

## **Best, et al. v. Grant County**

### **Monitor's Report**

#### **First Quarter, 2009**

April 27, 2009

Submitted by Francisco Rodriguez, Settlement Monitor

#### **Monitor's Activities**

During the first quarter, I travelled Grant County on three separate occasions:

- January 12-13, 2009
- February 9-10, 2009
- March 23-24, 2009

While in Ephrata, I observed court proceedings, reviewed court files, and met with public defenders. Between site visits, I maintain regular contact with the Supervising Attorney and have periodic contact with individual defenders, investigators, and counsel for both parties.

In addition to my regular activities, on February 19, 2009, I met with counsel for Grant County and for Plaintiffs, Supervising Attorney Ray Gonzales, and one of the Grant County Commissioners to discuss Grant County's plans for an in-house public defense system.

Due to past problems with jail visits, I now review case assignments and jail visitation logs each quarter to determine whether the Grant County public defenders are visiting their in-custody clients in a timely fashion. In addition, I systematically review electronic court dockets for cases assigned to Grant County's public defenders in order to evaluate defender motions practice, use of experts, and case outcomes.

#### **Access to Information**

The Settlement Agreement provides that the Monitor shall have broad access to information concerning the Grant County public defense system. Plaintiffs are granted similarly broad access with the additional requirement that all requested documents must be provided within ten days.

Since Grant County began implementing its in-house public defense system, information relating to the public defense system has been much more difficult to obtain. Despite repeated promises to address the problem, formal requests for information have been

treated as public disclosure requests, resulting in long delays in the production of documents and inappropriate redaction of the documents produced.

Grant County has been more forthcoming with documents and other information in recent weeks due to the intervention of counsel. Counsel for Grant County has also offered fresh assurances that requests from the Plaintiffs and the Monitor will no longer be subject to the public disclosure process.

### **2007-09 Compliance**

The parties recently reached an agreement with respect to compliance issues for 2007-2009. As part of that agreement, Grant County is to obtain Monitor approval of its in-house public defense program by May 28, 2009. At present, Grant County is actively working toward approval.

### **Departure of Okanogan Defenders**

As noted in my last report, four full-time Grant County public defenders, Mike Haas, Melissa MacDougall, Mike Prince, and Brian Gwinn, submitted their resignations in December after winning the public defense contract for Okanogan County. The newly formed law firm, Haas, MacDougall, and Prince took over Okanogan County public defense as of January 1, 2009. Grant County was aware that the start date for the Okanogan County contract was January 1 and that continuing to employ these attorneys as public defenders in Grant County while they simultaneously worked in Okanogan County would violate the Settlement Agreement. Nonetheless, Grant County continued to assign new cases to all four defenders in January and February. Brian Gwinn continued to receive new cases through March.

Each of the four defenders worked in Okanogan County during the first quarter. In addition to receiving new case assignments in Okanogan County, they took over several hundred pending cases from the prior public defenders. As a group, these defenders have been practicing in both Okanogan Superior Court and Okanogan District Court, handling felonies, misdemeanors, juvenile cases and dependencies. The Okanogan cases appear to have been handled primarily by Mike Haas, Melissa MacDougall, and to a lesser extent Brian Gwinn.<sup>1</sup> Mr. Prince has spent far less time than his colleagues in Okanogan County as he has been serving as the primary Grant County coverage attorney for the group.

When I visited Grant County in mid-January, I specifically expressed concern about the departing defenders maintaining two full-time public defender positions at the same time. Supervising Attorney Ray Gonzales indicated that he shared my concerns about Mr. Haas

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<sup>1</sup> Haas, MacDougall, and Prince did hire other attorneys to assist with the workload in Okanogan County, but Mr. Haas and Ms. MacDougall have both been working there full-time, and Mr. Gwinn is the primary conflicts counsel for felonies, dependencies, and district court cases.

and Ms. MacDougall but assured me that Mr. Prince and Mr. Gwinn were not yet practicing in Okanogan County. I urged him to investigate the matter further because I had received reports to the contrary. I also suggested that Grant County avoid assigning new cases to these defenders unless absolutely necessary. Grant County chose instead to continue assigning new cases to the Okanogan defenders.

Grant County eventually negotiated an early termination agreement with three of the four defenders but continued to assign them new cases in both January and February. The County made these assignments even though the remaining defenders had sufficient capacity to absorb the cases. Moreover, even after acknowledging that these defenders were actively practicing in Okanogan County, Grant County did very little to ensure that their existing clients in Grant County were being represented appropriately.

The impact on indigent defendants in Grant County of continued representation by these defenders has varied. The greatest impact has been on the clients of Mr. Haas because at the time of his departure, he had been carrying a full felony caseload for years, and due to his experience level, he had some of the most serious and complex cases in Grant County. The impact of Ms. MacDougall's absence has been less because she had far fewer open felony cases than Mr. Haas. Ms. MacDougall had been sharing responsibility for the probation violation docket which reduced significantly the number of new case assignments she received. In addition, she had only been working in Grant County since mid-September and so did not have time to build up a large backlog of felony cases. Mr. Prince also had a reduced felony caseload due to his assignment to the probation violation calendar. Moreover, Mr. Prince has actually been present in Grant County far more than Mr. Haas or Ms. MacDougall. Finally, Mr. Gwinn had very few felony cases left in 2009 because he has been handling child support cases almost exclusively for about a year.

Early in the first quarter, it became clear that Mr. Haas and Ms. MacDougall were no longer spending much time in Grant County and that Mr. Prince was covering most of their hearings. At first, Mr. Prince was simply standing in for them in court while they attempted to continue working their own cases. Eventually, however, it became clear to all of the lawyers involved that Mr. Haas and Ms. MacDougall had become counsel in name only, and Mr. Prince assumed full responsibility for their remaining clients. This transition seems to have occurred in late February and early March. Mr. Prince was thus handling not only his own caseload but that of two other full-time public defenders (plus his limited work in Okanogan County).

Caseload limits are intended to ensure that the strain of public defender workloads does not create undue pressure to settle cases or take other shortcuts that may not be in the best interest of the client. In a criminal case, legal issues and strategic decisions are often not clear cut. The attorney can easily rationalize recommending a plea or a trial, a bench trial or jury trial, stipulating or refusing to stipulate, etc. The fact that a plea or bench trial or stipulation saves the attorney time and effort should not be a factor in the attorney's decision-making. Unfortunately, as workloads increase, the path of least resistance becomes more tempting.

In this instance, I have no doubt that Mr. Prince, Mr. Haas, and Ms. MacDougall had, and continue to have the best intentions with respect to the quality of representation provided to their clients. Nevertheless, I am concerned about whether the workload of these defenders may have influenced their decision-making. For example, in reviewing case files and dockets, I noticed a surprising number of CrR 3.5 stipulations submitted by Mr. Prince<sup>2</sup> during the first quarter. To confirm my observations, I compared the stipulation rates for Mr. Haas, Ms. MacDougall, and Mr. Prince to the other defenders and found that the Okanogan defenders had submitted stipulations in 37% of their cases while the other defenders had submitted stipulations in only 11% of theirs.<sup>3</sup> Stipulations may have been in the client's interest in every one of these cases, but the surrounding circumstances certainly raise questions about whether workload may have affected the attorneys' decision-making.

Accessibility has also been an issue. Both Mr. Haas and Ms. MacDougall have been largely absent from Grant County since the start of the year. Apparently, they have been quite busy with their new practice in Okanogan County, leaving little time to communicate with and/or visit Grant County clients. Client complaint records and jail visitation logs confirm that their availability has been problematic throughout the quarter.

As far as case dispositions, the risks inherent in this situation are obvious. A lack of communication prevents the development of a healthy attorney-client relationship. Absent such a relationship, defendants tend to lack confidence in the advice offered by their attorneys. Some may plead guilty because they have no faith in their attorney's ability to represent them well at trial while others may insist on going to trial because they do not trust their attorney's recommendation to accept a plea offer. For the attorney who is newly substituted in, trial preparation may be less than optimal due to having too many cases to juggle and less familiarity with the case to be tried than the assigned attorney.

During my March visit, for example, Mr. Prince requested a trial continuance on behalf of C.T., a client assigned to Mike Haas. When the request for continuance was denied, Mr. Prince was faced with going to trial the very next day, unprepared, with a client whom he was never assigned to represent. Ultimately, the case was continued the next morning when Mr. Prince informed the court that he was too ill to try the case.

I later learned that Mr. Prince had already tried another of Mr. Haas' cases early last month. Mr. Haas had represented client J.L. since May of 2008, but Mr. Prince represented him at trial after having been in court with him only once in 2009 to cover an omnibus hearing for Mr. Haas. Mr. Prince filed a "notice of association" on March 9. Trial started March 11, and J.L. was found guilty the same day. J.L. has a second case

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<sup>2</sup> I looked at 420 cases that were pending at some point during the first quarter of 2009. The Okanogan defenders submitted stipulations in 34 of 93 cases while the other defenders submitted stipulations in only 37 of 327 cases.

<sup>3</sup> It is unclear which attorney actually made the decision to stipulate. Mr. Prince submitted the stipulations in most cases, but I do not know whether he was acting on directions from Mr. Haas or Ms. MacDougall when he entered stipulations on their cases.

currently awaiting trial in which the prosecutor is threatening to amend to attempted murder. Although Mr. Haas has represented the client on that case since April 2008, Mr. Prince plans to handle that trial as well.

I am not able to determine whether the representation provided to any of the affected defendants has actually been compromised, but the situation is certainly troubling. In late March, I wrote to Grant County to formally express my concern that the Okanogan defenders were (1) exceeding caseload limits; (2) engaging in private practice without approval; and (3) engaging in private practice in excess of the amount permitted by the Settlement Agreement. To address these problems, I recommended that Grant County immediately transfer all pending cases assigned to Mike Haas and Melissa MacDougall.

At present, a few cases have been transferred; the rest have not. The court, understandably frustrated by the absence of Mr. Haas in particular, has reportedly expressed reluctance to relieve Mr. Haas of his obligations on a few of his cases. Mr. Gonzales has advised me that he expects the issue of substitution of counsel on many of these cases to be resolved in this week. At this point, Grant County's overriding concern must be to take whatever steps are necessary to protect the interests of the affected clients.

To avoid a recurrence of this situation in the future, I have recommended that Grant County revise its defender contracts. Current contracts require 120 days notice of termination and contain no wind-down provision.<sup>4</sup> These contracts are unrealistic and unworkable unless the resigning defender is planning to simply go into private practice within Grant County. Very few employers are likely to wait 4 months for a new attorney to start work much less allow him or her return to Grant County month after month in order to completely resolve a full public defender caseload. Indeed, past experience in Grant County demonstrates that when its public defenders resign, they start other work prior to the end of the notice period and ultimately withdraw from many of their remaining cases. There is a simple solution to this problem. The contractual notice period should be shortened and a wind down period added so that departing defenders are not in lame duck status for four months and the County is not saddled with absentee public defenders for months on end. Contracts for incoming defenders should require them to assume an existing caseload so that there is no additional cost to the County in transferring the cases. New defenders could then immediately take over cases from those who are leaving, ensuring that indigent defendants in Grant County aren't left effectively unrepresented when their attorneys take other jobs and move away.

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<sup>4</sup> Grant County has generally elected not to assign cases during the last 30 days of an attorney's tenure, but to the best of my knowledge, this informal practice is not required under the current contracts. Grant County's defender contracts for 2007 required only 90 days notice and contained a 45 day wind down provision which prohibited new cases assignments for the last 45 days of the contract.

## **Attorney Staffing**

To replace the attorneys leaving for Okanogan County, Grant County hired three new full-time defenders. Frank Grigaliunas and Dean Terrillion started on March 2, and Kacie Maggard started April 1. All were hired as Grant County employees with the newly created Grant County Department of Public Defense. Mr. Grigaliunas comes to Grant County from the Spokane County Prosecutor's Office while Mr. Terrillion comes from the Pacific County Prosecutor's Office. Ms. Maggard was just admitted to the bar last year. Because she lacks the requisite experience to handle felonies under WSBA-endorsed standards, Ms. Maggard will be assigned to the child support calendar full-time.

Grant County lost yet another defender at the end of March with the resignation of Karen Lindholdt. The departure of Ms. Lindholdt is another serious blow to Grant County public defense. She is one of the most experienced attorneys on staff and has demonstrated herself to be a strong advocate for her clients. She routinely negotiates very favorable resolutions for her clients but also consistently recognizes and litigates legal issues. She also goes to trial when appropriate. Ms. Lindholdt has been invaluable to the program as an attorney capable of handling very serious and/or complex cases without the need for close supervision.

The level of staff turnover in Grant County causes me great concern. The County has lost more than half of its defenders in the last several months. At this point, only one defender has been with Grant County for as long as two years. The newly hired attorneys do not have nearly as much criminal defense experience as those who have resigned, and I worry that Grant County may not have a sufficiently experienced staff to handle all of its serious cases.

I have repeatedly urged Grant County to negotiate contract extensions with the remaining contract defenders so as to avoid further turnover. Indeed, I had strongly advocated that Grant County extend Ms. Lindholdt's contract in particular because I viewed retaining her as critical to the long term success of the program. Despite the obvious negative consequences for its public defense system of these departures, Grant County has so far declined to offer any measure of job security to its defenders.

The remaining contract defenders have expressed apprehension about the number of serious felony cases they are now receiving. Given the lack of commitment by Grant County and what they perceive to be increasingly hostile working conditions, they are exploring other employment options.

## **Caseloads**

The Settlement Agreement requires Grant County to observe an annual caseload limit of 150 case equivalents for each attorney. In addition, Grant County has adopted monthly and quarterly limits to protect against excessive short-term workloads and to ensure its defenders do not reach annual caseload limits too early in the year. The annual caseload

limit of 150 would translate to a pro-rated monthly limit of 12.5 cases and a quarterly limit of 37.5 cases. The monthly and quarterly limits adopted by Grant County are somewhat higher than that at 16 case equivalents per month and 40 per quarter. These higher limits allow Grant County flexibility in handling fluctuations in assignments from the court.

During the first quarter, there were fewer felony case assignments than expected, so most defenders were well below monthly and quarterly limits. The reduction in felony filings was particularly well-timed in that it allowed Grant County to reduce case assignments somewhat for the defenders who had resigned and were already actively working in Okanogan County. During the first quarter, the departing defenders (other than Brian Gwinn) received about half as many case assignments as those who remained.

Although caseloads were generally well below limits, one defender, Brian Gwinn, was assigned far too many cases. Mr. Gwinn's monthly caseload for January was 21.66, well above the monthly limit of 16. His quarterly total was 52.66, again well above the quarterly limit of 40. Most importantly, Mr. Gwinn exceeded his pro-rated annual caseload limit. Mr. Gwinn has resigned and the County agreed not to assign him cases in April. His pro-rated annual caseload limit for the three months he was eligible for case assignments in 2009 was 37.5.<sup>5</sup> Thus, he exceeded his annual caseload limit by more than 15 cases.

Mr. Gwinn's high caseload resulted from the fact that he was the sole attorney assigned to the child support calendars during the first quarter. Child support assignments have historically been high in the first quarter of the year and can fluctuate dramatically from month to month. For that reason, I have previously recommended to Grant County that child support cases be assigned to more than one attorney to avoid exceeding caseload limits. In this instance, it was evident in January and February that Mr. Gwinn's caseload was too high. Indeed, Mr. Gwinn had already reached his caseload limit by the end of February. Nonetheless, he remained the sole defender assigned to handle child supports during March and was assigned 14.33 additional cases. Grant County clearly could have and should have handled this situation better.

In terms of impact on his clients, I do not believe Mr. Gwinn's high caseload is likely to have affected the quality of his representation, though I cannot be sure. My main hesitation in this regard is the fact that over the last few months, in addition to completing his contract with Grant County, Mr. Gwinn has also been working in Okanogan County as a public defender and accepting private cases. Because Mr. Gwinn has not provided the required disclosures regarding this work, I am unable to determine his outside workload or evaluate its impact on his work in Grant County.

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<sup>5</sup> Grant County's contract with Mr. Gwinn provides for a 30 day wind-down period during which he is not to receive any new case assignments. Because he is not eligible for new case assignments during this time, I did not include the month of April when calculating his pro-rated annual caseload limit. Even adding that month, however, Mr. Gwinn still exceeded his annual caseload limit albeit by a much smaller margin.

In the future, Grant County needs to take steps to address the problems involved in assigning a single defender to cover all child support cases.<sup>6</sup> This issue is particularly pressing in that Grant County's newest full-time defender is not permitted to handle any other type of case. It may be that monitoring assignments more closely and rotating another defender in to cover occasional child support calendars would solve this problem. In addition, I understand that Grant County has again approached Plaintiffs about the possibility of reducing case credits for child support cases. Such an agreement could also help alleviate this problem. In the meantime, Grant County is considering adopting a separate set of monthly and quarterly caseload limits for child support cases with higher limits than for felony cases.

### **Training**

The Settlement Agreement requires Grant County to satisfy NLADA Standards for defender training. The preface to those standards recognizes that “[c]ontinuous improvement and training are critical to competence [and] crucial to the delivery of effective services to the clients served by defender organizations.” To the best of my knowledge, neither bar associations nor private organizations nor any other groups regularly provide training on criminal defense topics in Grant County. Accordingly, in the past, Grant County has satisfied its obligations under the Settlement Agreement by organizing its own trainings and by subsidizing defenders who attend relevant trainings elsewhere.

In 2009, Supervising Attorney Ray Gonzales has not organized any formal training for Grant County's defenders. Former supervisor Alan White was very creative in finding local resources for in-house trainings and also organized more formal trainings in Grant County with the assistance of the Washington Defender Association and the Washington State Office Public Defense. I hope that in the future Mr. Gonzales is able to arrange for similar training opportunities.

In addition to the lack of any organized training during the first quarter, Mr. Gonzales has informed me that Grant County no longer intends to provide support to its contract defenders for trainings. This change in policy is extremely disappointing. Training has always been an area of strength for Grant County. In past years, in addition to the local trainings set up by Mr. White, Grant County has sent defenders to the National Criminal Defense College in Macon, GA, for two weeks of intensive trial training and supported other defenders in attending intensive 3-day trainings through Jerry Spence's Trial Lawyers College. Under the new policy announced by Mr. Gonzales, it is unclear to me how Grant County intends to meet its training obligations.

On a positive note, Grant County's Department of Public Defense recently joined the Washington Defender Association and offered financial support to its in-house defenders to attend the annual conference in Winthrop, Washington. In the future, I hope that

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<sup>6</sup> Similar problems arise with probation violation calendars, and Grant County should attend to that issue as well.

Grant County will return to its prior practice of supporting its contract defenders in attending such trainings.

### **First Appearances**

The Settlement Agreement requires that Grant County provide representation at initial appearances for all indigent defendants. Grant County satisfies this obligation by assigning each of its full-time defenders first appearances duty for a week at a time on a rotating basis throughout the year. At present, Grant County appears to be providing representation to all in-custody defendants. I have not evaluated representation of out-of-custody defendants recently but plan to do so next quarter.

Although Grant County no longer requires its public defenders to visit first appearance clients in jail prior to their hearings, most defenders continue to do so. I found a record of many such client visits during the first quarter. For each month, I found a few days on which the first appearance attorney did not visit any clients in the jail, but those days were clearly the exception rather than the rule.

### **Jail Visits**

Grant County requires its public defenders to make contact with all new clients within seven days. Supervising Attorney Ray Gonzales has established a higher standard for in-house defenders, indicating that defenders from his office are expected to visit jailed clients within three days of assignment. For all defenders, Grant County's written policy on client contact makes clear that a meeting with the client in the courtroom or in the hallway outside the courtroom is not sufficient.

Timely jail visits have been a persistent problem in Grant County. In past years, delays of several weeks or longer were not uncommon. Some inmates pled guilty and were sentenced without ever having received a visit from the assigned attorney. Despite clear rules requiring prompt jail visits and close scrutiny of performance in this area, some of Grant County's defenders continue to have difficulty consistently visiting their in-custody clients in a timely fashion.

I reviewed 70 in-custody cases assigned during the first quarter and found that the Grant County defenders visited their clients on or before the day of arraignment approximately 41% of the time. Within a week, the defenders as a group had visited 76% of their in-custody clients. These figures are down from last quarter when the defenders visited 90% of jailed clients within seven days and 70% prior to arraignment. Nonetheless, the first quarter visitation rates did remain higher than those from the first three quarters of 2008. The table below reflects the timeliness of jail visits over the past five quarters:

	<u>1Q 2008</u>	<u>2Q 2008</u>	<u>3Q 2008</u>	<u>4Q 2008</u>	<u>1Q 2009</u>
Visit before arraignment	25%	34%	38%	70%	41%
Visit within 7 days	39%	46%	65%	90%	76%

During the first quarter, some defenders were quite diligent in visiting clients within seven days. Janelle Peterson and Julie St. Marie both received 10 in-custody assignments during the first quarter and visited 100% of them within seven days. John Perry and Karen Lindholdt each received 13 assignments. Mr. Perry visited all but one within seven days, a rate of 92%, and Ms. Lindholdt was close behind at 85%. Although they received very few in-custody case assignments, Dean Terrillion and Mike Prince visited all of their clients within seven days.

Only four defenders, John Perry, Janelle Peterson, Julie St. Marie, and Dean Terrillion visited more than 50% of their clients prior to arraignment. Ms. St. Marie had the highest rate of visits before arraignment at 70%.

Among defenders receiving a significant number of in-custody case assignments, only Brett Billingsley had a particularly low rate of timely visits. He received 15 in-custody cases and visited less than half within seven days. His jail visits were timely in only 47% of his cases. Several other defenders also performed poorly in this area during the first quarter. Mike Haas, Melissa MacDougall, and Frank Grigaliunas were assigned a total of six in-custody cases between them and did not manage to visit any of them within seven days.

While some defendants only had to wait a few extra days for a visit, others had to endure much longer delays. I found 8 inmates who had to wait 26 days or more for an attorney visit. Mr. Haas and Ms. MacDougall were most problematic in this regard as they did not visit any of their five newly assigned in-custody clients during the first quarter. Ms. MacDougall has not visited any client at the Grant County Jail in 2009. Mr. Haas has not visited any of his clients at the jail since January 26. Although fellow defender Mike Prince eventually visited four of the five clients for Mr. Haas and Ms. MacDougall, the clients had already waited 19 days, 31 days, 37 days, and 68 days respectively before Mr. Prince went to see them. Two of the clients pled guilty on the day Mr. Prince finally visited them. A third pled guilty a week before he finally received a visit, not from his assigned attorney but from Mr. Prince. The last of the in-custody clients assigned to Mr. Haas had yet to receive a visit from anyone by the end of the third quarter, having already waited 34 days in jail.

Brett Billingsley, Frank Grigaliunas, and John Perry also had long delays in visiting some clients. Mr. Billingsley waited 26 days to visit one client while another client had waited in jail 48 days by the end of the quarter without ever having received a visit. Mr. Grigaliunas did not visit his lone in-custody client for 28 days, apparently due to a misunderstanding regarding the jail visit policy. While Mr. Perry visited 11 of his 12 in-

custody clients within seven days, he had one client who waited 35 days and had not yet received a visit by the end of the quarter. Mr. Perry explained that he had been in contact with client and actively working on the case and that the lack of a jail visit was an oversight on his part.

### **Client Complaints**

Grant County maintains a toll-free telephone line for client complaints. Instructions regarding how to make a complaint are posted in several locations at the jail in both English and Spanish. For out-of-custody defendants, the assigned public defender provides each client with a flyer at arraignment that directs him or her to contact the Supervising Attorney with complaints and includes his contact information. I understand that the flyer may still identify Alan White as the Supervising Attorney. If so, this document should be updated to include Mr. Gonzales' name and contact information.

Despite the change in Supervising Attorney at the end of 2008, Grant County has continued to rely on former Supervising Attorney Alan White to process client complaints. As before, calls to the toll-free complaint line go to Mr. White's office, and his assistant, Aracely Yanez, logs all incoming calls. She then forwards messages to the assigned defender or refers the matter to the Supervising Attorney for follow-up.

The split responsibility for complaints between Alan White and Ray Gonzales has caused some problems in complaint reporting. Alan White has continued to provide detailed monthly reports on the complaint calls his office receives, but Mr. Gonzales has not been regularly tracking or reporting on the complaints he receives. As a result, records relating to client complaints for the first quarter are incomplete. Mr. Gonzales has now forwarded to me what records he has, and his assistant Gail Sundean has created a form for documenting such complaints in the future to avoid a recurrence of this problem.

During the fourth quarter, there were 148 calls to the complaint line. Many inmates call the line repeatedly for the same or similar reasons. Although there were a total of 148 calls, there were only 73 unique callers. Both the number of calls and the number of unique callers are higher than in the previous quarter. In addition to calls to the complaint line, Mr. Gonzales received some complaints directly. Many of the complaints received by Mr. White were referred to Mr. Gonzales for follow-up. Yet according to Mr. Gonzales, he assumed Mr. White was responsible for handling complaints. As a result of this confusion, no one followed up on some complaints.

As has consistently been the case, most complaint calls related to attorney-client communication and were similar in content to those received in prior quarters. Many callers expressed frustration over their lack of contact with Mike Haas. Grant County received complaints regarding Mr. Haas throughout the first quarter, starting in early January.

On January 7, defendant T.W. called to request that Mr. Haas visit him in jail as soon as possible. Mr. White's office notified Mr. Haas and Mr. Gonzales regarding the call. Mr. Haas never visited T.W. in jail, and T.W. finally pled guilty on February 18, approximately 42 days after requesting that his attorney visit him as soon as possible. Mr. Gonzales does not recall what may have been done to follow up on this complaint.

On January 8, defendant M.S. called to complain that Mr. Haas telephone line was not able to receive messages. Mr. Gonzales emailed Mr. Haas asking him to get in touch with the client. I have no record of any other follow-up.

Also on January 8, defendant R.B. reported that he was unable to reach Mr. Haas. Mr. Haas did visit the client on January 13, but on January 22, defendant R.B. called again to report that he could not reach Mr. Haas. The client called back repeatedly over the next several days regarding Mr. Haas' availability. On February 10, R.B. called again to request that Mr. Haas visit him. On February 22, R.B. called to ask if Mr. Haas was still his attorney since Mike Prince had helped him. He was told that Mr. Haas was still his attorney. On February 26, R.B. called to request that Mr. Haas visit before his next court date. Mr. Haas did not visit R.B. again after the January 13 visit. Mike Prince finally visited the client on March 4. The case was ultimately resolved by way of a plea and prison sentence on March 30 at which time the defendant had not received a visit from his assigned attorney for 76 days. R.B. made a total of 19 calls to the complaint line during the first quarter. Although the client's calls were relayed to Mr. Haas, I have no record of any investigation or meaningful follow-up on the client's complaints regarding the ongoing lack of contact with Mr. Haas.

On February 4, defendant I.I. called to request a visit from Mr. Haas. This client had waited 24 days for the initial visit from Mr. Haas. On February 9, defendant I.I. called the complaint line again requesting to see his attorney. He reported that Mr. Haas had only visited him once in all the time he'd been in jail, that he had lots of questions, and that he wanted a good lawyer or for Mr. Haas to visit him. The message was forwarded to Mr. Gonzales and Mr. Haas. I have received no record of any investigation or follow-up on this complaint. Defendant I.I. finally pled guilty on March 24 having never received another visit from his assigned attorney. In fact, Mr. Haas only appeared at one of the six hearings on the case from arraignment through sentencing.

On February 24, defendant C.B. called to complain that Mr. Haas wouldn't return calls and postpones everything. Her case had been pending since September. Alan White wrote a letter to Mr. Gonzales detailing the client's complaint and submitting it to him for review. I have no record of any follow-up or investigation of this complaint. Mr. Gonzales reports that he did have a brief telephone conversation with C.B. but did not speak with Mr. Haas regarding this matter.

On March 16, defendant D.H. called to report that he had called Mr. Haas several times without any response. He asked whether Mr. Haas was still his attorney and requested that someone reply as he would like to review his discovery. Mr. Haas had been assigned the case approximately a month earlier.

On March 17, defendant B.S. called because he had been unable to reach Mr. Haas. He reported that Mr. Haas' voicemail was full. He was calling because he was running a high fever and wanted Mr. Haas to request a continuance.

Mr. Haas was not alone among the departing defenders in receiving complaints. On February 24, defendant R.R. called the complaint line to request a new attorney who was "not so busy." The client had been assigned to Melissa MacDougall about a week before she and her partners took over the Okanogan County public defense contract. Ms. MacDougall is exceptionally dedicated to her clients, so for her to receive this type of complaint suggests to me that her workload must have been very heavy at that time. Defendant R.R.'s case is still pending trial and has been covered by Mike Prince for at least the last couple of months. Mr. Prince filed a "notice of association" on March 3.

In general, I am concerned as to whether Supervising Attorney Ray Gonzales is giving client complaints appropriate attention. His standard response seems to be to convey the complaint to the handling attorney. It should come as no surprise that he then receives assurances that the matter has been taken care of. Depending on the nature of the complaint, a message to the assigned attorney may be sufficient to address the client's concerns, but some complaints require more follow-up, particularly if there is a pattern of similar complaints. Aside from an inquiry to the assigned defender, I see little evidence of any actual investigation of most complaints. Mr. Gonzales often did not even have direct contact with the individual making the complaint as the messages were forwarded from Mr. White's office. While former Supervising Attorney Alan White frequently visited clients in jail to investigate complaints, jail records do not reflect a single jail visit by Mr. Gonzales during the first quarter even though at least one caller expressly requested a visit.

While criminal defendants frequently make frivolous complaints against their public defenders, not all such complaints are unfounded. In the future, Mr. Gonzales should probe more deeply to determine whether clients who call to complaint may have valid concerns. In one case, for example, a client wrote to Mr. Gonzales that his defender told him he was "was withdrawing as my counsel because I wouldn't waive my right to speedy again for the 8<sup>th</sup> time, so I felt that contacting you might be appropriate as you will be needing to assign me new counsel." Mr. Gonzales responded by writing "[s]hould it become necessary to assign new counsel based on a decision by the court, our office certainly will abide by the court's order." Rather than dismiss the complaint and refer the client to the court, a more appropriate response would have been to call the client for further explanation, review the docket and perhaps the court file, and discuss the matter with the attorney involved to determine whether the client's complaint had any validity.

## **Investigator Staffing**

Grant County currently has five approved public defense investigators: Ellyn Berg, Marv Scott, Kathleen Kennedy, Jim Patterson, and Mario Torres. The feedback I have received on Ellyn Berg and Marv Scott has always been excellent. One defender recently described them as “top-notch.” Another called them “absolutely outstanding.” According to the defenders, they are thorough, thoughtful, and always professional. Kathleen Kennedy has only been with Grant County since last quarter, but I’ve also received favorable reviews regarding her work.

Mr. Patterson has not been available for case assignments for most of the last six months. Although he has previously done good work for Grant County’s public defenders, he always seems to have a heavy workload. In the past, defenders have complained about his communication and the timeliness of his work. He recently informed Grant County that he was again available for new assignments and received one new Grant County case at the end of March. I hope that Supervising Attorney Ray Gonzales will be vigilant in monitoring Mr. Patterson’s work in the coming months to ensure he has sufficient time to devote to Grant County cases.

As reported last quarter, I have received nothing but negative reviews regarding the work of Mario Torres. He has failed to complete assigned tasks and been unresponsive to attorney requests. In light of the consistently negative feedback, Alan White has stopped assigning cases to Mr. Torres. Mr. Torres did not receive a single new adult felony case assignment during the first quarter.

Supervising Attorney Ray Gonzales recently approached me regarding a potential request to disapprove Mr. Torres. I explained that while my approval allows Grant County to assign cases to Mr. Torres, Grant County is not required to assign Mr. Torres any cases at all. I hope that Grant County will resolve this matter internally so that there will be no need for me to determine whether to formally withdraw my approval. If, however, I continue to receive complaints regarding his work, I will contemplate doing so.<sup>7</sup>

Given Mr. Gonzales’ awareness of the problems with Mr. Torres, I was surprised to learn that he had declined to re-assign one of Ms. MacDougall’s cases when she complained about Mr. Torres. Ms. MacDougall reports that she wrote to Mr. Gonzales twice to complain and requested re-assignment of the case, but Mr. Gonzales was unwilling to re-assign the case. Mr. Gonzales reports that he referred the matter to Alan White as he did not want to interfere with Mr. White’s assignment of investigators.

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<sup>7</sup> I had significant reservations when I originally approved Mr. Torres and advised Grant County in writing that I had struggled with the decision. Regarding my reservations, I wrote to the County that “I spoke with three different criminal defense attorneys who recommended that he not be approved. Their primary concerns were the thoroughness and timeliness of his work. Even some of the attorneys who supported Mr. Torres expressed concern about him not completing work on time due to being understaffed and overextended.” I ultimately approved Mr. Torres because of his fluency in Spanish and strong support from Alan White.

## **Investigation Rates**

The overall rate of investigation for the first quarter was 29.1%, compared with 36% in 2008 and 35% in 2007. The rate for individual attorneys ranged from 7% to 63%. Individual rates are listed in the table below:

<b>ATTORNEY</b>	<b>1<sup>ST</sup> QUARTER INVESTIGATION RATE</b>
Peterson	63%
MacDougall	40%
Lindholdt	32%
St.Marie	26%
Prince	25%
Billingsley	24%
Perry	10%
Haas	7%

As in the past, most defenders appear to be making appropriate use of investigators on their cases.

Mike Haas and John Perry had very low rates of investigation during the first quarter relative to their colleagues. To ensure that below average case assignments had not skewed the numbers, I compared individual investigation rates for the first quarter to rates for the last 6 months and for all of 2008. The rates for most attorneys were fairly consistent, but the rates for Mr. Haas and Mr. Perry were substantially lower in recent months than they had been previously:

<b>ATTORNEY</b>	<b>2008 RATE</b>	<b>6 MONTH RATE</b>	<b>1<sup>ST</sup> QUARTER RATE</b>
Haas	41.2%	6.3%	6.7%
Perry	33.3%	21.7%	10.3%

Mr. Haas has submitted a total of two investigation requests in the last six months. Mr. Perry has received more case assignments over the last six months and made substantially more investigation requests than Mr. Haas, but his steadily declining rate of investigation is worrisome, particularly since he only joined Grant County last June. I hope that this decline proves to be a temporary aberration as Mr. Perry does seem to understand the importance of investigation.

## Experts

The Settlement Agreement requires that public defenders request experts via *ex parte* motion and that the records relating to experts be sealed. During the first quarter, I found two cases in which Grant County public defenders requested experts. Both requests were made by John Perry. The requests appear to have been made *ex parte* but were not sealed. In one case, Mr. Perry planned to have his own psychological expert observe the defendant's evaluation at Eastern State Hospital and his application did not contain any confidential information other than the identity of the expert. In the other case, however, Mr. Perry's declaration in support of his request for an expert clearly contained confidential mental health information and should have been sealed. Nonetheless, Mr. Perry is to be applauded for his use of experts on behalf of his clients.

In the coming months, I hope that new Supervising Attorney Ray Gonzales will make the issue of defense experts a priority and formalize the procedures to be used by Grant County's public defenders. Standardized forms, procedures, and policies would be very helpful in ensuring that experts are employed when appropriate and that client confidentiality is protected.

## Motions Practice

I continue to evaluate motions practice by reviewing electronic court dockets to identify cases in which motions are filed. During the first quarter, I reviewed both new felony assignments and ongoing cases from 2008 and found 13 cases in which Grant County defenders had filed substantive motions.<sup>8</sup> Six different defenders filed motions. The totals for all of the defenders who filed motions during the first quarter are listed below:

<b>ATTORNEY</b>	<b>MOTIONS</b>
Peterson	6
Perry	2
St. Marie	2
Billingsley	1
Lindholdt	1
Terrillion	1

Janelle Peterson and Julie St. Marie actually filed more motions than reflected above because they sometimes filed more than one motion in a given case.<sup>9</sup> Ms. Peterson and Ms. St. Marie both maintain an active motions practice as does Ms. Lindholdt. I have been impressed with their level of practice in this area. Although Mr. Perry has not been practicing in Grant County as long as the others, he too has consistently filed motions

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<sup>8</sup> For purposes of this analysis, I defined substantive motions as any written motion to suppress pursuant to CrR 3.5 or CrR 3.6, any written Knapstad motion, and any written brief that contained substantive legal analysis tailored to a particular case.

<sup>9</sup> Ms. Peterson and Ms. St. Marie also raised CrR 3.5 issues this quarter and contested admission of their clients' statements in lengthy evidentiary hearings. Others may have had such hearings as well.

when appropriate. Mr. Terrillion only joined Grant County for the last month of the quarter but has already filed a substantive motion.

Four felony defenders did not file any motions in the first quarter. Frank Grigaliunas just started in March, so he has not yet had a real opportunity to develop a motions practice. Mr. Haas, Ms. MacDougall, and Mr. Prince did not file any motions, but it is difficult to determine whether any meaningful conclusion can be drawn from this as they have been assigned fewer cases than the other defenders and may simply not have received any cases in which motions were warranted.

In terms of how I assess motions practice, some defenders have suggested that I have not given appropriate attention to release motions, furlough motions, motions to compel, DOSA evaluations, and other similar motions that may not involve legal research but are nonetheless a very important measure of the quality of the representation being provided. As one defender pointed out, these issues often matter more to the client and take more time than suppression motions. I agree and will endeavor to evaluate these areas in more detail in future reports.

### **Overall Quality of Representation**

Given the amount of turnover in Grant County during the first quarter, it is difficult to evaluate the overall quality of representation. Grant County has three new public defenders who have not been on staff long enough to evaluate. Clearly, the departure of almost half of Grant County's public defenders for Okanogan County has resulted in some turmoil within the public defense program and raised questions about the quality of representation being provided. At the same time, the County still has several defenders who consistently visit their clients in jail, file motions, investigate cases, and go to trial when necessary. Retaining these attorneys should be Grant County's top priority.

Disposition data for felony cases resolved during the first quarter indicates that Grant County's public defenders continue to obtain favorable results for their clients in many cases. Overall, the defenders had a felony conviction rate of 61%. The individual rate of felony convictions for most defenders ranged between 55% and 64%. John Perry had an impressively low rate of 46% while Mike Haas and Brett Billingsley had higher rates at 73% and 80% respectively. These figures are of limited value, however, because they include only cases resolved during the first quarter, ranging from 15 to 33 cases per attorney.

I also found 14 dismissals obtained by Grant County's public defenders during the first quarter. Ms. St. Marie had the most dismissals with four. In one case, she obtained a sworn declaration from the alleged victim that persuaded the prosecutor to dismiss. In another, she won a dismissal by pushing a weak case to trial. These are precisely the type of victories that one would expect to see from a strong public defense program.

Grant County public defenders had three felony trials during the first quarter, two jury trials and one bench trial. Ms. St. Marie won a not guilty jury verdict on a drug possession charge. She had filed four separate briefs in the case, arguing unsuccessfully for suppression and dismissal. Mr. Prince also tried a drug possession case originally assigned to Mr. Haas. As noted above, that case resulted in a guilty verdict. Finally, Brett Billingsley took a felony eluding case to bench trial. That case also resulted in a guilty verdict but not before Mr. Billingsley persuaded the court to conduct a scene visit. In addition to the trials that went to verdict, Ms. Lindholdt and Mr. Perry both resolved cases on favorable problems on the day of trial when the State discovered unexpected problems with each case.

### **Supervising Attorney**

The Settlement Agreement requires that the Monitor “oversee and assess the Supervising Attorney’s performance.” To date, I have been disappointed with the performance of Supervising Attorney Ray Gonzales. The change in tone under Mr. Gonzales has been dramatic and negative. His adversarial approach to supervision, poor communication, and reluctance to take on administrative responsibilities threatens to erase the progress made by Grant County over the last year.

Mr. Gonzales seems to have adopted something of a siege mentality. He takes an adversarial approach to Plaintiffs, the Monitor, and even the defenders he supervises. In written communications with me, Mr. Gonzales frequently acts as though he is a member of Grant County’s legal team. He has often been vague, evasive, and noncommittal in his answers to my inquiries, particularly in his written responses regarding the County’s proposed in-house public defense program. He now copies Grant County’s lawyers on routine email correspondence with me.<sup>10</sup> Overall, I have found counsel for Grant County to be far more candid and straightforward than Mr. Gonzales.

With respect to the public defenders, Mr. Gonzales has created a working environment defined by fear and dysfunction. He has repeatedly cast doubt on the contract defender’s job security, making clear that he views them as an easily replaceable commodity. Moreover, he has refused to consider extending any of the current defenders’ contracts while also suggesting that he intends to cut the salaries of those who remain next year.<sup>11</sup> Mr. Gonzales appears to care very much about his public image and intentionally or not, has left the defenders with the impression that communication with the Monitor will be viewed as a personal betrayal. As a result, the defenders are now extremely reluctant to share their views with me as they fear retaliation. Mr. Gonzales disputes the notion that the defenders are fearful and suggests that they have no reason to be concerned about retaliation. Perhaps this impression is simply a result of poor communication between Mr. Gonzales and the defenders. Regardless, it is not a healthy dynamic.

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<sup>10</sup> Mr. Gonzales explains that he was instructed to do so by counsel.

<sup>11</sup> Mr. Gonzales disputes that he has suggested reducing salaries.

It should come as no surprise that morale among the remaining public defenders is still quite low. I met with each of the current defenders individually during the first quarter. While the contract defenders were less open with me than in the past, it was nonetheless evident that their opinions regarding Mr. Gonzales have changed very little. With only four contractors remaining, however, there is no longer any safety in anonymity. As a result, they are unwilling to be openly critical of Mr. Gonzales or share specific complaints that might identify them. The lone exception has been Karen Lindholdt who resigned last month. When asked about her reasons for leaving, she cited “irreconcilable differences with new management” and expressed great frustration with Mr. Gonzales.

On a practical level, I am concerned about whether Mr. Gonzales has the administrative skills necessary to run the program. Although he has been employed by Grant County for more than four months and now has two support staff, Mr. Gonzales has still not assumed responsibility for the administration of Grant County’s public defense program. For some reason, Grant County continues to outsource those tasks to its former Supervising Attorney, Alan White. Mr. Gonzales does not yet assign cases, assign investigators, perform conflicts checks, monitor caseloads, track jail visits, or write any of the required reports. Even the client complaint line is still routed to Alan White’s office.

I am perplexed at Mr. Gonzales’ willingness to abdicate one of the central functions of his position for so long. It is my understanding that at present, Mr. Gonzales is unable to determine which defender represents a particular client because he doesn’t have a list of case assignments. I find it troubling that Grant County clients could obtain the name of their attorneys by calling my office more easily than by calling the Grant County Department of Public Defense. Retaining Mr. White for a period of time to assist with the transition made sense, but after more than four months, that transition has not yet begun. Until recently, Mr. Gonzales had not planned to start taking over most administrative tasks until June and was already contemplating an extension of Mr. White’s contract beyond the original 6 months.

I understand that counsel for Grant County has now directed Mr. Gonzales to accelerate his timetable. To his credit, Mr. Gonzales and his staff seem to have embraced the challenge. The County currently anticipates that Mr. Gonzales’ office will be able to take over administrative responsibilities within about a month. In addition, over the last week or so, Mr. Gonzales and his staff have been proactive in working with me to understand and identify the information I need and have generously offered to provide information to me on a more frequent basis than before.

Another major issue with Mr. Gonzales is that he fundamentally disagrees with the requirements of the Settlement Agreement. Although he is charged with enforcing the Agreement, he has shown little understanding of its terms. During the first quarter, Mr. Gonzales has:

- Assigned himself to a vehicular homicide case even though the Settlement Agreement prohibits the Supervising Attorney from having a caseload. See S.A. § II(B)(1);

- Insisted that he have “general oversight, monitoring, and budget responsibilities” for District and Juvenile Court despite the Settlement Agreement’s express requirement that he work full-time in Superior Court. See S.A. § II(B)(1);
- Failed to advocate for defender salary parity with prosecutors even though the Settlement Agreement requires it. See. S.A. § II(B)(3) & § II(E)(1)
- Suggested that he intends to alter the case credit formula for extraordinary cases set forth in the Settlement Agreement. See S.A. § II(D)(3);
- Assigned a conflict case without immediately notifying the Monitor of the assignment or seeking approval of the assignment. See S.A. § II(F)(3);
- Informed the contract defenders that he anticipates substantially reducing their salaries in 2010 despite the fact that the Settlement Agreement specifies the salaries for these defenders.<sup>12</sup> See S.A. § II(E)(1); and
- Suggested to me that in-house investigators did not need Monitor approval even though the Settlement Agreement requires approval before Grant County hires “any investigator.” S.A. § II(E)(2).

After consultation with counsel for Grant County, Mr. Gonzales has retreated from most of the above positions. His apparent disregard for the terms of the Settlement Agreement is particularly troubling in light of the fact that I expressed concerns regarding his willingness to adhere to the Settlement Agreement before approving Mr. Gonzales as supervisor. At that time, I was assured by Grant County that he understood the Agreement and would abide by its terms. Mr. Gonzales acknowledges some past errors in interpreting the Settlement Agreement but notes that such mistakes were early in his tenure and insists that he is committed to full compliance with the Agreement.

To succeed as Supervising Attorney, Mr. Gonzales needs to fundamentally change his approach. He must stop viewing himself as counsel for Grant County in this litigation and start thinking of himself as an advocate for indigent defendants and the public defenders who represent them. He must embrace a more cooperative, team approach and somehow persuade the defenders that they share a common mission.

## **Conclusion**

Grant County public defense experienced tremendous turmoil during the first quarter. The loss of four public defenders to Okanogan County has been difficult to say the least, and the transition to a new Supervising Attorney has been not been smooth. Grant County had made great progress by the end of 2008, but with yet another talented

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<sup>12</sup> Again, Mr. Gonzales disputes making such statements.

defender resigning in March and others looking for alternate employment, Grant County now seems on the verge of starting over.