

# Montana's Public Defense System

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An Evaluation Five Years Into the Statewide System

**OCTOBER 2011**



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**After the findings in this Report were finalized in August, 2011, the ACLU learned that the Chief Public Defender had stepped down after five years of service. We hope that as the Commission searches for a new Chief Public Defender, it takes this opportunity to reflect upon the issues revealed through the investigation and makes the institutional and managerial changes necessary to move the agency forward under new leadership.**



# I. INTRODUCTION

In 2002, the American Civil Liberties Union filed suit in Montana seeking reform of the state's public defense system. The lawsuit was brought in response to widespread dissatisfaction with a county based system that resulted in gross disparities in the quality of representation provided from county to county; a lack of supervision, oversight, and the data collection necessary for proper supervision and oversight; public defenders who lacked the resources necessary to provide constitutionally adequate services; and clients who suffered serious injuries as a result of the system's failures.

The lawsuit was ultimately settled when the Attorney General's Office agreed to collaborate with the ACLU to fashion a legislative solution. The legislation was passed in 2005 and resulted in the creation of a statewide public defense system. In 2009, American University ("AU") issued a report on the new system and made a series of recommendations for its improvement. Two years after the AU report, the ACLU revisited the system to evaluate its effectiveness in providing services to clients.

We found that, roughly five years after the creation of the system, the provision of public defense services has greatly improved in some counties—particularly in those that previously had only minimal resources. The system continues to fall short of achieving its full potential, however, largely in areas involving central administration, oversight and supervision, and management. Serious and on-going problems in these areas contribute to the continued failure to collect essential data, wide disparities between regions and even among offices within regions, and poor staff morale. Most importantly, there is also evidence that these shortcomings have adversely affected client representation in some places. Finally, despite OPD reports to the contrary, many of the recommendations made by the AU Report have yet to be followed.

## II. METHODOLOGY

The ACLU has actively monitored the Office of the Public Defender (“OPD”) since its creation and is deeply invested in the Office’s success. In early 2011, in response to an uptick in client complaints received by the ACLU of Montana and on-going concerns about the management and administration of OPD, the ACLU reconvened the litigation team responsible for the 2002 lawsuit.<sup>1</sup>

Over the course of 7 days in June, July and August 2011, members of the legal team visited five public defender offices: Billings, Kalispell, Polson, Missoula, and Miles City. In each location, the team interviewed a combination of regional directors, managing attorneys, staff attorneys, and public defender clients. In some locations, legal assistants, investigators, and private attorneys were also interviewed. All interview subjects were assured anonymity and confidentiality to encourage them to speak freely.<sup>2</sup>

The team met with 28 staff members of various public defender offices, including regional directors, managing/lead attorneys, staff attorneys, legal assistants, and investigators; 23 clients; and two private attorneys.

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1 From 2006 through 2010, the ACLU of Montana received 143 complaints from public defense clients from counties throughout the state, with 80 complaints received in 2009 and 2010 alone. The six counties with the most complaints in descending order of number were Yellowstone, Missoula, Butte-Silver Bow, Flathead, Lake and Cascade. The majority of the complaints focused on lack of communication or access to counsel (often due to their being over-worked) and pressure from counsel to plead guilty. Both these written complaints and complaints the ACLU received during meetings with several individual complainants were entirely consistent with this Report’s Findings. The ACLU has also requested information and records relating to client complaints filed with the Office of Public Defender. That request is still pending.

2 To protect these individuals from retaliation, where appropriate, this Report refers to all interviewees with a female pronoun, regardless of the person’s actual gender.

## III. SUMMARY OF FINDINGS

### A. Key AU Report Recommendations Have Not Been Effectively Implemented

#### 1. Failure to Collect Essential Caseload Data (AU Recommendation #1)

*AU Recommendation #1: Information should describe caseloads, dispositional processes, attorney workload, and related data that describes the agency's operations.*

Tracking of data such as that recommended by the AU Report is an essential part of managing an agency like the OPD. Without accurate caseload information, for example, it is impossible to know whether OPD has sufficient attorneys, whether the attorneys it does have are over-worked, or to justify to the legislature the need for additional resources.

Attorneys in each of the five offices with whom we met were nearly uniformly unaware of what their yearly caseloads are. Most had a general sense of how many cases they have open at a given time, but the couple who knew what their yearly numbers were had compiled that information themselves. It is nothing short of shocking that OPD has failed to collect and track data on yearly caseloads since the failure to collect such information under the old system was one of the primary complaints driving the lawsuit. The capacity to do so easily exists using the Justware program, but the information does not appear to be collected, much less used to help with management, proper and efficient resource allocation, and advocacy on behalf of OPD.

Similarly, attorneys, regional directors and managing attorneys did not appear to have access to basic statistics like trial rates, dispositive motion rates, or cases overturned on appeal. It is unclear whether anyone is collecting such information, but it is certainly not being used as a management tool if it is being collected.

Finally, no one appears to track any of this information whatsoever for contract attorneys. For example, as far as the ACLU can tell, caseload information is not collected from these attorneys to ensure that they are not over-stretched and possibly shortchanging their public clients.

#### 2. Poor Management Practices (AU Recommendation #s 19, 21)

*AU Recommendation #19: Chief should communicate with staff regularly regarding policies, procedures, evaluations, compensation, etc.*

*AU Recommendation #21: Remove fear of retaliation for noting agency problems*

Not a single attorney employed by the OPD actively praised OPD for its management. The single most frequently identified complaint about the OPD system was OPD (mis)management.

Strikingly, the same complaints surfaced over and over again: micro-management of regional and local office affairs, a lack of transparency in hiring and firing, and perceived favoritism towards certain employees coupled with vindictiveness against others. Office morale in several locations was observed to be extremely poor and was both noted by staff and attributed directly to OPD management.

#### Examples of micromanagement:

- OPD has reached over the head of local office and regional directors to hire and fire non-attorney support staff employees at the local office level, including (perhaps most recently) an investigator in the Billings office.
- OPD has not allocated to local and regional office heads the authority to approve requests for mental health evaluations and expenses such as requests for additional investigative resources. We were informed that in one case, the Chief Public Defender personally had to approve of resources for an investigator and waited one month to do so. In many instances, the Chief Public Defender must personally sign off on requests for expenditures greater than \$200.
- Instead of ensuring proper management of the entire system, OPD and the Chief Public Defender have personally been involved with looking for new office space for the Kalispell office by inspecting new potential sites.

#### Examples of lack of transparency in hiring and firing:

- Open positions are sometimes not posted until they have been filled.
- When OPD reaches over local and regional heads to fire support staff, other employees in the office are not informed until after the fact and often do not know why the employment action took place, making them fearful for their own jobs.
- Attorneys in management positions are demoted without explanation, most believe because they have crossed the Chief Public Defender.

#### Examples of favoritism/vindictiveness and retaliation:

- Staff members who show loyalty to OPD are rewarded with favoritism. For example, the new investigator in the Billings office was formerly a legal assistant. She has no B.A. or former investigatory experience, as required by OPD hiring guidelines, but we were told by members of the office that OPD perceives her as being loyal.
- Attorneys who voice criticisms about OPD are sometimes demoted. One former managing attorney indicated that she expressed repeated dissatisfaction with OPD management of

the system and was demoted. Another managing attorney in a different office was transferred to a different department before returning to the office as a misdemeanor attorney.

- Multiple attorneys reported that they believed the Regional Directors serve at the personal pleasure of the Chief Public Defender, and that they can and are fired at will for displeasing her, regardless of whether they are doing their jobs properly.
- In Flathead County, three of the contract attorneys in the county are “holdovers” from the old system, and we were informed by one staff attorney that the Chief Public Defender agreed to limit the number of Flathead contract attorneys so that those three attorneys would have more cases.

#### Loss of confidence in Chief Public Defender and Commission:

- The poor management of OPD has resulted in a serious loss of confidence in the Chief Public Defender, which was reflected in a majority of interviews with staff attorneys. One staff attorney referred to the Chief Public Defender as “a disaster.” Another staff attorney stated that things in the system “will never improve” until the Chief Public Defender leaves. Without being prompted, at least six attorneys singled out the Chief Public Defender for criticism in their comments to us.
- To a lesser extent, staff attorneys expressed frustration with the OPD Commission’s failure or inability to act upon complaints and feedback from attorneys about the system. A number of attorneys indicated that they had submitted letters or testified before the Commission as to improvements needed within the system but received no response.
- Two attorneys specifically commented on OPD’s response to the AU Report. One stated that she believed the office was responding only superficially and cosmetically to the Report (a conclusion with which this Report agrees). Another stated that OPD held a management training session after the AU Report that was more like a strategic planning session, that the session produced no measurable results, and that the Chief Public Defender did not follow through on any of the recommendations.

### 3. Failure to Control Caseloads (AU Recommendation #s 2, 15 and 16)

*AU Recommendation #2: Adjust case weighting system*

*AU Recommendation #15: Develop a plan to deal with case overloads*

*AU Recommendation #16: When caseloads are at a maximum level, OPD refuses cases*

Although caseloads in the new system do not appear to be as excessive as they were under the old system (with the possible exception of the Billings office), it is difficult to tell given the failure of

OPD to collect yearly caseload data. Attorneys continue to complain about being overworked. OPD has implemented a case weighting system, by which different cases are assigned a point value and each month every attorney receives a printout to reflect the number of new points (i.e. cases) they are being assigned. Attorneys are theoretically supposed to receive no more than 12.5 points per month. The system, if used properly, would tell managers when an attorney has an excessive caseload that could jeopardize the type of representation that the attorney is capable of providing. The fact that attorneys are carrying caseloads that have weights that are twice what the OPD recommends should be an issue of concern.

Only one office—in Polson—reported routinely contracting out cases when staff attorneys reached the 12.5 case weighting number each month. Attorneys elsewhere reported dissatisfaction with the case weighting system, a lack of management planning to deal with case overloads, and a failure to reduce caseloads when attorneys are overloaded.

#### Examples of caseload problems:

- A sampling of case weights taken from the Kalispell office in September 2010 indicate that several attorneys had excessive caseloads but nothing was done: 17 (for an attorney who was fresh out of law school), 15.2, and 17.2. Case weights taken from the same office in April 2011: 13.5, 21.7, 16.1, 14.2 (new misdemeanor attorney), and 14.2 (another new misdemeanor attorney). Sample 12 month case weights from the Missoula office: 17.76, 16.83, 14.15, 16.30, 14.07, 15.63.
- One attorney in the Kalispell office noted that she had 260 open cases *at any given time* her first year as a misdemeanor attorney and that management in the office pressured attorneys to take more cases, telling them how expensive it is to contract out cases. National guidelines recommend that attorneys handle no more than 300 misdemeanor cases *per year total*.
- Attorneys expressed dissatisfaction with the caseload weighting system, noting for example that it does not count things like DUI court or certain civil court responsibilities, e.g. weight for extra charges against juveniles.
- Attorneys who worked more than 40 hours per week uniformly reported pressure from OPD and regional management not to create or report the comp time or overtime (to which they are entitled per union contract) as a cost savings measure.
- Attorneys in the Missoula office reported uneven caseloads and a lack of transparency in the case assignment system.
- One attorney in the Missoula office had 150 open felony cases as of June 2 and had started with a clean slate in January. This would put her on pace for 300 felony cases a year, well over the national guideline recommendation of no more than 150 felony cases a year.



- One attorney in the Billings office informed us that the five felony attorneys in the office routinely had case weight numbers ranging between 15 and 24 most months. The attorneys asked for relief from the Regional Director and none was provided.
- Attorneys in the Billings office reported that the office does not have any procedures to provide coverage in the event of illness, maternity leave, or family emergencies. One attorney was out of the office for two weeks for a family emergency and continued to be assigned cases.
- Attorneys informed us about a meeting during which the Chief Public Defender announced that the national guidelines (the NAC guidelines of 150 felonies a year and 300 misdemeanors) were “made up” but that no other guidelines have been supplied by OPD. Another attorney noted an OPD newsletter praising the ability of a particular public defender to handle cases significantly in excess of these numbers.

#### 4. Failure to Evaluate Attorney Performance (AU Recommendation #s 3, 11, 12 and 22)

*AU Recommendation #3: A meaningful system should be developed for evaluating the work of the lawyers.*

*AU Recommendation #11: An evaluation procedure for lawyers needs to be developed which is timely, is based primarily on objective data, and promotes the lawyer’s professional development over the next year.*

*AU Recommendation #12: Special procedures should be developed for evaluating contract lawyers, relying primarily on the information provided in the periodically filed fee petitions and the proposed closing documents.*

*AU Recommendation #22: Staff must be accountable to implement Standards, Policies and Procedures.*

Attorney evaluations are the primary tool by which management can ensure that its staff have understood and are complying with office standards and protocol, and that appropriate client representation is being provided. Attorneys interviewed in each of the larger offices reported a lack of meaningful oversight and supervision. Not one attorney found the evaluation system implemented by OPD to be effective, meaningful, or accurate; in some offices, attorneys indicated that evaluations were rarely if ever even conducted. It is worth noting that only the attorneys in Lake County were satisfied with the evaluations performed by their Managing Attorney, who appears to serve as a true mentor and supervisor.

Examples of failure to provide meaningful attorney evaluations:

- A supervising attorney in the Kalispell office noted that the office is still “finding its way” with respect to evaluations. Another attorney in the office noted that she once wrote a letter to the Chief Public Defender documenting shortcomings in the evaluation system and that those shortcomings have not been addressed. Her letter noted, for example, that the OPD Human Resources head is not an attorney; that there were issues with hiring, mentoring and evaluating in the office; that OPD had failed “miserably” with respect to job descriptions and evaluations; that there were problem attorneys in the office who should have been fired but were not; and that some attorneys in the office were not being penalized in their evaluations for failing to keep time.
- No one in the Kalispell office appears to supervise the roughly 15 contract attorneys for Region 1. That office continues to contract with Ben Anciaux, a public defender for Lake County when the original ACLU lawsuit was filed. Numerous complaints were received about Mr. Anciaux dating from the original lawsuit and the Regional Director for Region 1 noted that she continues to get complaints about Anciaux’s “bedside manner.” The Managing Attorney for Lake County noted that when she receives client complaints, she typically has to instruct Anciaux to go meet with his clients: “Ben [Anciaux], you need to talk to your guy.”
- No one in the Kalispell office spot checks briefs or watches lawyers in court to observe performance.
- Lead attorneys in the Missoula office do not have any supervisory or oversight responsibilities even though the Regional Director is out of the office more than half of each week. One attorney in the Missoula office noted that she had not received a single evaluation in five years. That same attorney stated that there are attorneys in that office who routinely miss court dates or who are regularly late for court but who are not disciplined or otherwise subject to administrative oversight.
- Attorneys in the Missoula office uniformly reported that when evaluations did take place, they were not meaningful. One attorney noted that the sole comment she received once was to be more mindful of the office budget.
- Attorneys in the Billings office reported that because evaluations that indicate above or below average performance require the supervising attorneys to write something specific, each attorney in the office gets evaluations that indicate strictly “average” performance. There is no meaningful feedback. One attorney in that office noted that she has only received one performance evaluation the whole time she has been at the office—since its inception five years ago.
- Contract attorneys for the Billings office do not appear to be meaningfully supervised. The Regional Director does not regularly visit, court watch, or otherwise supervise attorneys

in two of the counties for which he is responsible. Although he personally takes cases in the other two counties for which he is responsible, his supervision of contract attorneys in those counties appears to consist of watching them in court on days when he himself must appear in court and happens to be there.

## 5. Failure to Provide Adequate Attorney Training (AU Recommendation #s 8 and 9)

*AU Recommendation #8: Training Officer should regularly survey staff and contract attorneys to determine training needs.*

*AU Recommendation #9: Each training program should have systematic feedback and evaluations from attendees.*

Staff attorneys were uniformly appreciative of Eric Olsen's training office at OPD and believe that he is doing a good job with what resources he has at his disposal. However, attorneys in the larger offices all noted a lack of meaningful on the job training at the office level, particularly for new lawyers. They noted that the OPD training program is limited to a trial-focused boot camp offered over the course of a weekend once a year and CLEs, both of which are useful, but not sufficient for new attorneys. With the exception of the Lake County office, none of the offices appears to have implemented a formal training program for new attorneys, and even Lake County fails to provide training for civil cases.

### Examples of failure to provide meaningful attorney training:

- With few exceptions, staff attorneys reported that they received no training in addition to that which is offered by Olsen's office at OPD, and that that training was insufficient to prepare them to do their jobs. Some attorneys sought mentorship on their own.
- The lack of necessary training was particularly pronounced for those attorneys responsible for civil work, i.e. abuse and neglect cases, involuntary commitments, and juvenile delinquency cases. Attorneys receiving those cases uniformly reported a lack of training. One who practiced near an Indian reservation and who regularly represented Native American children, noted that she was forced to teach herself about the Indian Child Welfare Act because no relevant training was available. This same attorney noted that contract attorneys taking civil cases were often "clueless" and would come to her with questions. Another attorney who works on these cases noted that when she is overloaded, civil cases get assigned to other attorneys who have no expertise or training in how to handle them.
- Attorneys in the Missoula office stated that there is no basic manual for new attorneys and no court observation of new attorneys. One lawyer in the office stated that the failure to

train in the office has resulted in client harm, as when new attorneys let evidence in that should not be admissible.

- One investigator in an office noted that she did not receive an office manual until nine months after she started work.

## 6. Access to Investigators and Experts (AU Recommendation #31)

### *AU Recommendation #31: Investigator resources provided to misdemeanor cases*

Although access to experts and investigators has improved immeasurably from the old system in the more rural counties, there continue to be shortcomings, particularly with respect to access to investigators for misdemeanor cases. As the AU Report recognized, misdemeanor clients are still entitled to a presumption of innocence and to have the prosecution prove its case beyond a reasonable doubt, and some of them can go to jail if convicted. They are therefore also entitled to investigative resources where warranted and the denial or lack thereof may result in client harm. The Regional Director for Region 11 noted that before the new system, requests for investigators were by court order and that the new system, with an in-house investigator in his office, was far better. Attorneys in Yellowstone County, however, which previously had a public defender office, noted that their access to experts and investigators has actually declined under the new system.

### Examples of failures to provide adequate access to experts and investigators:

- Many attorneys complained about the involvement of Dr. Laura Wendlandt, a mental health doctor employed by OPD, in the mental health evaluation request process. They noted that she is not an attorney, pressures attorneys not to use experts, and takes too long (2-3 weeks) to process requests. One Regional Director indicated that Dr. Wendlandt herself was considered by her attorneys only to be qualified to perform the basic level of mental health evaluation. Dr. Wendlandt is apparently departing the OPD, but continued involvement of OPD in this process appears to be another example of micro-management.
- A significant number of attorneys also noted that the list of available experts approved by OPD is limited because of the Memorandum of Understanding that OPD requires potential experts to sign. Attorneys informed us that because the MOU was overly burdensome and placed too many restrictions on experts, many experts in their areas simply refused to sign and therefore could not or would not take OPD work. Many noted that the remaining experts available in their geographic areas were often not very well qualified. Some attorneys claimed to serve as their own experts, or to prefer to attack the prosecutions' experts to hiring their own.

- Attorneys in the Missoula office reported that while access to investigators for felony attorneys is good, misdemeanor attorneys must place a special request to the Regional Director, who typically denies those requests to conserve resources, even when the client faces potential incarceration.
- Misdemeanor attorneys in the Kalispell office do not appear to request investigators particularly often. One felony attorney stated that she believed this was because they are less experienced attorneys who do not know when they need one.
- The Billings office was short one investigator out of three because OPD went over the head of the office to fire one. The civil attorney for that office noted that this meant she had to operate without an investigator for two months.
- One investigator noted that the yearly training offered for investigators is “a joke” and that the yearly evaluations performed by Morrie Woods were not substantive.

## **B. These Failures Result in Widely Varying Quality of Representation Between Offices**

The purpose of the original ACLU lawsuit was to eradicate a county-by-county patchwork whereby clients would receive varying levels of representation depending upon in which county their cases took place. The new statewide system was supposed to ensure that the quality of representation one received would no longer depend upon the county of one’s residence, and that all citizens of Montana would be assured a basic minimum of constitutionally adequate representation. Unfortunately, as it is currently administered, the new system continues to result in gross disparities in the quality of representation offered to clients between regions and offices.

### **1. Billings Office**

Attorneys in the Billings Office all volunteered that the old public defender system in the county functioned better than the new one. They believed that pay was better, caseloads lower, access to experts and investigators better, and morale better. The main sources of client harm in the office appear to be overly zealous eligibility screening, with those who should be qualified told that they do not; attorneys covering for one another without adequate preparation; and ineffective conflicts screening due to poor screening practices. A number of clients were very satisfied with their representation, but there were a couple of troubling incidents. Overall, the Billings office appears to be relatively well-functioning with regard to client services in spite of, not because of, the new public defense system.

### Examples of client harm:

- One attorney noted that she has covered for other attorneys without ever having met the client, and that this type of coverage happens frequently in the office. She reported once witnessing an attorney filling in for another on a sentencing in which the previously agreed upon sentence turned out to be impermissible. The subsequent negotiations were deeply flawed because the covering attorney was unfamiliar with the case.
- We were informed that conflicts checking at the office is conducted at a stage in which major witnesses and victims are identified only by their initials. One attorney in the office noted that she was once instructed to represent two co-defendants whose interests conflicted. Another attorney reported that her co-counsel had previously represented the victim in a case but that nothing was being done about the conflict.
- One attorney in the office stated that eligibility screening is being conducted without regard to undue hardship for clients in an effort to reduce caseloads and that clients who should qualify for services are being improperly denied.
- One client on a probation violation was passed between four separate public defenders by administrative staff at the office. He met with one defender once, and has not been visited in jail a single time in the month he had been incarcerated when we met with him, much less by his most recently appointed attorney. His next court appearance is not until October 14.
- Another client of the office reported that she missed a court date because her public defender left town without advising her of it. As a result of the missed court date, she was taken into custody. She noted that her attorney was so difficult to reach by phone, she gave up on calling.

## 2. Flathead

Supervision, oversight, and active management in the Kalispell office are lacking; staff morale is extremely low; and clients suffer harm because their attorneys do not serve as forceful advocates. Clients have missed court dates, worked out their own arrangements with their judges, and are rarely taken to trial.

### Examples of client harm

- Two attorneys reported that they conducted no felony trials in two years. Another stated that she conducted one such trial in two years.
- One client with a chronic drinking problem told us that while he was trying to sober up, his public defender called him drunk to ask him for good fishing spots and to say she was

having problems at work. The same public defender told this client that she was entering the same treatment facility the client had, and wanted to know whether she could bring snuff inside with her. Although this public defender had recommended that the client begin serving a 10 year sentence, the client was able to work out a treatment plan with the judge himself and received an agreement that he could get a second chance if he stayed clean for six months.

- One client was arrested in Helena, where he sat for 35 days without a public defender before being transferred to Flathead County, where he waited for a week to be screened for a public defender, and then another week after that to actually receive one.
- One client was informed by his public defender that he did not have to be present for his omnibus hearings. He was subsequently arrested for missing those court dates, lost his bond of \$3,000, and had not seen his public defender since.

### 3. Lake County

The public defender office in Lake County was by far the most functional of the offices visited. Staff morale was excellent, the Managing Attorney was engaged and responsive to his staff's needs, cases are being tried, and the clients interviewed were uniformly extremely satisfied with the representation they received. In fact, two clients specifically contrasted their recent positive experiences with the office with previous public defenders under the old system. Lake County is a prime example of the good that the new system has produced, but the credit is largely due to the active and involved management of Steve Eschenbacher rather than to OPD.

There is still room for improvement at the office, particularly in the area of training and resources for civil cases and in the office's policy on client phone calls. We were informed that the office has a policy of not accepting calls if the attorney is not in the office.

### 4. Miles City

Region 11, based in the Miles City office, has also witnessed dramatic improvements from the old system. The presence of two full time attorneys, an investigator and an assistant have made a real difference in the quality of services provided. The Regional Director noted that access to the brief bank, listserves, and other electronic resources offered by OPD have tremendously improved things. That said, the office does suffer from turnover and relies heavily upon contract attorneys who should be more closely supervised. In particular, we heard a number of negative comments about John Forsyth, the contract attorney for Forsyth City—including from the Sheriff of the city himself, who stated that clients who received Forsyth as an attorney were being done a disservice.

There was little complaint in the office about OPD, in large part because whatever bureaucratic requirements OPD may impose, it is still an improvement upon the old system. For example, the

Regional Director noted while he was an attorney in the County Attorney's Office, a judge asked him to be in charge of assigning public defenders to clients, a clear conflict of interest. He also noted that under the old system, a court order was needed to get an investigator and that he now has one in-house.

## 5. Missoula

The Missoula office, like the Kalispell office, is plagued with poor staff morale and a history of gross mismanagement. We were informed that an outside consultant hired by the Chief Public Defender was brought into the office in December 2010. She made recommendations like "clarify who is supposed to do what," develop "clear structure of how the office is run," and "all new hires need training and a training manual." These recommendations were never implemented. Most troublingly, some of the office's policies result directly in client harm, such as disregard for attorney conflicts of interest, a failure to provide discovery to clients, lengthy pre-trial detention without sufficient attorney contact, and unresponsive attorneys.

### Examples of client harm:

- One attorney who used to work in the office told us the office "never saw a conflict it couldn't rationalize." Another told us she was once forced to work on a case despite a conflict of interest and that she was on another occasion assigned to a case only three weeks before trial.
- In an effort to save money, the office policy is not to mail discovery to clients because postage is too expensive. We were also informed that attorneys in the office received OPD memos pressuring attorneys not to provide discovery at all to clients because photocopying is too expensive.
- The office policy is to not accept collect calls from incarcerated clients if the attorney is not in the office. Two attorneys in private practice report that clients of the office often complain about a lack of communication.
- One client sat in jail for 196 days before going to trial on a DUI charge. He fired his first defender after a month because the attorney did not visit him a single time and did nothing with the case. He reported that his second attorney did nothing for five months but file continuances. His third attorney finally took him to trial, where he got a hung jury. On a separate charge, this attorney advised him that he would only get probation if he filled out his PSI form; after he did, he was sentenced to two years at MSP with no possibility of parole. This client indicated that he has had public defenders in 9 different states and that Missoula was by far his worst experience.
- One client sat in jail for 30 days before he was able to bail out without his public defender's assistance. This same defender did not respond to his attempts to communicate with her.



While out on bail, the client was unable to get a response from the Missoula office as to his next court date. He eventually went to the courthouse himself to inquire, was informed that neither he nor his attorney showed up for his court date, and was then arrested. He was released a day later (the attorney accepted responsibility) and pushed for a jury trial. His attorney failed to coordinate with him prior to trial and was unresponsive to his attempts to communicate; he was eventually convicted and waited in jail for three months for sentencing, during which time his attorney continued to be unresponsive to his questions.

- One client reported that three different public defenders stood in for his original attorney over three hearings; two of whom did not even know who he was.

## IV. CONCLUSION AND RECOMMENDATIONS

The new state-wide public defense system in Montana has resulted in dramatic improvements in the quality of services in counties that were previously severely under-resourced. Unfortunately, other areas continue to suffer from offices that are poorly run and under-serve their clients; the level of care provided appears to depend largely upon the personal management skills of the supervising attorneys in each office. The measures needed to improve the system are all well within the power of OPD management; in fact, each of the deficiencies identified above is tied directly to poor OPD management. Recommendations made by the AU Report, at least one outside consultant, and public defense staff have been consistently disregarded or only superficially addressed. Unless and until OPD administration of the public defense system is overhauled, the true potential of the new system will never be realized.

It is unclear whether and to what extent insufficient funding for the system may play a role in OPD's deficiencies. It is possible, for example, that OPD does not collect caseload data, provide sufficient training or overtime, or encourage active supervision by managing attorneys because the resources to do so do not exist. To the extent additional funding is needed, OPD must first collect the data that show this to be the case, *e.g.* by collecting meaningful caseload information, providing estimates of what it would cost to build a more complete training program or to provide proper overtime to staff, and by analyzing the attorney time required to provide effective supervision and oversight of staff attorneys.

Finally, we note that OPD has repeatedly claimed to have addressed the AU Report's recommendations, via reports available to the public on its website and to the Public Defense Commission itself, most recently at the Commission's February and August 2011 meetings. Some of these claims—*e.g.* that attorneys are tracking their time and reporting on trials and motions filed—are belied by the reality of the system's day to day operations, as reflected in this Report. Other documents, such as the FY 2011 Training Report, which does not contain any information on which attorneys are attending trainings and from which regions, are simply too vague to be of any use in assessing performance. While the ACLU does not doubt that OPD makes these claims in good faith, we are troubled that they are being made at all in light of our findings.

### Recommendations:

1. Begin the immediate collection and analysis of yearly caseload and other relevant data. Such data should be distributed generally to Regional Directors and Managing Attorneys and staff attorneys should receive their own data.
2. Enroll all senior OPD personnel and Regional Directors in management training with an accredited outside provider. Make personnel changes as necessary.

3. Remove OPD involvement from the hiring and firing of support staff in regional offices and from approval of expert and investigator expenses unless such expenses would result in a Region exceeding its annual budget.
4. Establish uniform standards to be applied across regions for maximum attorney caseloads and identification of conflicts of interest.
5. Develop and implement a training program for new attorneys and for civil cases.
6. Empower Regional Directors and Managing Attorneys to administer and manage their offices, to conduct meaningful staff and attorney evaluations, and to supervise and oversee contract attorneys. Ensure that such supervision, management and oversight are actually being conducted.
7. Require objective and verifiable evidence of future compliance with the AU Report and other recommendations for change.