

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

### **Monitor's Report**

#### **Second Quarter, 2009**

July 23, 2009

Submitted by Francisco Rodriguez, Settlement Monitor

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

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

- April 13, 2009
- May 4-5, 2009
- June 15, 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.

#### **Access to Information**

The Settlement Agreement provides that the Monitor shall have access to information concerning the Grant County public defense system. This access expressly includes "the right to interview all persons with knowledge about the public defense system." To facilitate access to information, Grant County must "require the Supervising Attorney and public defenders to cooperate fully with the Monitor and promptly to provide all information (excluding privileged communications and work product) requested by the Monitor."

While Grant County freely provides basic data regarding its public defense program, I frequently encounter resistance when I attempt to probe more deeply. During the second quarter, for example, Supervising Attorney Ray Gonzales directed public defender Janelle Peterson not to speak to me regarding her complaint against a prosecutor that had led to re-assignment of 10-15 of her cases. When I pointed out to Mr. Gonzales that prohibiting Ms. Peterson from speaking with me was a violation of the Settlement Agreement, he immediately changed course and agreed to allow her to speak with me.

Prior problems with application of public disclosure standards to information provided under the Settlement Agreement recurred during the second quarter. After receiving Grant County's monthly report information for May, I was advised that the Grant

County's public records officer had raised objections about some of the information sent to me. While I have no need for the particular information in question, I continue to be concerned generally about Grant County restricting the flow of information based upon public disclosure principles that have no application in this context. Counsel for Grant County Francis Floyd has repeatedly assured me in the past that he had resolved this problem, but that does not appear to be the case.

### **Approval of In-House Program**

Grant County opened an in-house public defense office on March 2, 2009, prior to the expiration of the required 90-day waiting period and prior to receiving Monitor approval of its plans. On April 3, 2009, I disapproved Grant County's proposed in-house public defense program due to, among other issues, salary disparities with Grant County prosecutors, conflict of interest concerns, and the lack of a proven ability to administer the system. On April 17, 2009, the parties reached an agreement under which Grant County was to obtain Monitor approval of its in-house public defense program by May 28, 2009.

Over the next six weeks, Grant County made substantial progress in addressing the concerns I had identified in my April 3rd letter. While I continued to have concerns about the management of the in-house program, I did not feel the remaining issues warranted withholding approval. Accordingly, on May 28, 2009, I approved the following changes in the form of the Grant County public defense system:

1. The Supervising Attorney is now a Grant County employee;
2. Five public defenders are now Grant County employees; and
3. One investigator is now a Grant County employee.

Counsel Francis Floyd and the Grant County Board of County Commissioners devoted considerable effort to obtaining approval, and it was their commitment to the process that ultimately made the difference. I would be remiss if I did not also specifically note the substantial contributions of June Strickler, Administrative Services Coordinator to the Board of County Commissioners, who was instrumental to Grant County's efforts to obtain approval.

### **Attorney Staffing**

Grant County continues to experience a very high rate of turnover among its public defenders. One of its newly hired in-house public defenders, Frank Grigaliunas, has already resigned after only three months with Grant County. His last day was June 12. In addition, Karen Lindholdt, who had resigned at the end of last quarter, negotiated an early release from her contract and has now completed her work with Grant County.

Several new defenders started with Grant County this quarter. Kacie Maggard joined the Grant County Department of Public Defense on April 1. Because she has limited criminal experience, she has been assigned to handle the child support docket full-time. In May, Grant County hired John Doherty, an experienced criminal attorney from Tacoma, to join the in-house program. Because Mr. Doherty is still winding down his private practice, I approved a transition plan placing him on a reduced caseload for the first several months. Grant County also recently retained a new contract attorney, Robert Kentner, to take over Ms. Lindholdt's contract for the balance of the year. Grant County has attempted to fill Mr. Grigaliunas' in-house position but has been unsuccessful thus far.

Grant County is likely to lose yet another defender in the near future as Janelle Peterson may be seeking an early release from her contract. Ms. Peterson has filed a complaint over an incident in which she felt physically threatened by a Grant County prosecutor and has engaged an attorney to represent her. Her attorney recently wrote to Grant County that Ms. Peterson's fear of this prosecutor is such that she is "not able to zealously advocate on behalf of her clients." Supervising Attorney Ray Gonzales has responded insisting that Ms. Peterson comply with the terms of her contract or be involuntarily terminated.

The current situation is an untenable one for Ms. Peterson's clients. For the last several weeks, Ms. Peterson has asked other attorneys to cover and continue many of her hearings so as to avoid having to be present in court with the prosecutor in question. Her fear seems genuine, and her attorney has made clear that the quality of her representation is suffering. While Mr. Gonzales' suggestion that Ms. Peterson simply honor her contract may make sense from a staffing perspective, it ignores the consequences to her clients whose representation may now be compromised. If Ms. Peterson cannot provide effective representation, for any reason, Grant County has an obligation to provide her clients with new counsel. No doubt Grant County and Ms. Peterson will continue to discuss the terms of her departure, but regardless of how those issues are resolved, it seems clear at this point that her departure is imminent, and Grant County should prepare accordingly.

The high level of staff turnover in Grant County is not conducive to establishing a quality public defense system. Recruiting and retaining skilled personnel is essential to long term success and stability. Ms. Peterson is currently the longest tenured public defender in Grant County. With her departure, five of the eight defenders will have started work this year. Moreover, Ms. Peterson has consistently been among the most diligent defenders in visiting her clients in jail, investigating her cases, and litigating motions. Her work on behalf of her clients has reflected very well on Grant County, and her departure will be yet another serious blow to public defense there.

I continue to strongly recommend that Grant County negotiate contract extensions with the remaining contract defenders so as to avoid further turnover. While my prior admonitions have been ignored, I remain hopeful that Grant County will recognize the

importance of retaining quality defenders and act to extend their contracts before it is too late.

### **Caseloads**

The Settlement Agreement requires Grant County to limit annual caseloads to 150 case equivalents for each attorney. Grant County has also 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. While each attorney should receive approximately 12.5 cases per month and 37.5 cases per quarter, 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.

Overall, the caseload outlook in Grant County is positive. During the second quarter, felony case assignments continued to come in at a lower rate than last year, so most defenders were well below monthly and quarterly limits. There were, however, significant administrative problems with case assignments and reassignments in June that resulted in cases not being accurately tracked and/or counted. Sorting out the discrepancies in assignment records and correcting the errors was quite a challenge.

After reconciling all the case assignment data, I found that two defenders exceeded their monthly caseload limits for June. Dean Terrillion's monthly caseload for June was 18.66 case equivalents. Mr. Terrillion's caseload was even higher before several cases were transferred to other attorneys late in the month. Similarly John Doherty had exceeded his approved monthly caseload for June until a number of his cases were transferred to other attorneys in late June and early July.

The high caseloads in June were due in part to a large number of cases that had to be re-assigned from other defenders. Almost 40 cases were reassigned as a result of the resignation of Frank Grigaliunas and Janelle Peterson's conflict with one of the prosecutors. Because the re-assigned cases were not tracked in any systematic way, they were not properly credited to the newly assigned attorneys. Moreover, with Mr. Grigaliunas gone and Ms. Lindholdt winding down, Grant County was essentially down two attorneys for most of June.

Managing the large number of reassignments was challenging, but Supervising Attorney Ray Gonzales should have monitored case assignments and reassignments more closely and recognized that several attorneys were approaching their June caseload limits before those limits had been exceeded. Brett Billingsley, John Perry, and Julie St. Marie all had room under their monthly limits at the end of June and could have absorbed the extra cases. Moreover, while I agree with the decision to avoid assigning cases to Ms. Lindholdt during her last month, she could easily have handled one or more of the

probation violation calendars instead of Mr. Terrillion, thereby reducing his June caseload to within monthly limits.<sup>1</sup>

In addition to some of the monthly totals, I am also concerned about the distribution of different types of cases among the public defenders. During the second quarter, almost all of the class A felony cases were assigned to just three attorneys:

<b>Attorney</b>	<b>Total</b>
Perry	10
Billingsley	6
St. Marie	5
Peterson	1
Doherty	0
Grigaliunas	0
Lindholdt	0
Maggard	0
Terrillion	0
<b>Total</b>	<b>22</b>

For Mr. Perry especially,<sup>2</sup> but also Mr. Billingsley and Ms. St. Marie, the high number of class A case assignments tends to make their caseloads much more challenging than those of other defenders. Similarly, dedicating certain defenders to handle probation violation cases (Terrillion) and child support cases (Maggard)<sup>3</sup> removes those less demanding cases from the mix of assignments available to other defenders. In the future, Grant County should strive to balance workloads more evenly among the defenders. Aside from better distribution of the class A assignments, Grant County should also consider rotating coverage of the probation violation calendars and hiring additional attorneys qualified to handle class A felonies. To some extent, this problem may be alleviated with Mr. Doherty and Mr. Kentner available to share the class A work in the coming months.

On a more general level, I am concerned that the case counts provided by Grant County do not always accurately reflect all of the cases actually handled by its public defenders. In addition to the problems with tracking reassigned cases noted above, Grant County's

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<sup>1</sup> Mr. Grigaliunas could also have covered the probation violations during the first two weeks of June. He was assigned no cases for the month even though he worked until June 15.

<sup>2</sup> At the current rate, Mr. Perry would receive 40 class A felonies in a year in addition to his 100 or so other felony cases. It would be extraordinarily difficult to provide effective assistance of counsel to all of one's clients while carrying such a caseload.

<sup>3</sup> Grant County has created a difficult situation for itself with respect to Ms. Maggard as she does not yet meet minimum standards for handling felony cases. As a result, she will be limited to child support cases for the foreseeable future. This is problematic in that it prevents other defenders from handling a portion of the child support cases as a means of relief from felonies. In addition, Ms. Maggard will never become qualified to handle felony cases if she continues to work on child supports full-time. Ms. Maggard is interested in criminal practice, and I have encouraged Supervising Attorney Ray Gonzales to explore options for giving her some criminal experience in district court (subject to approval by the parties).

current method of counting probation violation, child support, and some felony cases does not appear to comply with the Settlement Agreement. With respect to probation violations, it is my understanding that a large number of cases are not being credited to the attorney handling them. Although I have repeatedly asked Supervising Attorney Ray Gonzales for some policy or rationale that would explain the failure to count these cases, he has offered no theory under which these cases should not be credited to the handling attorney. I recently reviewed the probation calendar from just one week and found approximately 15 uncounted cases.

Similarly, I recently discovered that Grant County has adopted a formula that awards reduced credit for some child support cases. The Settlement Agreement provides simply that each case is to be counted as one case equivalent. Grant County, however, awards 1/3 of a credit for some hearings. In some instances, this may result in the attorney receiving more credit than required by the Settlement Agreement; in other instances, they will receive less. I do not know whether correcting the child support credit formula to comply with the Agreement will ultimately result in more or less credits being awarded to the attorney covering child support matters. I have discussed this matter with Mr. Gonzales, and it is my understanding that he anticipates revising the Department's method of counting child support cases to comply with the Settlement Agreement.

Finally, some felony cases during the second quarter were counted as 1/3 of a credit. Most of these reduced credit cases were cases assigned for sentencing only. While I do not necessarily disagree with the notion that cases assigned post-plea warrant less credit than cases pending trial, the Settlement Agreement does not offer a reduced credit option. It simply requires that all felony cases, aside from probation violations, be counted as one case equivalent. After discussing the matter with Supervising Attorney Ray Gonzales, I expect that Grant County will be submitting a proposal to Plaintiffs to allow for reduced credit in certain circumstances.

## **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.”

In April, Grant County supported its in-house defenders in attending the annual conference of the Washington Defender Association which provides about 10 hours of relevant training.<sup>4</sup> This was a very positive development, and I hope that Grant County continues to support its defenders in attending this conference in the future. I understand that Grant County also offered some financial support to its contract defenders but did so at the last minute, too late for any of the contract defenders to attend the conference.

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<sup>4</sup> Grant County's Department of Public Defense recently became a member of the Washington Defender Association, allowing in-house defenders to attend CLEs without paying tuition. Grant County agreed to reimburse its defenders who attended the out of town conference up to \$300 toward expenses.

Grant County has also been flexible in allowing Julie St. Marie to attend the Gerry Spence Trial Lawyers College in Wyoming for three weeks this month (at her own expense). Furthermore, Mr. Gonzales has indicated because Ms. St. Marie did not attend the WDA conference, he will ask Grant County to authorize her to apply the funds made available for that conference to the Trial Lawyers College.

I have been disappointed, however, by the lack of local training opportunities for Grant County's defenders this year. Supervising Attorney Ray Gonzales has not organized any trainings for Grant County's defenders in 2009. His predecessor regularly organized local trainings and was quite creative in doing so. With Mr. Gonzales' experience with the Washington State Office Public Defense and his work in other counties, I had hoped that he would improve the training available to local defenders. To date, however, training has not seemed to be a priority for Mr. Gonzales.

Mr. Gonzales should organize local trainings on a regular basis. Lunchtime trainings are a staple of institutional public defenders. Such trainings are not difficult to organize, typically cost nothing, and can be extraordinarily helpful. Potential speakers include not just local criminal defense attorneys, but also judges, prosecutors, jail personnel, or representatives from the clerk's office. It can be incredibly helpful on many levels to interact with other participants in the criminal justice system outside of a courtroom setting. Attorneys in other practice areas such as immigration, disability, and family law can also provide valuable insights to the criminal practitioner. Lastly, the public defenders themselves are a valuable untapped resource for trainings. Every public defender in Grant County has practiced in another jurisdiction and likely has unique knowledge and insights to share with his or her colleagues. Mr. Gonzales himself presumably has a wealth of experience to share from his many years of practice. All of these resources are readily available to Grant County if only Mr. Gonzales would take advantage of them.

### **First Appearances**

The Settlement Agreement requires that Grant County provide representation at initial appearances for all indigent defendants. Grant County assigns first appearance duty to its defenders on a rotating weekly basis. Based upon my review of court files and intake sheets, Grant County appears to be providing representation to all defendants at first appearance.

Although Grant County no longer requires its public defenders to visit defendants in jail prior to their first appearance, they continue to do so on a fairly consistent basis. I found records of 121 such visits during the second quarter. Mr. Terrillion (33) and Mr. Perry (25) had the most first appearance visits during the second quarter.<sup>5</sup> Visits seem to average about 10 minutes long.

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<sup>5</sup> It appears that the in-house defenders are covering most of the Wednesday through Friday hearings so that the contract defenders are not forced to travel to Ephrata solely to handle a few first appearances.

## Jail Visits

Grant County public defenders are required to make contact with all new clients prior to arraignment if practicable but in no event later than seven days from the date of assignment. For in-custody clients, an in person visit at the jail is required. Grant County's written policy on initial client contact makes clear that a meeting in the courtroom or in the hallway outside the courtroom is not sufficient.

In the past, some of Grant County's public defenders have not made timely jail visits a priority. In 2008, the defenders as a group showed steady improvement, and by the fourth quarter, were visiting 90% of their in-custody clients within 7 days. While the defenders have not maintained that pace in 2009, the percentage of timely visits in 2009 remains higher than in the first three quarters of 2008.

To assess the timeliness of jail visits during the second quarter, I reviewed 70 in-custody felony cases assigned during the quarter, cross-referencing the case assignments with jail visitation logs and inmate lists from the Grant County Jail. Overall, I found that the Grant County defenders visited their clients on or before the day of arraignment approximately 59% of the time and within seven days approximately 83% of the time. These figures are up from last quarter and represent the second best overall performance since the start of 2008. The table below reflects the timeliness of jail visits over the past six quarters:

	<u>1Q 2008</u>	<u>2Q 2008</u>	<u>3Q 2008</u>	<u>4Q 2008</u>	<u>1Q 2009</u>	<u>2Q 2009</u>
Visit before arraignment	25%	34%	38%	70%	41%	59%
Visit within 7 days	39%	46%	65%	90%	76%	83%

As in prior quarters, some defenders were quite diligent in visiting in-custody clients within seven days. Three attorneys received the bulk of the in-custody assignments during the second quarter: John Perry (18), Janelle Peterson (14), and Julie St. Marie (13). All were well above average in making timely visits to their in-custody clients. Ms. Peterson visited 100% of her in-custody clients within seven days and 67% before arraignment. Mr. Perry visited 94% of his clients within seven days and 88% before arraignment. Finally, Ms. St. Marie visited 85% of her clients within seven days and 62% prior to arraignment.<sup>6</sup>

Aside from Dean Terrillion, who visited all four of his jailed clients within seven days, the remaining defenders were all below average in making timely jail visits. Brett Billingsley had the highest rate of timely visits in this group at 75%, but the two clients

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<sup>6</sup> Ms. St. Marie did have long delays in visiting two clients assigned in June. I suspect these delays were due to the fact that she was in trial three times in the space of about 5 weeks during this time, just before leaving for her three week training in Wyoming. Still, Ms. St. Marie should have visited these clients in a timely fashion or asked that they be reassigned.

he was late in visiting were both charged with class A felonies. Both Ms. Lindholdt and Mr. Grigaliunas were scheduled to leave the employment of Grant County at or near the end of the quarter, and that status appears to have affected their jail visits. Ms. Lindholdt visited only 50% of her clients within seven days. Neither of her in-custody clients from June had received a jail visit as of July 10, having already waited approximately a month. Mr. Grigaliunas had the lowest rate of timely jail visits at 33%. Two defendants assigned to him shortly before he resigned never received a visit from him. The first opportunity for these clients to sit down and meet with their attorneys occurred when the cases were reassigned to new counsel, approximately a month after counsel was originally appointed. In the future, it would seem prudent to avoid assigning in-custody defendants to departing defenders if at all possible.

Supervising Attorney Ray Gonzales has indicated that he expects the in-house defenders to visit jailed clients within three days of assignment. I strongly support his effort to encourage his staff to make initial contact with their clients as soon as possible. During the second quarter, however, the in-house defenders made the initial jail visit within three days only 52% of the time.

Overall, Grant County public defenders are much better in making timely jail visits than they were a year ago at this time, but there remains substantial room for improvement. Currently, even though Grant County policy requires a jail visit prior to arraignment, it appears that in the minds of most Grant County public defenders, the real deadline for jail visits is seven days from assignment. While a week's delay is certainly an improvement over past practice, Grant County should hold its defenders to a higher standard. Grant County policy requires a visit prior to arraignment "if practicable." It seems unlikely that such visits are not practicable 41% of the time.

### **Investigator Staffing**

Grant County currently has five approved public defense investigators: Ellyn Berg, Marv Scott, Kathleen Kennedy, Jim Patterson, and Mario Torres. Ms. Berg recently accepted an in-house position and is now a full-time employee of the Grant County Department of Public Defense. In addition, Grant County recently submitted two additional investigators for approval.

Both Ellyn Berg and Marv Scott consistently receive exceptionally positive reviews. Kathleen Kennedy has not been with Grant County as long as Ms. Berg and Mr. Scott, but she too seems to be highly regarded. According to one attorney, Ms. Berg is a "genius" who ought to be making more than the attorneys. Marv Scott is "fantastic, smart, timely, great attitude . . . ." Kathleen Kennedy is "well-trained . . . very smart and has helped me explore case theories I wouldn't have otherwise."

Though Jim Patterson has only recently resumed work for Grant County, the quality of his investigation has always been excellent. So long as he can devote sufficient time to his Grant County cases, Mr. Patterson's return is a very encouraging development.

In my last report, I noted that both the defenders and Supervising Attorney Ray Gonzales had expressed concern regarding the work of investigator Mario Torres. During the first quarter, former Supervising Attorney Alan White had stopped assigning cases to Mr. Torres, and Mr. Gonzales had approached me regarding withdrawing my approval of him. Under the circumstances, I assumed that Mr. Gonzales would simply stop assigning cases to Mr. Torres. I later learned, however, that Grant County had actually resumed assigning cases to Mr. Torres during the second quarter.

Feedback on Mr. Torres work this quarter has been mixed with one attorney pleased with his work but another wondering whether he's done any work at all and reporting an almost total lack of communication from Mr. Torres. A third attorney was unaware Mr. Torres had been assigned to investigate one of his cases because Mr. Torres had never contacted him in the six weeks he'd had the case. In one case assigned to Mr. Torres, the only contact the attorney had with him was a request from his office for discovery two weeks after the case had been assigned to him. Although the attorney specifically requested progress reports, Mr. Torres did not provide any. Although the attorney specifically instructed the investigator not to contact the client directly, Mr. Torres went to the jail and had a lengthy meeting with the client. This meeting was apparently Mr. Torres' first work on the case and occurred two days before the investigation was due to be completed.

Under the circumstances, I have serious reservations about Grant County's continued use of Mr. Torres for felony investigations. If Mr. Gonzales elects to continue assigning cases to Mr. Torres, he should closely monitor those cases to ensure that Mr. Torres' work is timely and the quality of his interviews and reports is appropriate for felony cases.

Overall, the investigation staff continues to be a strength of Grant County's public defense system. During the second quarter, the investigation work of Mr. Patterson and Ms. Berg convinced prosecutors that they had charged the wrong men in a co-defendant robbery case and resulted in outright dismissal. Defender Julie St. Marie also reported that Mr. Scott's investigation was critical to defense efforts in her drug trial in April that ended in a hung jury.

### **Investigation Rates**

The overall rate of investigation for the second quarter was 27.6% down slightly from 29.1% in the first quarter. Investigation rates have been higher in prior years at 36% in 2008 and 35% in 2007. The rates for individual attorneys during the second quarter ranged from 0% to 59%:

	<b>2Q INVESTIGATION RATE</b>
<b>ATTORNEY</b>	
Peterson	62%
Perry	36%
Lindholdt	33%
Terrillion	25%
St. Marie	17%
Billingsley	10%
Doherty	8%
Grigaliunas	0%

As in the past, most but not all defenders appear to be making appropriate use of investigators on their cases.

The investigation rates for defenders Peterson, Perry, Lindholdt, and Terrillion all appear reasonable. Mr. Terrillion's rate of investigation appears lower than it actually is because a number of cases re-assigned to him in June were already pending sentencing when he received them. Ms. St. Marie's rate is somewhat low, but it is likely that her busy trial schedule during the latter half of the second quarter delayed submission of new investigation requests. Mr. Doherty just started with Grant County and received most of his cases during the last 6 weeks of the quarter. I expect his investigation rate will increase during the next quarter. Mr. Billingsley's rate of investigation is too low, but he received almost half of his case assignments for the quarter during the last two weeks of June and will likely be requesting investigation on those during the next quarter.

While it makes sense to give some defenders the benefit of the doubt and expect their rates to improve next quarter, Frank Grigaliunas' investigation rate of 0% cannot be so easily explained away. During his tenure with Grant County, Mr. Grigaliunas never requested investigation on any of his cases. His wholesale failure to conduct investigation falls well below the minimum standards required for effective assistance of counsel. In speaking with Mr. Grigaliunas after his departure, he agreed that he should have utilized investigators on his cases but indicated that he did not know how to get an investigator assigned and said that when he asked, he was referred to a form on the office computers. He found the process cumbersome and did not pursue it further.

I first met Mr. Grigaliunas in March, and based upon my meeting with him as well as my observations of him in court, I immediately expressed concerns to Supervising Attorney Ray Gonzales about the quality of his representation. I urged Mr. Gonzales to supervise him very closely so as to recognize and address any problems before they negatively impacted his clients. Mr. Gonzales does not seem to have heeded this warning. As Supervising Attorney, Mr. Gonzales is expected to work with the defenders on their cases, offering strategic guidance and ensuring that indigent defendants in Grant County are well represented. Moreover, he personally assigns the investigators. At some point,

Mr. Gonzales should have recognized that Mr. Grigaliunas was not investigating his cases and should have immediately taken steps to rectify this problem.

### **Experts**

The Settlement Agreement requires that public defenders make expert requests *ex parte* and that records relating to experts be sealed. During the second quarter, I found three cases in which Grant County public defenders requested experts. Two requests were made by John Perry, and the other by Brett Billingsley. The requests appear to have been made *ex parte* but were not sealed. As was the case last quarter, in one case, Mr. Perry planned to have his own psychological expert observe the defendant's evaluation by personnel from Eastern State Hospital, and his application did not contain any confidential information other than the identity of the expert. Sealing was not necessary in that case. In Mr. Perry's second case, he did ask that his pleadings be sealed but that request was denied by the court. On Mr. Billingsley's expert request, he explained that he did not make a motion to seal because he anticipated the court would deny it.

Sealing of expert requests continues to be a problem in Grant County. As I indicated last quarter, Supervising Attorney Ray Gonzales should take the lead in developing standardized forms, procedures, and policies to guide the use of defense experts. He should draft a motion to seal with authority and argument in order to persuade local judges that such documents should be sealed or if unsuccessful with the trial court, to make a record for appeal in an appropriate case.

### **Motions Practice**

Each quarter, I evaluate motions practice by reviewing electronic court dockets to identify cases in which motions are filed and then review the court files in those matters. During the second quarter, I reviewed both new felony assignments and ongoing cases from 2008 and found 10 cases in which current Grant County defenders had filed substantive motions.<sup>7</sup> Five different defenders filed motions. Julie St. Marie filed motions in six of her cases this quarter. Brett Billingsley, Frank Grigaliunas, John Perry, and Janelle Peterson each filed motions in one case.

Julie St. Marie's motions practice this quarter was particularly impressive. She challenged the warrantless entry and search of a home, the warrantless arrest of an uninvolved bystander during service of a search warrant, and the detention and search of a vehicle's passenger in connection with the arrest of the driver. She filed motions pursuant to CrR 3.5, CrR 3.6, and State v. Knapstad.

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<sup>7</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.

Brett Billingsley's work was also noteworthy. He filed a series of motions in a child molestation case that went to trial this quarter. He raised a Franks issue questioning the validity of an order authorizing a wiretap, moved to dismiss for prosecutorial mismanagement under CrR 8.3 based on repeated discovery violations, and filed detailed case-specific motions in limine prior to trial. His motions practice in this particular case was very thorough.

Three defenders did not file any substantive motions during the second quarter: John Doherty, Karen Lindholdt, and Dean Terrillion. Mr. Doherty and Ms. Lindholdt received the fewest new case assignments during the quarter. As noted above, Mr. Doherty didn't start work with Grant County until May and received the bulk of his cases relatively recently. I am not concerned with Ms. Lindholdt's lack of motions as she has always been diligent in raising legal issues and filing motions. Mr. Terrillion received a large number of his new assignments for the quarter at the end of June, too late to file any appropriate motions before the end of the quarter. He has been primarily covering the probation violation calendar.

This quarter I also attempted to track motions that are less substantive in that they involve little or no legal research and writing but are nonetheless a very important part of criminal practice. Basic discovery requests and motions to compel are classic examples. During the second quarter, I found eight cases in which Janelle Peterson had filed detailed request for additional or missing discovery. In reviewing court files, I have also observed that Ms. Peterson makes good use of the omnibus hearing to obtain orders that specific items of discovery be provided by a date certain. In addition to discovery requests, I found that Frank Grigaliunas and Dean Terrillion both filed written release motions. Karen Lindholdt and Dean Terrillion obtained orders for DOSA evaluations. Brett Billingsley filed a written declaration in support of a motion to continue the trial date, and John Perry filed a motion to depose the State's expert witness in a murder case.

### **Overall Quality of Representation**

Grant County continues to have a solid core of defenders who provide quality representation. With the loss of some very good defenders in the last six months and potentially more going forward, the core group is not as strong as it once was, but Grant County still has a solid foundation upon which to build. Hopefully, Grant County already has the pieces in place to do so. Only time will tell if the defenders hired in the last several months will prove to be worthy replacements for those who have moved on.

Among the current defenders, Julie St. Marie clearly stands out. She has a strong motions practice and a consistently aggressive approach to her work. She took cases to trial four times in the second quarter alone and has already had another trial in early July. She has completed twice as many jury trials in 2009 as any defender had in all of 2008. Although I have not personally had the opportunity to observe her in trial, Ms. St. Marie is reportedly quite a skilled trial attorney. During the second quarter, she won a not guilty verdict on a burglary charge in one trial and a hung jury on a drug charge in

another. In the drug case, she had to overcome a large quantity of drugs found in her client's purse as well as a confession.

Brett Billingsley and Karen Lindholdt also had jury trials during the second quarter. Mr. Billingsley tried a class A sex case, and as described above, was exceptionally thorough in litigating the relevant legal issues in the case. Ms. Lindholdt tried a case involving two counts of Assault 3<sup>o</sup> on a police officer, Resisting Arrest, and Criminal Trespass. She was able to win an acquittal on one count of Assault 3<sup>o</sup> and on the charge of Resisting Arrest.

### **Supervising Attorney**

The Settlement Agreement requires that the Monitor "oversee and assess the Supervising Attorney's performance." Unfortunately, I continued to be disappointed with the performance of Supervising Attorney Ray Gonzales during the second quarter. As Supervision Attorney, Mr. Gonzales has two primary job responsibilities, administration and supervision. He did neither well during the second quarter.

The administrative problems experienced by the Grant County Department of Public Defense during the second quarter were significant. Neither monthly caseloads nor conflicts of interest were monitored appropriately. Case assignments and reassignments were done haphazardly and not in a timely fashion. Cases were frequently assigned to one attorney and then later taken back to be reassigned to a different attorney because Mr. Gonzales had realized that the original attorney was over his caseload limit or had a conflict or wasn't available for some reason.

The departure of Frank Grigaliunas was particularly poorly handled. Mr. Grigaliunas first notified Mr. Gonzales of his decision to resign on May 26, 2009. Yet Mr. Gonzales did not take any meaningful steps to transfer Mr. Grigaliunas' cases until approximately June 19, a week after Mr. Grigaliunas had left Grant County. At least six cases assigned to Mr. Grigaliunas had scheduled hearings the week of June 15; one was scheduled for trial that week. It appears that the in-house defenders simply stood in on those cases until new counsel could be assigned. Two more of Mr. Grigaliunas' cases were scheduled for trial the following week. One was transferred on June 23, the day of trial; the other was transferred five days prior to trial. In the interim, all of these defendants were essentially unrepresented. Moreover, Mr. Grigaliunas had not requested investigation on any of his cases and prepared transfer memos in only a few. Some cases were apparently handed directly to other attorneys with no transfer process at all. Others were discovered in Mr. Grigaliunas' desk drawers after he left.

Mr. Gonzales' complete failure to prepare for Mr. Grigaliunas' departure did a disservice to the remaining defenders, the court, and most importantly, the Department's clients. Upon learning that Mr. Grigaliunas intended to resign, Mr. Gonzales should have prepared a list of cases assigned to Mr. Grigaliunas and reviewed the status of each case with him in preparation for transfer. For cases pending trial, particularly in-custody

cases, Mr. Gonzales should have immediately identified the attorney to whom the case would be transferred. He should have directed Mr. Grigaliunas to request any missing discovery, file briefs and request investigation where appropriate, and prepare a transfer memo for the new attorney. To the extent possible, the cases should have been transferred while Mr. Grigaliunas was still employed by Grant County to allow Mr. Grigaliunas to introduce his clients to their new attorneys and otherwise ensure a smooth transition. Mr. Gonzales should have been monitoring the transfer process throughout.

Similar problems occurred with the transfer of Janelle Peterson's cases.<sup>8</sup> On June 10, Ms. Peterson delivered approximately 13 cases to the Grant County Department of Public Defense for reassignment. Although several of the cases had hearings scheduled on June 15, Mr. Gonzales did not begin reassigning the cases for more than a week. Some cases were not reassigned until June 22 and June 23. During the week of June 15, when the court or prosecutors called the cases waiting to be transferred, no one communicated to the court that the cases were being transferred. Instead, it appeared that Ms. Peterson was simply neglecting her duties. Defenders volunteered to stand in for her and requested continuances, but they did not have files or any explanation to provide the court. Mr. Gonzales' delay in reassigning these cases and his failure to advise the court of his plan to reassign them reflected poorly on both Ms. Peterson and the public defense system as a whole.

Conflicts of interest were also problematic in the second quarter. In mid-May, Mr. Gonzales advised me that two co-defendants had both been assigned to attorneys with the Grant County Department of Public Defense. He explained the one of the defendants had been represented by John Perry for several months while the other had only recently been reassigned to Frank Grigaliunas. He advised me that the second case had been in-house for only a few days and that he intended to reassign that case to a contract defender. In discussing the situation with Mr. Gonzales, I noted that ethics rules arguably required withdrawal from both cases but that since it had only been a few days, Mr. Perry might be able to keep his case if Mr. Gonzales set up a formal conflict screen. I subsequently learned that Mr. Grigaliunas had actually been assigned to the second co-defendant for more than a month, that the conflict had not been discovered until the day before trial, and that Mr. Gonzales never established a formal conflict screen.

Upon learning of the above conflict, I began reviewing conflicts more closely and discovered a host of other problems. In June, numerous cases were assigned to defenders who had apparent conflicts of interest based on prior representation of witnesses and/or co-defendants. In one instance, Brett Billingsley was assigned to two different co-defendants charged in the same incident for which he already represented the third co-defendant. Most of these conflicts were identified by office staff at the time of assignment but inexplicably overlooked by Mr. Gonzales in making case assignments. At least six conflicts were not discovered until I reviewed the case assignments for

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<sup>8</sup> In response to Ms. Peterson's expressed fear of a particular prosecutor, Grant County agreed to "accommodate" Ms. Peterson by reassigning cases in which that prosecutor was directly involved.

conflicts and notified the Grant County Department of Public Defense.<sup>9</sup> One case had already been completed by the attorney with the apparent conflict.

I also discovered conflicts of interest issues relating to the complaint line and to the hiring of an in-house investigator. After denying Grant County's initial request for approval of its in-house program due in part to concerns relating to conflicts of interest, Grant County provided specific assurances that the issues I had raised would be addressed in the new Department's policies and procedures. In explaining my concerns regarding complaints, I wrote:

Perhaps the most difficult conflicts problem created by the move in-house is oversight of co-defendant cases. Whenever the Grant County Department of Public Defense is assigned to represent one co-defendant, the Department and its Supervising Attorney will be presumptively disqualified from involvement in the cases of the other co-defendants. In such cases, the Supervising Attorney would not be available to supervise the co-defendants' cases nor would he be available to receive and investigate complaints regarding the representation of the co-defendants.

To address these issues, on May 8, 2009, Grant County adopted a complaint response policy that requires any complaints on cases in which the Grant County Department of Public Defense had a conflict to be "forwarded to a neutral third party for disposition . . . ." In July, however, when I inquired as to how complaint calls were screened for conflicts, I was informed that calls were not reviewed for conflicts at all.

Similarly, regarding investigators, I wrote:

At present, the County does not appear to have done sufficient planning to address the issues associated with employing in-house investigators. In particular, conflicts issues have not been adequately addressed. Each approved investigator has been actively working for indigent criminal defendants in Grant County for some time. For any of these investigators who are hired in-house, their former clients must be tracked and included in any conflicts check procedure. As with the defenders, an investigator's prior work on behalf of a witness, victim, or co-defendant in a current case may result in imputed disqualification of the entire Department of Public Defense.

In response, Grant County adopted a conflict of interest policy which provides that investigators are subject to the same conflicts standards and policies as attorneys. I recently discovered, however, that the conflicts procedure for investigators that has been implemented is woefully inadequate and does not comply with the Rules of Professional Conduct. The only conflict that the current procedure is designed to detect is two co-defendants being assigned to the same investigator. The procedure does not recognize

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<sup>9</sup> Two listed conflicts were later deemed to be clerical errors rather than conflicts. Nonetheless, the failure to recognize the apparent conflict and resolve the issue prior to assignment remains problematic.

that the investigator's work on behalf of co-defendants or witnesses may itself create a conflict for the entire Department.

This potential problem has become a reality with the hiring of Ellyn Berg as an in-house investigator. Prior to being hired in-house, Ms. Berg was a contract investigator with Grant County. As a result, she had an existing caseload on which she continues to work now that she is an employee of the Grant County Department of Public Defense. Among the cases Ms. Berg brought with her in-house are cases in which the Department has a clear conflict of interest based upon representation of the co-defendant. In other words, a Department attorney is working on behalf of one co-defendant while Ms. Berg, a Department investigator is working on behalf of a different co-defendant. In a brief review of recent investigation assignments, I found two cases in which this had occurred, including a first degree murder case. In addition to obvious conflicts such as Department employees working on behalf of different co-defendants, conflicts may arise based upon Ms. Berg's previous investigation work on behalf of a witness or victim. As with an attorney, that prior relationship may create a conflict of interest. The current Grant County procedures are simply not designed to detect such conflicts.

While the administrative issues are a serious concern, perhaps the most troubling aspect of Mr. Gonzales' performance in the second quarter was his inadequate supervision of Mr. Grigaliunas. As discussed above, I had serious concerns about Mr. Grigaliunas from the start and shared those concerns with Mr. Gonzales. I urged Mr. Gonzales to closely supervise Mr. Grigaliunas so that he could either dispel my concerns or promptly recognize and address any issues that arose. In March, Mr. Grigaliunas waited almost a month to visit one of the first in-custody clients he was assigned in Grant County at a time when he had very few cases. He had similar issues in April and May. Mr. Grigaliunas never requested investigation on any case, and I found only 4 cases that were resolved by Mr. Grigaliunas during his employment by Grant County. At this point, there is little dispute that the quality of Mr. Grigaliunas' work in Grant County was poor. Yet when Mr. Grigaliunas first submitted his resignation, Mr. Gonzales declined to accept it and asked that he take a few days to reconsider. Mr. Gonzales' response suggests that he was either unaware of, or unconcerned with, the quality of Mr. Grigaliunas' work.

In speaking with Mr. Grigaliunas after his departure, I found him to be very candid and self-critical in his assessment of his work in Grant County. He seemed well-intentioned, but acknowledged that he did not do as much as he should have on his cases. He explained that defense practice is very different from being a prosecutor and that he had difficulty with the adjustment. He felt largely unsupervised and unsupported in Grant County and lacked guidance on local procedures and practices. While he likes Mr. Gonzales very much personally, Mr. Grigaliunas felt that Mr. Gonzales was not proactive in discussing cases with him, and there were no regular staff meetings to discuss cases and/or legal issues. Mr. Grigaliunas was quick to add that he did not seek out assistance or direction either. Mr. Grigaliunas noted that in setting up his private practice, he was spending "a lot of time designing forms and checklists for opening, developing, and

closing cases, as well as making a database of relevant information. It hadn't occurred to me before that at Grant, we really had nothing of the kind."

At one point in April, Mr. Grigaliunas reported that Mr. Gonzales discussed the Monitor's concerns about his performance with him and suggested they would have weekly meetings to make sure Mr. Grigaliunas succeeded in Grant County. Unfortunately, those meetings never occurred. Mr. Grigaliunas recently wrote to me that his wife summed up his experience in Grant County by saying "it was a horrendous disaster of a failure—nobody was in charge and everybody was in trouble."

Mr. Gonzales could have and should have recognized the problems with Mr. Grigaliunas' work much sooner than he did. Mr. Grigaliunas' account regarding the lack of supervision and support from Mr. Gonzales is extremely troubling. I detailed for Mr. Gonzales in March what I thought were fairly significant concerns about Mr. Grigaliunas. That Mr. Gonzales subsequently left Mr. Grigaliunas essentially unmonitored is disappointing to say the least. While I have not surveyed all of the defenders regarding the level of supervision provided by Mr. Gonzales, Mr. Grigaliunas' description echoes the reports I've received from others. It is my impression that Mr. Gonzales is not proactive in supervising the defenders and is not sought out by them because he is not seen as a helpful resource. He delegates many of his responsibilities to others, particularly to defender John Perry. Mr. Perry, however, has a full caseload of his own and has no official supervisory role in Grant County.

The second quarter was definitely unusually challenging, but Mr. Gonzales must be able to successfully overcome such challenges. Administratively, he must take steps to correct the systemic problems that became apparent during the second quarter. In supervising his staff, Mr. Gonzales must be more proactive in both his oversight and his mentoring of the defenders.

### **Client Complaints**

Grant County continues to maintain 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. Responsibility for handling the toll-free complaint line was transferred to the Grant County Department of Public Defense in early May. 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. The flyer has now been updated to reflect the fact that Mr. Gonzales is the Supervising Attorney, but I recently discovered that the local number listed for Mr. Gonzales on the flyer is incorrect.

During the second quarter, it appears that the overall number of complaint calls was down.<sup>10</sup> Most calls continue to relate to attorney-client communication, with inmates requesting visits from or trying to reach their assigned attorneys. I suspect that the availability of a full-time receptionist at the Grant County Department of Public Defense is at least partially responsible for the apparent reduction in calls to the complaint line. The ability of clients to reach a live person who can connect them directly to their assigned attorneys or promise to relay a message to the attorney or let them know the attorney is in court, at jail, etc. no doubt reduces client frustration and prevents communication issues from escalating into complaints.

After reviewing the complaints logs for the second quarter, it appears that most complaints were handled appropriately. I remain concerned, however, that Supervising Attorney Ray Gonzales sometimes seems too ready to dismiss client complaints without a thorough investigation. For example, repeated complaints from two clients of Frank Grigaliunas should have raised red flags for Mr. Gonzales. Had he investigated these complaints more thoroughly, he might have learned much earlier of serious problems with the quality of representation being provided by Mr. Grigaliunas. While it is important for a supervising attorney to be supportive of his staff, the first priority must always be the clients. I agree with Mr. Gonzales' inclination to trust that the defenders he supervises are handling their cases appropriately and to reassure the clients when needed, but he must take care to verify, rather than assume, that his trust is warranted.

## **Conclusion**

The keys to providing high quality public defense are caseload limits and hiring the right personnel. Grant County has the necessary caseload limits in place to allow its defenders to provide effective representation. Grant County continues to face serious challenges, however, in recruiting and retaining the personnel needed to ensure that the system works as it should.

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<sup>10</sup> I do not have actual data on the number of complaint calls during the second quarter because there was some confusion in transferring responsibility for the complaint line in-house regarding the format for recording complaints. As a result, no spreadsheet was prepared for May.