

SENATE JUDICIARY
COMMITTEE NO. 2
2/2/11
SB 187

16 December 2009

MEMORANDUM

TO: The Law and Justice Committee

FROM: Jim Shockley

SUBJECT: The American University (AU) Report on the Office of the Public Defender (OPD) and my comments

I. Background

In 2003 then Attorney General Mike McGrath appeared before this Committee. He was candid - either set up a proper public defender system or the ACLU was going to win its lawsuit and a system would be imposed by the federal court. The committee set up a subcommittee to deal with the issue and produced a bill. The Public Defender Act passed in 2005 and went "live" on 1 July 2006.

Everyone concerned knew that there were going to be problems with the start up. The ACLU suit did not include the civil aspects of the present OPD; e.g., civil commitments, dependency and neglect, and juvenile cases. The data for the civil side was much weaker than the criminal side; the state had been paying a portion of the felony costs for years and there was reliable data on that type of case.

Two years after the OPD went into business the then Chairman of the Public Defender Commission, Jim Taylor, requested the study that resulted in the *Assessment of the Initial Period of Operations of the Montana Statewide Public Defender System*. The examination was done between August 2008 and June 2009. The report is dated October 2009. The Agency has about 118 staff attorneys and contracts with about 222. There are many more investigators, secretaries, paralegals, and other support staff. There were good parts of the program, bad parts of the program, and portions of the program that simply could not be investigated in light of time and monetary constraints. I have been told that OPD was reluctant to cooperate with American University (AU) and a close reading of the report might support that allegation (p.2): see the second complete paragraph on page 3. You will note that AU became somewhat strident towards the end of the report

when making their recommendations.

On a related matter I have been trying to get OPD to generate some income, as the bill came out of the Legislature it had no obligation to collect fees, and did not want to do so. I do not want to digress too much, but AU mentioned OPD relations with the Legislature and budgeting. As an example of what concerned me, Ravalli County averaged \$35,000 from "indigent" defendants in the three years prior to 2006; in 2008 I doubt it collected \$100. The OPD wishes to provide free services, in part to maintain better relations with OPD's clients, in part because OPD feels that it is not cost effective to try and collect.

II. Good aspects of the instant program

The creation of the Commission itself, and the OPD were very good ideas clearly required by the situation. The policies and practices committed to paper were good. AU liked the training program (p.33) and this was confirmed by my own limited investigation. The University also liked OPD's billing program and the forms related to hiring and assigning people (p.16).

III. Other aspect of the OPD did not work out well, and need fixing

A. Management is poor

There are not enough supervisory staff, nor administrative staff to support the lawyers. Supervision of attorneys and staff is minimal at best and data collection is simply abismal. In my mind the biggest problem is a lack of management (p.19).

The management failure is partly due to the fact that major supervisors themselves have case loads. Statute requires that the Commission establish maximum case load for the CD, 47-1-202(11), MCA. It has not been done. The legislation does not require the CD or the deputies to carry heavy case loads (p.21). Management, except at the smallest offices, should not try cases.

Each evaluation of about 340 attorneys must be done by the CD (p.28). She has no time to do that job, supervise and evaluate support staff, attend to her other administrative duties, and represent her own clients (p.29). As for the CD, the Commission has never evaluated her performance as required (p.28).

The managers do not maintain up-to-date case load data for the attorneys

that they are required to supervise. (p.41) The attorneys do not keep time records as required by Policy No. 120 (p.42) so that managers do not know how much work an attorney accomplishes, or what effort a particular type of case requires. The case weighting systems used by the OPD, a management tool designed to assist supervisors to manage the caseloads of their attorneys has no validity. (p.42)

B. The computer system is inadequate

However, that may not too important at this time. Few people attempt to use it, and they are not trained on the system (p.18).

With adequate data collection there can be no effective management (p.26), or a reasoned budget presented to the Legislature (p.19). This lack of data is the likely reason that the OPD is not better funded. "The lack of compiling information about the nature of services provided in handling the cases filed and their final disposition is probably the most serious problem confronting the Defender Office"(p.20).

C. Morale is low

Five of the 11 original regional deputies are no longer with the OPD. Staff assert that the office environment has a climate of "fear and retribution" and management "by intimidation" is the norm(p.48) (p.53). However, no one who talked to me was afraid to do so, although it was not for attribution. One attorney asserted that most of the complaints were just from a few malcontents. Another thought that they were well founded.

It is alleged that the CD plays favorites in assignments, promotions and assignment of resources (p.48). As an example of what is apparent favoritism, Roberta Drew is supervising misdemeanor defense in Yellowstone County. Ms. Drew was billing for hours that she supposedly earned visiting her client in Deer Lodge (this was before the OPD), and did not make the visits billed. Judge Loren Tucker made her appear to explain the complaints from her client. She was held in contempt of court and the Supreme Court reprimanded her. Why such person would be hired, let alone put in a supervisory capacity, makes no objective sense. There are other similar issues and they hurt morale.

D. The Chief Defender needs to change her management style

CD will not delegate her authority. Montana is simply too big to allow

personal supervision by the CD (P.21). The CD insists on hiring all attorneys herself. This is impractical given her other duties (p.48).

The CD tries cases, way too many cases. As an example the CD starts a 6 week murder trial in Billings this January, and when I called Tuesday she was in another trial.

SUMMARY

The two biggest problems of the OPD are a lack of management, and inadequate data collection; the two are related.

The biggest single problem is that the supervisors are trying cases instead of managing. I suspect that this is related to the fact that the managers were hired for their litigation experience, not their management experience, or inclination. If the Commission understood management, it would not allow its major managers to have case load. They should only appear in court to train their subordinates, and in emergencies. "Management is a full time job" (p.19).

The Commission has good ideas and adopted some excellent policies, but it fails to supervise the O. It needs at least one staff person of its own so as not to rely on the staff of the organization that it is overseeing. The CD should not be the Commission secretary. The Commission must make a real effort to hire lawyers with management experience; perhaps from county, state, or federal governments.

I recommend that the members read the recommendations that start on page 3. There are more problems than I have discussed, and I do not fully support all of the recommendations.

Jim Shockley