a.m.

### **Commissioners Present**

Mike Sherwood, Missoula; Terry Jessee, Billings; Tara Veazey, Helena; Kenneth Olson, Great Falls; Majel Russell, Billings; Charles Petaja, Helena; and Richard (Fritz) Gillespie, Helena. Caroline Fleming, Miles City, attended the meeting by teleconference, and Jim Taylor, Missoula, attended portions of the meeting via videoconference from China.

### **Commissioners Absent**

Bill Snell, Billings; Jennifer Hensley, Butte

### **Interested Persons**

Scott Crichton and Niki Zupanic, American Civil Liberties Union of Montana (ACLU); Brent Doig, Office of Budget and Program Planning; Jenny Erdahl, Legislative Audit Division; Pat Gervais, Legislative Fiscal Division; OPD Regional Deputy Public Defenders Ed Sheehy, Peter Ohman, Matt McKittrick, David Duke, Dan Boucher, Doug Day, Jon Moog, John Putikka, Garry Bunke; Chief Appellate Defender Joslyn Hunt; Brian Smith, Missoula Managing Attorney

### **Introduction of New Members**

Chairman Sherwood congratulated Commissioners Fleming and Russell on their reappointments, and welcomed Terry Jesse to the Commission. Charles Petaja was also recently appointed to the Commission and will be present later in the day. Commissioner Veazey noted that orientation materials from the last meeting are available on the OPD website.

### **Approval of Minutes** (\*Action Item)

Commissioner Olson moved to adopt the minutes of the July 23-24, 2009 and July 30, 2009 meetings as submitted. Commissioner Veazey seconded. The motion carried.

### **Public Defender Program Report**

#### *Chief Public Defender Report*

Chief Public Defender Randi Hood introduced the regional deputy public defenders in attendance. She met with them in Helena yesterday, and they will be attending the annual meeting and training conference beginning at noon. She also introduced Joslyn Hunt, the new Chief Appellate Defender. Chairman Sherwood invited the OPD staff to make public comment at 10:30 and asked them to be available for questions from the Commission.

A major crimes unit (MCU) has been established as part of a system reorganization. Scott Spencer from Missoula will supervise the unit's three attorneys and two support staff. The intent is to provide relief to the regional offices when they have too many resource-intensive cases, either by assigning the case to the MCU or by partnering the MCU with the regional office. The MCU will also take on complex cases in the remote regions instead of having to assign them to contract attorneys, improving cost control. Policies and procedures are being developed. Expenditures will be carefully monitored, and the financial reports will show both the MCU costs and how they are reallocated to the regions.

Chief Hood reported that the Great Falls, Helena and Bozeman office moves are underway and should be completed within the next month or so. In Great Falls, the regional and public defender offices will be in one location. In Helena, three current offices will be combined (regional, public defender and appellate). The Appellate Defender Office will have separate offices on the second floor with its own reception area. The major crimes unit will also be housed in this building. In Bozeman, additional space has been secured in the current building.

Chief Hood has been appointed by the Governor to the Montana Board of Crime Control (MBCC). Chairman Sherwood asked if there is any correlation between MBCC data on felonies and OPD's data. Administrative Director Harry Freebourn said that the data doesn't exactly line up because MBCC gathers data on all crimes, and OPD's data is filtered to include only crimes allegedly perpetrated by those who qualify for OPD services. However, OPD has used MBCC data in the past, as well as information from the judiciary, especially when preparing fiscal notes. The judiciary data is approximately a year behind because they are just now implementing their case management system.

The performance appraisal process for FTE attorneys has been revised and evaluations are underway. The new procedure seems to be working well, and Chief Hood hopes the process will be completed within the next 4-6 weeks. Commissioner Veazey asked to what extent the American University (AU) concerns were incorporated, and she requested a copy of the new procedure. Chief Hood described the new process in detail, and had previously distributed the new evaluation form to the Personnel Committee. Commissioner Veazey said that normally, sending forms to the Personnel Committee would be sufficient, but for now she would prefer that staff err on the side of "over including" the rest of the Commission. Chief Hood agreed. She said that the new forms were developed by Personnel Attorney Jon Moog and Human Resource Officer Barb Kain based on the standard state form. It was then modified to be appropriate for various staff positions. Chief Hood will send copies of what is used in each category to all Commission members.

Commissioner Olson asked about evaluations for contract attorneys. Chief Hood said that she and Contract Manager Larry Murphy are working on revising that process as well, and will begin implementation following completion of the FTE evaluation process. It is high on the list of priorities. Chairman Sherwood noted that part of the AU critique had to do with evaluations across the board, including the failure of the Commission to evaluate the Chief. Appropriate input must be solicited from people throughout the system, including managers, line staff and contractors. He invited thoughts from the managers on the process for evaluating the Chief. Commissioner Veazey said that the AU report also raised an issue regarding meaningful job descriptions for employees, and she suggested that a hard copy job description be given to each attorney as part of the process. Chief Hood agreed that was an excellent idea. Commissioner Veazey also asked for copies of the job descriptions.

Chairman Sherwood asked about exit interview forms. Ms. Kain is currently conducting the interviews using a form developed in consultation with Commissioner Fleming.

Commissioner Taylor asked that a checklist be developed that certifies compliance with the Standards as part of the evaluation process—something more than the general statement that is currently part of the evaluation form. He is interested in identifying multiple areas of compliance, and the reasons for any non-compliance, and wants to see the data. There was discussion regarding how to present this information while protecting the confidentiality of individuals, since compliance is a personnel issue. Chairman Sherwood said that following each meeting, he will summarize information requests made to staff in written form so that he can follow up with staff as needed.

Commissioner Russell asked what the next step is if the performance evaluation is poor? Chief Hood said that the process is a tool to help people reach the appropriate level of competency through training, mentoring or monitoring. She is not comfortable sharing individual remediation plans with the Commission, but will produce a written report on the general results of the evaluation process and how deficiencies will be addressed generally.

Chief Hood is working on a program to assess compliance with the Standards. She recently sent a question to all of the regional deputies regarding how soon clients are being seen. She will send their responses to the Commission on Monday, and pose another Standards question to her staff. It helps all of them to reflect on these issues and find out where there are problems around the state.

Training Coordinator Eric Olson's report (exhibit 1) shows the number of topics to be covered during the annual meeting. All Commissioners are encouraged to attend as much of the conference as they are able, including the evening banquet. Commissioner Veazey asked about training evaluations, and Chief Hood said that there is a new system to provide for electronic submission of the training evaluation form. She will provide a hard copy form to the Commission.

OPD has been awarded \$60,000 in federal stimulus funds through a MBCC subgrant for a file management project. The funds will be used to employ student workers to begin the process of destroying old files and scanning other files to electronic storage, as well as to purchase scanning equipment. The agency is currently in the process of having retention schedules approved by the Secretary of State, and will then request approval to destroy files that have exceeded the retention period. The JustWare case management system will be used to track the file destruction schedule.

A mentoring policy has been adopted, providing assistance from experienced attorneys to field staff with a case going to trial. It helps the attorney to articulate the defense and theory of the case, and lets them brainstorm with experienced attorneys.

Mr. Freebourn reported on dependent and neglect costs in response to a request at the last meeting. OPD's actual FY 08 cost of \$2.225 million is the base budget and is incorporated in the FY 2011 biennium budget. This is much higher than the costs incurred by the Supreme Court Administrator in FY 05 and 06, and higher than the initial funding under SB 176. Commissioner Veazey would like to compare caseloads to the change in costs. Mr. Freebourn will try to get the necessary information from the judiciary. One reason for the increase in caseloads and costs is that the guardian ad litem and the attorney for the child are now two people instead of one as in the old system. In addition, an attorney is now appointed for each parent, further increasing caseloads.

The case management tool process (exhibit 2) is a result of negotiations with the union. The report through August (exhibit 3) is included in the packet. The Labor Management Committee met recently to discuss modifying the weighting system. Since JustWare is now being used successfully, actual time will be tracked for several months before reassigning case weight values by case type.

### **Public Comment**

Several OPD staff members including Ed Sheehy, David Duke, Jon Moog, Koan Mercer, Brian Smith, John Putikka, Joslyn Hunt, and Myshell Uhl commented on the AU recommendations regarding management and caseload issues and answered questions from the Commission.

Commissioner Veazey led a discussion of how to determine whether Standards are being met, and what to do if they are not. She also said that the Commission would be negligent if they didn't address the management concerns identified in the AU report, but recognizes how lucky the state and their clients are that lawyers of this caliber have agreed to do these jobs.

Garry Bunke provided the perspective from a rural area, saying that each region has unique challenges—for him that includes travel and the large amount of work he does with contract attorneys.

### **JustWare Demonstration and Training Schedule**

Brian Smith and Heidi Henry did a JustWare demonstration for interested Commission members during lunch. The Commissioners asked if a field for race is included in the data gathering, and if the initial interview form is being used? The Commission would like to review the policies related to JustWare, and asked that they include a statement regarding mandatory use of the program, how dispositional information is entered, how the accuracy of the data is ensured, timelines for running and reviewing reports, and how management staff is to use that information.

Chairman Sherwood asked if it would be helpful for the Commission to relay to all employees how important their use of JustWare is, not only because of the relationship between accuracy of the data and funding, but also as a way to better represent clients. The consensus was that it would help to encourage employee's commitment to training and to reinforce why the training is necessary. Chairman Sherwood will draft a letter to all employees. JustWare training will be conducted through the remainder of the conference, and Commission members were invited to attend.

### **Appellate Defender Report**

Chief Appellate Defender Joslyn Hunt highlighted some aspects of the appellate defender program report (exhibit 4). Currently the office is down three attorneys. Combined with an influx of cases recently, she expects to see an increase in contractor costs. The Supreme Court doesn't have the backlog that it used to, so the Appellate Defender Office (ADO) is filing more extensions. This will go down when they are back to full staff. Chief Hunt is trying to develop policies regarding caseloads, and is interested in developing a weighting system similar to the system used for the union attorneys.

The disposition of cases includes 109 dismissed appeals, including Anders briefs. Chairman Sherwood asked for a comparison to prior years, and Chief Hunt will work on it. She will also do some work around Anders briefs, talking to attorneys to prevent filing unnecessary appeals.

Chief Hunt and the Commission discussed various ways of informing the Commission of Supreme Court decisions that have operational or fiscal implications for the public defender system. Suggestions included adding the Commission list serve to the email distribution list, developing a standard summary format highlighting key points, and including the information in the regular ADO report.

### *Conflict Discussion*

Chief Hunt assured the Commission that under her management the barriers separating the ADO from the public defender program will be reinforced. She said that she has never felt any pressure not to raise

ineffective assistance of counsel (IAC) claims just because the ADO also reports to the Chief Public Defender. The obligation is to the client, regardless of whether the Chief Public Defender, the Public Defender Commission or the Governor's office are "the boss." Chief Hunt did some research on how other states approach the appellate function, and does not think that there is an ethical conflict in Montana.

A lengthy conversation regarding conflict ensued based on the AU finding that not only the appellate office but also each of the regional offices should not be considered independent for conflict purposes. Esoteric versus practical concerns were addressed, as well as possible solutions to address the conflict problem. This included changing the rules of ethics to apply only to the private bar (as Minnesota did); creating a separate ADO under the supervision of the Commission; and requesting legislation to address the issue during the next session. There was discussion regarding requesting an ethics opinion from the State Bar, but that would only be advisory. There are also ways to bring issues before the Supreme Court if the Commission would like them to issue a decision. The Commission asked Chief Hunt for a brief supporting the current system position on the conflict issues, both regarding the ADO and also regarding identifying regions as separate law offices. Chief Hunt will have the brief ready for the next meeting or the one after that. The Commission can then decide if they wish to pursue an advisory opinion or take it to the Supreme Court.

Mr. Freebourn had previously noted that Brent Doig, Pat Gervais and Jenny Erdahl were present to hear the discussion regarding conflict issues. Chairman Sherwood asked them if they had any guidance to offer. Mr. Doig said that no additional budgetary authority can be created, but Budget Director David Ewer's door is open if the agency wants to reallocate funds. If the Commission wishes to hire staff, including support staff or a chief appellate defender, they should pursue that through the EPP process. In addition, Mr. Doig noted that the legislature would have to approve moving responsibility for the ADO from the Office of the State Public Defender to the Commission. Ms. Gervais clarified that the appropriations are already set, and there are very few ways to change them. Receiving a federal grant is one of the few ways to add resources, and if it's not a federal grant, it's a shell game to find the money elsewhere. If risk factors are identified, it is part of her job to help look at those risks, especially during the next legislative session. She suggested that as an executive branch agency, the Commission should seek advice from the executive branch. The Commission should also keep both Mr. Doig and Ms. Gervais apprised of any risks that are identified.

### **Public Comment**

Chairman Sherwood invited the assistant appellate defenders present to make public comment.

Tammy Hinderman believes that there is a conflict when an arguable IAC claim is raised against a co-worker. She is worried because it's the attorney and their license on the line, regardless of the position that OPD or the Commission take. She also said that the two pre-eminent groups in the country (the ABA and the NACDL) think there is a conflict.

Koan Mercer agreed that it is a gray area, and he wants be sure he is doing the right thing. He thinks that the interoffice conflict situation is aggravated by the implementation of the mentoring policy. He would like to see a decision from the Supreme Court or a rule change.

Lisa Korchinski agreed that a Supreme Court decision would be welcome. However, she zealously represents her clients in all cases; because it is record based, she has no problem raising an IAC claim if necessary.

### **Budget and Legislative Report**

Mr. Freebourn said that due to time constraints the budget information (exhibits 5 and 6) didn't need to be discussed, but he wanted to briefly talk about the mitigation plan (exhibit 7). Things are looking a little better due to stabilization of contractor costs, which are down about 10% from last year. In general, there are four ways to mitigate a budget shortfall—more money, less expenditures, more productivity, and/or less services (which would be the last resort). The deficit increased by about \$250,000 due to the funding of the attorney pay ladder. Chairman Sherwood expressed his hope that the pay increases will improve morale.

Chief Hood recently conducted some training for the Nevada system, and she learned that other states are working to reclassify crimes to take them out of the public defense realm by making certain offenses civil instead of criminal. She will be receiving some information regarding this effort and plans to share it with the attorney general's office. Mr. Freebourn said that despite the many mitigation efforts, he doesn't want the Commission to be surprised if there is still a deficit at fiscal year-end in excess of \$1 million.

### **American University Recommendations—Gantt Chart (Time Line and Costs)**

The Gantt chart (exhibit 8) illustrates the time frame to address all 32 of the AU recommendations. New committee assignments will be made and tasks will be assigned to the appropriate committee. Timelines may be adjusted, and the chart should be considered a work in progress.

Commissioner Veazey requested time on the next agenda to formally identify the reports that the Commission would like to see at every meeting.

Commissioner Jesse initiated a discussion of how cases are counted. His biggest concern is that things aren't handled in substantially the same fashion across the board, and Chief Hood replied that that is the goal. The issue of disproportionate funding between Region 9 (Billings) and Region 2 (Missoula) was raised again. Commissioner Veazey requested a definitive explanation of the differences at the next meeting, or if that is completely unreasonable, at least a specific plan for resolution. She said that one of the Commission's primary oversight duties is to remedy inequities across the state, and until we get to the bottom of this, she is not comfortable that the mandate has been met. It is also the source of the serious morale problem in Billings. Mr. Freebourn and Chief Hood were instructed to present their best analysis of the discrepancy at the next meeting.

There was further discussion of the question of whether managers should carry a caseload (#5 on the chart) and other management concerns. The Commission expects to have further insight into management issues as perceived by the line attorneys after meeting with them tomorrow. The Commission also discussed developing a questionnaire as a means of gathering information. Once concerns have been identified, a plan can be developed.

### **Committee Discussion**

#### *Membership and Assignments*

Committee assignments were revised per exhibit 9. Chairman Sherwood will email assignments to each committee.

### **Commission General Discussion**

The Commission will investigate sending someone to a seminar at Seattle University in November that might provide a way to obtain extra funding for representation at the initial appearance in misdemeanor cases. Chairman Sherwood will forward the materials.

Chairman Sherwood heard a concern regarding people sitting in jail in Libby for a long period of time before seeing a lawyer. His concern will be forwarded to John Putikka.

Chairman Sherwood asked about the protocol when a member leaves the Commission. The staff sent former Commissioner Miller his name plate and a thank you note. Chairman Sherwood will send a letter on behalf of the Commission. For chairpersons, their name is also added to a plaque with the names of each chairperson and the years of service as chair.

Chairman Sherwood summarized his tasks. He will send a letter to Chief Hood and Mr. Freebourn requesting specific information and setting the agenda for the December meeting. He will send a letter to Mr. Doig, Ms. Gervais and Sherry Heffelfinger laying out the conflict of interest problem as identified in the AU report. He will assign Gantt chart tasks. He will draft a letter to FTE for review by the Commission regarding the need for data and a proposal on providing feedback regarding management.

#### *Ex Officio Members*

The Commission discussed the benefits and costs involved in adding both FTE and contractor ex-officio members to the Commission. These members would provide input, but would not be allowed to vote. Chairman Sherwood moved to budget \$1000 per meeting for two ex-officio members to attend Commission meetings. Commissioner Veazey said that \$1000 might be insufficient. Chairman Sherwood revised his motion to authorize the expenditure of sufficient funds to pay for travel and lodging, to reimburse a contract attorney at the regular rate of pay, and to allow the FTE representative to have paid work time to attend meetings. Commissioner Veazey seconded. Commissioner Taylor would like to explore asking the Montana Association of Criminal Defense Lawyers to assist in choosing a contract attorney to serve as ex-officio member, and perhaps to help pay for the attorney's time. Chairman Sherwood withdrew his motion and will table the discussion until the next meeting.

#### **Public Comment**

No additional public comment was offered at this time.

#### **Old Business/New Business (\*Action Items)**

##### *Approval of Three New Standards (exhibits 10-12)*

Chairman Sherwood noted that there is a problem with the standard determining indigence after initial representation by retained counsel because it doesn't place a limitation on a contract attorney collecting money from clients. He will draft another revision for the Standards Committee to review at the next meeting

Commissioner Veazey moved to adopt all three standards. Commissioner Gillespie seconded. Commissioner Taylor asked if there had been a fiscal analysis of what the ancillary proceedings might cost. Chief Hood said that this standard actually provides insurance against paying out of lot of money for ancillary proceedings, and Mr. Freebourn agreed that any cost would be minimal. The motion carried.

##### *Set Future Commission Meeting Dates*

The next meeting will be December 18 in Helena in conjunction with the Law and Justice Interim Committee.

The meeting adjourned at 5:50 p.m.