MEMORANDUM

TO: Dave Bohyer, Director of Research and Policy Analysis

FROM: Richard E. "Fritz" Gillespie, Chair

DATE: January 26, 2016

RE: Agency Response to Proportionality Analysis

1. The U.S. and Montana Constitutions provide that a person accused of a crime for which incarceration is a possible penalty is entitled to legal counsel provided (paid for) by the state. Art. VIII, sec. 14, of the Montana Constitution states that "no money shall be paid out of the treasury unless upon an appropriation made by law." Since 2005, when the Montana Public Defender Act was enacted, the Public Defender Office or the Appellate Defender Office, or both, have regularly requested supplemental appropriations because the costs incurred for indigent defense services provided by or through the PDO/ADO have exceeded amounts initially appropriated.

> **Question:** In the respective opinions of the Public Defender Commission, the Chief Public Defender, and the Chief Appellate Defender, what financial constraints, if any, are there when providing constitutionally guaranteed public defender services?

Answer: The State has recognized that persons charged with criminal offenses and persons involved in certain non-criminal actions may be entitled to counsel at public expense. Our attorneys have legal and ethical obligations to provide a certain level of service. We recognize and accept the responsibility to be fiscally responsible in allocating the funds appropriated. Our financial boundaries are a consideration in any discussion on resource distribution for providing counsel. As each fiscal year begins estimated budgets are worked out among the regional deputies across the State with the caveat that those budgets may have to be adjusted as external pressures increase demand. As daily, case-by-case decisions in support of our attorneys and clients are made, we do so fully aware that funds are limited and thoughtful decisions on resources have to be made.

The State must provide indigent persons with the basic tools of an adequate defense. When Montana's citizens are haled into court, they have a right to fundamentally fair proceedings and to effective representation by their attorney. They are innocent until proven guilty. They have a right to be represented by an attorney who is not burdened by a conflict of interest. If these rights are violated, OPD's clients may be entitled to relief in the form of a new trial, sentencing hearing or appeal. We want to do it right the first time, and avoid unnecessary costs of relitigation.

In a given case, we have to assess what level of representation is necessary to protect the rights of the clients. Our attorneys must meet with the client, conduct an appropriate investigation and develop a theory of the case. The client's interests and desired outcome are weighed.[1] Our managers and supervisors have to decide what tools are necessary to provide an adequate defense. These decisions are driven in cases by the charges, the evidence and resources brought to bear by the State. If the State had some item of evidence tested at the crime lab, we may need to seek our own expert resources to determine how to respond. If an attorney requests a particular service or resource, the attorney has to justify the need. For example, a mental health evaluation may not be necessary if lack of a requisite mental state is not at issue in the case. If a tool is necessary, we strive to get the adequate tool in the most cost-effective manner.

To be prudent stewards of the funds, we focus on providing the necessary level of representation in the most cost-effective manner. However, we regularly find ourselves running out of funds appropriated due to caseload pressures, often in the most expensive cases such as dependent/neglect cases.

We constantly monitor and evaluate caseload trends and unanticipated spikes, and our expenditures to track how well we are within budget. As the number of cases increases, the costs associated with providing appropriate legal services increase. OPD reaches the point at which the stream of new cases into the system challenges our ability to stay within the appropriation, and we must consider following the provisions of Title 17 regarding supplemental appropriations. We also have to consider the option of seeking to halt the inflow of cases.

2. Section 47-1-104(3), MCA, requires, whenever "a court orders the office [of public defender] or the office of appellate defender to assign counsel, the appropriate office shall immediately assign a public defender qualified to provide the required services." Section 47-1-102(5), MCA, states that one purpose of the Montana Public Defender Act is to "ensure that adequate public funding of the statewide public defender system is provided and managed in a fiscally responsible manner."

Question: Once the OPD or APD appoints a qualified public defender as counsel as required under section 47-1-104(3), MCA:

(a) what "benchmarks" does OPD/APD use to ensure that the funding that underpins the services is "managed in a fiscally responsible manner" as is required under section 47-1-102(5);

(b) how does OPD/APD ensure that an OPD/APD-employed public defender or the contract public defender is adhering to the "benchmarks"; and

(c) what actions does OPD/APD take and at what point in the process of providing the required services does OPD/APD take the actions if the "benchmarks" are not met?

Answer: No two cases, even of the same type, are the same. Cases differ in terms of evidence, defenses and numerous variables. The people we represent have different needs, interests and goals. There are no precise "benchmarks" against which time, cost, or performance can be measured in each case.

Cases are assigned in our regional offices based on a "weighted case" system. Cases are valued in terms of hours, and this value provides a general time frame for resolving that case. Workloads are monitored, and routinely taking more time to resolve case than the case weights indicate is necessary would be a concern. Discussions should be had with the attorney to determine the reasons.

A similar concept is applied to contract attorneys. Each claim that is submitted for payment goes through multiple levels of review. The first level of review is the Regional Deputy Public Defender (RDPD). The RDPD uses their expertise and knowledge regarding how much time a given task should generally take. If they have questions about why a task took longer than their experience has shown that task to take, the RDPD will seek clarification from the contractor regarding the circumstances that necessitated the additional time. In some circumstances the RDPD will modify or deny specific charges. Once the RDPD is satisfied, they submit the claim to Central Services, where the information from the claim is input into the accounting system and the claim is reviewed for mathematical errors. Errors related to actual charges or mileage are corrected in accordance with OPD rates and policies. Finally, Central Services submits the claim to the Contract Manager who reviews the claim for both accounting errors as well as for reasonableness of the tasks charged. Again, the Contract Manager uses her expertise and knowledge regarding how much time a task should take, and will seek clarification or obtain copies of work product if there is any question as the reasonableness of the claim. The Contract Manager is also able to modify or deny claims or portions of claims.

Our attorneys must submit specific requests for resources for investigative services, expert assistance, tests or evaluations. These requests and the anticipated costs are reviewed on several levels. For example, if an attorney wants to have a client undergo an evaluation to determine if she is mentally competent to be prosecuted, the attorney must first provide information supporting that request to OPD's mental health consultant. Our consultant may either approve or deny the request. If the request is approved, the consultant also will specify the mental health expert who will conduct the test, and the specific amount approved to be paid for the test. Then, the attorney's supervisor may approve or deny the request, and if approved, the head of the program then must approve the request. Only after this level of review can the test or evaluation be conducted. The bills submitted by the evaluator are reviewed upon submission.

If additional work is necessary, and the amount requested will not be sufficient to cover the extra tasks, this process must be done again, with submission of a supplemental request.

3. The Montana and U.S. Constitutions and associated case law guarantees every citizen the right to effective legal counsel in certain proceedings, even when the citizen is unable to pay from the citizen's own assets for the services provided. The state legislature has the duty and responsibility to ensure that the aforementioned constitutional rights are preserved and, simultaneously, to exact from the taxpaying public only as much revenue as is necessary to provide the spectrum of goods and services required by law, including but certainly not limited to legal counsel services provided to certain individuals who are unable to pay for the services.

Questions: (a) Do the Public Defender Commission, Office of Public Defender, and Office of Appellate Defender, respectively, believe that the constitutional right to legal counsel supersedes the legislature's duty to guard the public fisc?

(b) If the answer is, "Yes, the constitutional right to legal counsel supersedes the legislature's duty...", what limit, if any, is there on the expenses incurred to provide legal counsel?

(c) If the answer is, "No, the constitutional right to legal counsel does not supersede the legislature's duty...", how does the Commission, OPD, and OAD limit expenses incurred in providing legal counsel?

Answer:

(1) We believe the duties should be balanced rather than one superseding the other.

(2) One of the purposes of the Montana Public Defender Act is ensuring "that adequate public funding of the statewide public defender system is provided." That has proven to be challenging.

(3) Getting adequate public funding is not a recent challenge. The judiciary required supplemental appropriations when it had control over the provision of public defense. The courts have not been in that position since it relinquished public defense to OPD. Legislators and stakeholders have acknowledged before legislative committees that OPD has been underfunded from its inception.

(4) When OPD was created in 2005, *M.C.A. §47-1-104(3)* provided, "Beginning July 1, 2006, when a court orders the office to assign counsel, the office shall immediately assign a public defender qualified to provide the required services."

(5) *M.C.A. §41-3-425(2)*, regarding abuse and neglect (DN) cases, provides, "Except as provided in subsections (3) and (4), the court shall immediately appoint the office of the state public defender to assign counsel for:" Subsection (1) provides "any party involved in a petition filed pursuant to 41-3-422 has the right to counsel in all proceedings held pursuant to the petition."

(6) Law enforcement issues tickets and makes arrests. Prosecutors file criminal charges and petitions in the *M.C.A. §47-1-104(4)* "civil cases." Neither consider whether their activities might cause OPD to exceed its budget, nor should they.

(7) *M.C.A. §47-1-104(4)* lists 19 different types of cases in which 208 court order OPD to immediately assign counsel. Courts order OPD to assign counsel in 9 types of cases listed in *M.C.A. §47-1-104(4)(b)* "regardless of the person's financial ability to retain private counsel."

(8) Courts order OPD to assign counsel upon request without consideration of whether the order might cause OPD to exceed it budget.

(9) Courts have no statutory authority to order OPD clients to pay any of the costs of assigned counsel except for defendants pleading guilty or having been convicted of felonies or misdemeanors.

(10) OPD has no control over the number of cases or types of cases in which it will be ordered assign counsel.

(11) No statutory authority exists that allows OPD to decline or ignore a court order to appoint counsel on the ground that the appointment will cause OPD to exceed its budget.

(12) OPD motions to suspend the issuance of orders to appoint counsel have been denied as demonstrated by the order submitted with this answer.

(13) OPD is reactive due to the nature of the foregoing factors.

(14) Caseload increases, the nature of cases experiencing increases, and especially unexpected spikes, for the next biennium have proven not very predictable.

(15) Freely expending resources is not our management philosophy. We are constantly working at delivering effective assistance of counsel in the fiscally responsible ways previously described.

(16) It is very challenging to prospectively make budget proposals for only as much revenue from the taxpaying public as is believed necessary when the amount of services to be provided is unknown.

(17) OPD makes every effort to control costs and live within appropriations and still have fidelity to the core requirement of providing effective representation. Even with these efforts, we look to a supplemental appropriation when the cost of the assistance of counsel cannot be balanced against the OPD budget.

4. Under section 46-8-113, MCA, if a defendant represented by the Office of Public Defender pleads guilty prior to trial to: (a) one or more misdemeanor charges and no felony charges, the defendant is required to pay $250 for the cost of counsel, or (b) one or more felony charges, the defendant is required to pay $800 for the cost of counsel.

Questions: (a) Do the amounts of $250 for a misdemeanor and $800 for a felony reasonably represent the actual costs incurred by the OPD, whether provided by an OPD-employed attorney or an OPD-contracted attorney, for the services provided in defending a defendant who pleads guilty to the charges?

(b) Under what circumstances, if any, does the OPD allow the actual costs of providing legal counsel to exceed the $250 or $800 thresholds?

(c) When the actual costs incurred for providing legal counsel exceed the $250 or $800 thresholds, at what point and in what manner is the Chief Public Defender, Regional Public Defender, or Chief Appellate Defender informed that the costs have exceeded the thresholds?

(d) What action does the Chief Public Defender, Regional Public Defender, or Chief Appellate Defender take when informed that the costs incurred have exceeded the thresholds?

(e) Are the actions taken by the Chief Public Defender, Regional Public Defender, or Chief Appellate Defender required to follow written policies and procedures or are the actions taken determined *ad hoc* on a case-by-case basis?

(f) If the actions to be taken are required to follow written procedures, how does the Chief Public Defender or Chief Appellate Defender ensure that the procedures are followed and what does either Chief Public/Appellate Defender do if the procedures are not followed?

Answer: The costs listed in § 46-8-113, MCA are not required to be imposed. Imposition of the costs is conditioned on a finding that the defendant has the ability to pay.

(a) The amounts do not reasonably represent the actual costs incurred by OPD. The statute was amended in 2011 and lesser amounts for misdemeanors and felonies were increased to $250 and $800. Insofar as the PDC and OPD are aware, the $250 and $800 amounts did not represent the costs for misdemeanors and felonies then and were not intended to be thresholds against which management is to measure the proficiency of representation by what a public defender expends in time and resources on a case. The amounts are less of a threshold five years later.

(b) – (f). In many criminal cases the actual costs incurred by OPD exceed these amounts. For example, in a major felony prosecution, we can assume from the moment we are ordered to assign an attorney to the defense that barring some exceptional development, the costs of defending the case will be greater than $800. Misdemeanor cases like a partner/family member assault that go to trial will most often exceed the $250 amount listed as a fee that may be imposed in cases in which an accused pleads guilty. These amounts were not intended to reflect a threshold or actual costs incurred. These amounts do not necessarily relate to the work required. Since the $250 and $800 amounts have no relationship to the costs of defense for a case, nor were they meant to, OPD does not measure cases against these amounts.

5. Federal and state law distinguish between employees and contractors. The OPD and APD each have employees who are attorneys and contract with private attorneys.

Questions: (a) What limits and requirements in regard to work methods and products does the OPD or APD place on a contract attorney when the contract attorney is compensated by the OPD or APD for providing legal counsel to an indigent defendant? (b) Does OPD or APD have written guidelines that clarify what actions taken by the OPD or APD in regard to legal services provided by a private, contract attorney would make the contract attorney, for legal purposes, e.g., the purposes of taxation, labor laws, or fringe benefits, an employee of the OPD or APD rather than an independent contractor? (c) If the answer to question 5.(b) is "Yes", please provide a copy of the written guidelines.

Answer: The general test used in Montana for whether a person is an employee or an independent contractor is the "'control test,' under which the right to control details of the individual's work is decisive."[2] We have been, and remain, cognizant of this test. We structured

the MOU we use with contractors accordingly. We realize that the existence of an independent contractor exemption under § 39-71-401(3), MCA does not preclude further analysis of a worker's actual status.[3]

Our approach was reaffirmed in August, when we reviewed our memoranda of understanding to see if we complied with the Affordable Care Act. At that time, we reviewed an Employer's Supplemental Tax Guide advisory from the IRS which gave examples of employees and contractors. Based on the example, we concluded our contract attorneys fall within the IRS example of a contractor.[4]

That said, we are cognizant of a 2012 decision from the Washington Supreme Court, Dolan v. King County, 258 P.3d 20 (Wash. 2011). There, King County, Washington provided the required defense services to indigent criminal defendants by using nonprofit corporations to provide services funded through and monitored by the county's Office of the Public Defender. Over time, the County took steps to improve and make these nonprofit organizations more accountable to the county. In so doing, it asserted more control over the groups that provide defender services. A class of employees of these defender organizations filed suit, claiming that the organizations were no different than other County agencies, and the employees were entitled to be enrolled in the County's retirement system. After a trial, the trial court agreed, and the Supreme Court affirmed the decision on appeal. The defender organization employees were entitled to be enrolled in PERS.

The majority recognized that "[p]rudent financial controls and careful oversight of contract compliance does not render a contractor an agency of the government."[5] However, the majority opinion makes clear that the traditional "lack of control" test may not be sufficient to win an argument that a private attorney is an independent contractor. The test was "unhelpful" because "a public defender is not amenable to administrative direction in the same sense as other employees of the State." Polk County v. Dodson, 454 U.S. 312, 321, … (1981). Because "a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client," and "it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages," insistence on the traditional test of control over the details of the employee's day-to-day job performance is unworkable in this context.[6]

Respect for an attorney's independent judgment in client representation is required by our ethical obligations. The Montana Supreme Court made this clear in In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures, 2000 MT 110, ¶ 47, 299 Mont. 321, 2 P.3d 806. There, the Supreme Court held that insurance companies cannot demand prior approval for costs to be incurred by defense attorneys the companies hire to represent insured parties. The Court concluded that "the requirement of prior approval fundamentally interferes with defense counsels' exercise of their independent judgment, as required by Rule 1.8(f), M.R.Prof.Conduct. Further, prior approval creates a substantial appearance of impropriety in its suggestion that it is insurers rather than defense counsel who control the day to day details of a defense." This does not mean that contract public defenders have a blank check, or that they cannot be held accountable.

Many public defender agencies, including the federal defenders, have to handle the same situation. We ought not to interfere with the attorney-client relationship or trial strategies. We should not tell a private attorney what motion to file, but we can (and do) reduce the bill if it is not reasonable for the task and there is no good explanation. OPD can both respect the attorney's professional independence and maintain oversight of the costs.

A final point worth noting, in light of the Task Force's questions about how the federal system and its use of private "CJA" panel attorneys works: the federal system recognizes that the system is based on fairness, and the client comes first. "To be sure, the judiciary and the lawyers have an obligation to be stewards of CJA funds. But this oversight should not trade off with the rights of clients." United States v. Tillman, 756 F.3d 1144 (9th Cir. Nev. 2014).

6. The constitutional right to legal counsel extends to a defendant's right to appeal.

Questions: (a) Under what circumstances, if any, does the Office of Appellate Defender have the authority to decline, ignore, or override a client's desire to appeal?

(b) What procedure does the OAD's or Commission's policy or rule(s) require an OAD-employed or OAD-contracted attorney to follow if the attorney believes there is no basis for appeal but the client insists on appealing?

(c) How, if at all, does the Chief Appellate Defender manage a case on appeal that a subordinate attorney or contract attorney believes has no basis for appeal but that the client insists on appealing?

Answer: (a) None in terms of "desire to appeal."

Public defenders have no authority to decline, ignore or override a client's desire to appeal. Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). The law provides that the right to appeal rests exclusively with the client and not with anyone within OAD. "[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal[.]" Jones v. Barnes, 463 U.S. 745 (1983). While there is no explicit constitutional right to appeal, every state provides some method of appeal from criminal convictions. *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956). Once a state provides the first appeal of right, it cannot discriminate against criminal defendants because of their poverty. *Id*.

As the question recognizes, basic protections, such as the right to a transcript on appeal and the right to counsel, adhere to the appeal process without regard the merit of any potential appeal claims. Douglas v. California, 372 U.S. 353, 357 (1963). Just as at the trial level, the OAD attorney must act on behalf of the client rather for the benefit of the court: "'The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.'" *State v. Swan*, 199 Mont. 459, 468, 649 P.2d 1297, 1302 (1982), *quoting Anders v. California*, 386 U.S. 738, 744 (1967). Failure to preserve a defendant's right to appeal when he has requested notice be filed is error. *State v. Rogers*, 2001 MT 165, ¶ 24, 306 Mont. 130, 32 P.3d 724. In addition to violating the constitutional mandate to provide effective assistance of counsel,

declining, ignoring or overriding the citizen's insistence to appeal, can lead to complaints filed with the Office of Disciplinary Counsel that could lead to disciplinary action by the Supreme Court against lawyers in OAD. Legal malpractice suits can also be brought against the OAD lawyers, the agency, and the State. The cost of defense to the State is expensive even when the malpractice suits are unsuccessful.

Public defenders' obligation to file a notice of appeal when requested to do so is no different than that of private retained counsel. Retained counsel cannot ignore or "override" a client's desire to appeal on the basis that counsel believes there is no basis for appeal or that the client cannot pay the costs of appeal. Retained counsel must make certain the notice of appeal is timely filed and only then can retained counsel move to withdraw. *See M. R. App. Pro. 4(5)(b)(ii)*. Failing to file a notice of appeal when requested would expose any defense counsel - appointed or retained - to disciplinary action and a malpractice suit. After retained counsel has withdrawn pursuant to the requirement of *M.C.A. § 46-8-103(2)*, representation of those formally private appellants often falls to OAD when the Montana Supreme Court orders OAD to appoint counsel subject to an eligibility determination.

(b) OAD counsel evaluate and determine whether there are meritorious issues for appeal after having had an opportunity to review the record. OAD counsel consults with the client about the issues the client wants presented but counsel is only obligated to argue those issues on appeal that counsel has determined to have merit.

Practice Standards 10.2 D, F, and H at http://publicdefender.mt.gov/Standards/10-2.pdf , adopted by the Public Defender Commission address the situation when counsel concludes the issues the client wants appealed have no merit:

> D. After reviewing the record, counsel should confer with the appellant and discuss whether, in his or her professional judgment, there are meritorious grounds for appeal and the probable results of an appeal. Counsel should explain the advantages and disadvantages of an appeal. The decision whether to proceed with the appeal must be the client's own.
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> F. Counsel shall not abandon an appeal solely on the basis of his or her own determination that the appeal lacks merit, but rather should advance any sound basis for changing the law. If, after conscientious analysis, counsel determines that there are no nonmeritorious grounds for appeal, counsel should follow the procedures outlined in *Anders v. California*, 386 U.S. 738 (1967) and §46-8-103 MCA. Counsel shall discuss with the client the determination that counsel has made and give due consideration to the wishes of the client.
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> H. After exercising independent professional judgment, which may include omitting issues too weak or tenuous to secure relief or distractive of superior claims, counsel should assert claims which are supported by the record and which will benefit the client if successful.

During the discussion required by Standard F above, appellate counsel informs the client there are no non-frivolous issues to appeal, and advises the client of the options to either voluntarily dismiss or proceed with the *Anders* procedure. If the client declines to voluntarily dismiss the appeal, the client will have the opportunity to respond directly to the Montana Supreme Court.

The Practice Standards are an expression of the requirements of *M.C.A. § 46-8-103(2)* which is a codification of the constitutional rule announced in *Anders v. California*, 386 U.S. 738 (1967).

To be clear, the practice standards do not mean that the options are all or nothing. Counsel is not obligated to go forward with issues the client wants presented that in counsel's professional judgment are frivolous. Obviously, counsel should have very good reasons for not presenting issues. The result may be that counsel files briefs arguing issues considered meritorious without presenting those deemed frivolous. An *Anders* brief is filed when there are no meritorious grounds for appeal in the sound professional judgment of counsel expressed in the brief.

(c) Please see 6(b). All appellate attorneys, whether employees or contractors, are subject to the United States Supreme Court mandate in *Anders v. California*, *M.C.A. § 46-8-103(2)*, and the Practice Standards.

7. The OPD and APD rely on the "Case Weight System" for tracking OPD and APD attorney workloads. Each case within a PD Region is assigned by the Regional PD or Regional Managing Attorney (or Conflict Coordinator). A separate JustWare Form is maintained for each attorney. The JustWare Report for the Region, compiled from the JustWare Forms, is provided to each OPD attorney assigned to the Region and is also sent to the OPD Central Office. The JustWare Forms and Reports are used to help assure that an attorney, attorneys within a Region, or the agency is not exceeding ethical caseload limits. The Forms and Reports are not used to measure performance.

Questions: (a) How effective, in the judgment of the Commission, the Chief Public Defender, and the Chief Appellate Defender, are the JustWare tools in achieving their caseload management purposes?

(b) Are cases assigned to contract attorneys also included in the JustWare system?

(c) Are the actual hours worked on a case and reported by an attorney on the JustWare Forms compared to the hours assigned to the case under the Case Weight System?

(d) If the answer to 7.(c) is "Yes", what are the OPD's and APD's observations about the hours assigned under the Case Weight System and the actual hours recorded by the attorney assigned to the case?

(e) Has the OPD or APD conducted statistical analysis of the data contained in the JustWare Forms and Reports?

(f) If the answer to 7.(e) is "Yes", what conclusions has the OPD or APD reached?

Answer: (a) For the trial level attorneys, our JustWare tools are reasonably effective in achieving our workload management goals.
The OAD case weight numbers give a rough predictive sense of how long cases should take to complete and assist management in balancing case workload across OAD attorneys. While individual cases can take more or less time than the case weights would predict, in aggregate the weights give a more accurate, useful workload metric than merely counting case numbers. We do believe, however, that an individually tailored, professional time-study would produce an even more accurate workload approximation.

(b) Data relating to cases assigned to contract attorneys in the trial level programs are included in JustWare. The contract attorneys do not keep track of time in JustWare.

JustWare contains OAD's case weight numbers for both contract and FTE attorneys going back to 7/1/2015. Prior to that time, the Chief Appellate Defender maintained the case weight numbers separately from the JustWare program.

(c) Actual hours worked on a case are compared to the hours assigned to the case type under our case weight system. This is not done in every case. It is part of an ongoing process OPD uses to assess the case weight system. We have a Labor-Management Committee which periodically reviews our case weights. We rely on actual time tracking to evaluate the validity of the case weights.

OAD has never undertaken such an analysis. We believe doing so as a part of a professional, time-study would be very helpful in producing a more individually tailored predictor of workload.

(d) We are planning to convene the Labor-Management Committee to make this assessment.

(e) OPD has not conducted meaningful statistical analysis of the data in JustWare. OPD has discussed retaining the National Center for State Courts to conduct a comprehensive evaluation of our attorney and non-attorney workloads. A primary objective of this evaluation would be to develop a Montana-specific caseload protocol. The study could include our administrative and investigative support staff as well as attorneys. The type of study could be comprised of several stages:

- a several-week long time study to track what is currently done by support staff, investigators and attorneys in defined case types and by specific tasks;

- a time sufficiency survey of all FTEs to determine what currently is not being done on cases that should be, due to insufficient time;

- a collaborative review by experienced persons – both within OPD and in the private sector – to identify the time necessary to effectively perform those tasks not currently being done due to lack of time;

- developing for attorneys a weighted caseload protocol, and developing for staff and investigators a clear measure of their workloads and the appropriate levels necessary to provide effective, cost-efficient representation state-wide.

OPD currently does not have available funding to undergo such a study.

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[1] The accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. Jones v. Barnes, 463 U.S. 745 (1983).

[2] Carlson v. Cain, 204 Mont. 311, 320-321, 664 P.2d 913 (1983). There, the Court held that the four factors to consider under the control test include: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. Employment status can be established on the strength of any one of the factors.

[3] Ramsey v. Yellowstone Neurosurgical Assocs., P.C., 2005 MT 317, ¶26, 329 Mont. 489, 125 P.3d 1091.

[4] The example appears in Publication 15-A. I referred to the guide for use on 2015; the same example appears in the 2016 guide.

Donna Yuma is a sole practitioner who rents office space and pays for the following items: telephone, computer, on-line legal research linkup, fax machine, and photocopier. Donna buys office supplies and pays bar dues and membership dues for three other professional organizations. Donna has a part-time receptionist who also does the bookkeeping. She pays the receptionist, withholds and pays federal and state employment taxes, and files a Form W-2 each year. For the past 2 years, Donna has had only three clients, corporations with which there have been long-standing relationships. Donna charges the corporations an hourly rate for her services, sending monthly bills detailing the work performed for the prior month. The bills include charges for long distance calls, on-line research time, fax charges, photocopies, postage, and travel, costs for which the corporations have agreed to reimburse her. Donna is an independent contractor.

Our contractors are responsible for their own office space, pay their expenses, and are responsible for their own employees. The contractors bill us an hourly rate of $62.00 per hour. They have to submit monthly bills detailing the work done. We provide a $25 monthly stipend for expenses for work-related costs.

[5] 258 P.3d at 20, ¶ 32.

[6] 258 P.3d 20, ¶ 33 n. 15.