



Steve Bullock  
Governor

# MONTANA PUBLIC DEFENDER COMMISSION STATE OF MONTANA

Richard E. "Fritz" Gillespie  
Chair

## MEMORANDUM

TO: Dave Bohyer, Director of Research and Policy Analysis

FROM: Richard E. "Fritz" Gillespie, Chair

DATE: January 26, 2016

RE: Information for the Task Force on Public Defender Operations

This memorandum provides information you requested for distribution to the Task Force on Public Defender Operations. Please let me know if you need further information. The Montana Public Defender Commission and agency staff look forward to working with you and the Task Force members during this process.

**1. Prepare a 10-year forecast for the agency that contains key operating and financial assumptions.**

[Cover memo](#) and [worksheet](#)

**2. Provide an update on the CRM project.**

Over the past few years, we have worked diligently to put together an online billing system to assist the Office of the State Public Defender in our endeavors to pay our vendors quickly and fairly. We were able to implement the new system in several regions beginning in July, 2015. As of the end of November, 2015 all contract attorneys in all regions are now using the new online system. We believe it will take several months to work out any system issues related to implementation.

We met in early January to begin discussions related to enhancements to the CRM system. There are two phases we have identified that will benefit the Agency and our operations. The first will include enhancements to show real-time hours worked on a particular case during the review process. These enhancements will also show how many total days the case has been open. There are also enhancements which will aid in making the system more user friendly and will provide additional accounting tools for both the vendors entering their time, and also those reviewing the claims. The second phase will allow us to expand the online billing system to all other vendors, including mental health providers, transcriptionists, investigators, and expert witnesses. Following completion of the second phase of enhancements, we will be able to use the online system for several other processes including the pre-approval process, wherein attorneys (both full-time employees and contract attorneys) request approval to obtain the services of contract mental health providers or investigators.

We plan to begin work on both phases of enhancements at the beginning of March, 2016. The first phase should take approximately one month to complete. The second phase should take approximately three months to complete. The timeline is not set in stone as it requires reviewing, revising, and approving internal OPD policies.

OPD has identified many benefits of the online billing system. First, it has been positive in many regards to move to a paperless system. By doing this, the Regional Deputy Public Defenders and the Contract Manager and Conflict Coordinator, all have the ability to approve bills remotely anywhere they have internet access. This should reduce the amount of time it takes to pay bills, and reduce the opportunity for agency input error. The agency no longer needs to rely on the mail system to ensure that central office receives the paper claims. Additionally, the online system has provided managers with an easily navigated way to access prior month's claims to review the work of our vendors, which in turn has benefitted OPD in management of the contractor work force.

The benefits of implementing the online billing system will continue to be varied and positive. In one year, we would like to see all of the enhancements completed. At the time of completion, we anticipate that we would be in a place where we could begin collecting information relating to case costs in a beneficial way. Additionally we anticipate that at the end of the first year we will have all vendors submitting their bills online which will reduce the amount of work done manually entering claims into SABHRS. We also anticipate that by allowing all forms or pre-approval requests to be completed online we will increase the efficiency of the attorneys requesting services as they will no longer be required to track down the mental health coordinator, their Regional Deputy, or the Chief Public Defender for approval because everything will be electronic.

### **3. What is our plan to grow the contract attorney pool?**

In many areas of Montana, OPD is faced with a lack of private attorneys. A recent article in the University of Montana Law Review highlighted the problems Montana's citizens face in gaining access to legal services in rural Montana.<sup>1</sup> A lack of attorneys in these rural areas is one of the fundamental obstacles to providing legal representation. According to the article, approximately 81 % of Montana's active attorneys are located in the six most-populated judicial districts, based in Billings;<sup>2</sup> Missoula;<sup>3</sup> Bozeman;<sup>4</sup> Kalispell;<sup>5</sup> Great Falls;<sup>6</sup> and, Helena.<sup>7</sup> Less than 20% of Montana's active attorneys serve the state's remaining 16 judicial districts. OPD cannot expand the contract attorney pool in these areas unless attorneys live and practice there. Expanding the pool may require steps that are beyond OPD's current means.

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<sup>1</sup> See, Wandler, *Spreading Justice to Rural Montana: Rurality's Impacts on Supply and Demand for Legal Services in Montana*, 76 Mont. L. Rev. 225 (2015).

<sup>2</sup> (13th District, Yellowstone County)

<sup>3</sup> (4<sup>th</sup> District, Missoula and Mineral Counties)

<sup>4</sup> (8<sup>th</sup> District, Gallatin County)

<sup>5</sup> (11<sup>th</sup> District, Flathead county)

<sup>6</sup> (3<sup>rd</sup> District, Cascade County)

<sup>7</sup> (1<sup>st</sup> District, Lewis & Clark and Broadwater Counties)

One solution for the dearth of private attorneys in rural areas is to persuade attorneys to move to rural Montana and open offices in those regions. Incentives to offer attorneys may include the following:

- Differential pay. The Public Defender Commission could set a higher hourly rate for contract attorneys in specific areas in which OPD has a need.<sup>8</sup> The hourly rate that would be sufficient to persuade more private attorneys to seek contract work with OPD is unknown at this time. For purposes of comparison, in a 2011 survey of members of the State Bar of Montana, 43% of attorneys who responded reported that an hourly rate was their primary source of income. Of these attorneys, 90% reported charging \$100 or more per hour as the typical rate.<sup>9</sup>
- Benefits. Attorneys may be persuaded to move to rural Montana and open offices if part of the compensation included provision of health care and/or other benefits.
- Loan forgiveness. Attorneys who are relatively new to private practice may be persuaded to move to rural Montana and open offices if part of the compensation includes some type of student loan forgiveness.
- Training/Mentoring. In the 2011 State Bar of Montana survey, 23% of the attorney members reported that they spent 20% or more of their time in the field of criminal law. OPD currently includes contract attorneys in “boot camp” training for newly admitted and/or inexperienced attorneys. OPD could consider including a training component by which attorneys who are willing to locate in rural Montana would receive “how to” instruction in substantive criminal law and procedure.

Additionally, OPD will continue with its current practice of reaching out personally to new attorneys as we learn individuals have moved to these rural regions. OPD will continue to encourage the use of associates in firms that currently provide services for our clients.

**4. Consider using a different contractor rate to attract this resource to problem parts of the state. What is the federal rate and what is its process for using contractors? As part of the response, note that the agency’s mode of operation is to keep the most costly/complex cases in house.**

The current rate for Federal Defenders is \$129 per hour. OPD’s current hourly rate for contract attorneys is \$62 per hour. The federal system is different from our system in several ways. Attorneys must be approved for the CJA (Criminal Justice Act) panel of attorneys by a selection committee. The number of attorneys is limited to 60 for the entire state, although this limit was just recently implemented and the panel is currently above said limit. Attorneys are also paid, not on a monthly basis, but only upon completion of the case. The federal

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<sup>8</sup> The Commission determines appropriate compensation rates for contract attorneys. ARM 2.69.601.

<sup>9</sup> State Bar of Montana Membership Survey (2011).

system also has a soft-cap system, with a \$10,000 maximum for felonies. Anything over the cap is discretionary by the judge. Additionally, the courts review the bills. Similar to the state system, the federal system will have CJA attorneys cover conflict cases and occasionally overflow cases.

As was noted in Number 3 above, OPD has considered using a different contractor rate to attract attorneys in rural areas of the state. However, we have not implemented the use of differential rates for a number of reasons, including but not limited to; budgetary restrictions, logistical difficulties, and a lack of approval for such practice by either the legislature or the Public Defender Commission. One additional difficulty OPD is concerned about regarding different rates of pay, is the response we may receive from the contract attorney pool should different Regions be granted a higher rate of pay. Hypothetically, we could see attorneys in Missoula for example, refusing to work for OPD if they find that attorneys in Glendive make double what they make for the same work. It should be noted, the Office of the State Public Defender, as a matter of practice, keeps the most costly and complex matters in house which often means we are contracting out a high volume of misdemeanor cases to contract counsel. Unfortunately, some contract attorneys are not interested in misdemeanor work and would prefer to only work on the more challenging, higher cost felony type criminal work. The state and federal systems differ in the scope of representation. Montana's public defenders must provide legal representation in numerous civil case types.

**5. Provide FTE vs Contractor studies, including the one that we did not include in the FY 15 Governor's report that shows how we develop the base FTE and contractor rates, and allocate overheads based on assumptions to get to a "fully allocated rate." As part of our response consider providing an explanation as to why we use the combination of FTE and contractors to serve our client base as we do today, and why we need both. Provide our strategy and why it works.**

FTE vs. Contract Attorney Hourly Cost, [FY 14](#) and [FY 15](#)

*Answer: why do we use the combination, and why do we need both?*

In March, 2004, the Law and Justice Interim Committee voted unanimously to pursue development of a statewide public defender system managed and supervised by a state public defender office.<sup>10</sup> The bill which established OPD included provisions for regional offices and for reliance on contracting for public defender services.<sup>11</sup>

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." The phrase "sufficiently high" "generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

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<sup>10</sup> *For the Defense: Enacting a Statewide Public Defender System in Montana (2004)*, at p. 30.

<sup>11</sup> See, § 47-1-216, MCA, enacted in Sec. 12, Ch. 449, L. 2005.

In each of our eleven regions, there are enough cases in which OPD is ordered to appoint counsel to support full-time public defenders, and the remaining number of cases are enough to support meaningful involvement of private attorneys.

Contract attorneys provide a necessary resource (1) in those areas in which OPD does not have an adequate FTE presence; and (2) when the workloads of staff attorneys become excessive. For example, attorneys serving in rural areas must manage court dockets and hearings in multiple locations. Some types of cases require prompt attention, such as involuntary commitment proceedings. Staff attorneys simply cannot cover all courts and fulfil other obligations to clients. Contract attorneys also provide a necessary option (3) in those cases in which staff attorneys have a conflict of interest which disqualifies them from involvement in a particular case.

In sum, contract attorneys enable the State, through OPD, to fulfill its constitutional obligation to provide counsel to those who are entitled to legal representation at public expense.

6. Break out our [five year cost per case type](#) average by year.
7. Provide an explanation for growth in inactive cases. Check to assure that inactive cases are removed from the case durations and are not affecting the numbers. Explain the policy change that increased the number of inactive cases.

OPD is required to report for each fiscal year the number of cases that remain open but are inactive. These are cases that do not require active work by attorneys.

We monitor the status of each case in our case management system. The number of inactive cases has increased in part due to a 2013 modification to our internal policy on reporting the status of criminal cases in which a deferred sentence was imposed. Prior to the change, most cases in which a deferred sentence was imposed were then closed in our case management system. If a petition to revoke the sentence was filed later in the underlying matter, a new case was opened. Now, when a deferred sentence is imposed, the case is placed on inactive status in our case management system.

We see an increase in some of our criminal case types, such as misdemeanors, and the increase in “inactive” cases may result from an increase in deferred sentences being imposed.

The number of cases reported as inactive has increased due to a second internal change. Some private attorneys would provide information and mark as “closed” cases in which deferred sentences had been imposed. These should have been listed as “inactive” cases. We have centralized the case closing function for cases handled by private attorneys, and as a result we gave a more accurate number of inactive cases.

Cases also may be moved to “inactive” if the state appears not to actively pursue a pending matter. Additionally, if an arrest warrant has been issued in a case, we will place the case on inactive status until the warrant is served and the accused appears, or the warrant is quashed.

These cases can languish for a long period of time, and as of now we carry these inactive cases from year to year. Our next step is to develop a procedure for identifying those cases that should be closed, and scrubbing these “inactive” cases from our report.

OPD does not include the period in which cases are inactive when calculating case durations.

**8. More fully explain our proficiency determination policy and process.**

As has been noted previously, the OPD Contract Manager, with assistance from other OPD managers and the OPD Conflict Coordinator, puts together proficiency determination packets bi-annually for each contract attorney in the contract attorney pool. These packets include a variety of information from a variety of sources and will in the future also track adherence to OPD Standards. (Please see the answer provided for Question 14.) OPD has attempted to receive feedback from a variety of sources including court personnel and Judges. Our agency has historically solicited this feedback by reaching out via telephone and email. This approach has not been well received. As such, OPD has contacted several judges in various judicial districts to solicit feedback or suggestions regarding how to make this process easier and more successful. As a result of the contacts that were made, OPD has plans to develop a short online survey that will be distributed to Judges to request feedback regarding the contract attorneys that are appearing in their courts. It is anticipated each survey will be brief, between 5 and 10 questions, and will also provide the Judge with the opportunity to provide comments. One of the judges who was contacted has graciously agreed to review the survey prior to its distribution. Although OPD has had better success in contacting court staff by telephone and email, OPD will like move to an online survey for their feedback as well as it gives the recipient of the survey more time to formulate a response which will lead to more meaningful feedback.

It should be noted at this time that, while OPD will certainly engage in communications with prosecutors and law enforcement, feedback from prosecutors and law enforcement will not routinely be solicited for purposes of the proficiency determinations. One reason for this is the feedback we may receive may not be impartial, simply because of the nature of the work we do working in an adversarial system. However, it should be noted that OPD certainly considers all complaints or comments we receive from all sources, and as an agency OPD is willing to engage in a dialogue with any source that can help us do a better job for our clients.

OPD treats the information we receive and compile in the Proficiency Determination packets as confidential. As such, while we notify managers of the final determination, in general we keep all information private and do not distribute this information to members of the public. OPD intends to continue this practice as our agency does not intend to infringe on the privacy rights of our contract attorney pool.

**9. Provide salary surveys.**

[Policy 540, Broadband Pay](#)  
[2014 Market Spreadsheet](#)  
[EPP Personal Services Narrative](#)

[2014 Market Analysis Process](#)  
[2014 Attorney Salary Survey](#)

**10. Identify a communication plan, and what commissions/councils/committees we serve on and the value they bring to our mission. Identify our stakeholders and how our actions affect them.**

OPD's actions in representing over 30,000 people a year in a wide spectrum of criminal and civil cases affect any person who has an interest in how our justice system operates.

Certainly, our clients and their family members are stakeholders. Law enforcement agencies, from the local level to the state and federal levels, are involved in OPD's cases. City, county and state prosecutors initiate the cases that OPD is ordered to take on. DPHHS is involved in a number of cases, from dependent/neglect cases to mental health/commitment matters.

Mental health and chemical dependency providers are involved in many of our cases. We recognize that our efforts have a substantial impact on so many, and we strive to develop and maintain open lines of communication and collaboration with stakeholders in our communities.

The Chief Public Defender serves on the Montana Board of Crime Control. The Board is the single state planning agency designated by the Governor that helps identify needs, facilitates programs and administers millions of grant dollars dedicated to public safety, crime prevention, and victim assistance statewide. MBCC is headed by an eighteen-member board appointed by the Governor. Current membership of the Board includes the Attorney General, the Director of the Department of Corrections, city and county law enforcement officials, tribal leaders, educators, a county attorney, a county commissioner, the court administrator and a representative from community corrections. OPD Training Director Peter Ohman is a member of the Board's Youth Justice Advisory Council, which includes representatives from the judiciary, local governments, law enforcement and youth resources. Our participation in these groups helps us understand the needs of our colleagues in the justice system, and form levels of understanding.

The Chief Public Defender serves on the Commission on Courts of Limited Jurisdiction. The Commission was created by order of the Montana Supreme Court, and identifies educational needs and supervises programs that result in judge certification. Membership includes limited jurisdiction court judges, a district court judge, a city attorney, a county attorney, and the president of the limited jurisdiction court clerks' association. OPD handles a substantial number of cases annually in the courts of limited jurisdiction. The judges can provide the chief with input and comments as to the level of representation in their courts by OPD staff attorneys and contract attorneys. This type of input is particularly valuable in those courts in which OPD does not have a regional office. It can be a challenge for our regional deputies and management to see staff attorneys and contract attorneys in many of Montana's courts of limited jurisdiction. The judges who preside on these courts can, and have, provided valuable input that we have relied on in evaluating our attorneys. OPD can discuss systemic issues with the judges and provide input as well.

This type of collaborative dialogue is best exemplified by our decision to open a branch OPD office in Glasgow. Discussions with judges on courts of limited jurisdictions, and discussions with a local prosecutor, corroborated deficits in our ability to provide timely and adequate representation with primarily a contract attorney work force across an area that is thousands of square miles in size. This input played a key role in our decision to open a branch office with a full-time OPD staff attorney. After that office opened and the staff attorney took on a

full load of cases, we were able to discuss outcomes with these stakeholders, and confirmed that the presence of a full-time staff attorney was better for our clients, but also for the prosecutors and the judges.

The Chief Public Defender is a member of the Protecting Montana's Kids DN Task Force, which is tasked with making recommendations to the Governor for improvements in the dependent/neglect case system.

Training Coordinator Peter Ohman serves on the Commission on Sentencing.

The Chief Public Defender is a member of the Forensic Sciences Laboratory Advisory Board, headed by Dr. Kinsey, the director of the state crime laboratory.

Our regional deputies serve on community boards and commissions regarding jail re-entry and criminal justice coordinating councils.

**11. Add a section to track adherence to the Standards to our proficiency determinations and staff attorney evaluations.**

The Public Defender Commission enacted Practice Standards to encourage and allow attorneys representing all persons entitled to public legal representation “to perform to a high standard of representation and to promote excellence and professionalism in the representation of those persons.” The standards “are intended to be used as a guide to professional conduct and performance.” The standards identify steps or courses of action that may be appropriate or necessary in a given case, and assist the attorney in deciding on actions to take in order to provide the client with effective representation.

OPD's staff attorney and contract attorney evaluation protocols recognize that the practice standards provide a benchmark or measure by which attorney performance and conduct may be evaluated. We will continue to do so, and consider additional steps to enhance the supervision of our attorneys based on adherence to the standards. We can better use our data to measure performance based on particular standards. For example, we will consider whether an attorney files motions and briefs appropriately. We can assess whether an attorney spends the appropriate amount of time communicating with the client, in part by looking at billing records. We will focus on standards established for representation in certain specific types of cases, such as Youth Court and dependent/neglect cases.

**12. What is [agency turnover by year](#)? And why did it happen?**

**13. Provide a report from the Public Defender Commission on efforts to contract with national entity, e.g. the National Conference of State Courts, for an efficiency study of the agency.**

More than once in the past the PDC has considered bringing in a national agency to do an efficiency study of OPD during the decision package process in developing the OPD budget request, similar to the National Conference of State Courts [NCSC] [2010 study](#) of the Virginia Indigent Defense system. Each time the discussion was short because it was decided there were too many other higher priorities needing funding. During the 2015



legislative session it was suggested that perhaps the NCSC would do an efficiency study of OPD at little or no cost like it had done for the Montana district courts. It was reported to the PDC that NCSC does these studies at little or no cost for agencies within the judiciary and since OPD is an executive branch agency it would not be available to do the efficiency study.

Further inquiry revealed that NCSC would contract with OPD to do an efficiency study. The study was outlined to begin in 2016 but a final report would not have been available until after the 2017 legislative session had adjourned. The cost of the study was proposed to be slightly more than \$200,000. The 2017 biennium budget for OPD appropriated \$250,000 discretionary spending per year to the PDC to address criminal case growth, DN caseload pressures, appellate caseload pressure, and unforeseen fiscal pressures. The PDC asked OPD management to identify ideas for spending the discretionary funds. Among proposals were presented to the PDC budget committee was a NCSC efficiency study. The budget committee was divided over whether a NCSC study met the letter or spirit of the intent behind the appropriation of the discretionary funds. Inquiry about intent was made at the Task Force meeting on December 10, 2015. Based in part on what was learned, the PDC elected at its December 11, 2015 meeting not to use the discretionary funds to pay for an NCSC efficiency study.

Consideration has been and will continue to be given to bringing in another national organization such as the NLADA if funding can be found. In the meantime, the PDC did set aside up to \$10,000 to bring in consultants from the National Association for Public Defense [NAPD] for advice on how OPD might change its practices to be more efficient. The PDC will soon begin the process of adopting decision packages for the next proposed budget.

#### **14. Information on [DN cases and costs](#) for FY 15**

cc: Bill Hooks  
Chad Wright  
Kristina Neal  
Harry Freebourn