Judge Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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JOSEPH JEROME WILBUR, *et al.*,

Plaintiffs

v.

CITY OF MOUNT VERNON, *et al.*,

Defendants.

----------x

No. C11-1100RSL

STATEMENT OF INTEREST OF THE UNITED STATES

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
950 Pennsylvania Avenue, NW
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TABLE OF CONTENTS

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-2000

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
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STATEMENT OF INTEREST OF THE UNITED STATES

The United States files this Statement of Interest to assist the Court in answering the question of what remedies are appropriate and within the Court's powers should it find that the Cities of Mount Vernon and Burlington violate misdemeanor defendants' right to counsel. The United States did not participate in the trial in this case and takes no position on whether Plaintiffs should prevail on the merits. The United States files this SOI to provide expertise and a perspective that it may uniquely possess. If the Plaintiffs prevail, it is the position of the United States that the Court has discretion to enter injunctive relief aimed at the specific factors that have caused public defender services to fall short of Sixth Amendment guarantees, including the appointment of an independent monitor to assist the Court. The United States has found monitoring arrangements to be critically important in enforcing complex remedies to address systemic constitutional harms.

In discussing the remedies available to the Court in this Statement, the United States will address questions (1) and (3) of the Court's Order for Further Briefing, with particular focus on the role of an independent monitor. (Dkt. # 319.) To answer the Court's first question, the United States is unaware of any federal court appointing a monitor to oversee reforms of a public defense agency, but the Ninth Circuit has recognized a federal court's authority in this area under 42 U.S.C. § 1983. *Miranda v. Clark County, NV*, 319 F.3d 465 (9th Cir. 2003). The United States is aware of one case in which a federal court, through a Consent Order instituting reforms of a County public defender agency, received reports from the county regarding the progress of those reforms. *Stinson v. Fulton Cnty. Bd. of Comm'rs*, No. 1:94-CV-240-GET (N.D. Ga. May 21, 1999). However, the Court did not have the benefit of an independent monitor to assist it in assessing the implementation of the reforms.

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
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Washington, D.C. 20530
(202) 514-2000

Also, an independent monitor is currently monitoring systemic reform of a juvenile public defender system through an agreement between the United States and the Shelby County (TN) Juvenile Court ("Shelby County").

Finally, it is worth noting that but for removal to federal court by the Cities here, this matter would have proceeded in state court, and state court litigation over the crisis in indigent defense is not at all unusual. Those cases bear out the practicality—and, at times, the necessity—of court oversight in this area.

In answer to the Court's third question, a number of states have imposed "hard" caseload standards,[1] but the United States believes that, should any remedies be warranted, defense counsel's *workload* should be controlled to ensure quality representation. "Workload," as defined by the *ABA Ten Principles of a Public Defense Delivery System,* takes into account not only a defender's numerical caseload, but also factors like the complexity of defenders' cases, their skills and experience, and the resources available to them. Workload controls may require flexibility to accommodate local conditions. Due to this complexity, an independent monitor would provide the Court with indispensible support in ensuring that the remedial purpose of workload controls is achieved.

The Washington State Bar's Standards for Indigent Defense, incorporated by its Supreme Court in its criminal rules, considers the importance of workloads in evaluating the efficacy of defender services. Washington's move to implement workload controls is a welcome recognition of its obligation under *Gideon*. The United States recognizes that these standards are the result of work commenced at least since 2003 by the Washington State Bar Association's Blue Ribbon Commission on Criminal Defense and supported by the State Legislature, the

[1] For example, Arizona, Georgia, and New Hampshire have specific caseload limitations. A number of states have "soft" caseload caps by using a weighted system. See attached Exhibit 1 for a description of select jurisdictions.

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-2000

Washington Defender Association, and the Washington Association of Prosecuting Attorneys, among others. These workload controls are scheduled to go into effect October 2013.[2]

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in federal court. The United States has an interest in ensuring that all jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon v. Wainwright*, 372 U.S. 335 (1963). The United States can enforce the right to counsel in juvenile delinquency proceedings pursuant the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (Section 14141). As noted above, the United States is currently enforcing Section 14141's juvenile justice provision through a comprehensive out-of-court settlement with Shelby County.[3] An essential piece of the agreement, which is subject to independent monitoring, is the establishment of a juvenile public defender system with "reasonable workloads" and "sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters." *Id.* at 14-15.

As the Attorney General recently proclaimed, "It's time to reclaim Gideon's petition – and resolve to confront the obstacles facing indigent defense providers."[4] In March 2010, the Attorney General launched the Access to Justice Initiative to address the access-to-justice crisis. Indigent defense reform is a critical piece of the office's work, and the Initiative provides a

[2] The United States does not by this mean to endorse or detract from the efforts of these entities.
[3] Mem. of Agreement Regarding the Juvenile Court of Memphis and Shelby Counties, Tennessee (2012), *available at* http://www.justice.gov/crt/about/spl/findsettle.php.
[4] Attorney General Eric Holder Speaks at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright*, March 15, 2013, *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html.

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-2000

centralized focus for carrying out the Department's commitment to improving indigent defense.[5] The Department has also sought to address this crisis through a number of grant programs.[6] The most recent is a 2012 $1.2 million grant program, *Answering Gideon's Call: Strengthening Indigent Defense Through Implementing the ABA Ten Principles of a Public Defense Delivery System* administered by the Bureau of Justice Assistance.[7] In light of the United States' interest in ensuring that any constitutional deficiencies the Court may find are adequately remedied, the United States files this Statement of Interest on the availability of injunctive relief.

BACKGROUND

The Plaintiffs' claims of deprivations of the right to counsel, if meritorious, are part of a crisis impacting public defender services nationwide. Fifty years ago, the Supreme Court held that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344. And yet, as the Attorney General recently noted, "despite the undeniable progress our nation has witnessed over the last half-century—America's indigent defense systems continue to exist in a state of crisis," and "in some places—do little more than process people in and out of our courts."[8]

Our national difficulty to meet the obligations recognized in *Gideon* is well documented.[9] *See*, *e.g.* ABA Standing Committee on Legal Aid and Indigent Defendants Report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, (December 2004). Despite

[5] The office works with federal agencies, and state, local, and tribal justice system stakeholders to increase access to counsel, highlight best practices, and improve the justice delivery systems that serve people who are unable to afford lawyers. More information is available at http://www.justice.gov/atj/.
[6] *See* Government Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding* 11-14 (May 2012), *available at* http://www.justice.gov/atj/idp/.
[7] Grants have been awarded to agencies in Texas, Delaware, Massachusetts, and Michigan.
[8] Attorney General Eric Holder Speaks at the American Film Institute's Screening of *Gideon's Army*, June 21, 2013, *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130621.html.
[9] In March 2013, the Yale Law Journal held a symposium on the challenges of meeting Gideon's promise and published resulting articles in its most recent issue. *See* 122 Yale L.J. __ (June 2013).

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
950 Pennsylvania Avenue, NW
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(202) 514-2000

long recognition that "the proper performance of the defense function is . . . as vital to the health of the system as the performance of the prosecuting and adjudicatory functions," Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, *Final Report* 11 (1963), public defense agencies nationwide remain at a staggering disadvantage when it comes to resources. Steven W. Perry & Duren Banks, U.S. Bureau of Justice Statistics, *Prosecutors in State Courts, 2007 Statistical Table*s 1 (2012) (noting that prosecution offices nationwide receive about 2.5 times the funding that defense offices receive); National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 61-64 (2009) (collecting examples of funding disparities).

Due to this lack of resources, states and localities across the country face a crisis in indigent defense. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. Rev. L. & Soc. Change 427 (2009) (describing crises nationwide). In many states, remedying the crisis in indigent defense has required court intervention. *E.g., State v. Citizen*, 898 So.2d 325 (La. 2005); *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010); *Missouri Public Defender Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012). The crisis in indigent defense extends to misdemeanor cases where many waive their right to counsel and end up unnecessarily imprisoned. NACDL, *Minor Crimes, Massive Waste* 21 (2009).[10]

DISCUSSION

It is the position of the United States that it would be lawful and appropriate for the Court to enter injunctive relief if this litigation reveals systemic constitutional deficiencies in the Defendants' provision of public defender services. Indeed, the concept of federal oversight to address the crisis in defender services has gained momentum in recent years. *See, e.g,. Gideon's*

[10] The report is available at http://www.opensocietyfoundations.org/reports/minor-crimes-massivewaste.

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
950 Pennsylvania Avenue, NW
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(202) 514-2000

Broken Promise, *supra*, at 41-42 (recommending federal funding); Drinan, *The Third Generation of Indigent Defense Litigation*, *supra* (arguing federal judges are well suited to address systemic Sixth Amendment claims); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 Harv. L. Rev. 2062 (2000) (advocating systemic litigation). (Again, the United States takes no position on the merits of the underlying suit.)

I. The Court Has Broad Authority to Enter Injunctive Relief, Including the Appointment of an Independent Monitor, if It Finds a Deprivation of the Right to Counsel.

If Plaintiffs prevail on the merits of their claims, or as part of a consent decree, this Court has broad authority to order injunctive relief that is adequate to remedy any identified constitutional violations within the Cities' defender systems. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *see also Thomas v. County of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992) (noting that courts have power to issue "broad injunctive relief" where there exist specific findings of a "persistent pattern of [police] misconduct"). When crafting injunctive relief that requires state officials to alter the manner in which they execute their core functions, a court must be mindful of federalism concerns and avoid unnecessarily intrusive remedies. *Labor/Community Strategy Center v. Los Angeles County*, 263 F.3d 1041, 1050 (9th Cir. 2001). Courts have long recognized—across a wide range of institutional settings—that equity often requires the implementation of injunctive relief to correct unconstitutional conduct, even where that relief relates to a state's administrative practices. *See, e.g.*, *Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding injunctive relief affecting State's administration of prisons); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (upholding injunctive relief affecting State's administration of schools). Indeed, while courts "must be sensitive to the State's interest[s]," courts "nevertheless

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
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must not shrink from their obligation to 'enforce the constitutional rights of all persons.'" *Plata*, 131 S. Ct. at 1928 (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)).

In crafting injunctive relief, the authority of the Court to appoint a monitor is well established. *Eldridge v. Carpenters 46*, 94 F.3d 1366 (9th Cir. 1996) (holding that district court's failure to appoint a monitor was an abuse of discretion where defendant insisted on retaining a hiring practice already held to be unlawfully discriminatory); *Nat'l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 543 (9th Cir. 1987); *Madrid v. Gomez*, 889 F. Supp. 1146, 1282 (N.D. Cal. 1995) (holding that the "assistance of a Special Master is clearly appropriate" because "[d]eveloping a comprehensive remedy in this case will be a complex undertaking involving issues of a technical and highly charged nature").

II. Appointment of an Independent Monitor Is Critical to Implementing Complex Remedies to Address Systemic Constitutional Violations.

In the experience of the United States, appointing a monitor can provide substantial assistance to courts and parties and can reduce unnecessary delays and litigation over disputes regarding compliance. This is especially true when institutional reform can be expected to take a number of years. A monitor provides the independence and expertise necessary to conduct the objective, credible analysis upon which a court can rely to determine whether its order is being implemented, and that gives the parties and the community confidence in the reform process. A monitor will also save the Court's time.

In Grant County, Washington, an independent monitor was essential to implementing the court's injunction in a right-to-counsel case. *Best et al. v. Grant County*, No. 04-2-00189-0 (Kittitas Cty. Sup. Ct., filed Dec. 21, 2004). There, the monitor assisted the court and parties for almost six years by conducting site visits, assessing caseloads, and completing quarterly reports on the County's compliance with court orders. We note that the monitor's term in Grant County

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
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Washington, D.C. 20530
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was limited from the outset to a defined period, and the monitor's final report noted work that still remained to be done.[11] In our experience, it is best to continue monitoring arrangements until the affected parties have demonstrated sustained compliance with the court's orders.

In 2009, the United States entered a Memorandum of Agreement with King County, Washington to reform the King County Correctional Facility. *United States v. King County, Washington*, No. 2:09-cv-00059 (W.D. Wash., filed Jan. 15, 2009). That successful reform process was assisted by an independent monitor. Other significant cases involving monitors include: *United States v. City of Pittsburgh*, No. 97-cv-354 (W.D. Pa., filed Feb. 26, 1997) (police; compliance reached in 1999); *United States v. Dallas County*, No. 3:07-cv-1559-N (N.D. Tex., filed Nov. 6, 2007) (jail); *United States v. Delaware*, No. 1-11-cv-591 (D. Del., filed Jun 6, 2011) (mental health system); *United States v. City of Seattle*, No. 12-cv-1282 (W.D. Wash., filed July 27, 2012)(police). In each of these cases, the independent monitor improved efficiency in implementation, decreased collateral litigation, and provided great assistance to the court.[12]

The selection of a monitor need not be a strictly top-down decision by the Court. The parties may agree on who should fill the role of the monitor, but if they cannot, the Court can order them to nominate monitor candidates for the Court's consideration. In addition, it should be noted that the cost of an independent monitor, however it is paid, should not reduce the funds available for indigent defense.

Finally, it should be noted that the appointment of an independent monitor can ensure public confidence in the reform process. With allegiance only to the Court and a duty to report its findings accurately and objectively, the monitor assures the public that the Cities will move

[11] The monitor's final report and two of its quarterly reports are attached as Exhibit 2.
[12] Summaries of those cases, relevant pleadings, and reports from the monitors can be found at http://www.justice.gov/crt/about/spl/findsettle.php.

forward in implementing the Court's order, and will not escape notice if they do not. Moreover, the Cities' progress towards implementing the Court's order will be more readily accepted by a broader segment of the public if that progress is affirmed by a monitor who is responsible for confirming each claim of compliance asserted by the Cities.

III. If the Court Finds Liability in this Case, its Remedy Should Include Workload Controls, Which Are Well-Suited to Implementation by an Independent Monitor.

Achieving systemic reform to ensure meaningful access to counsel is an important, but complex and time-consuming, undertaking. Any remedy imposed by the Court may require years of assessment to determine whether it is accomplishing its purpose, and the Court and the parties may need independent assistance to resolve concerns about compliance.

One source of complexity will be how the Court and parties assess whether public defenders are overburdened. In its Order for Further Briefing, the Court asked about "hard" caseload standards, which provide valuable, bright-line rules that define the outer boundaries of what may be reasonably expected of public defenders. *ABA Ten Principles, supra*. However, caseload limits alone cannot keep public defenders from being overworked into ineffectiveness; two additional protections are required. First, a public defender must have the authority to decline appointments over the caseload limit. Second, caseload limits are no replacement for a careful analysis of a public defender's *workload*, a concept that takes into account all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties. *See id*. Making an accurate assessment of a defender's workload requires observation, record collection and analysis, interviews with defenders and their supervisors, and so on, all of which must be performed quarterly or every six months over the course of several years to ensure that the Court's remedies

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
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are being properly implemented. The monitor can also assess whether, regardless of workload, defenders are carrying out other hallmarks of minimally effective representation, such as visiting clients, conducting investigations, performing legal research, and pursuing discovery. ABA Standing Committee on Legal Aid and Indigent Defendants, *Eight Guidelines of Public Defense Workloads* (August 2009). These kinds of detailed inquiries, carried out over sufficient time to ensure meaningful and long-lasting reform, are critical to assessing whether the Cities are truly honoring misdemeanor defendants' right to counsel, and they can be made most efficiently and reliably by an independent monitor. As shown in Exhibit 2, these are the kinds of inquires made by the independent monitor in the Grant County, Washington case. Also, should non-compliance be identified, early and objective detection by the monitor, as well as the identification of barriers to compliance, allow the parties to undertake corrective action.

An independent monitor may also obviate the need for the Court to dictate specific and rigid caseload requirements. In the Shelby County juvenile justice enforcement matter, for example, the County is required to establish a juvenile defender program that provides defense attorneys with reasonable workloads, appropriate administrative supports, training, and the resources to provide zealous and independent representation to their clients, but the agreement does not specify a numerical caseload limit. *See* Mem. of Agreement at 14-15.

CONCLUSION

Should the Court find for the Plaintiffs, it has broad powers to issue injunctive relief. That power includes the authority to appoint an independent monitor who would assist the Court's efforts to ensure that any remedies ordered are effective, efficiently implemented, and achieve the intended result.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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EXHIBIT 1 TO U.S. STATEMENT OF INTEREST

EXHIBIT 1: CASELOAD LIMITS IN VARIOUS STATES

ARIZONA	
Caseload maximums	Presumptive caseload limits based on National Legal Aid and Defender Association standards: • 150 felonies per year • 300 misdemeanors per year
Case refusal discretion	Not stated
Authority	*Arizona v. Smith*, 140 Ariz. 355 (1984); *Zarabia v. Bradshaw*, 185 Ariz. 1 (1995)
Comments	The presumptive limits function as hard caps in the counties with public defender offices, but not in counties with contract attorneys.

GEORGIA: Northern Judicial Circuit	
Caseload maximums	Director of Georgia Public Defender Standards Council cannot assign more cases to contract attorneys than: • 125 felony cases to attorneys with 5 or more years of experience • 75 felony cases to attorneys with fewer than 5 years of experience • 300 misdemeanor cases to attorneys who handle only misdemeanor cases
Case refusal discretion	Not stated
Authority	*Cantwell v. Crawford,* No. 09EV275M, Consent Order 6-7 (Elbert Cty. Sup. Ct. July 8, 2010)
Comments	None

MONTANA	
Caseload maximums	Montana has "soft caps" in the form of a case weight system to ensure that a public defender agency is not exceeding ethical caseload limits, and to ensure that resources are being properly distributed. The case weight system assigns daily case hours to each case when assigned and evenly distributes cases among attorneys to monitor how many cases

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
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	each attorney receives per month. When an attorney's monthly hours reach 125, the Regional Manager or Managing Attorney must meet with the staff attorney to discuss the attorney's caseload. Different types of offenses are given different case weight hours: • **Misdemeanors** range from 2.5 hours for fugitive/out of county warrants to 10 hours for misdemeanor sex crimes. Additional hours are added when jury trials occur, when the case is outside of the assigned region, if there are five or more charges in one case, and for those who practice in courts located outside of the city where their office is located. Hours are assigned based on the highest crime charged, with no hours assigned for the other charges. • **Felonies** range from 2.5 hours for fugitive/out of county warrants to 100 hours for homicides. Additional hours are added if there are three or more charges in the case, if the case is outside of the assigned region, when a jury trial occurs, and for those who practice in courts located outside of the city where their office is located. Hours are assigned based on the highest crime charged, and additional points may be added based upon the number of additional charges. • **Civil/Juveniles** range from 2.5 hours for involuntary commitments to 20 hours for dependent neglect. Additional hours are added if the case is outside of the assigned region, and for those who practice in courts located outside of the city where their office is located.
Case refusal discretion	When a public defender faces an excessive workload, the supervising attorney shall consider doing any of the following: • discontinue assigning cases to the public defender for a specified time; • discontinue assigning specific kinds of cases to the public defender for a specified time; • assign other public defenders to assist on particular cases; • assign extra staff or an investigator to assist on particular cases; • reassign particular cases; and/or • negotiate time off work for the public defender.
Authority	Statute authorizing establishment of statewide standards for acceptable caseloads and workload monitoring protocols to ensure that public defender workloads are manageable:

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 353-1077

	• Mont. Code Ann. § 47-1-105 (2011) Administrative policy for case refusal: • Mont. Admin. Pol'y Title 47, § 1-105 (2012)
Comments	The Public Defender Commission adopted OPD Policy Number 117, which states that a mission of the Office of the Public Defender is to ensure that no attorney doing public defender work—either as an employee or as a contract attorney—has a workload of such an amount that clients are not adequately represented and/or the attorney's well-being is jeopardized. The Policy also establishes that regional deputy public defenders and managing attorneys in each public defender office are responsible for managing attorney caseloads, sets out a procedure for monitoring caseloads, and requires the Chief Public Defender to report to the Commission any workload problems that arise. The Public Defender Commission, adopted on February 15, 2013, resolved that the Chief Public Defender is authorized to take any and all actions necessary to align caseloads with resources, including, but not limited to, taking all necessary and appropriate actions, in conjunction with and in consultation with judges and prosecutors, to limit acceptance of new case assignments, until OPD either receives additional resources to cover caseloads, or caseloads subside to a level that OPD can handle them with current resources, or some combination of both.

NEW HAMPSHIRE	
Caseload maximums	Full-time attorneys providing general felony, misdemeanor, and juvenile delinquency cases shall maintain a caseload of not more than 65 open and active cases. When attorney cases are a mixture of different types, the acknowledged maximums are as follows: • Felony maximum: 35 cases • Misdemeanor maximum: 35 cases • Juvenile delinquency maximum: 20 cases • Other cases: 15 cases The mix of cases totaling 65 for each attorney shall be determined by the Public Defender Program Executive Director, Director of Legal Services, and Managing Attorneys based upon the staff attorney's experience level.

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
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Case refusal discretion	The allocation of cases between the public defender program and assigned counsel shall be in accordance with a plan adopted by the public defender program and approved by the judicial council. The plan establishes caseload limits for defender attorneys in accordance with professional standards under the code of professional responsibility, and shall provide for appointment of assigned counsel only where maximum caseloads have been reached or public defender attorneys are otherwise unavailable. Once caseloads have been reasonably reduced, the public defender will resume intake of new cases.
Authority	Allocation of cases: N.H. Rev. Stat. § 604-B:6 Appointment of other counsel if and when a decision is made to close the intake of new cases: N.H. Rev. Stat. § 604-A:2 II.
Comments	Conflict cases are handled by private attorneys under contract. Their caseloads are limited by virtue of the fact that they contract to handle a certain number of "units" each year, and no one is awarded so many "units" that their caseload of indigent defense matters could or would become unmanageable. The conflict case administrator sends the contract attorneys their cases in an even rotation, ensuring that the contract attorneys do not acquire too many cases at any one time.

NEW YORK CITY	
Caseload maximums	Number of cases assigned per year per attorney shall not exceed: • 150 felony cases; • 400 misdemeanor cases; or • Proportional combination calculated at a ratio of 1 felony case to 2.66 misdemeanor cases Chief Administrator of Courts shall annually review attorney workloads and take action to promote compliance Rules are non-binding guidelines between 4/1/10 and 3/31/14, and will be made binding as of 4/1/14.
Case refusal discretion	Not stated
Authority	Rules at: Title 22 NYCRR Judiciary, Part 127.7; Part ZZ of Chapter 56 of the Laws of 2009 directed that such rules be promulgated.
Comments	None

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
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VIRGINIA	
Caseload maximums	No hard caps. The Virginia Indigent Defense Commission uses a "soft number" of 335 cases per attorney per year (mixed misdemeanors and felonies).
Case refusal discretion	Chief public defenders have statutory authority to turn down cases when they believe their office caseload is too high.
Authority	VA Code § 19.2-163.4 provides authority for defenders to turn away conflict cases.
Comments	None

U.S. Department of Justice
Civil Rights Division, Special Litigation Section
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EXHIBIT 2 TO U.S. STATEMENT OF INTEREST

EXHIBIT 2(A) TO U.S. STATEMENT OF INTEREST

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[VIA EMAIL ONLY]

RE: Best, et al. v. Grant County

Dear Counsel,

It is my understanding that my tenure as Settlement Monitor ends at the conclusion of the "Monitoring Period" on June 30, 2012. Accordingly, I am writing to provide a brief assessment as to the current state of Grant County public defense as well as recommendations for the future.

During the last five years, Grant County's public defense program has improved significantly. Though performance varies among attorneys, the overall quality of representation provided by public defenders in Grant County is far better than it was when I started serving as Settlement Monitor in 2007. The trial rate has increased dramatically. Motions and expert requests are filed with much greater frequency than before. Defenders are more likely to make timely jail visits.

While Grant County has made substantial progress in establishing a quality public defense program, there remains much work to be done. Going forward, I recommend making the following areas/issues priorities:

1. **Support staff –** Grant County has never provided its in-house defenders with appropriate paralegal/secretarial support. GCPD has been operating without an office manager for 6 months. The only other permanent staff member is Katy Montemayor who serves as receptionist and administrative assistant. Her work is almost exclusively administrative and does not directly support the work of

individual defenders. As a result, the in-house defenders have no paralegal/secretarial support. Director Stephen Kozer has emphasized the need for additional support staff but thus far has not received hiring authorization. Grant County needs to immediately hire an office manager and at least one paralegal or secretary to support the defenders

2. **Mental health cases** – The failure to promptly seek experts in mental health cases has been a chronic problem in Grant County. Mentally ill defendants frequently find their cases in limbo, with the speedy trial period stayed, no defense expert, no investigation, and a lengthy waiting list for Eastern State evaluations. Although required to do so by the Amended Settlement Agreement, Grant County has not yet adopted a policy requiring its defenders to seek an expert on cases in which defendants are evaluated by Eastern State Hospital. Similarly, Grant County has yet to provide its defenders with forms to be used in requesting experts.

3. **Investigation** – Attorneys continue to be inconsistent in their use of investigators. Director Stephen Kozer has put appropriate policies in place but more active monitoring and supervision is needed in this area.

While there are certainly other areas for improvement, these three have the potential to make the greatest practical difference for defenders and their clients.

The long-term success of Grant County's public defense program will depend primarily on its ability to recruit and retain quality public defenders. Recruiting has been an ongoing problem as Grant County lacks a significant pool of local criminal defense attorneys from which to draw. Attorneys who apply from elsewhere often lack the necessary experience or are poor candidates for a variety other reasons. Obvious solutions to this problem are to pay more, advertise openings more widely, and recruit more actively.

On an institutional level, I recommend that Grant County expand its in-house program to include at least a few district court positions. In most jurisdictions, public defenders start with misdemeanors where they learn the basics of criminal defense work and gain trial experience. Those defenders are then promoted to felony work when positions become available. A group of in-house misdemeanor defenders would provide Grant County with a pool of qualified applicants who are known quantities and have not already learned bad habits and/or been unsuccessful in other jurisdictions. Moreover, recruiting for a misdemeanor division should be much easier as a law degree is the only experience required and new law graduates may be much more willing and able to move to Grant County for work.

If Grant County does elect to expand GCPD to include district court, it is essential that Director Stephen Kozer do absolutely no felony casework or coverage. Training new defenders requires intense supervision. For at least the first few months of any new attorney's tenure, Mr. Kozer would need to regularly accompany the attorney to court appearances and consult in the preparation of all cases. Handling even a small felony caseload or providing coverage for other attorneys in Grant County Superior Court would be incompatible with these responsibilities.

Although my term is ending, I remain invested in the success of Grant County's public defense program. If I can be of any assistance in the future, please do not hesitate to contact me.

Finally, I would appreciate any guidance you may have as to the disposition of my files. Normally, such files would be the property of the client, but in this case, I do not have a client in the traditional sense. If either party wishes to retain the files, I am happy to make them available to you. Most of my file materials consist of documents copied from Grant County Superior Court files which I suspect would be of little interest. I also have some handwritten notes from observing court, interviewing investigator candidates, etc. Finally, I have electronic files that include my reports, correspondence, spreadsheets, and the like. If you would like to take possession of any or all of my file materials, please let me know by July 31, 2012. If I do not hear from either party, I plan to dispose of the file materials as I see no ongoing need for them.

Thank you for the opportunity to serve as Settlement Monitor. It has been a very challenging but also rewarding experience.

Sincerely,

Tito Rodriguez
Attorney at Law

Cc: [via email only]
Donald Scaramastra
Theresa Simpson
David Taylor
Breena Roos
Joe Morrison
Sarah Dunne
Jerry Moberg
Stephen Kozer
Susan Oglebay
BOCC
June Strickler

EXHIBIT 2(B) TO U.S. STATEMENT OF INTEREST

Best, et al. v. Grant County

Monitor's Report

First Quarter, 2011

April 23, 2011

Submitted by Francisco Rodriguez, Settlement Monitor

Monitor's Activities

During the first quarter, I conducted monthly site visits to Grant County on the following dates:

- January 10-11, 2011
- February 22-23, 2011
- March 21-22, 2011

While in Grant County, I observed court proceedings, reviewed court files, and met with public defenders.

Between site visits, I have periodic contact with the Supervising Attorney, individual defenders, investigators, and counsel for both parties. I also regularly review electronic court dockets to track case dispositions, motions practice, and the use of experts, as well as to identify cases that warrant further review.

Access to Information

The Settlement Agreement provides that the Monitor is entitled to broad access to information concerning the Grant County public defense system. During the first quarter, I continued to experience delays in receiving basic monthly report information from the Grant County Department of Public Defense (GCPD). The delays were even lengthier than last quarter. For example, Grant County did not provide some monthly report information for January until April 15 despite multiple requests for the information. In addition, Supervisor Ray Gonzales has been slow in responding to requests for information. In some instances, I had to make repeated requests over several weeks before receiving any response from Mr. Gonzales.

Until last quarter, significant delays in receiving basic data regarding the public defense program had been rare. Supervising Attorney Ray Gonzales attributes this quarter's delays on Grant County's implementation of the DAMION case management system. He reports that the new system has "bugs" and "anomalies" that have prevented his office

from fully adopting the software and interfered with his ability to produce monthly report information.

With respect to court documents, Katy Montemayor, GCPD's legal assistant, continues to be very diligent and prompt in responding to my requests. Similarly, the staff in the Grant County Superior Court Clerk's Office is always exceptionally helpful in my review of court files.

Compliance Issues

As noted in my last report, I asked the parties to submit argument on the question of whether an extension of the Settlement Agreement was warranted. I originally asked the parties to respond by February 16, but the parties requested that I extend that deadline as they attempted to negotiate an agreed resolution. On March 2, Plaintiffs' counsel submitted a lengthy letter urging that I not only extend the term of the Settlement Agreement by one year but also find Grant County in violation for 2010. Plaintiffs' letter detailed a variety of violations of the Agreement and proposed a number of "cures" for these violations including the termination of Supervising Attorney Ray Gonzales.

The original deadline for resolution of the dispute regarding 2010 compliance was March 16, but the parties have requested several extensions to facilitate negotiations. The current deadline for both resolution of the pending dispute and my decision regarding extension of the Settlement Agreement is April 29. I understand that the parties are very close to reaching an agreement to resolve all outstanding issues.

Attorney Staffing

The first quarter of 2011 was a period of transition for Grant County public defense. Defender John Doherty departed at the end of January. Dean Terrillion, who left GCPD in early December, returned to finish a few remaining cases early in the quarter. Julie Trejo has also resigned, but her departure date has now been extended to May 31, 2011. Supervising Attorney Ray Gonzales reports that he stopped assigning Ms. Trejo new cases in early April.

Two new attorneys joined GCPD during the first quarter. Stephen Kozer started work on January 3, 2011. Mr. Kozer has 27 years of criminal experience as a public defender, private criminal defense attorney, and prosecutor. He most recently worked at the Yakima Office of Assigned Counsel. Christian Cabrera began work at GCPD on March 1, 2011. Mr. Cabrera has approximately one year of criminal experience handling misdemeanors for the Yakima Department of Assigned Counsel.

Grant County's hiring of Mr. Cabrera to handle criminal cases covered by the Settlement Agreement is problematic as he lacks the qualifications required to handle felony cases under the WSBA Standards for Indigent Defense Services. Those standards require that any attorney assigned to handle felony cases, including probation violations, must have a

minimum of one year of criminal experience and have completed at least two jury trials. Mr. Cabrera has completed just one jury trial and is thus not qualified under the WSBA Standards to work on any criminal cases covered by the Settlement Agreement.[1]

Supervising Attorney Ray Gonzales apparently failed to evaluate Mr. Cabrera's qualifications under the WSBA Standards when making his hiring decision and was not aware of the issue until I raised it with him recently.[2] As a result, Mr. Cabrera has already been assigned to cases for which he is not qualified in apparent violation of the Settlement Agreement. More problematic, however, is the fact that Mr. Gonzales now has two full-time attorneys in his office who are limited to handling child support cases, a caseload that last year amounted to about .33 FTE. I have written to the parties urging them to address this issue right away.

Grant County has yet to hire a replacement for Julie Trejo but has advertised the position. Unlike previous positions, the notice for this contract defender position was posted through both the Washington Defender Association (WDA) and the Washington Association of Criminal Defense Lawyers (WACDL). As of mid-April, Supervising Attorney Ray Gonzales was still interviewing potential candidates.

Based upon the cases assigned during the first quarter, Grant County will receive approximately 600 more criminal case assignments this year. With current staffing, Grant County has a remaining caseload capacity of 566 case credits, a shortfall of 34 credits. This shortfall will worsen if Grant County does not hire Ms. Trejo's replacement right away. The primary reason for the projected deficit is the inability of Grant County to assign criminal cases to Ms. Maggard or Mr. Cabrera. If the parties agree that either or both attorneys are eligible to handle criminal cases covered by the Settlement Agreement, Grant County will have a surplus capacity of approximately 115 to 265 case credits (0.75 to 1.75 FTE).

Caseloads

The Settlement Agreement establishes an annual caseload limit of 150 case equivalents for full-time defenders. In addition, Grant County has adopted monthly and quarterly caseload limits to ensure that case assignments are spread relatively evenly throughout the year.

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[1] I have not had the opportunity to review Mr. Cabrera's work or even meet with him, so I do not intend to make any comment on his knowledge or skills as an attorney.

[2] Mr. Gonzales's failure to determine whether Mr. Cabrera was even eligible to handle felonies is troubling. Presumably, trial experience would be an important area of inquiry in the interview process for a position in the felony unit of a public defender office. Moreover, Mr. Gonzales is well aware that the Settlement Agreement requires that all attorneys meet the WSBA Standards. We have had numerous discussions about those standards as well as the Settlement Agreement's requirement of compliance with those standards. Indeed, this is precisely the same error Mr. Gonzales made when he hired Kacie Maggard mistakenly believing she would be eligible to handle criminal cases under the Settlement Agreement.

Overall case assignments during the first quarter of 2011 were virtually identical to the first quarter of 2010. Individual attorney caseloads were higher, however, because Grant County has one fewer public defender on staff this year. The first quarter total caseload for each defender is listed in the table below:

ATTORNEY	1Q TOTAL
Kentner	37.33
Trejo	37.33
Oglebay	36.66
Kozer	36.33
Perry	36.33
Maggard	22.00
Cabrera	7.66
Doherty	1.33

Although the totals for all defenders were within Grant County's monthly and quarterly limits, the projected annual caseloads for the five public defenders eligible for criminal cases assignments are very close to the annual maximum, leaving virtually no flexibility for upward fluctuations in case assignments. Moreover, had those defenders been required to absorb the criminal cases erroneously assigned to Mr. Cabrera, all would have projected annual caseloads exceeding the yearly limit.

As noted in prior reports, the above caseload figures are likely inaccurate as Grant County continues to omit extraordinary credits from its caseload totals. Supervising Attorney Ray Gonzales reported zero extraordinary credits earned during the first quarter. He has not reported a single extraordinary case credit earned in the last 8 months. Because Mr. Gonzales makes no effort to track extraordinary cases, it is difficult to estimate the magnitude of this problem.

Caseload Management/Transfers.

Grant County has not established any policy or procedure to facilitate the transfer of caseloads when public defenders leave the program. Although I have encouraged Supervising Attorney Ray Gonzales to develop a formal framework for addressing caseload transfers, he has thus far declined to do so. The recent spate of resignations has highlighted the problems with Mr. Gonzales's informal approach to this issue.

In response to past inquiries regarding the transfer process, Mr. Gonzales had indicated that departing attorneys were providing their replacements in each case with a detailed case status report, though perhaps in a different format than I had suggested. I have been requesting samples of these documents for months and only recently learned that no such documents exist. Instead, Mr. Gonzales finally produced a case list for each attorney. These lists contained very little information other than the next court date (if that).

The case transfer process in Grant County does not adequately protect the interests of indigent defendants. When taking over a felony case, the new attorney needs to know the status of discovery, investigation, motions, and plea negotiations. The substituting attorney should not be forced to essentially start over or attempt to reconstruct the case history based upon documents in the file.

The recent transfer of John Doherty's caseload illustrates the problems caused by the lack of any formal transfer protocol. Almost all of Mr. Doherty's cases were transferred to Stephen Kozer. In moving for a continuance on an Attempted Murder 1° case, Mr. Kozer recently explained that he "had to 'jump' into the middle of most of [Mr. Doherty's] cases, sorting out the work that needs to be done" and that he needed a continuance in order to provide effective assistance of counsel. Mr. Kozer went on to explain that "I have been in the office early in the morning (5am) and have spent every weekend Saturday and Sunday . . . working on cases." Although taking over another attorney's caseload is always challenging, adequate supervision can dramatically ease the transition. Handing a new attorney a large stack of felony case files and wishing him or her good luck is not an appropriate way to transfer a caseload.

I am also concerned about Grant County's caseload management for new attorneys. Grant County does not award incoming attorneys any caseload credit for transferred cases when they assume a departing defender's caseload. This is not an unreasonable practice assuming care is taken to ensure that the new attorney's workload is manageable. If no credit is to be awarded for such cases, the supervising attorney should (1) require that the prior attorney fully work up the cases, file briefs, request investigation, etc., (2) review the entire caseload and assign some cases to other attorneys in order to lighten the transfer burden, and (3) not assign the recently hired attorney a full load of new cases until he/she is up to speed on the inherited caseload. Unfortunately, Supervising Attorney Ray Gonzales has not been taking these or other similar steps to manage workloads.

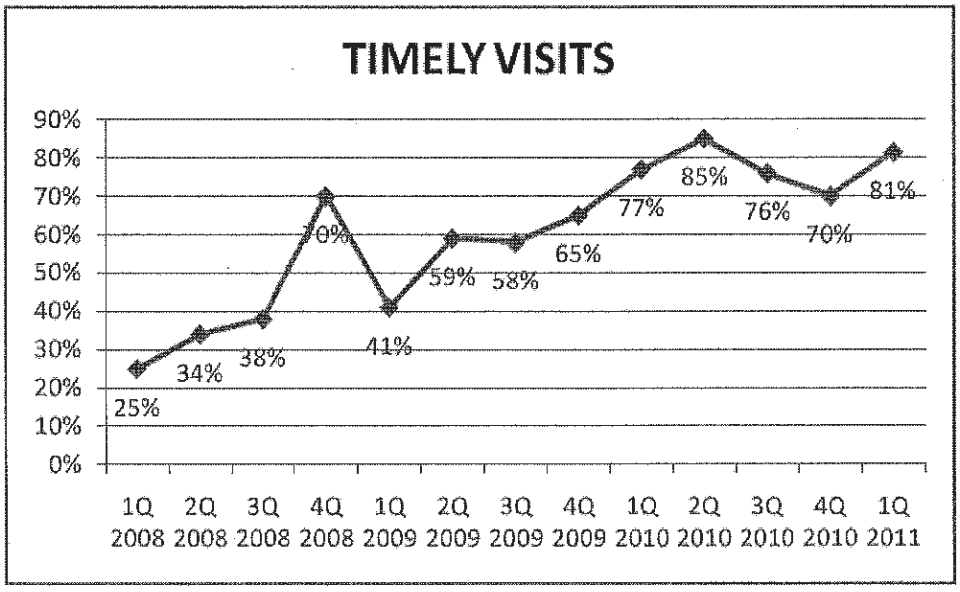
In the declaration mentioned above, defender Stephen Kozer wrote that he had been "reassigned from Mr. Doherty's caseload approximately 28 A and B felonies . . . ." In addition, Mr. Kozer has received a full load of new case assignments in each of his first three months. The quarterly caseload maximum for Grant County's public defenders is 40 case equivalents. Supervising Attorney Ray Gonzales assigned Mr. Kozer 67.33 case equivalents in the first quarter, 36.33 in new assignments and 31 in transferred cases. While Mr. Kozer seems highly capable and extremely diligent, the workload he has been asked to assume is overwhelming. It does not appear that Supervising Attorney Ray Gonzales has offered Mr. Kozer any relief or accommodation to account for the large volume of serious cases he inherited.

Jail Visits

Grant County requires its public defenders to visit all in-custody clients prior to arraignment. This requirement is memorialized in a formal written policy and subject to monthly monitoring by the Supervising Attorney.

For the first quarter, I reviewed 70 in-custody felony case assignments, cross referencing case assignment data with jail visitation logs, jail inmate rosters, and court dockets to determine whether the assigned lawyers visited their clients prior to arraignment. In some cases, I treated the visit as timely even though the visit occurred shortly after arraignment because the case had been assigned on or after the arraignment date.

Overall, I found the rate of timely jail visits for the first quarter to be 81.4%, the second best quarterly performance recorded in the last three years. Although the overall rate of timely visits has greatly improved over the last several years, the rate of timely visitation remains inconsistent and below what it should be. This quarter Grant County exceeded 80% compliance for only the second time in more than three years:



Individually, public defender performance this quarter was more consistent than in past quarters:

ATTORNEY	% TIMELY
Kentner	100.0%
Perry	94.7%
Oglebay	85.7%
Kozer	80.0%
Trejo	53.3%

Bob Kentner again visited 100% of his clients in a timely fashion. Mr. Kentner has now maintained a perfect rate of timely visits for the last year. John Perry also had a high rate of timely visits this quarter, visiting 18 of his 19 in-custody clients as required (94.7 %). Susan Oglebay (85.7%) also made timely visits to all but one of her jailed clients.

Stephen Kozer's visitation rate (80%) was somewhat lower, but that is certainly understandable given his workload. In addition to taking over Mr. Doherty's caseload and receiving a full load of new cases, Mr. Kozer also received the highest number of in-custody felony case assignments this quarter at 20.

Julie Trejo had a much lower rate of timely visits than her colleagues this quarter at 53.3%. Jail visitation has always been a weakness for Ms. Trejo due in part to her commute from Spokane. Setting aside Ms. Trejo's visits, the overall rate of timely visits for the other defenders as a group was 89.1%.

I am optimistic that in the near future, Grant County's public defenders will finally achieve and maintain an overall rate of timely visitation of 90 to 100%. Defenders Kentner, Perry, and Oglebay have already demonstrated their commitment to timely jail visits. Although Mr. Kozer's rate of timely visits this quarter was not as high as it should be, he appears to be extremely diligent, and I anticipate that he too will consistently visit his jailed clients as required. If Grant County's next attorney hire is similarly committed to complying with Grant County's jail visitation policy, Grant County should easily attain a rate of timely jail visits that exceeds 90%.

In addition to the timeliness of initial visits, I also reviewed the total time each defender spent visiting clients at the jail. Stephen Kozer spent substantially more time visiting his in-custody clients during the first quarter than the other defenders:

ATTORNEY	TOTAL HOURS
Kozer	56
Kentner	42
Perry	26
Trejo	16
Oglebay	11
Maggard	5
Cabrera	3

Bob Kentner also spent a great deal of time consulting with his jailed clients. Ms. Oglebay and Ms. Trejo spent less time in the jail visiting their clients than their peers. Ms. Oglebay has only recently started receiving new felony assignments, however, having handled the probation violation calendar for the last year or so. Kacie Maggard handles child support cases, and Christian Cabrera has taken over the probation violation calendar, so their workloads inherently involve fewer jail visits.

The outlook for jail visitation at this point is quite positive due almost entirely to the personnel currently in place. Past experience demonstrates, however, that Grant County cannot rely on always having a highly diligent, self-motivated staff of public defenders. Accordingly, Grant County needs to adopt its own system of monitoring jail visits so that it has a mechanism in place to identify and correct future problems in this area. The current system of transcribing jail sign-in logs into spreadsheets and cross-referencing them with case assignment records is very time-consuming and unlikely to continue after

the Settlement Agreement ends. I have recommended that Supervising Attorney Ray Gonzales explore a simpler and less labor intensive approach to monitoring jail visits, but he has yet to take any action to address the issue despite repeated promises to do so.

Client Complaints

Grant County maintains a toll-free telephone line for client complaints. All calls to the complaint line are logged, and substantive complaints are referred to Supervising Attorney Ray Gonzales for follow-up as appropriate. Most calls to the complaint line are from inmates at the Grant County Jail. In addition to using the complaint line, clients and family members sometimes contact Supervising Attorney Ray Gonzales directly with complaints.

Grant County's posted notices within the jail dormitories seem to be effective in informing jailed defendants how to make a complaint, but Grant County has yet to implement an effective complaint system for out-of-custody clients. Supervising Attorney Ray Gonzales has delegated responsibility for informing these clients of the complaint procedure to the public defenders. The defenders are asked to provide written notice of the complaint procedure to their clients at the time of arraignment. In practice, however, the public defenders rarely distribute the complaint notice to their clients. During my three site visits this quarter, I did not observe a single defender distribute the notice. I have advised Supervising Attorney Ray Gonzales that the current system does not comply with Grant County County's obligation under the Settlement Agreement to "inform[] all indigent criminal defendants of the right to make complaints regarding the quality of their public defense." Based upon our discussions of this issue and his own observations of the problem, Mr. Gonzales agreed that his office would mail a notice to each defendant with information about how to make a complaint along with the name and contact information of the assigned attorney. Months later, however, Mr. Gonzales has yet to institute this or any other procedure that complies with the Settlement Agreement.

During the first quarter, Grant County logged approximately 22 calls to the complaint line from 14 different clients:

ATTORNEY	CALLS
Trejo	9
Perry	4
Kentner	3
Billingsley	2
Doherty	2
Oglebay	1
Kozer	1

Although nine calls came from Ms. Trejo's clients, none of those calls were concerning. Five were from the same defendant who was apparently anxious about the resolution of his case. Ms. Trejo visited him eight times over the course of a month and was able to

resolve his case with a misdemeanor plea. The other callers made inquiries or left messages unrelated to the quality of their representation.

Most of the calls from clients of the other current defenders did not involve substantive complaints about their public defenders. One of Bob Kentner's clients complained about a lack of visitation, but the jail sign-in logs show that Mr. Kentner had visited him relatively recently, and Mr. Kentner visited him again the day of his call. A client of John Perry called to complain about not being released as expected due to a DOC hold, and Mr. Perry promptly obtained a new release order for the client.

Calls from two clients of defenders no longer working for Grant County were of greater concern, but as those attorneys are no longer with Grant County, I see no need to address them further at this time.

The relatively small number of complaints documented in Grant County's reports is encouraging, but I am concerned that these reports may not capture all of the complaints made against Grant County's public defenders. Some callers to the complaint line are apparently urged to submit their complaints using a jail "kite." These "kites" are not included in the complaint logs. Defendants who file repeated motions for new counsel sometimes do not appear on the complaint line report. Similarly, two individuals who contacted me to complain this quarter do not appear in the complaint log. It is surprising that individuals who seem rather aggressive in pursuing complaints against their public defenders never called the complaint line nor complained directly to the Supervising Attorney.

Supervising Attorney Ray Gonzales's most recent report noted that he had had contact with three clients who were "not complaining but wished to have their concerns heard." In response to my request for clarification, Mr. Gonzales reported that one of these clients was "concerned about the progress of his case and whether his counsel was properly prepared to go to trial." At one point, the client's calls to the GCPD office had become so frequent that Mr. Gonzales directed the client to call no more than twice per week. When I reviewed the docket and portions of the court file for this defendant's case, I found that he had filed a request for new counsel containing very specific allegations against his assigned attorney. I also learned that Mr. Gonzales was present and addressed the court in connection with at least one of the defendant's requests for new counsel. At that hearing, the clerk's minutes reflect discussion of a lawsuit the defendant had filed over the handling of his case. The fact that this client's complaints appear nowhere in Grant County's complaint logs and that the only reference to his complaints in GCPD records is a vague, passing reference to a client who wished to have his "concerns heard" is troubling.

Investigator Staffing/Caseloads

Grant County has five approved public defense investigators: Ellyn Berg, Karl Calhoun, Taylor Kindred, Jeff Wade, and Jason Dowd. Ms. Berg is on staff with GCPD and works

exclusively with the in-house felony defenders. The other four investigators are private investigators who accept case assignments from Grant County. They are assigned adult felony cases with the contract defenders as well as other public defense cases in juvenile and district court. Jeff Wade and Jason Dowd were approved on a trial basis during the first quarter and added to Grant County's investigator panel.

During the first quarter, Grant County's defenders requested investigation in 54 adult felony cases. As in prior quarters, Ms. Berg received the highest number of adult felony assignments:

INV	1Q CASES
Berg	22
Calhoun	19
Kindred	8
Wade	6
Dowd	2

Mr. Calhoun and Mr. Kindred also received 4 juvenile case assignments each this quarter. It appears that Mr. Calhoun is receiving a disproportionate share of the case assignments. When juvenile cases are included, his total case assignments are higher than those of full-time in-house investigator Ellyn Berg. Supervising Attorney Ray Gonzales should carefully monitor Mr. Calhoun's workload to ensure he does not take on too many cases. Mr. Gonzales should also consider distributing case assignments more evenly.

Each quarter, I contact the public defenders to request feedback on the investigators, but I received little response this quarter. The in-house attorneys have always been very complimentary regarding Ms. Berg's work, and I again received positive feedback about her.

Investigation Rates

As noted above, Grant County's full-time felony defenders requested investigation in a total of 54 cases during the first quarter. The individual totals for the public defenders are listed in the table below:

ATTORNEY	INV REQ
Kentner	22
Perry	15
Trejo	7
Oglebay	6
Kozer	4

Bob Kentner again submitted the most investigation requests followed by John Perry. They have consistently been the attorneys most likely to investigate their cases.

The overall rate of investigation in Grant County at the end of first quarter was 39.1%. This rate is slightly higher than the overall rates for the last several years. Individual investigation rates continue to vary widely:

ATTORNEY	% INV
Oglebay	78.6%
Kentner	64.8%
Perry	43.1%
Trejo	18.7%
Kozer	11.4%

Defenders Susan Oglebay, Bob Kentner, and John Perry seem to be investigating their cases appropriately. Julie Trejo's investigation rate is low, and she had not submitted any investigation requests this quarter until late March. Stephen Kozer's investigation rate is also low. Moreover, he had two jury trials this quarter in which no investigation was requested. Given Mr. Kozer's workload this quarter, however, it would be premature to draw any conclusions regarding his use of investigators.

Supervising Attorney Ray Gonzales should monitor the use of investigators by Grant County's public defenders on a regular basis and take corrective action when defenders are not using investigation appropriately. Mr. Gonzales should ensure that trial cases are investigated and that the attorneys are making timely requests for investigation in all cases in which investigation is warranted.

Experts

The Settlement Agreement recognizes that defenders need to employ experts in some cases in order to be effective. The Settlement Agreement also specifically requires that expert requests be made *ex parte* and sealed in the court file.

Grant County defenders filed eight expert requests during the first quarter. Susan Oglebay and Stephen Kozer each made two requests. Bob Kentner, John Perry, Julie Trejo, and John Doherty each made one request. Mr. Kentner's request was the only one that was properly sealed in the court file. In three cases, no motion to seal was filed. In three others, the defenders filed a motion to seal that was granted, but confidential information remained unsealed due to drafting errors in the forms used.

Mental health experts are, by far, the most commonly used type of expert in Grant County. They are utilized to evaluate competency and potential mental defenses as well as to determine amenability for SSOSA. This quarter, four experts were retained to explore possible mental defenses, and two were hired to perform sexual deviancy evaluations for possible SSOSA requests.

I continue to recommend that Supervising Attorney Ray Gonzales provide additional training on the use of experts, particularly in mental health cases, and that he develop

forms and briefing to facilitate the process of requesting experts. Standardization of the process of requesting an expert through the creation of templates would allow Mr. Gonzales to finally resolve longstanding problems with unsuccessful efforts to seal expert requests. To date, however, Mr. Gonzales has demonstrated no inclination to address these issues.

Motions Practice

During the first quarter, Grant County public defenders filed substantive motions in 15 cases. Every defender filed motions in at least two cases. The totals for each public defender are listed below:

ATTORNEY	MOTIONS
Kozer	4
Trejo	4
Kentner	3
Oglebay	2
Perry	2

Julie Trejo continues to maintain an active motions practice, filing substantive motions in four cases this quarter. She won dismissal of a methamphetamine delivery case after challenging the validity of the warrant. Stephen Kozer also filed motions in four cases this quarter and appears to be quite aggressive in pursuing legal issues. In the four cases in which he filed motions, I found nine separate substantive briefs raising a wide variety of legal issues.

All of the public defenders currently handling adult felonies in Grant County are quite capable of identifying basic legal issues in their cases and appear to have been diligent in raising those issues this quarter.

Trials

The trial rate in Grant County continues to be a strength for its public defense program. Grant County's public defenders tried eight cases during the first quarter:

ATTORNEY	TRIALS
Perry	3
Kozer	3
Trejo	1
Kentner	1

Stephen Kozer quickly demonstrated his willingness to take cases to trial, completing three trials in his first three months in Grant County. He won a complete acquittal for a client charged with Assault 2°, Assault 3°, and Assault 4°. John Perry also had three trials this quarter. He won a favorable outcome for a client charged with multiple counts of

Harassment, Intimidating a Public Servant, and Resisting Arrest, with not guilty verdicts on three of the four counts.

Training

Supervising Attorney Ray Gonzales did not conduct any trainings during the first quarter. Grant County appears to have largely outsourced its training for public defenders. Mr. Gonzales reports that he anticipates most of the in-house defenders will attend the Washington Defender Association's annual training conference later this month.

I continue to recommend that Grant County offer local trainings more frequently. Such trainings are helpful because they can be tailored to the particular needs of the staff. Moreover, the less formal setting of in-house trainings promotes the exchange of ideas among public defenders and helps develop a team approach to the practice. With the wealth of criminal experience currently available within its own ranks, Grant County is missing an opportunity to allow the defenders to learn from each other. Such in-house trainings are a staple of quality public defense programs.

Conflicts

Grant County continues to operate without an approved conflict of interest policy as it has for almost two years now. Supervising Attorney Ray Gonzales is aware of the problem and has repeatedly promised to submit a conflict policy for approval. To date, however, he has not done so.

With respect to identifying conflicts, I did find some problems this quarter. In one case, Grant County's conflict check system correctly identified John Perry as having a conflict, but Mr. Gonzales assigned the case to Mr. Perry anyway. When the conflict was recognized about three weeks later, Mr. Perry was forced to withdraw from the representation of both clients. Mr. Gonzales explained that he simply made a mistake in overlooking the conflict. In another case, Grant County's conflict check system missed multiple conflicts, and the disqualified attorney represented the client through resolution of the case. I found at least two other cases in which conflicts were either overlooked or not identified.

In reviewing court files this quarter, I found yet another conflict issue. John Doherty represented a client who pled guilty to Robbery 2°. The client subsequently sought to withdraw his plea based on Mr. Doherty's ineffective assistance. Mr. Doherty represented the defendant at the hearing on his motion, arguing his own ineffective assistance. Mr. Doherty had apparently failed to inform the client that he was pleading guilty to a strike offense. In fact, Mr. Doherty had erroneously stricken language in the plea statement notifying the defendant the charge against him was a strike. Though it is laudable that Mr. Doherty was willing to acknowledge his mistake, his error created a conflict of interest, and he should not have represented the client on the motion to

withdraw his plea. The matter was ultimately resolved with a plea to non-strike offenses. When I asked Mr. Gonzales about the case, he indicated he was unaware of the situation.

The process of assigning cases to conflict counsel has also been somewhat problematic this quarter. The Settlement Agreement requires that the Supervising Attorney notify the Monitor of conflict cases immediately after assignment so that I may review whether the assignment is appropriate. Two problems have arisen in this process. First, Mr. Gonzales sometimes neglects to inform me of conflict assignments in a timely fashion. Second, when he does notify me of a conflict assignment, Mr. Gonzales frequently does not immediately send me the supporting documents I need in order to review the conflict. Apart from these procedural problems, when I was able to review conflict cases this quarter, I did not find any inappropriate conflict assignments.

Without a written conflict policy to review, it is difficult to know where to begin in making recommendations as to how to avoid these types of problems. Supervising Attorney Ray Gonzales should draft a conflict policy immediately and submit it for approval as required by the Settlement Agreement.

Supervising Attorney

My assessment of the Supervising Attorney's performance has not changed. Mr. Gonzales has addressed virtually none of the issues identified in my quarterly reports over the last two years and seems completely unconcerned with ongoing violations of the Settlement Agreement. He either ignores recommendations for improvement or promises to implement changes and never does.

Conclusion

Poor supervision is at the root of most of the problems within Grant County's public defense program. I am hopeful that the current group of public defenders may be sufficiently competent, diligent, and self-motivated to succeed in spite of a lack of effective supervision. For the long term, however, Grant County must solve its supervision problem if it hopes to institutionalize quality standards for public defense.

EXHIBIT 2(C) TO U.S. STATEMENT OF INTEREST

Best, et al. v. Grant County

Monitor's Report

Fourth Quarter, 2010

January 23, 2011

Submitted by Francisco Rodriguez, Settlement Monitor

Monitor's Activities

During the four quarter, I conducted monthly site visits to Grant County on the following dates:

- October 25-26, 2010
- November 15-16, 2010
- December 6-7, 2010

While in Grant County, I observed court proceedings, reviewed court files, and met with public defenders.

Between site visits, I have periodic contact with the Supervising Attorney, individual defenders, investigators, and counsel for both parties. I also regularly review electronic court dockets to track case dispositions, motions practice, and the use of experts, as well as to identify cases that warrant further review.

In addition to routine monitoring activities, I met with two investigator candidates during the fourth quarter as well as one indigent defendant who requested to meet with me.

Access to Information

The Settlement Agreement provides that the Monitor is entitled to broad access to information concerning the Grant County public defense system. During the fourth quarter, I experienced some delays in obtaining information from the Grant County Department of Public Defense (GCPD). These delays were unusual as I typically receive monthly report information within a few days of the due date and other basic information quite promptly. The office staff seem rather overwhelmed at present. Gail Sundean, GCPD Office Manager, continues to be responsible for responding to most of my requests for information. Katy Montemayor, GCPD's legal assistant, is often tasked with obtaining the court documents I request and provides them quite promptly when assigned to do so. Finally, the staff in the Grant County Superior Court Clerk's Office is always extremely cooperative and helpful with my review of court files.

Compliance Issues

I routinely identify compliance issues in my quarterly reports and make recommendations to address any problems noted. The Settlement Agreement provides for payment of legal fees in the event of noncompliance, but I am not charged with addressing that issue unless the parties submit a dispute to me for resolution.

The Settlement Agreement does authorize the Monitor to extend the term of the Agreement for up to one year if Grant County is not in full compliance at all times after December 31, 2007. I have not yet decided whether an extension of the Settlement Agreement is warranted. I recently wrote to the parties requesting input on this issue by February 16, 2011.

There have been a number of disputes regarding compliance over the course of the year, and though those issues apparently remain unresolved, neither party has formally requested my intervention to date.

Attorney Staffing

Grant County had experienced an unusual period of stability in staffing over the past year, but that ended in the fourth quarter. Julie Trejo[1] gave notice in early November that she was terminating her contract, and defenders Dean Terrillion and John Doherty subsequently resigned their in-house positions. Brett Billingsley's contract also ended in October.

Grant County will soon have lost 50% of its 2010 defender staff. Julie Trejo had been the longest tenured Grant County public defender, having started there in September of 2007. Brett Billingsley started working with Grant County part-time in January 2008 and converted to full-time later that year. Dean Terrillion and John Doherty had been with Grant County less than two years. Of the remaining defenders, all have worked in Grant County less than two years except John Perry who started about two and a half years ago in June of 2008. Put another way, Grant County has experienced almost 90% turnover in its defender staff in less than two years.

Grant County has experienced ongoing problems with a lack of local public defender candidates who are both interested in and qualified for the position. As a result, many of Grant County's defenders commute great distances to work. Mr. Terrillion and Mr. Doherty, for example, had been commuting to homes in Western Washington almost every weekend, and both identified job location as their primary reason for leaving Grant County.

Julie Trejo's contract requires her to give 120 day notice of her intent to terminate. As in-house defenders, Mr. Terrillion and Mr. Doherty are not bound by any particular notice requirements when leaving Grant County's employ. Mr. Terrillion gave

[1] Julie St. Marie recently got married and changed her name to Julie Trejo.

approximately two weeks notice as his new employer was not willing to be flexible on his start date. Mr. Doherty gave about one month's notice. These rapid departures created significant challenges for Supervising Attorney Ray Gonzales in assigning and transferring cases, particularly as he approached quarterly and yearly caseload limits at year's end. Fortunately, Grant County and Ms. Trejo agreed to extend her contract through the end of April 2011, providing Mr. Gonzales with some relief in assigning new cases.

Supervising Attorney Ray Gonzales reports that he has had difficulty locating qualified candidates to replace the departing public defenders. I have recommended that Mr. Gonzales advertise through the Washington Defender Association (WDA) and the Washington Association of Criminal Defense Lawyers (WACDL), the two primary (and perhaps only) criminal defense organizations in the state of Washington. Yet Mr. Gonzales has not posted any of the recent attorney openings with either organization. WDA currently has postings for Whatcom, Benton/Franklin, King and Clark Counties. Even Grant County District Court has posted an opening. Meanwhile, Mr. Gonzales informs me that he anticipates re-opening his posted positions to seek additional applicants. I hope that he will abandon his informal, word-of-mouth approach in favor of more traditional methods of recruiting public defenders.

Grant County has hired one new in-house public defender. Stephen Kozer started this month and will take over most of John Doherty's caseload. Mr. Kozer is an experienced public defender who most recently worked for the Yakima County Office of Assigned Counsel where Mr. Gonzales also once worked. Mr. Kozer had written to Mr. Gonzales back in September inquiring about openings in Grant County.

Supervising Attorney Ray Gonzales has indicated that Grant County plans to hire one additional in-house public defender to fill Mr. Terrillion's position as well as one additional contract defender to replace Ms. Trejo. If case assignments for 2011 continue at the same rate as in 2010, the planned staff of seven full-time defenders should be sufficient to handle the anticipated caseload.

Attorney Salaries

The Settlement Agreement requires that compensation for in-house defenders be comparable to that of their counterparts in the Prosecuting Attorney's Office. Ensuring salary parity was a central concern in considering whether to approve Grant County's move to an in-house public defender office. After extensive discussions regarding salary parity, Grant County agreed to adopt a formal compensation plan that based attorney salaries on criminal legal experience. Adoption of this compensation plan was a condition of approval for the in-house defender program.

A recent review of public defender salaries revealed that Grant County has not followed its own compensation plan. The compensation plan establishes six salary levels based upon criminal experience. Yet the salary levels assigned to the two most recently hired

Grant County public defenders appear to bear no relation to their actual level of criminal experience. The salary classification for each of the in-house defenders is listed below:

ATTORNEY	SALARY LEVEL	EXPERIENCE RANGE	ACTUAL EXPERIENCE
Maggard	Attorney 1	0-3 years	< 1 year
Kozer	Attorney 2	2-5 years	27 years
Oglebay	Attorney 2	2-5 years	16+ years
Terrillion	Attorney 2	2-5 years	7+ years
Doherty	Attorney 5	10+ years	16+ years
Perry	Attorney 6	Discretionary	15-17 years

Both Susan Oglebay and Stephen Kozer were assigned "Attorney 2" salaries, a level intended to include attorneys with two to five years of criminal experience. Ms. Oglebay has practiced criminal law for 23 years. Even setting aside her other areas of practice, she conservatively estimates that she has 16 years of full-time criminal experience. Similarly, Mr. Kozer has practiced criminal law for 27 years. Despite their extensive criminal experience, these attorneys were hired at salaries just one step above entry level, By comparison, the Prosecuting Attorney's Office has two felony attorneys slotted at the "Attorney 2" level, and both have only two years of legal experience. Such disparities violate the salary parity contemplated by the Settlement Agreement.

Caseloads

The Settlement Agreement establishes an annual caseload limit of 150 case equivalents for full-time defenders. In addition, Grant County has adopted monthly and quarterly caseload limits to ensure that case assignments are spread relatively evenly throughout the year.

The departure of Brett Billingsley at the start of the fourth quarter left Grant County with little excess caseload capacity for the remainder of the year. Although most of the public defenders were well below their annual limits, quarterly caseload limits prevent Grant County from assigning excessive caseloads to defenders even if they have unused capacity from earlier in the year. Capacity concerns were further complicated by the rather sudden departure of Mr. Terrillion in December which forced Supervising Attorney Ray Gonzales to transfer almost all of his active cases to other public defenders.

Fortunately, the overall number of case assignments for the fourth quarter was dramatically lower than in prior quarters. New felony assignments were down by approximately one third, with Grant County recording the three lowest monthly totals of the year in October, November, and December. Fewer new case assignments enabled Grant County to absorb the unanticipated addition of 25 transfer cases from Mr. Terrillion without overburdening the remaining defenders.

Evaluating Grant County's compliance with caseload limits is challenging because the figures provided by Grant County are not accurate. Grant County has acknowledged

errors in counting probation violation cases but has not corrected its counts for the first 5 to 6 months of the year. In addition, Grant County has not reported work on "extraordinary" cases as required. For example, John Perry represented a defendant on a charge of Aggravated Murder from September 2009 until December of 2010 without ever receiving any extraordinary credits. The failure to properly count extraordinary cases can result in significant underreporting of case credits. In 2008, the year before Supervising Attorney Ray Gonzales took over the program, Grant County reported about 110 extraordinary case credits. In 2010, Mr. Gonzales reported approximately 12. As a result of the errors in counting credits for probation cases and extraordinary cases, the attorney caseload totals reported by Supervising Attorney Ray Gonzales are artificially low.

The caseload data provided by Grant County suggests that all of its public defenders were within their monthly, quarterly, and annual caseload limits:

ATTORNEY	2010	4Q 2010	OCT '10	NOV '10	DEC '10
Oglebay	135.33	25.33	5.33	11.33	8.66
Trejo	126.33	36.33	11.00	10.33	15.00
Doherty	123.66	37.00	13.66	8.33	15.00
Kentner	111.33	25.66	5.66	6.00	14.00
Perry	108.66	30.00	9.00	10.00	11.00
Terrillion	108.33	20.33	9.66	10.66	0.00
Billingsley	70.66	0.00	0.00	0.00	0.00
Maggard	50.00	7.00	6.00	1.00	0.00

Public defender Susan Oglebay had the highest caseload total for the year at 135.33. She is the only defender who approached her annual caseload limit. Although Grant County's final figures show her finishing the year at about 135 credits, it is likely that her true caseload exceeded the annual limit of 150. Ms. Oglebay has been the primary attorney handling probation violation matters since April, and Grant County did not properly count her case credits for at least the first 2 to 3 months she covered that calendar. In addition, Ms. Oglebay was assigned at least one extraordinary case for which she has not received extraordinary case credits as required. Though the caseload totals reported for most, if not all, of the other defenders were also inaccurate, these defenders probably did not exceed their annual caseload limits as they likely ended the year with sufficient remaining capacity to absorb the uncounted credits that they should have been awarded.

Distribution of class A felony case assignments continues to be a concern. For the year, John Perry and John Doherty received about twice as many class A felony assignments as the other defenders:

ATTORNEY	2010 CLASS A
Doherty	16
Perry	16
Kentner	9
Terrillion	8
Billingsley	7
Trejo	7
Oglebay	2
TOTAL	**65**

These assignments should be spread more evenly among the defenders to balance the workload and to add depth of experience to the entire defender group.

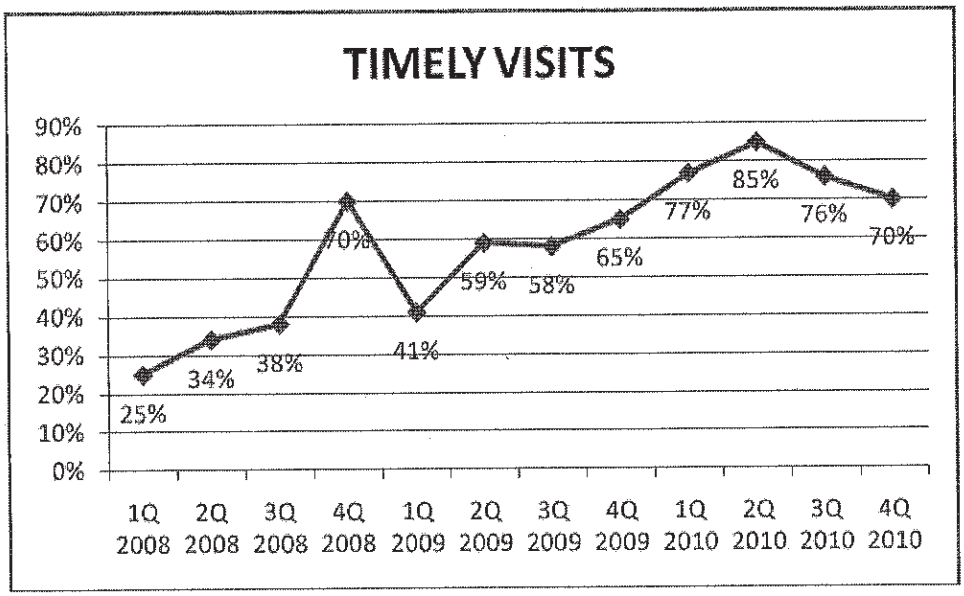
The departure of Mr. Terrillion in December posed a challenge for Supervising Attorney Ray Gonzales who had to reassign a large number of cases on short notice. Mr. Gonzales did not reassign most of Mr. Terrillion's cases until after his departure. Most were reassigned by the end of the following week, however. When a public defender resigns, that defender's cases should be reassigned at least a week or two before his or her last day to ensure continuity of representation and to allow the new attorney an opportunity to consult with counsel of record. The departing defender should prepare a transfer memorandum detailing the status of the case including discovery, investigation, motions, and plea negotiations. The memorandum should also identify any potential legal issues, summarize the client's version of events and goals for the representation, and outline case strategy. I have discussed the need for transfer memos with Mr. Gonzales in the past, and he has agreed that such documentation would be helpful. Despite this acknowledgment, Mr. Gonzales has not established any formal procedures for transferring cases and has been unable to produce a single transfer memo from Mr. Billingsley or Mr. Terrillion.

Jail Visits

Grant County requires its public defenders to visit all in-custody clients prior to arraignment. Despite its clear written policy on initial client contact, Grant County has had little success in ensuring its public defenders consistently visit their jailed clients in a timely fashion. While some defenders do make timely visits a priority, others do not. Grant County has done little to emphasize the importance of initial jail visits or enforce its own policy.

For the fourth quarter, I reviewed 65 in-custody felony case assignments, cross referencing case assignment data with jail visitation logs, jail inmate rosters, and court dockets to determine whether the assigned lawyers visited their clients prior to arraignment. In some cases, I treated the visit as timely even though the visit occurred shortly after arraignment because the case had been assigned on or after the arraignment date.

Overall, I found the rate of timely jail visits for the fourth quarter to be 70%, the worst quarterly performance this year. Though Grant County's jail visitation policy has been in place since at least 2007, Grant County has exceeded 80% compliance in a quarter only once in the last three years:



The rate of timely visits for the year was 78%, an improvement over the 2009 rate of 54%, but still unacceptably low. While I am somewhat encouraged by the generally positive trend over time, progress has been very slow. Grant County should expect more of its public defenders.

Individually, public defender performance varied widely in the fourth quarter, with Bob Kentner and Susan Oglebay visiting 100% of their clients in a timely fashion and John Perry at better than 90%, while the other defenders had much lower rates:

ATTORNEY	% TIMELY
Kentner	100.0%
Oglebay	100.0%
Perry	90.9%
Terrillion	66.7%
Doherty	58.8%
Trejo	40.0%

Both Mr. Doherty and Ms. Trejo had clients held in custody more than three weeks without receiving a visit. Mr. Doherty was assigned a mentally ill client who, as of January 10, had been in custody more than 25 days without receiving a visit. Ms. Trejo's client waited more than 22 days before finally entering a guilty plea without ever having

received a visit from his assigned attorney. For the most part, however, Grant County's defenders visited their in-custody clients within a week or so of assignment.

For the year, Mr. Kentner and Ms. Oglebay visited virtually all of their in-custody clients in a timely fashion, and Mr. Perry also had a high rate of timely visits:

ATTORNEY	% TIMELY
Kentner	98.0%
Oglebay	95.2%
Perry	87.9%
Doherty	80.3%
Terrillion	79.1%
Trejo	60.0%
Billingsley	48.6%

Mr. Kentner's near perfect performance is particularly impressive given the fact that he commutes from Seattle each week. Aside from Mr. Kentner and Ms. Oglebay, the other public defenders did not consistently visit their jailed clients as required.

To address ongoing problems with timely jail visits, I have recommended that Supervising Attorney Ray Gonzales meet individually with public defenders who fail to comply with the jail visit policy in order to stress the importance of timely jail visits as well as the consequences of failing to comply with Grant County policy. Mr. Gonzales is resistant to this type of supervision and has generally declined to formally address the problem. As a result, jail visits are not a priority for many defenders. I have also recommended that Mr. Gonzales monitor jail visits weekly by simply passing around a clipboard with a list of the week's case assignments during Grant County's regular docket days and asking attorneys to confirm that each client has received a visit. Mr. Gonzales embraced this idea and agreed to implement it months ago but still has taken no action.

Supervising Attorney Ray Gonzales has simply not made timely jail visits a priority for Grant County public defense. Defenders ignore Grant County policy with impunity and Mr. Gonzales seems unaware of or unconcerned by the problem. Indeed, his last two monthly reports did not even include jail visit information. For November, Mr. Gonzales's office did not complete its review of initial jail visits until December 30. Mr. Gonzales indicates that he views timely jail visits as very important, even suggesting he expects in-house defenders to visit all clients within three days. Yet Mr. Gonzales makes no effort to monitor compliance with this three-day visit requirement, and his staff does not comply with it.

In addition to the timeliness of initial visits, I also evaluated the total time each defender spent visiting clients at the jail. Bob Kentner spent by far the most time visiting his in-custody clients in 2010:

ATTORNEY	TOTAL HOURS
Kentner	147
Perry	112
Trejo	93
Doherty	88
Oglebay	82
Terrillion	45
Billingsley	26
Maggard	23

Dean Terrillion spent less than a third of the time that Mr. Kentner did visiting clients in jail and about half the time of most of his other colleagues. Brett Billingsley appears to have spent very little time meeting with his in-custody clients, spending an average of less than 3 hours per month on jail visits.

The lack of client visits in one of Mr. Terrillion's trial cases this quarter was particularly troubling. Mr. Terrillion visited the client in question for just ten minutes on the day of his arraignment. He did not visit the client again for more than two and a half months. The second jail visit occurred on the morning the client's trial began. After he was convicted, Mr. Terrillion did not visit him at all during the two and a half months between trial and sentencing. The client was convicted on 8 of 9 counts and received an exceptional sentence of 20 years in prison. Over the more than 5 months he had the case, Mr. Terrillion spent a total of about 45 minutes visiting his client.

Supervising Attorney Ray Gonzales recently expressed concern that some defenders may not be spending adequate time visiting jailed clients and reports he is considering establishing a minimum time each defender is expected to allot to jail visits each month. No such policy is currently in place, however.

Client Complaints

The Grant County Department of Public Defense maintains a dedicated toll-free telephone line for client complaints. All calls to this line are logged and substantive complaints are referred to Supervising Attorney Ray Gonzales for follow-up as appropriate. In addition, clients sometimes contact Supervising Attorney Ray Gonzales directly with complaints.

The Settlement Agreement requires the Supervising Attorney to maintain a compliant system that not only records complaints but also "informs all indigent criminal defendants of the right to make complaints regarding the quality of their public defense." For in-custody clients, Grant County posts information regarding the complaint line in the jail dorms. These jail postings appear reasonably effective as most of the calls to the complaint line come from inmates.

For out-of-custody clients, the assigned public defenders have been instructed to provide written notice of the complaint procedure at arraignment. In practice, however, the public defenders rarely do so. Supervising Attorney Ray Gonzales recently advised me that he estimates the complaint flyers are given to clients about a third of the time. Based upon my observations, his estimate is overly optimistic. I have notified that Mr. Gonzales that the existing procedure does not comply with the Settlement Agreement and recommended alternatives. He has not yet implemented any changes, but I have been advised that he will do so in the near future.

During the fourth quarter, Grant County logged approximately 31 contacts through the complaint line or the Supervising Attorney from 20 different clients:

ATTORNEY	CLIENT CONTACTS
Kentner	10
Trejo	8
Doherty	6
Perry	5
Terrillion	1
Billingsley	1

For the year, Grant County logged 207 complaints from 101 different clients:

ATTORNEY	CLIENT CONTACTS
Billingsley	64
Perry	41
Doherty	32
Kentner	30
Trejo	30
Terrillion	7
Oglebay	3

Clients frequently call the complaint line to ask for attorney phone numbers, leave messages for their assigned attorneys, or make other inquiries not related to the quality of their representation. Accordingly, reliance solely on call totals can be somewhat misleading. The annual totals, however, do reflect the general pattern of substantive complaints during the year.

In reviewing the substance of the fourth quarter complaints, I found complaints from two clients particularly concerning. Client A is charged with Attempted Murder 1° and the prosecutor's office is seeking an exceptional sentence. The client called in November to complain that his attorneys, John Doherty and Dean Terrillion, had each visited him only once during the six months he had been in custody. In following up on this complaint, Supervising Attorney Ray Gonzales reported that he had contacted counsel who advised him that the client had been seen and the case was "proceeding appropriately."

Mr. Gonzales' investigation of this complaint was inadequate. Had he reviewed the jail visit logs produced by his own office, he would have learned that the client's complaint was valid. Dean Terrillion visited the client briefly a few days after assignment in May. The next visit the client received occurred more than six weeks later in late June when John Doherty visited the client for the first time. This second visit took place a week before the client's scheduled trial date and about three weeks after completion of his omnibus hearing. These were the only visits he received until, after more than six months in custody, Client A finally called to complain about the lack of jail visits on the day his trial was scheduled to begin. This was the third scheduled trial date. At that time, Mr. Doherty and Mr. Terrillion had spent less than an hour combined over more than six months visiting their client on an Attempted Murder 1° case. Such behavior should not be tolerated and falls well below acceptable standards of practice. Mr. Gonzales' failure to take this complaint seriously is disappointing.

Client B called in December to complain that his attorney John Doherty has been telling him for a month that he would win the client's case with a suppression motion. The client called to complain on the day of his suppression hearing because Mr. Doherty still had not filed a suppression motion, and his hearing had been stricken. An internal email regarding Client B's complaint adds that the client "feels that JD just gave up and doesn't want to help him and lately JD has been giving him attitude. He would like to get a different attorney, one that cares." Supervising Attorney Ray Gonzales did visit the client in response to his complaint. Mr. Gonzales reports that the "client did not intend to complain" and after discussion, now "understands" his situation. Mr. Gonzales's response to this complaint suggests that he was more interested in diffusing the complaint than investigating it. Clearly, the client intended to and did complain about Mr. Doherty. Rather than meet with the client privately to investigate his complaint more thoroughly, Mr. Gonzales brought Mr. Doherty along for the visit. It should have come as no surprise that the client was reluctant to repeat his complaints in the presence of Mr. Doherty. Yet Mr. Gonzales considered the matter resolved and took no further action in the matter. Nowhere in his report does Mr. Gonzales address the substance of the client's complaint that Mr. Doherty had failed to file a winning suppression motion as promised

Overall, I have found Supervising Attorney Ray Gonzales's response to client complaints to be lacking. Mr. Gonzales seems to believe his role is to defend his lawyers against client complaints rather than to objectively investigate those complaints in order to protect the rights of indigent defendants. Mr. Gonzales cannot effectively supervise Grant County's defenders unless he is prepared to be critical when appropriate and to take correction action when necessary.

Investigator Staffing/Caseloads

Grant County has three approved public defense investigators: Ellyn Berg, Karl Calhoun, and Taylor Kindred. Ms. Berg is on staff with GCPD and works exclusively with the in-house felony defenders. Karl Calhoun and Taylor Kindred are private investigators who accept case assignments from Grant County. They are assigned adult felony cases with

the contract defenders as well as other public defense cases in juvenile and district court. Investigator Marv Scott retired as of November 1, 2010.

During the fourth quarter, Grant County's defenders requested investigation in 45 adult felony cases. As in prior quarters, Ms. Berg received the highest number of cases:

INV	4Q CASES
Berg	24
Kindred	13
Calhoun	10

Mr. Kindred also received 7 juvenile case assignments this quarter. For the year, Ms. Berg averaged about 10 new adult felony cases per month. Her total caseload was more than double that of the other investigators:

INV	2010 CASES
Berg	122
Calhoun	60
Kindred	24
Scott	21
Patterson	13

Supervising Attorney Ray Gonzales has expressed concern regarding Ms. Berg's workload in past quarters and had planned to contract with an overflow investigator to provide her with some relief. Unfortunately, he has not yet been able to do so.

Mr. Gonzales has submitted two additional investigators for approval, and I completed the review process on both candidates more than a month ago. Their applications remain pending, however, as Mr. Gonzales and I await a response from counsel for Grant County regarding possible conditional approval. Counsel has thus far not responded to my inquiries on this matter.

Investigation Rates

Grant County's felony defenders requested investigation in a total of 44 cases during the fourth quarter. The individual totals for the public defenders are listed in the table below:

ATTORNEY	INV REQ
Kentner	13
Doherty	10
Perry	9
Trejo	6
Oglebay	3
Terrillion	3

The total number of requests for 2010 followed a similar pattern:

ATTORNEY	INV REQ
Kentner	55.5
Perry	51.5
Doherty	37.5
Trejo	28
Oglebay	22
Terrillion	16.5
Billingsley	8

Together, Grant County's defenders requested investigation in 219 cases this year.

The overall rate of investigation in Grant County at the end of 2010 was 36%. This represents an increase over last year (29%) and is consistent with the investigation rates in 2007 (35%) and 2008 (36%). Individual investigation rates continue to vary widely:

ATTORNEY	% INV
Perry	58.4%
Kentner	50.4%
Oglebay	49.6%
Doherty	35.5%
Trejo	26.7%
Terrillion	20.3%
Billingsley	12.2%

Mr. Perry and Mr. Kentner more than doubled their rate of investigation in 2010. Mr. Doherty and Ms. Trejo increased their rates by more than 10%. By contrast, Mr. Billingsley and Mr. Terrillion investigated roughly the same percentage of their cases this year as they did last.

Though the investigation rates of most defenders improved in 2010, some defenders are still not investigating all of the cases they should. During the fourth quarter alone, Grant County's public defenders had six jury trials in which they had not requested investigation. Brett Billingsley took four cases to trial without the benefit of investigation while Dean Terrillion and Julie Trejo each had one such trial. Mr. Terrillion's client, discussed above, faced eight counts arising from two residential burglaries and was ultimately sentenced to 20 years in prison. It is rarely, if ever, appropriate for an attorney to proceed to trial without investigation. Neither the attorneys involved nor Supervising Attorney Ray Gonzales has offered any justification for the lack of investigation in these cases.

I continue to believe that Supervising Attorney Ray Gonzales should provide the defenders with training regarding the effective and appropriate use of investigation and that he should more closely supervise public defenders who demonstrate problems in this area. To date, Mr. Gonzales has been unwilling to follow these recommendations.

Experts

The Settlement Agreement recognizes that defenders need to employ experts in some cases in order to be effective. The Settlement Agreement also specifically requires that expert requests be made *ex parte* and sealed in the court file.

Grant County defenders filed four expert requests during the fourth quarter. Bob Kentner, John Doherty, Dean Terrillion, and July Trejo each made one request. The requests of Mr. Kentner and Ms. Trejo were sealed. Mr. Terrillion and Mr. Doherty did not file a motion to seal.

I remain particularly concerned about the handling of cases involving mental health issues. Since last quarter, Grant County public defenders have requested that three more indigent defendants be evaluated by Eastern State Hospital. In two of the three cases, the assigned defenders did not ask for a defense expert.[2] Supervising Attorney Ray Gonzales has assured me that he recognizes the importance of retaining defense experts in these cases. He has even gone so far as to propose adopting a policy requiring that Grant County's public defenders seek an expert in all cases involving mental health issues. Yet he has not follow through with his proposal or taken any other action to address this issue. When discussing the cases identified in last quarter's report, Mr. Gonzales indicated that the problem was just a matter of timing and that he still expected the assigned defenders to retain an expert in those cases. In fact, the assigned attorneys never retained experts in any of the four cases I identified. In two cases assigned to John Doherty, he stipulated to a finding of competence almost immediately after Eastern State Hospital completed its report. .

Two cases I reviewed this quarter were concerning due not only to the failure of the assigned attorneys to request an expert but also their failure to identify mental health issues in a timely fashion. In one case, the assigned attorneys had little contact with the jailed client for more than two months. During the first month the client was in custody, he received one visit from his assigned attorney Dean Terrillion.[3] The visit lasted for a total of 7 minutes. Mr. Terrillion did not seek an expert, request investigation, or raise mental health concerns with the court. The case was later transferred to John Doherty who represented the client for almost a month but never visited him. Mr. Doherty was advised that the defendant was unable to appear in court and that he already had a court-ordered mental health evaluation pending in district court. Still, Mr. Doherty did not request investigation or an expert. Only after the client had been in custody for more than two months did Mr. Doherty finally secure an order for a mental health evaluation at Eastern State Hospital.

[2] Mr. Terrillion and Mr. Kentner both failed to request experts in their cases. Mr. Kentner did request an expert in the third case.

[3] No one visited the client prior to his first appearance. No one visited the client prior to arraignment either, probably due to the fact that Supervising Attorney Ray Gonzales did not assign counsel until the day of arraignment.

In another case, police described the defendant as suicidal with strange, nonsensical speech. He was punching himself in the mouth and had broken a tooth in the process. Police took him to Grant County Mental Health for an evaluation but were called back later when he became disruptive. When police tried to assist mental health staff by escorting the man back to a secure room, the man resisted and was charged with Assault 3°. The need for a psychological evaluation was noted by the attorney handling his first appearance. Dean Terrillion was assigned to represent him shortly thereafter. Despite the obvious mental health issues, Mr. Terrillion never requested an expert or otherwise raised mental health issues. The case was subsequently transferred to Susan Oglebay who requested the defendant be evaluated by Eastern State Hospital. When Ms. Oglebay made the request, the court questioned why the prosecutor was even pursuing felony charges in the matter. The case was resolved by misdemeanor plea a week later.

Many of Grant County's public defenders exhibit a lack of urgency in addressing mental health issues in their cases. Part of the problem is likely inadequate client contact which prevents the defenders from recognizing mental health issues promptly. Even when such issues are readily apparent, however, some public defenders are not requesting a defense expert or even seeking an evaluation by the State in a timely manner. I have recommended that Supervising Attorney Ray Gonzales arrange for additional training in this area and that he develop forms and briefing to facilitate the process of requesting experts. Mr. Gonzales has expressed support for these ideas but taken no action.

Motions Practice

During the fourth quarter, Grant County public defenders filed substantive motions in 14 cases. The totals for each public defender are listed below:

ATTORNEY	MOTIONS
Trejo	5
Terrillion	3
Kentner	2
Oglebay	2
Doherty	1
Perry	1

Julie Trejo again filed the most substantive motions this quarter, as she has in every quarter this year. Mr. Kentner had a noteworthy success, winning an unusual post-conviction motion challenging a prison inmate's offender score more than 7 years after sentencing. He won the client's immediate release.

For the year, Grant County public defenders filed substantive motions in 55 cases, with Ms. Trejo filing motions in almost twice as many cases as every other defender except Mr. Terrillion:

ATTORNEY	MOTIONS
Trejo	15
Terrillion	12
Oglebay	8
Perry	8
Kentner	7
Doherty	4
Billingsley	3

Ms. Oglebay's motions total is also impressive given that she was assigned the fewest new felony cases by a substantial margin. Mr. Doherty, by contrast, received among the highest number of new cases but filed very few motions. Grant County's defenders frequently obtained favorable results for their clients by filing motions as 19 of the cases in which motions were filed ended in dismissal or a misdemeanor plea.

The departure of Ms. Trejo and Mr. Terrillion may result in fewer motions filed in 2011 given that together they filed almost as many motions as the other five defenders combined. Supervising Attorney Ray Gonzales should take care to emphasize the importance of motions practice with new hires to help ensure Grant County is able to maintain the progress it has made in this area.

Trials

The trial rate in Grant County has become the program's greatest strength. Grant County's public defenders tried 11 cases during the fourth quarter:

ATTORNEY	TRIALS
Billingsley	4
Perry	2
Terrillion	2
Trejo	2
Kentner	1
Doherty	0
Oglebay	0

Brett Billingsley had twice as many trials as any other defender as he finished his remaining cases and transitioned to his new position as a public defender in Grant County District Court. Mr. Billingsley won favorable verdicts in all of his trials, including complete acquittals in three cases. Mr. Terrillion won not guilty verdicts for his client on charges of Assault 1° and Assault 2° with the client convicted of the lesser charge of Assault 3°. Bob Kentner lost a difficult robbery trial but helped his client avoid three deadly weapon sentencing enhancements.

For the year, Grant County public defenders had 38 trials, almost twice the number as in 2009. Ms. Trejo continued her strong trial practice from last year while John Perry went from 1 trial last year to 8 this year, and both Brett Billingsley and Dean Terrillion doubled their trial totals from last year:

ATTORNEY	TRIALS
Billingsley	9
Perry	8
Trejo	7
Terrillion	6
Doherty	4
Kentner	3
Oglebay	1

Almost every public defender had multiple trials in 2010, the only exception being Susan Oglebay who received substantially fewer new felony case assignments than her colleagues.

With Mr. Billingsley and Mr. Terrillion already having left the program and Ms. Trejo and Mr. Doherty leaving soon, Grant County is losing attorneys who tried 26 cases last year. That represents almost 70% of the trials in 2010. Grant County will face a significant challenge in maintaining its trial rate in 2011 without these defenders

Sentencing

Sentencing practice remains a concern in Grant County. I recently observed Dean Terrillion represent a client at a sentencing hearing for which he appeared completely unprepared. The prosecutor sought an exceptional sentence of 20 years, arguing that the defendant's extensive criminal history suggested he would inevitably re-offend. Mr. Terrillion said little on the defendant's behalf; his comments were roughly "I can't deny the defendant is in warehouse status. The question is how much money do you want to spend warehousing him?" Both the defendant, who spoke about his family, and the judge, who noted that the defendant's criminal history was all nonviolent, made more persuasive arguments on the defendant's behalf than Mr. Terrillion. This was the same case discussed above in which Mr. Terrillion had spent very little time visiting the client, a fact that undoubtedly made presenting mitigation information more difficult. The court ultimately granted the State's request and imposed an exceptional sentence of 20 years for crimes arising from two residential burglaries that involved no weapons or violence of any kind. Ironically, Mr. Gonzales had insisted that Mr. Terrillion return from his new job to handle the sentencing in this matter because of his familiarity with the case.

Training

Supervising Attorney Ray Gonzales arranged for a lunch-time training on the Drug Offender Sentencing Alternative (DOSA) during the fourth quarter. For the year, Mr.

Gonzales organized only two local trainings. Grant County did, however, offer all of its defenders the opportunity to attend the WDA annual conference last spring. In addition, Grant County sent Dean Terrillion and Kacie Maggard to an intensive trial training program last year. As part of my year-end review process, Grant County provided the CLE record for each of its public defenders, and it appears that they all obtained adequate criminal defense training last year.

Though Grant County currently provides sufficient training opportunities for its defenders, Supervising Attorney Ray Gonzales should provide more local trainings targeted to ongoing issues such as investigation, experts, and sentencing practice. Moreover, Mr. Gonzales should take advantage of the resources available on his own staff. Grant County is in the process of losing four different public defenders each of whom could have led an in-house training. The failure to establish an ongoing in-house training program led by the defenders themselves is a significant missed opportunity.

Conflicts

Grant County continues to operate without an approved conflict of interest policy as it has for the last 18 months. Supervising Attorney Ray Gonzales has promised to submit a conflict policy for approval but still has not done so. Most recently, he assured me he would provide the conflict policy by December 17. At the end of December, he acknowledged he had missed his own deadline but still has not submitted a conflict policy.

Based upon the information provided by Mr. Gonzales, most conflict assignments during the fourth quarter seemed necessary and appropriate. One case, however, was assigned to outside counsel based not upon a conflict of interest but upon a perceived need for overflow counsel. Mr. Gonzales apparently concluded he needed overflow counsel because the other attorneys to whom he could assign the case had busy schedules. Mr. Gonzales explained that he believed that assignment to outside counsel was in the best interest of the client.

Finally, I have some concern about Mr. Gonzales's use of conflict screens. Mr. Gonzales has a very informal approach to screening conflicts of interest within his office. These conflict screens are generally not memorialized and amount to little more than an admonition to the attorneys involved to not talk with each other about the case. Conflict screens should be rarely used. If a screen is employed, it should be carefully documented. In the future, Mr. Gonzales should avoid the use of such conflict screens. If Grant County wishes to allow for screens in its conflict policy, that policy should detail how a conflict screen is to be documented.

Supervising Attorney

My assessment of the Supervising Attorney's performance remains unchanged. Despite having ample opportunity to address clearly defined problems, Mr. Gonzales has failed to do so. He seems ill-suited for a management role.

The problems identified in this report are not new. Neither are my recommendations. Each quarter I seem report on the same problems and make the same recommendations. Supervising Attorney Ray Gonzales frequently promises to follow these recommendations or otherwise address ongoing problems, but he rarely delivers on those promises. At the end of 2009, I provided a detailed list of recommendations for improving supervision in 2010. Supervising Attorney Ray Gonzales has largely ignored those recommendations. Among my recommendations from a year ago were many familiar topics:

- Monitor jail visits weekly for attorneys who have demonstrated problems in this area and personally assure each client receives a visit;
- Monitor investigation requests monthly and meet with attorneys who have low rates of investigation to discuss improving performance in this area;
- Provide training on the use of investigators and the importance of investigation;
- Draft written guidance for attorneys handling the probation violation calendar that defines which cases must be reported for case credit under the Settlement Agreement;
- Provide training on representing clients in probation violation hearings;
- Enforce reporting requirements for extraordinary credits as well as obtain and record credits for past-due hours from 2009;
- Draft templates for the defenders for expert requests and related motions to seal;
- Coordinate defender efforts regarding sealing issues and meet with the judges if necessary to better understand their concerns with the process;
- Provide training regarding the use of experts, sealing expert requests, and making a record for appeal on expert and sealing issues;
- Monitor expert requests on cases with mental health issues;
- Schedule standing weekly meetings with attorneys who have demonstrated a need for closer supervision;
- Meet with the defenders individually and/or as a group to discuss topics on which they would like training as well areas in which they might be able to present a training to their colleagues;
- Revise the conflicts policy and procedure to reflect current practice and submit it for approval;
- Develop a formal written procedure for transferring cases including a template for a transfer memo and specific guidance regarding the tasks to be completed prior to transfer; and

Rather than take specific steps to deal with ongoing problems and improve the practice in Grant County, Supervising Attorney Ray Gonzales seems content to remain a passive observer rather than a proactive manager of the program.

Mr. Gonzales's strength is in promoting a trial-oriented approach to criminal defense. He views trials as an important part of defense practice and encourages Grant County's defenders to go to trial when appropriate. I worry, however, that by emphasizing trial practice without also stressing the importance of trial preparation, Mr. Gonzales may inadvertently be cultivating what is sometimes referred to as a "cowboy mentality" among some of the public defenders. In such an environment, trial becomes an end in itself and little thought is given to the client's needs and goals or to less glamorous tasks such as investigation, jail visits, and trial preparation.

If Mr. Gonzales is to succeed as Grant County's Supervising Attorney, he must demonstrate a willingness to change and an ability to follow through on promised improvements. The turnover in attorney staff offers an opportunity to establish a new approach to supervision, a more proactive, structured approach. I hope that Mr. Gonzales will seize this opportunity.

Conclusion

Grant County starts 2011 facing the daunting task of rebuilding its public defender staff. Grant County may be fortunate and find attorneys who are highly skilled, diligent, and self-motivated, but given the high level of attorney turnover, the best way to ensure the quality of representation over time is through effective supervision. Accordingly, Grant County should make supervision a priority. Grant Count must take steps to ensure that its Supervising Attorney has internal systems and standards in place to monitor the performance of its public defenders and that he has the management skills necessary to improve attorney performance when it falls below Grant County's minimum standards.