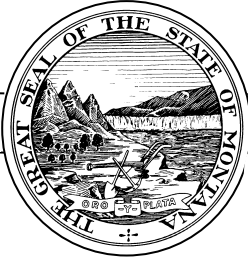


OFFICE OF THE STATE PUBLIC DEFENDER



STEVE BULLOCK
GOVERNOR

KRISTINA NEAL
CONFLICT COORDINATOR

STATE OF MONTANA

Phone: (406) 444-2536
Fax: (406) 444-2669
PO Box 200145
Helena, MT 59620-0145

November 30, 2015

To: Dave Bohyer, Legislative Services Division

From: Kristina Neal, Conflict Coordinator

RE: Response to Representative Kim Dudik

Dave, I am responding to Representative Dudik's questions to me, to be presented to the Task Force on OPD Operations next week. Since not all of the questions relate specifically to my area, the response was developed with the assistance of Chief Hooks, contract manager Wendy Johnson, and Harry Freebourn.

Discussion on the organizational structure of OPD and the mission of each program

Commission – The Public Defender Commission is tasked per § 47-1-105, MCA to “supervise and direct the system.” Its full list of duties are outlined in that same section, which includes adoption of the legal standards that all attorneys will adhere to when serving the client. The system is comprised of three programs and a central services group. The Commission has 11 members who are mostly nominated by others and appointed by the Governor. Qualifications for the 11 members are defined in § 2-15-1028, MCA. The services that are supervised and directed by the Commission are defined under § 47-1-104, MCA.

Trial Level Program – this is referred to as the Public Defender Program or Program 1. It is managed by a Chief Public Defender as appointed by the Commission. The Chief PD's duties are defined under § 47-1-202, MCA. Program 1 is comprised of a central services group (to be discussed below) and 11 regions. The regional duties are defined in § 47-1-215, MCA. Program 1 also has a major crimes unit which provides services to all regions. Program 1 uses the services of private (contract) attorneys to handle cases in regions where the workload exceeds staff capacity or where the agency does not have an adequate staff attorney presence.

Appellate Program – this is referred to as the Appellate Defender Program or Program 2. It is managed by a Chief Appellate Defender as appointed by the Commission. The Chief AD's duties are defined in § 47-1-205, MCA 5. This program uses both FTE and contract attorneys to provide services.

Conflict Program – this is referred to as the Conflict Coordinator Program or Program 3. It is managed by a Conflict Coordinator as appointed by the Commission. The Conflict Coordinator's duties are defined in § 47-1-118, MCA. This program uses both FTE and contract attorneys to provide services to handle all case types, which are referred from Programs 1 and 2.

Central Services – this is part of Program 1’s funding. It provides services for all programs and the Commission. Services include: contract services management, staff and contractor training, Commission staffing, accounting, budgeting, cash management, payment of claims for services, case management support, information and communication technology services, payroll and human resources, and facilities and safety management.

Discussion on the difference between non-conflict and conflict cases – as noted above, all programs handle cases. Programs 1 and 2 get the initial case assignment. The program will assign the case to either an FTE or contract attorney, unless they determine that they have a conflict of interest. The definition of a conflict of interest and the process for sending the case to the Conflict Coordinator are discussed in OPD policies [116](#) and [119](#), and in the Commission’s Standards for Counsel Representing Individuals Pursuant to the Montana Public Defender Act (rev. 2012), Standard III, sections [4](#) and [5](#).

1. Who determines what cases go to a contract or conflict attorney?

As noted above, OPD uses both state-hired (FTE) attorneys and contract attorneys. The first are state employees and the second are independent contractors. Too much control exerted by OPD on the independent contractors will classify them as state employees too.

In the Trial Program, the obligation to provide a public defender is triggered by the state’s initiation of a court action in any of several case types set out in Titles 41, 45, 46 and 47 of the Montana Code. When the state files a court action and the person affected requests a public defender, the court will order OPD to assign an attorney to represent that person. The Chief Public Defender’s regional deputies make the decision to assign the case to a staff attorney or a contract attorney based on the nature and volume of cases filed, the location of the case, and staff availability. Most often a case is assigned to an FTE attorney. The agency uses the services of contract attorneys to handle cases in regions in which the staff workloads exceed their capacity, and in regions in which the agency does not have an adequate staff attorney presence. The Trial Program’s attorney resource strategy is to have staffed offices in the major cities in the state where most of the cases reside, but to use primarily contract resources in the rural regions.

The Conflict Coordinator can assign a case to either an FTE or a contract attorney. The Conflict Program handles cases from both the Trial and Appellate Programs when a conflict of interest has been identified.

2. What cases are handled by a contract or conflict attorney?

All case types are handled by both FTE and contract attorneys. In multiple-defendant cases which present a conflict of interest, Program 1 represents the person facing the most serious charges whenever possible. In dependent/neglect cases in which children are involved, Program 1 typically represents the custodial parent and refers non-custodial parents and children to the Conflict Coordinator.

3. If a person is facing multiple charges and some of them do not warrant a public defender, if the charge qualifying them for a public defender is settled, does the appointed public defender stay in the case? At what stage will they be removed?

The right to a public defender in criminal cases depends on whether the law provides that the accused person may be incarcerated if found guilty. It would be unusual for a charge which carries the possibility of a jail sentence and thus warrants a public defender, to be settled while a charge which does not provide for a jail sentence remains contested. In that situation, the accused would not be entitled to a public defender and the attorney could ask the court for permission to withdraw from the case.

4. When are multiple attorneys appointed to cases? I have heard of incidents when a contract public defender will handle a case until it goes to trial and then that person stays on the case but another attorney (either another appointed attorney or an in-house public defender) is appointed to assist them. When does this happen?

Multiple attorneys are assigned to a case based on case-specific factors. Multiple attorneys are assigned in all capital cases. If a staff attorney with the Major Crimes Unit is assigned to represent a person, a local attorney or a second attorney may also be assigned. See OPD policy [150](#). A second attorney may be assigned to assist based on unforeseen or unanticipated circumstances arise. A more senior staff attorney may assist and mentor a less experienced staff attorney in trial preparation and at trial.

Recently, OPD was ordered to assign a public defender to represent a person charged with deliberate homicide. The same charge had been filed years ago, and then dismissed. When the charge was refiled, OPD included the defendant's former attorney as part of the defense team.

5. What policy does your division have about handling cases pro bono? There have been multiple reports about public defenders handling cases pro bono while still utilizing state resources.

OPD policy [525](#) covers pro bono work.

6. How is eligibility determined? What kind of exceptions are permitted (such as a hardship exception)?

When a court orders OPD to assign an attorney to represent a person in any of the ten case types listed in § 47-1-104(4)(a), MCA, OPD determines if the person is financially unable to retain private counsel, pursuant to statutory standards. The applicant must provide financial information. OPD determines whether the applicant's gross household income is at or less than 133% of the federal poverty level, or whether the disposable income and assets of the applicant and the members of the applicant's household are insufficient to retain competent private counsel without substantial hardship to the applicant or the members of the applicant's household. Secs. 47-1-111(3)(a), (b), MCA.

OPD policy [105](#) that sets forth policy and procedure for eligibility determinations. There is a uniform [application](#) for court-appointed counsel.

7. How often is the hardship exception used to determine eligibility? Is that data tracked?

Our eligibility training provides that hardship-based eligibility approval is to be entered into our case management system.

8. When are appointed public defenders removed from cases due to an ineligibility determination after one has already been appointed?

The person is entitled to be represented by an attorney during the period in which OPD makes the financial eligibility determination. Secs. 47-1-111(1)(c), (2)(d), MCA. If OPD determines that the person is not financially eligible for public defender services, OPD notifies the Court and files a motion to rescind the order which directed OPD to assign counsel. Sec. 47-1-111(b), MCA. The assigned public defender is removed from a case when a court grants the motion to rescind the order of appointment.

You may also refer to § 47-1-111, MCA and to OPD policy 105 as discussed in question 6.

9. What performance measurements do you have in place for contract/conflict public defenders?

Contract attorneys, whether assigned cases for the Trial, Appellate or Conflict programs, undergo periodic proficiency determinations as outlined in OPD policy [135](#).

As previously discussed, conflict cases may be assigned to either an FTE or a contract attorney. Policy [515](#) explains the employee evaluation process.

10. Who is input regarding the conflict/contract attorneys' performance taken from?

In conducting proficiency determinations for contractors, the Contract Manager elicits information from courts, clients, the local regional public defender(s), and the Conflict Coordinator. Also see policies 135 and 515 as discussed in question 9.

11. What efforts does your division take to grow the contract/conflict attorney pool?

Based on information from regional public defenders or contract attorneys regarding a potential attorney in the local area that might be receptive to public defender work, the Conflict Coordinator makes personal phone calls to explain how to become a contract public defender and to encourage the attorney to accept public defender cases. Additionally, when a contract attorney hires an associate, the Conflict Coordinator will talk with the current contract attorney and encourage the firm to allow the associate to begin taking public defender cases by going through the MOU process.

In addition, OPD continues to seek an increase in the hourly rate paid to private attorneys.

12. What specific training requirements are required for different contract/conflict attorneys? How do you track if these requirements are met?

When a prospective attorney submits his or her education summary to receive an MOU, the attorney must provide information about his or her background. If an MOU is entered into with an attorney, it can be limited to specific areas of practice for which the attorney has training and is qualified.

Training and proficiency requirements for all attorneys, FTE and contract, are included in the Standards. Space permitting, we invite new contract attorneys to attend our multi-day boot camp program. We also invite contract attorneys to the annual conference. We rely on the contract and conflict office to assess the skills of attorneys for involvement in various types of cases.

13. What oversight do you provide to contract/conflict public defenders?

The Conflict Coordinator reviews the attorney's summary of education and the MOU for each new potential conflict attorney. She talks to the regional deputy and the contract manager regarding their assessments of the attorney, and has a conversation with the attorney regarding his or her case interests and experiences.

The case management program allows the Conflict Coordinator to track the type of cases that each attorney is willing to handle, the date and case name of cases that each attorney has been asked to accept, and the date and client assigned to each attorney. The program also details when the last time that the attorney was assigned a case, either contract or conflict, and the type of case assigned. Finally, the program details the number of open OPD cases for each attorney. This allows the Conflict Coordinator to monitor caseload, even across regions.

The Conflict Coordinator also maintains an open dialogue with the attorneys and respects when they indicate that their caseloads are becoming unmanageable to them. When an attorney indicates that they have a sufficient number of cases, it is documented in the case management program and a date is calendared before approaching them regarding any new assignments.

Other tools used to monitor the attorneys' workloads and evaluate their work performance are the claim forms and closing forms. These are reviewed for the number of open cases that they are currently working on each month, the substance of the work being performed, and how the cases are being resolved. Client complaints, and the attorneys' responses to the complaints, also provide a lot of insight. Finally, review of the pre-approval requests allows the Conflict Coordinator to initiate conversations with the attorneys on case strategy.