

March 31, 2022

Rhonda Lindquist, Director
Travis Tilleman, Central Services Division Administrator
Brian Smith, Public Defender Division Administrator
Eldena Bear Don't Walk, Conflict Defender Division Administrator
Kaity Durdy, Chief Contract Manager
Interim Law and Justice Committee

Dear colleagues,

We have enjoyed working for the Office of the State Public Defender as contract attorneys. Collectively, we have decades of experience advocating on behalf of indigent clients and have represented hundreds of clients in Montana courts. In those years, we have protected parental rights, reunified families, and served as a safeguard for individual and constitutional liberties. We have served on boards advising on the status of abuse and neglect law, mentored young attorneys, and trained public defenders across Montana. Our labor should be compensated fairly.

Montana law provides that the director of the Montana public defense system “shall establish standards for a statewide contracted service program...” Section 47-1-121,(1), MCA. The director must “ensure that contracting for public defender services is done *fairly and consistently statewide* and within each public defender region.” Section 47-1-121(1), MCA. The current pay differences across the State are inconsistent with the clear statutory language governing contract public defense.

Montana’s compensation for contract attorneys is out of step with industry standards. The National Legal Aid & Defender Association’s *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* recommends that state agencies compensate attorneys at a minimum rate which reflects the following factors:

1. The customary compensation in the community for similar services rendered by privately retained counsel to a paying client or government or other publicly-paid attorneys to a public client;
2. The time and labor required to be spent by the attorney;
3. The degree of professional ability, skill and experience called for and exercised in the performance of the services.¹

¹ National Legal Aid & Defender Association, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, Guideline III-10. (<https://www.nlada.org/defender-standards/guidelines-governmental-contracts/black-letter>)

The *Guidelines* further specify that contracts should provide resources for support staff, social work staff, mental health professionals, forensic experts, and investigators.² The current system fails to satisfy these guidelines.³ The hourly rate for contract defense services fails to reflect the market rate for legal services in Montana⁴ and is out of step with our neighboring states.⁵

Over the last decade, the costs associated with the practice of law have increased substantially. Those include increases in expenses related to office space, bar fees, staff payroll, utilities, supplies, and technology, as well as the requirement to carry malpractice coverage of at least \$500,000 aggregate per year. Additionally, as private attorneys, even though we handle substantially similar work, we are not able to utilize public service loan forgiveness programs.

Unfortunately, despite the steep cost of practicing law in Montana, there has not been a corresponding increase in attorney compensation. Rather, in 2018 OPD reduced hourly rates, resulting in contract attorneys now making *less* than we did a decade ago.⁶ The budgetary justifications for the reduction were expected to be temporary, yet both the reduction to hourly rates and travel rates remain. The \$71 hourly rate, implemented in the 13th and 22nd Judicial Districts, is based upon findings from the 2020 Legislative Audit, which surveyed attorneys across the state and established, on average, that attorneys would take cases if rates were set at \$71/\$57(travel) for in-county work and \$76/\$61 for out-of-county work.⁷ As Table 5 to the Legislative Audit demonstrates, this is a statewide problem.

Adequate compensation is central to quality and effective indigent defense work.⁸ We respectfully request a rate increase to \$71/hr to match the rate paid to contract attorneys

² *Id.*, at Guideline III-8. See also, American Bar Association, *Ten Principles of a Public Defense Delivery System*, February 2002 (“Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.”)

³ For example, clients represented by contract attorneys do not have access to social workers employed by the Office of Public Defender.

⁴ Attorneys in Montana generally charge between \$180-230 for family law and criminal defense matters.

⁵ In South Dakota, contract indigent defense counsel are paid a rate of \$101 per hour and entitled to an annual rate increase equal to the cost of living increase received by state employees. (Court Appointed Attorney Guidelines, (November 4, 2021), <https://ujs.sd.gov/uploads/docs/CourtAppointedAttorneyGuidelines.pdf>); In Wyoming, private counsel retained by the public defender’s office are compensated at \$100/hr for time spent in court and \$65/hr for representation out of court. (Wyoming Rules of Criminal Procedure, Rule 44(e)(2).); Washington state contracts out caseloads in child dependency cases and provides an annual compensation ranging from \$125,000 to \$156,780. (Washington State Office of Public Defense, “Employment and Contract Opportunities,” <https://www.opd.wa.gov/>); Idaho pays contract public defenders \$65/hr. (See Ada County, State of Idaho, “Seeking Conflict Public Defender Contract Attorneys,” <https://adacounty.id.gov/blog/news/seeking-conflict-public-defender-contract-attorneys/>.)

⁶ Attorneys are currently paid \$56/hr for professional services and \$45 for travel

⁷ Legislative Audit Division, “Public Defender Workforce Management, See Table 5, <https://leg.mt.gov/content/Committees/Administration/audit/2019-20/Meetings/Oct-2020/19P-04.pdf>

⁸ See Also Sept. 2020 Public Defender Workforce Legislative Performance Audit, Recommendation #4, recommending that OPD “[a]ssess the need for an increase to the contract professional or travel rate to attract willing and competent attorneys in high demand areas of the state.”

in Yellowstone, Big Horn, Stillwater, and Carbon counties. Raising the rate to be commensurate with our colleagues in the 13th and 22nd Judicial Districts will not end the discussion of what reforms are needed to the public defense system in Montana; however, it will allow us to start taking cases again.

We understand there are growing, urgent needs for available and qualified contact attorneys in Missoula, Mineral, Ravalli, Granite, Powell, Deer Lodge, Butte-Silver Bow, and Gallatin counties, and the undersigned provide the critical contracted legal services for most of the cases in those counties, specifically involving child abuse and neglect. Despite the attempts by Judge Harris in Yellowstone County to legally compel OPD to address the concerns of contractors and thus, serve Montana's vulnerable citizens more equitably and appropriately, little has been done to address these significant issues. In light of the circumstances and lack of response, starting April 1, 2022, we will no longer be accepting new assignments in those counties until our concerns are addressed. We welcome the opportunity to meet with OPD and/or appropriate representatives from the Department of Administration and/or Governor's Office. In the interim, we will continue to advocate zealously for our current clients and work to reunify them as quickly as possible with their families.

Sincerely,

Kelly Driscoll
Melanie D'Isidoro
Meri Althausen
Daniel Biddulph
Erin Burke
Taryn Gray
Shannon Hathaway
William Paul
Karl Pitcher
Rochelle Wilson