

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

**Monitor's Report**

**Third Quarter, 2007**

October 25, 2007

Submitted by Francisco Rodriguez, Settlement Monitor

**Monitor's Activities**

My goal is to be on site in Grant County at least once per month. During the third quarter, I traveled to Ephrata on three separate occasions:

- August 1, 2007
- August 21, 2007
- September 18-19, 2007

While in Ephrata, I observed court proceedings, reviewed court files, and met with various participants in the Grant County criminal justice system.

In addition to monthly visits, I maintain regular contact with supervisor Alan White via email and telephone. I also have periodic contact with individual defenders, investigators, and counsel for both parties.

**Access to Information**

The Settlement Agreement provides that the Monitor shall have broad access to information concerning the Grant County public defense system. I routinely request information from Supervising Attorney Alan White, and both he and his assistant Aracely Yanez have been very cooperative in responding to my requests.

On one occasion, however, Alan White declined to provide me with information regarding new applicants for attorney positions, including those that had been offered contracts for 2008. Mr. White informed me that he was directed by counsel for the County not to provide this information. I am troubled that the County would intentionally withhold information from me and am left to wonder what other information may have been withheld. In this case, I ultimately obtained the requested information from June Strickler, Administrative Assistant to the Board of County Commissioners.

**2006 Compliance**

The question of compliance in 2006 remains unresolved. I submitted my findings and recommendations to the parties in July. The County appears to have adopted some but

not all of my recommendations. I expect that the parties will seek to revisit this issue in the near future.

### **Supervising Attorney**

The Settlement Agreement requires the Monitor to assess the performance of the Supervising Attorney. In my last report, I noted that my initial impression of Alan White's performance was quite positive. While I remain convinced that Mr. White is well-intentioned and does an admirable job juggling an overwhelming workload, I have some reservations about his ability to effectively lead the Grant County public defense program as currently structured.

Mr. White continues to have too many responsibilities. The Settlement Agreement requires the County to hire a "full-time" supervising attorney for the adult felony public defense system. Yet Alan White is asked to supervise not only adult felony defense but also district and juvenile court matters. His obligations as supervisor of district and juvenile court interfere with his ability to devote sufficient time to felony public defense.

In addition to supervising public defense in too many different courts, Mr. White supervises too many attorneys. WSBA Endorsed Standards recommend a ratio of one full-time supervisor for every ten public defenders. This is considered the minimum level needed for effective supervision. Mr. White currently supervises nine full-time felony defenders and four part-time felony defenders. In addition, he supervises at least 6 other defenders in district and juvenile courts. His workload thus far exceeds that recommended by WSBA Endorsed Standards for public defense. He simply cannot be an effective supervisor under the current management structure.

Furthermore, the demands of being monitored pursuant to the Settlement Agreement only add to Mr. White's already unmanageable workload. In addition to writing detailed monthly reports, Mr. White must routinely compile, organize and track an enormous amount of data. This administrative burden far exceeds that borne by most similarly situated public defense supervisors.

It is my recommendation that the County reduce Mr. White's workload by hiring an assistant supervisor or separate district and juvenile court supervisor. The County should also reduce the number of part-time attorneys used so that Mr. White supervises no more than ten attorneys.

Apart from his workload, I have concerns about whether Mr. White can effectively manage the program unless the County gives him more authority and independence. He currently lacks the power to hire, fire, or even discipline staff in any meaningful way. As a result, few of the defenders view him as their boss in anything but a technical sense. Both defenders and investigators assume (correctly) that they may openly defy him with little or no negative consequences. When dealing with a group of strong-minded, rebellious individuals, as defenders tend to be, stripping their leader of any real authority is a recipe for chaos.

These structural issues are magnified by the County's relationship with and management of Mr. White. Rather than treating him as on par with other professionals in the criminal justice system such as the prosecutor and the sheriff, the County treats Mr. White as though he is merely an administrator who needs to be kept on a short leash. While I understand that Mr. White does not hold elected office, the County must give him a measure of independence if the system is to function properly. Instead, it seems that whenever he does something that displeases County officials, he is scolded and instructed to stop the offending conduct immediately. This practice undermines whatever authority Mr. White does have and reinforces the perception that he is a relatively powerless bureaucrat.

Mr. White faces an extraordinarily difficult task. He must manage a defender group comprised of strong, often conflicting personalities. He must do so while having little real authority over them and while dealing with a tremendous administrative burden. I question whether anyone could be successful under these circumstances. Mr. White is simply pulled in too many different directions. He has too much to do and answers to too many people (clients, defenders, judges, Commissioners, counsel for the County, and the Monitor).

Alan White is smart, diligent, and dedicated. He has struggled to make the best of a very difficult situation. Absent sufficient authority to force compliance with his instructions, he trades on his personal likeability to get things done. Despite his best efforts, however, the public defense program continues to be somewhat dysfunctional. The defenders as a group lack cohesion and enjoy little of the comradery that is typically found in defender organizations. There is no accountability for failure to follow established procedures, and the defenders sometimes treat each other and their supervisor with disrespect. Some of these problems relate to personality clashes within the group. Some relate to the County's failure to give Alan White any real authority over the defenders. All of the problems are worsened by the fact that Mr. White is overwhelmed by administrative responsibilities and has little time left to focus on broader issues.

While he faces many impediments to running a successful program that are beyond his control, there are areas in which Mr. White could improve. In my opinion, Mr. White should make mentoring a higher priority. He needs to be more assertive in advocating for the defenders and their clients, even in the face of opposition from the County. He needs to find a way to enforce discipline amongst the defenders when necessary. Finally, he should exercise more independence of judgment. Seeking out advice and input when making decisions is always a good idea, but Mr. White needs to have more confidence in his own judgment when resolving problems rather than deferring to others for direction.

### **Staffing/Caseloads**

The Grant County public defense program experienced significant upheaval in the third quarter. In early August, Mike Aiken, one of the full-time defenders, suffered serious injuries in a fall and as a result, he has been out of commission for the last few months.

His loss reduced caseload capacity for the quarter, and his existing cases had to be re-assigned. His earliest anticipated return date is sometime in November. To its credit, the County quickly responded to the loss by hiring a new full-time defender for 2008 and convincing her to start early. She began work on September 1, 2007, minimizing the disruption caused by Mr. Aiken's accident.

In September, the County announced its decisions regarding staffing for 2008. Some of the current defenders were not invited to return and that has created some tension in the group. Moreover, two of the most experienced attorneys are leaving, and I am concerned about whether the County will have sufficient capacity to handle the most serious cases. Nonetheless I applaud the County for initiating contract negotiations much earlier this year and for offering most of the defenders two year contracts, giving the program more stability.

The departure of several current defenders for 2008 has ramifications for 2007 as well. Three of the departing defenders have invoked contract provisions that prohibit the County from assigning them cases for the last 45 days of the year. This effectively reduces their fourth quarter caseload capacity to a maximum of 32 case equivalents. The net loss to the County's caseload capacity from these departures is approximately 15 case equivalents. Moreover, the loss of these defenders will create additional pressure in December when the County will not be able to assign the affected defenders any cases at all.

Over the last three months, Alan White has maintained a fairly even distribution of case assignments while observing both monthly and quarterly caseload limits. The unpredictability of child support credits and credits for extraordinary cases continues to be a challenge. I have been working with Mr. White to develop policies to address these issues.

Based upon the first three quarters of 2007, the County expects to assign approximately 1224 case equivalents for the year. The County projects the capacity of existing staff to be approximately 1264 case equivalents. This projected forty case "cushion" is below the minimum I believe is necessary to ensure the County has sufficient attorney capacity through the end of the year. I understand, however, that the County has hired two new full-time defenders for 2008 and anticipates that each may be able to accept some case assignments in 2007.

There are a number of unresolved issues lurking that could dramatically affect the County's caseload capacity in the fourth quarter. First, the County assumes that Mike Aiken will return and carry a full caseload in November. Even if he returns, I question the whether it is reasonable to assume he can immediately manage a full-time caseload.

Second, one of the full-time defenders has not accounted for his time on extraordinary cases for almost four months. I understand that he may have hundreds of unreported hours. These credits alone could potentially absorb much of the County's current cushion.

Third, the County continues to use more part-time attorneys than permitted by the Settlement Agreement. If the County limits itself to only two for the remainder of the year as provided in the Settlement Agreement, caseload capacity will be further reduced.

Finally, it appears that almost all of the full-time defenders are maintaining some level of private practice. A recent search on the Washington Courts website revealed that all but one of the full-time public defenders currently engage in some degree of private practice. The Settlement Agreement permits full-time defenders to have a limited private practice, but for those who do, the annual caseload limit must be reduced to 140 cases. Both the defenders and the County have been repeatedly reminded of this requirement. Accordingly, I assume that the County will assign those defenders no more than 140 cases in 2007. This will obviously have a significant impact on the system's overall capacity.

In light of all of these issues, it is my opinion that unless the County adds caseload capacity, there is a significant risk of that there will be another staffing shortfall at the end of 2007. Accordingly, it is absolutely critical that the County proceed with plans to have its 2008 hires start early and/or make other arrangements to ensure that indigent defendants are not left without counsel at the end of the year.

### **Training**

Grant County public defenders seem to have adequate training opportunities available. During this quarter, Alan White organized a training relating to substance abuse treatment alternatives. In addition, I conducted a 2 hour CLE on communicating with in-custody clients, the attorney-investigator relationship, and motions practice.

### **Jail Visits**

Supervising Attorney Alan White has adopted a written policy requiring the public defenders to visit in-custody defendants prior to their first appearance in court. Each of the full-time public defenders is assigned to cover first appearances for a week at a time on a rotating basis throughout the year. The coverage attorney is required to visit in-custody defendants prior to court in order to obtain the information necessary to make a bail reduction and/or release motion.

Arraignment is scheduled approximately a week after the first appearance. Prior to arraignment, Alan White assigns each case to a specific defender who handles the case from that point forward. The assigned attorney is expected to visit the defendant in jail prior to arraignment.

In my last report, I noted that some defenders were not making the required jail visits. Since then, I have endeavored to emphasize to the public defenders the importance of these visits. I spoke at length on the issue at an August CLE in Ephrata and also addressed the topic in correspondence with the defenders.

In cross-referencing jail visitation logs with first appearance dockets for the third quarter, I noticed a marked improvement in the number of jail visits by the attorneys covering first appearances. Brian Gwinn and Janelle Peterson in particular were extremely diligent in making these visits. Some of the defenders still seem somewhat erratic about visiting first appearance clients, however. For two different weeks, I could not find any record of jail visits by the coverage attorney. In a few other weeks, it appeared as though the attorneys only made sporadic or token efforts to visit inmates scheduled for first appearances.

With respect to jail visits for assigned clients, I compared case assignment records with jail visitation logs and concluded that most of the full-time defenders were visiting their new clients in a timely fashion.<sup>1</sup> The part-time defenders, however, do not appear to visit clients promptly as required. I plan to ask Alan White to speak with them about this problem and monitor their jail visits more closely.

### **Investigation**

The Settlement Agreement requires the Monitor to approve all public defense investigators. Upon assuming the role of monitor, I learned that the County's investigators had never been approved. Accordingly, I initiated a review of the investigators employed by the County in order to determine whether each was appropriate for felony defense investigations.

After completing my review, I approved Jim Patterson, Mike Lewton, and Ellyn Berg to work on felony public defense investigations. I did not approve Basin Investigations. The County subsequently asked that I approve Marv Scott, and I approved him early last month.

During the third quarter, there were two troubling incidents involving investigators from Basin Investigations. In one case, an investigator contacted a represented co-defendant in the jail without his attorney's permission and interviewed the inmate regarding the case on which he was represented by counsel. The investigator's conduct was a clear violation of the Rules of Professional Conduct and not sanctioned by the attorney for whom he was working. In another case, the defense investigator conducted a tape-recorded interview of a key witness and then withheld information regarding the interview from the assigned attorney. The investigator apparently decided that because it was damaging to the defendant, the attorney wouldn't want to know about it. When the prosecutor learned of the interview months later, the defendant's plea deal fell apart and the defense attorney was left to explain why he had not complied with a court order to produce such information. Needless to say, the conduct of these investigators cast the public defense program in a very bad light.

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<sup>1</sup> The available case assignment records do not indicate whether a given defendant is in or out of custody. This limits my ability to accurately assess the promptness of visits for all clients. For example, if the attorney never visits the client, that fact will not be apparent from the records I reviewed.

Most of the public defenders continue to make regular use of investigators on their cases. Investigation rates for this quarter varied between 17% and 83%. Overall, the defenders requested investigation in 41% percent of their cases in the third quarter. I consider this to be an adequate rate of investigation. On an individual level, there was some improvement from last quarter. Two of the more experienced full-time attorneys and one of the part-time attorneys increased their investigation requests this quarter to a more acceptable level. For these defenders, it is possible that the unusually low rates last quarter were simply an aberration.

Two of the part-time defenders, however, continued to demonstrate a lack of understanding regarding the appropriate use of investigation. One attorney requests investigation in virtually every case but provides no guidance of any kind to the investigator. His requests seem to be more a reflex than a reasoned assessment of the need for investigation in a particular case.

The other problematic attorney requests investigation in very few cases. Upon learning that his use of investigators had been questioned, the attorney asked “Does an investigator need to be obtained for a crime arising out of a traffic stop, an assault with no witnesses, a case where there are witnesses, corroborating evidence, statements, and there is a properly obtained confession? Generally, I think not.” This statement demonstrates a startling lack of skepticism as to the government’s evidence. The role of the public defender is to question the State’s evidence not blindly accept what is written in a police report. Obviously, one cannot know whether a traffic stop was legal, a confession was properly obtained, or witnesses are reliable without some level of investigation.

### **Client Complaints**

The Settlement Agreement requires the Supervising Attorney to establish a system to track and investigate complaints from indigent defendants regarding their assigned attorneys. In order to meet this obligation, Alan White has established a telephone line for complaints. Notices in both Spanish and English are posted throughout the jail with information on how to make a complaint. Calls are answered by Mr. White or his bilingual assistant when they are in the office and by an answering machine after hours or when no one is in. All complaints are supposed to be logged and dealt with as appropriate.

During the third quarter, I learned of two significant problems with the County’s complaint system. First, the County currently has no system for informing out-of-custody inmates how to make a complaint. I understand that Alan White is working with the defenders to develop a solution to this problem. Second, inmates who reach the answering machine are generally cut off and unable to record a message. As a result, inmates who call at a time when neither Mr. White nor his assistant are in the office have no means of communicating their complaints.

The complaint logs for the third quarter reveal that once again the vast majority of client calls relate to a need for contact with the assigned attorney. I found 47 calls that either

requested a jail visit or asked that a message be passed on to the assigned attorney. There are two main reasons for these calls. First, some attorneys are not visiting their clients as often as they should. Second, the inmates cannot reach their attorneys by phone. The lack of telephone access and resulting lack of regular communication between attorneys and their clients is the primary cause of client complaints in Grant County.

In-custody defendants generally cannot make outgoing calls from the jail except via a collect call. While other jurisdictions make exceptions for calls to public defenders, Grant County has declined to do so. This system creates an unnecessary impediment to attorney-client communication. Clients are unable to leave a simple voicemail message for their attorneys to request a case update or ask for help with an emergency situation. Moreover, some attorneys refuse to accept collect calls at all leaving their clients with no direct means of requesting information or assistance from the attorney. Some of the calls to the complaint line in the third quarter illustrate the problem with this approach. In July, for example, an inmate called because the police had come by to question him at the jail, and he wanted someone to let his attorney know. In August, another inmate called to ask someone to contact his attorney because he needed an emergency furlough to attend the birth of his child. There can be no question that a private attorney would accept such calls from a paying client. There is no excuse for treating indigent defendants as second class citizens by denying them telephone access to their attorneys.

The Settlement Agreement requires that each defender “maintain a bilingual (English-Spanish) telephone and message system or other comparable system that allows incarcerated clients and other clients to leave messages.” No such system is currently in place. I have asked the County to arrange for inmates to have telephone access to counsel without having to make a toll call, but I have encountered significant resistance from both the County and the individual defenders. Frankly, I am baffled at the response I have received. The County seems unwilling to confront the funding, political and logistical issues involved in requiring the jail to change its policies. Some of the defenders seem to fear a barrage of client calls or are unwilling to deal with the hassle associated with obtaining reimbursement for collect calls. Rather than continue to reimburse attorneys for collect calls, the County is now requiring each defender to obtain a toll free number. I do not believe this is a workable solution. The County’s plan effectively shifts the cost of the calls to the individual defenders and amounts to a pay cut. Furthermore, it is my understanding that even with a toll free line, the attorneys will be required to pay a per minute charge for each call thus creating a disincentive to accept client calls. Finally, based upon the information I have received, having a toll free number, by itself, will not allow inmates to bypass the jail’s collect call system.

I consider inmate telephone access to attorneys to be a critical issue for Grant County public defense. In-custody defendants must have a means of communicating with their attorneys by phone. This is particularly important when so many of the defenders live outside of Grant County and may not be able to visit as frequently as a local attorney. The complaint logs demonstrate that attorneys who accept calls from in-custody clients receive far fewer complaints than those who do not. Defendants who are able



communicate with their clients have more faith in their attorneys and the system as a whole.

### **Overall Quality of Representation**

The Settlement Agreement requires Grant County to maintain a public defense system that provides effective assistance of counsel to all indigent defendants charged with felonies. The quality of representation in individual cases is difficult to evaluate without a careful review of the attorney's case file and access to the defendant. To date, I have not been able to devote sufficient time to conduct such a comprehensive review of individual cases.

My general impression is that the quality of representation provided by Grant County public defenders has improved but is not yet what it should be. For example, I recently learned that one of the defenders who had been assigned as co-counsel in a murder case for almost a year had never met his client. A month before the scheduled trial date, the defender had done nothing on the case except read the discovery and planned to simply show up for trial without further preparations. When lead counsel asked him to actually work on the case, he balked and moved to withdraw. After his motion to withdraw was denied, he informed me that he still had no intention of working on the case, and while he would attend the trial, he would not conduct direct or cross-examination of any witness, give opening or closing, or participate in voir dire. Needless to say, I found his position shockingly unprofessional and completely unethical. So long as examples like this persist, I have difficulty concluding that Grant County has successfully overhauled its public defense system.

I also remain concerned with rate of trials by defenders in Grant County. During the second quarter, the defenders had one jury trial and two bench trials. For the first three quarters of the year, there have been a total of four jury trials and four bench trials. The trial rate for the year continues to hover around 1% of felony cases assigned. In my opinion, there should be more trials in Grant County. Attempting to determine the reasons for the unusually low trial rate will be one of my priorities for the fourth quarter.

### **Conflicts of Interest**

The Settlement Agreement requires the County and each defender to have a conflicts-check system and procedure. Although the supervising attorney notes co-defendants for each case to ensure that each defendant has separate counsel, the County has no formal procedure for checking conflicts. When a witness or victim name seems familiar to him, Alan White checks for public defender representation in the years 2005-2007. This process occurs 2-3 times per month. In all other cases, Mr. White relies on the individual defenders to notify him whenever a conflict arises. He estimates that a defender notifies him of a conflict on an average of less than one case per month.

The Settlement Agreement also requires the County to maintain a list of attorneys available to handle conflicts cases. These attorneys must meet WSBA-Endorsed Standards and must be approved by Monitor. The County does not currently maintain such a list. At the end of August, the Grant County prosecutor filed charges against 12 co-defendants in a complex drug case (known as the “Mattawa 12”). The County did not have a sufficient number of public defenders available to represent all of the defendants and was forced to hire outside counsel.

When I reminded the Supervising Attorney that the Settlement Agreement requires me conflicts counsel, he submitted for my approval the three private attorneys assigned to represent Mattawa 12 co-defendants. Unfortunately, I was not able to approve any of the attorneys submitted. Two had district court caseloads that far exceeded WSBA-Endorsed Standards. The third may ultimately be approved, but the County has not yet provided sufficient information for me to properly evaluate him. At present, the County has no attorneys approved as conflicts counsel.

In a related vein, the County currently has only 4 approved investigators. Attorneys representing two of the Mattawa 12 co-defendants have already requested investigators. If three or more of the remaining 10 co-defendants request an investigator, the County will be left scrambling to find qualified candidates. Planning ahead for such a possibility would be in the best interests of indigent defendants and would likely save the County money in the long run as emergency hiring is almost always more expensive than contingency hiring.

While not common, cases with more than four co-defendants do arise from time to time, and the County should have some contingency plan for obtaining additional investigators if needed. Accordingly, I recommend that the County compile a list of conflicts investigators to be used in cases with a large number of co-defendants.

### **Other Issues**

There continue to be requirements of the Settlement Agreement that I have not yet addressed including interpreters, experts, and administrative support for defenders. I will endeavor to evaluate those areas in more detail in the coming months.

### **Conclusion**

The Grant County public defense system remains a work in progress. The County experienced a tumultuous third quarter. Over the last several months, we learned that three of the seven full-time defenders would not return for 2008. Meanwhile two new full-time defenders have joined the ranks, and two more new hires are expected to start work in November and December. While the County has lost a great deal of experience in the departing defenders, I am hopeful that the changes in personnel will help improve the group dynamic, infuse the program with some energy, and bring a fresh approach to some of the problems facing the County’s public defenders. The most pressing issue facing the County in the fourth quarter is ensuring that it has sufficient attorney capacity

for the remainder of the year. Toward that end, the County must work with the plaintiffs to resolve lingering issues regarding the use of part-time defenders and the private practices of the County's full-time defenders.