

Best, et al. v. Grant County

Monitor's Report

Fourth Quarter, 2007

January 17, 2008

Submitted by Francisco Rodriguez, Settlement Monitor

Monitor's Activities

During the fourth quarter, I traveled to Ephrata on two occasions, October 9, 2007, and November 13, 2007. My goal is to be on site in Grant County at least once per month. Unfortunately, I was not able to visit during the month of December due to scheduling conflicts. 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 site 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. Pursuant to this authority, 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. I also occasionally request information from June Strickler, Administrative Assistant to the Board of County Commissioners. She too has been responsive to my requests. Finally, the Grant County Superior Court Clerk's Office has always been very accommodating in my review of court files.

Although the County has generally been forthcoming in responding to my requests for information, I continue to encounter occasional resistance. During the fourth quarter, for example, the County refused to provide me with a letter written by Supervising Attorney Alan White relating to private practice by the Grant County public defenders. I learned of the letter when its existence was inadvertently disclosed in one of Mr. White's monthly reports. I subsequently requested a copy of the letter from both Mr. White and counsel for the County. Two months later, I still have not received a copy of the letter or a formal response to my request.¹

¹ On January 14, 2008, counsel for the County, Francis Floyd, indicated in a telephone conversation that he may provide a copy of Mr. White's letter to the Monitor and to plaintiffs' counsel shortly.

The County's refusal to provide information relating to private practice by its defenders is troubling. The County has offered no explanation for withholding relevant documents on this issue, and I see no legitimate basis for doing so. The Settlement Agreement sets specific limits on private practice by Grant County public defenders and requires reduced caseloads for defenders who accept private cases. Furthermore, private practice is completely prohibited unless approved in advance by both the Supervising Attorney and the Monitor. Under the circumstances, it appears that the County is attempting to circumvent these limitations on private practice by concealing evidence from both the Monitor and plaintiffs' counsel.

2006 Compliance

The question of compliance in 2006 has been resolved. In July 2007, I submitted my 2006 Compliance Report to the parties. In that report, I found that the County breached the Settlement Agreement in 2006 in various ways, most significantly by failing to provide counsel in a timely fashion to a large number of indigent defendants, many of whom were in custody. I also made recommendations to the parties regarding the corrective action necessary to "cure" the breach.

In November 2007, a dispute arose between the parties as to whether the County had adopted several of the "cure" recommendations contained in my 2006 Compliance Report. In resolving the dispute, I found that the County had failed to follow my recommendations and thus had not cured the breach as required by the Settlement Agreement.

I am hopeful that all concerned can now finally close the book on 2006. At the County's request and with the acquiescence of plaintiffs' counsel, I have not filed my reports regarding 2006 with the court. Both the 2006 Compliance Report and 2006 Cure Compliance Report are, however, available to the court upon request.

Supervising Attorney

The Settlement Agreement requires the Monitor to oversee and evaluate the performance of the Supervising Attorney. In Grant County, the Supervising Attorney fills a multitude of roles. He is expected to be a combination of administrator, compliance officer, mentor, and public defense advocate. Moreover, he answers to several different constituencies, each with its own set of priorities. Balancing these competing roles and constituencies is a herculean task, one that Alan White is still struggling to master. Despite some reservations, overall, I continue to believe that Mr. White does a commendable job in a very challenging environment.

Mr. White is very well-liked on a personal level by the public defenders he supervises.² When asked about his performance as supervisor, the defenders are generally positive

² Although he has a few vocal critics, they are very much the exception rather than the rule.

and supportive. Their main concerns seem to be structural rather than personal and relate to the supervisor's lack of independence and the resulting inability to zealously advocate for the public defense system and its clients. I frequently hear complaints from defenders regarding the ambiguity of Mr. White's role and the tension between being a county administrator and being a public defense advocate. Mr. White shares these frustrations and seems to struggle with his competing obligations on a regular basis. In a recent exchange with me, he described his predicament this way: "My role is, as everyone knows, limited, expanded, convoluted, and splintered."

While Mr. White cannot change the conflicts inherent in his position, he seems to be making some progress in trying to reconcile his competing responsibilities. In the past, Mr. White has attempted, without success, to chart a course that pleases everyone. Much to his dismay, the result has often been that he pleased no one. I believe that Mr. White is starting to realize the futility of trying to be all things to all people. He and I have had a number of discussions about his role, and he has expressed a desire to engage representatives of the County in a similar dialogue. With a new defender group now in place, I hope he will raise this topic with them as well. If nothing else, these discussions may help others to better appreciate Mr. White's predicament.

Aside from confusion about his role, Mr. White has had difficulties over the past year with rebellious defenders refusing to recognize his authority or follow his directions. Mr. White's management style is cooperative rather than autocratic and was not well-suited to the personnel in place in 2007. The situation was aggravated by the County's failure to give Mr. White sufficient authority and independence to manage the program effectively. Over time, I hope that the County will increase Mr. White's authority and demonstrate greater deference to him in public defense matters. In any event, the 2008 staff seems much more receptive to Mr. White's leadership style, and I do not expect the discipline problems experienced in 2007 to reoccur.

As I have noted in prior reports, supervising a public defense program is no easy task under any circumstance. In Grant County, Mr. White's task is made all the more difficult by the fact that in addition to his regular workload, the County requires him to supervise district court and to handle some administrative responsibilities for juvenile court. District Court defenders alone handled over 4000 case equivalents in 2007. Using WSBA-endorsed standards for public defense, Mr. White supervises the equivalent of approximately 13.5 attorney caseloads in District Court. While I understand that the County benefits from economies of scale in structuring its public defense program in this way, Mr. White already has more than a full-time workload supervising the adult felony defenders. The administrative convenience to the County of having Mr. White supervise other courts comes at the expense of the adult felony program. Moreover, assigning Mr. White these responsibilities appears to violate the Settlement Agreement's requirement that the County hire a "full-time" supervising attorney for the adult felony public defense system. Accordingly, I continue to recommend that the County either hire an assistant supervisor or designate someone other than Mr. White to supervise district and juvenile court.

To its credit, the County has simplified Mr. White's work somewhat in 2008 by reducing the number of part-time defenders employed. In 2007, the County utilized as many as six part-time defenders. For 2008, the County has committed to using no more than two. While the number of case assignments will not change, it will be easier for Mr. White to supervise fewer attorneys.

The fourth quarter was particularly difficult for Mr. White as he had to deal with the departure of numerous defenders who had contracts expiring at year's end. In addition to his normal responsibilities, Mr. White had to re-assign a large number of cases, including several that were quite serious and complex, train three new full-time defenders, and manage case assignments to ensure that caseload limits were observed. Moreover, the impending departure of certain defenders resulted in substantial tension and discord with and among the defenders, and Mr. White spent a great deal of time addressing these personnel issues. Although some residual issues remain, the most difficult part of the staffing transition is now complete.

Alan White has a mostly thankless job. He is rarely credited for his successes while he is blamed for every problem that arises with the public defense system. His job responsibilities are overwhelming. In spite of all this, he seems to remain positive and keeps striving to improve as a supervisor. I have been impressed with his openness to advice and to change, and it is this quality that makes me most optimistic for 2008.

Staffing/Caseloads

Despite significant staffing challenges, Grant County met annual caseload limits and ended 2007 with excess caseload capacity. The County faced a number of significant obstacles in achieving this goal. First, three full-time defenders resigned, effectively rendering them unavailable for case assignments during the last six weeks of the year. Second, the County lost one of its full-time defenders for more than three months due to his poor health. Third, the caseload limits for each of the full-time defenders had to be reduced late in the year when it became apparent that they were engaging in private practice. The County was able to overcome these problems by convincing its new full-time defenders for 2008 to start early. By doing so, the County added approximately 86 case equivalents worth of capacity starting in September. The County should be congratulated for responding quickly and decisively to avoid a staffing crisis at the end of the year.

Significantly, the County was also able to comply with the monthly and quarterly limits it imposed in July. This was no small feat given the rather tumultuous staffing situation during the last quarter. Moreover, Alan White was successful in spreading the case assignments among the defenders much more evenly in 2007 than in 2006.

In assessing 2007 caseload data, however, it is important to note several factors that affected the County's ability to meet the required caseload limits. First, in order to meet caseload demands, the County employed as many as six part-time defenders in 2007.

The Settlement Agreement limits the County to no more than two. Second, the 2007 case assignment totals are artificially low due to the failure of several defenders to report their work on extraordinary cases. One defender has not reported his time since June. Third, the County benefited from three consecutive months of unusually low case assignments from September through November.

As mentioned above, Grant County has undergone significant personnel turnover during the last three months. Seven of its defenders, three full-time and four part-time, are not returning in 2008. While the transition has been difficult, I am hopeful that the infusion of new personnel will bring improved collegiality and coordination among the defenders. I have already met with the three new full-time defenders, and my initial impression is very positive. Moreover, while it is much too early to reach any firm conclusions, the group dynamic already seems noticeably improved.

Training

Because many of the defenders commute from other jurisdictions, scheduling training sessions is sometimes difficult. Typically, the Supervising Attorney will arrange a lunch-time training on a Monday or Tuesday when the defenders are most likely to be in Ephrata for court. During the fourth quarter, Mr. White arranged one such training, an informational session on MRSA, an antibiotic resistant staph infection that is a concern in some jail populations.

On average, the County seems to provide about an hour of training each quarter. I would like to see more training offered in 2008. In the past, Grant County has been very supportive of its defenders attending intensive trial training courses. The County sent several defenders to the National Criminal Defense College in 2006, and those defenders benefited greatly from the experience. Some of the new defenders have expressed interest in receiving such training this summer, and I hope the County will continue to support its defenders in this area. I understand that the County has earmarked funds it received from the State Office of Public Defense for this purpose.

First Appearances

The Settlement Agreement requires that the County provide representation at initial appearances for all indigent defendants. In addition, 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 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.

The defenders on staff for 2008 appear to make these required jail visits on a fairly regular basis. During the fourth quarter, this was true for both the new hires and the

returning defenders. The defenders without contracts for 2008, however, frequently failed to visit in-custody defendants prior to their first appearances. Their “lame duck” status seems to have led some defenders to become quite lax about their professional responsibilities. In cross-referencing first appearance dockets with jail visit logs, I found at least a dozen days during the fourth quarter on which these defenders were assigned to cover first appearances but there was no record of any jail visits.

In analyzing first appearance data, I noticed that even the most diligent defenders occasionally failed to make the required first appearance visits. Upon further investigation, I learned that scheduling issues often make it difficult to visit defendants as required. First appearance hearings are held at 1:30 PM. The assigned defender generally receives a copy of the first appearance docket the morning of the hearing. The heaviest calendars tend to occur on Mondays and Tuesdays, the same days that defenders are in court all day on their assigned cases. Because they are busy handling their own cases on these mornings, the defenders may not be available to make first appearance visits until the lunch recess. The jail does not allow visits from 11:30 to 12:30, however, so the coverage attorney is left with perhaps an hour from 12:30 to 1:30 to visit clients. With large calendars, there simply isn't enough time to visit all the defendants on the docket during the lunch hour. As a result, defenders are sometimes left with little choice but to meet with the client in court. At least one attorney has elected to visit first appearance clients in jail the night before the hearing. While this practice certainly benefits the defendants, I am not sure it is reasonable to expect defenders with a full-time felony caseload to spend an extra hour or two at the jail several nights a week.

With respect to out-of-custody defendants, I recently learned that the County does not generally provide representation at first appearances. The coverage attorney does not receive any notice of these hearings and is not required to provide representation. Defenders may volunteer to stand in on behalf of such defendants, but there is no formal system to ensure that they have representation. When a defendant fails to appear in response to a summons, there is no attorney to evaluate whether the summons was properly served, to attempt to contact the defendant and determine the reason for his/her absence, or to argue against probable cause.

Jail Visits

Indigent defendants in Grant County are assigned counsel on a provisional basis at first appearance. If the client is in-custody, the assigned attorney is expected to visit him or her prior to arraignment which usually occurs the following week.

As with first appearance visits, the defenders on staff for 2008 appear to visit their clients within a reasonable period of time after the assignment. Again, however, the departing defenders were much less likely to visit clients promptly as required.³ Even defenders who had previously been quite diligent in visiting clients seemed to wait an extra week or

³ One caller to the complaint line, expressing his frustration at his attorney's failure to visit him, explained that he wanted to speak with his attorney “not in the hallway.”

so before getting around to a visit. In one case, I found that a defendant charged with a class A sex offense waited 28 days for a visit from his assigned attorney. In the future, Grant County will need to be more vigilant in monitoring the work of defenders leaving its employ.

Delays in jail visits also continue to be a problem with the part-time defenders as a group. Because these defenders have obligations in other jurisdictions and may not be present in Grant County each week, they often fail to visit clients in a timely fashion. This may be less of a problem in 2008 as at least one of the new part-time defenders resides in Grant County.

Investigation

Grant County currently has four approved investigators. It is my understanding that the defenders are generally quite pleased with their work. There were some concerns about the availability of one of the investigators for a period of time during the fourth quarter, but I am told that problem has now been resolved.

Most of the public defenders continue to make regular use of investigators on their cases. As in previous quarters, investigation rates varied substantially among the defenders. Overall, the defenders requested investigation in approximately 32% percent of their cases in the fourth quarter. This figure is down somewhat from last quarter. For the year, Grant County defenders requested investigation in approximately 35% of their cases. Four of the full-time defenders and one of the part-time defenders investigated at least 40% of their cases in 2007.

On an individual level, I am concerned that some defenders did not investigate enough of their cases in 2007. Two full-time defenders requested investigation in less than 20% of their cases for the year. Their investigation rates in the fourth quarter were only slightly above this yearly average. In addition, three of the County's part-time defenders had investigation rates below 20% for the fourth quarter. Two had annual rates below 20%.

Although the County's new full-time defenders have only been on staff for a short time, the data so far indicates that they are requesting investigation at an acceptable rate. In the first quarter of 2008, the County should pay particular attention to investigation rates by both the new full-time and part-time defenders to ensure that they are using investigation resources appropriately.

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. To satisfy this requirement, Alan White has a dedicated telephone line for client complaints. Notices regarding the complaint line are posted throughout the jail in

both Spanish and English. These notices were updated during the fourth quarter to reflect the best times to call in. Calls to the complaint line are logged, and if any follow-up is necessary, a message is conveyed to the handling attorney.

The complaint system seems to work relatively well when someone is in the office to answer the calls. Mr. White's part-time assistant is available to accept calls in the mornings on most days. In the afternoons and after regular business hours, calls to the complaint line go to voicemail. During the fourth quarter, some mornings calls were not answered when Mr. White's assistant had a day off, attended a training seminar, or was out of the office on work-related tasks.

Missed calls are not a problem so long as the inmate can leave a message. Unfortunately, in-custody defendants in Grant County do not currently have that option. The jail phone system requires the person receiving the call to accept it by pushing a specified button. As a result, calls to voicemail are not put through, and the inmate cannot leave a message. This is a significant problem. In the fourth quarter, Mr. White's office received 140 calls from the jail in which inmates were unable to leave a message.⁴ Approximately three out of every four callers were unable to register their complaints. Mr. White has no way to identify such callers or determine the reason for their calls. I noted this problem in my last quarterly report, but to the best of my knowledge, the County has taken no action to correct the problem. The Settlement Agreement specifically requires the County to provide a "message system" for the complaint line. Accordingly, I strongly recommend that the County take immediate action to address this problem.

In my last report, I noted that the County's complaint system did not provide out-of-custody inmates with notice of how to make a complaint. This oversight has now been corrected. During the fourth quarter, Supervising Attorney Alan White developed an informational flyer that includes instructions on how to make a complaint. This flyer is now distributed to defendants at arraignment. Based upon the depleted supply of flyers, it appears that the public defenders are distributing this information to defendants as required.

As far as substance, the complaint logs for the fourth quarter reveal that once again more than half of client calls relate to a need for contact with the assigned attorney. The jail phone system continues to be a problem in this regard. In an attempt to address the cost of collect calls, the County has required most of the defenders to set up toll free lines. As I have repeatedly informed the County, however, a toll free line, standing alone, will not solve this problem. Two additional steps are necessary. First, the toll free numbers must be assigned a two-digit code so that inmates can access them from the jail. Second, the phone system must be configured so that calls to those numbers bypass the recorded screening process that prevents the inmate from leaving a message.

I understand that in the last several days, the County has finally assigned several of its defenders the "speed dial" codes necessary to access toll free numbers. Although I am

⁴ The calls can be identified as jail calls because the voicemail system captures a portion of the jail's recorded message.

pleased that the County has finally made progress in this area, I am disappointed that it has taken so long for the County to respond. Moreover, these codes will be of limited utility unless the County also ensures that the jail phone system has been configured to allow inmates to leave messages.⁵

Overall Quality of Representation

The quality of representation in Grant County remains uneven. While some defenders are quite diligent in visiting clients, investigating cases, and filing motions, others are not. The quality of representation definitely suffered in the fourth quarter as some of the departing defenders seemed to prematurely disengage from their professional obligations to their remaining Grant County clients. At the same time, I was impressed with what I observed of the representation provided by the new defenders that the County brought in late in the year.

On my most recent visit to Grant County, I was particularly impressed with the development of one of the returning defenders. I observed this defender aggressively arguing discovery motions as well as successfully navigating a difficult sentencing hearing. In reviewing court files, I found that this defender had filed a potentially winning Knapstad motion in one case, made efforts to obtain a sentencing alternative in another, and was routinely submitting detailed discovery demands. The same defender had retained an expert on yet another case and participated in a contested CrR 3.5 hearing later that same week.

Although I see signs of progress, each quarter there seems to be at least one case that gives me pause with respect to the overall quality of Grant County public defense. During the fourth quarter, I learned that two defenders had been handling a third strike case for over a year without ever investigating the defendant's prior strikes. When a substitution of counsel occurred, the new attorney quickly recognized this oversight and upon pulling the court files, discovered that one of the alleged strikes was legally defective and not likely to count as a strike at all. Obtaining all records relating to prior strike convictions is one of the first steps a defense attorney should take in a third strike case. Ironically, the defenders involved are among the most diligent the County has. Their error in this case was simply a matter of inexperience in handling complex cases. In order to avoid such mistakes in the future, I have urged Alan White to either assign his more experienced defenders to such cases or become more closely involved in the representation in order to ensure that less experienced defenders avoid critical mistakes.

There were two jury trials during the fourth quarter. In both cases, the defendants were represented by part-time defenders who are not returning in 2008. The trial rate for the fourth quarter was approximately 1%. The trial rate for the year was also approximately 1%. The number of trials in Grant County is surprisingly low, and I have yet to find a

⁵ The Settlement Agreement expressly requires that each of the County's public defenders "maintain a bilingual (English-Spanish) telephone and message system or other comparable system that allows incarcerated clients and other clients to leave messages."

satisfying explanation for this lack of trials. Moreover, the situation may very well worsen in the coming year given that the defenders responsible for 9 of the 10 trials held in 2007 are not returning in 2008. The 2007 trial rate for the returning full-time defenders was an abysmally low 0.2%.

Experts

In my review of court files, I was pleased to discover several instances in which Grant County public defenders had obtained funding for defense experts. The use of experts is often critical to an effective defense. The fact that at least some defenders have made the effort to consult with experts is a very positive sign in terms of the quality of representation being provided.

I feel compelled to point out, however, that I should not have been able to learn about defense experts by reviewing a court file. Requests for funding should be made ex parte, and all pleadings relating to defense experts should generally be filed under seal. Based upon my review, most expert requests by Grant County defenders are made ex parte, though I did find one that was not labeled as such. It appears, however, that some defenders are not obtaining an order to seal the pleadings relating to their expert requests. As a result, all of the details regarding their ex parte expert requests are publicly accessible in the court file. In addition, I found at least one file in which materials relating to the request for expert funding were filed under seal, but subsequent pleadings relating to the expert's billing were not. I have discussed these problems with the Supervising Attorney, and he has assured me that he will review the importance of obtaining orders to seal with the defenders.

Conflicts of Interest

The Settlement Agreement requires both the Supervising Attorney and each defender to have a conflicts-check system. These procedures must be approved by the Monitor. To date, I have not been asked to approve any policy or procedure for conflicts checks.

Until recently, the Supervising Attorney had not been using a formal or systematic procedure for checking conflicts. Mr. White has always been careful not to assign multiple co-defendants to the same defender or firm. In addition, it was his practice to research potential conflicts whenever he recognized the name of a witness or alleged victim.

During the fourth quarter, Mr. White adopted a much more systematic approach to conflicts. For each case, Mr. White personally reviews the police report and compiles a list of witnesses and alleged victims. He provides this list to his assistant who also reviews the police reports and double checks the list. She then runs the names against their case assignment database which dates back to 2005 and notes any potential

conflicts. The list of witnesses and alleged victims is then passed on to the assigned attorney who is expected to run his or her own conflicts check.

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 the Monitor. As reported last quarter, the only attorneys submitted for approval as conflicts counsel did not meet WSBA-Endorsed Standards. The County has not submitted any additional names for approval and currently has no one approved to handle conflicts cases.

Administrative Support

The Settlement Agreement requires each defender to maintain a minimum of ¼-time secretary or paralegal. The Monitor may waive this requirement if a given defender does not need such support. It is my understanding that very few defenders employ any support staff. There are at least three reasons for this. First, it is difficult to hire a qualified secretary or paralegal to work just 10 hours a week. Second, the individual defenders are expected to pay the salary for any support staff they employ, thus reducing their own compensation. Third, some of the defenders have no office and/or commute from other jurisdictions, making the use of support staff impractical. The use of secretarial or paralegal support is much easier when staff can be shared by multiple defenders. In Grant County, however, the potential for conflicts makes sharing staff very difficult.

Alan White is in the process of assessing the administrative support for each of the current defenders. I have not yet received his report on this topic. I anticipate addressing this issue in the first quarter to determine whether the requirement for administrative support is being met and whether any waivers of the requirement are appropriate.

Conclusion

I believe that Grant County has the potential to make great strides in 2008 toward improving the quality of its public defense system. The staffing changes engineered by the County promise to bring more cohesion and cooperation to a defender group that had become increasingly fractured and dysfunctional. The changes in personnel will also offer the Supervising Attorney the opportunity for a fresh start with a staff more receptive to his leadership. For its part, I hope that in the coming months the County will address some of the nagging issues that have tended to overshadow its progress overall. In particular, the County needs to confront the problem of private practice by its defenders, ensure that the jail phone system is configured to allow inmates to call their attorneys and leave messages, and obtain all of the approvals required by the Settlement Agreement.