

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

**Monitor's Report**

**Second Quarter, 2007**

July 16, 2007

Submitted by Francisco Rodriguez, Settlement Monitor

**Monitor's Activities**

I formally assumed the role of Monitor on May 31, 2007. In order to minimize any transition issues, I attempted to familiarize myself with the Grant County public defense system and its various participants as quickly as possible.

It is my understanding that both the parties and the prior Monitor felt that more involvement by the Monitor was needed. Accordingly, I expect to be on site more often in the coming months. During the second quarter, I traveled to Ephrata on three separate occasions:

- June 5-6, 2007
- June 11, 2007
- June 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 preparation for my duties as Monitor, I reviewed the following documents, records, and files:

- Settlement Agreement
- Plaintiffs' summary judgment pleadings
- Defendant's summary judgment pleadings
- Court's Memorandum Decision on summary judgment
- Hundreds of pages of correspondence (email and letters)
- Attorney and Supervising Attorney employment contracts
- Case assignment spreadsheets
- Jail visit logs and sign-in sheets
- Complaint logs
- Court files in 22 cases
- Electronic court dockets in 33 cases
- Supervising Attorney Alan White's Monthly Reports
- Monitor's Quarterly Reports

I had in person meetings with:

- Plaintiffs' counsel David Taylor, Beth Colgan, Nancy Talner, and Breena Roos
- Defense counsel Jerry Moberg and Francis Floyd
- Grant County Board of County Commissioners
- Former Monitor Jeff Robinson
- Grant County Superior Court Judge Evan Sperline
- Supervising Attorney Alan White
- Various Grant County public defenders
- June Strickler, Administrative Services Coordinator, Board of County Commissioners

I had telephone conferences with:

- Defense counsel Francis Floyd
- Plaintiffs' counsel Beth Colgan
- Supervising Attorney Alan White
- Various Grant County public defenders
- June Strickler, Administrative Services Coordinator, Board of County Commissioners

In addition, I had extensive email contacts with Supervising Attorney Alan White and the Grant County public defenders.

### **Access to Information**

The Settlement Agreement provides that the Monitor shall have broad access to information concerning the Grant County public defense system. I have made extensive use of this authority during the second quarter. The County, Supervising Attorney Alan White, and the individual public defenders have all been very cooperative with my many requests for information and documents. Alan White has dealt with the bulk of my requests and has been particularly helpful in tracking down needed information.

### **2006 Compliance**

The question of compliance in 2006 was unresolved when I assumed the role of Monitor. On June 26, 2007, the parties and I participated in an informal conference to attempt to resolve this lingering dispute. Although no agreement was reached at that time, the parties engaged in a fruitful dialogue that may lead a resolution of this issue in the near future. I recently submitted my formal findings and recommendations to the parties regarding the dispute. It is my hope that the parties will use these recommendations as a guide for amicably resolving their differences.

## **Supervising Attorney**

The Settlement Agreement requires the Monitor to assess the performance of the Supervising Attorney. Although I have only served as Monitor for a short time, I have already had extensive contact with Alan White. My initial impression of Mr. White as Supervising Attorney is very positive.

Managing a felony public defense unit is a difficult job under any circumstances. In Grant County, the position is even more challenging because Mr. White must oversee the implementation of an entirely new public defense system and simultaneously deal with the administrative burden of being closely monitored by outsiders. His wide-ranging administrative responsibilities make it very difficult for him to devote sufficient time to the day-to-day work of supervising, training, and mentoring the public defenders.

Mr. White does a commendable job managing his many competing responsibilities. He recognizes, however, that he has much to learn as a supervisor and seems genuine in his desire to improve in that role. His openness to change and to constructive criticism will serve him well in that regard. At this point, I have every reason to expect that Mr. White will continue to grow into the position and serve Grant County well for the foreseeable future.

Although I am more than satisfied with Alan White's performance as Supervising Attorney, I do have some concerns about how the position is structured. Currently, Mr. White is simply asked to do too much. He supervises twelve adult felony public defenders in Grant County Superior Court and four misdemeanor public defenders in Grant County District Court. In addition, he has some limited administrative responsibilities over juvenile court. The administrative burden of supervising three different courts and such a large number of lawyers makes it very difficult for Mr. White to find time to train and mentor the individual public defenders. 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.

I am also concerned that the Supervising Attorney does not have sufficient independence and authority to do his job effectively. Participants in the Grant County criminal justice system seem to routinely bring complaints about public defenders or the public defense system directly to the Board of County Commissioners. The Commissioners undoubtedly have more important business to attend to than attempting to resolve petty disputes between public defenders, prosecutors, and investigators. Alan White should have the responsibility and authority to handle such matters, and the Board should expect him to do so. I have discussed this issue with Mr. White and believe he is prepared to accept more responsibility in this regard.

The public defense system would have greater stability and a stronger leader if the County made a clear commitment to its Supervising Attorney. Currently, the Supervising Attorney has a one-year contract. With such little job security, it is very difficult for the Supervising Attorney to be an effective leader. Moreover, the public defense program is

in yearly jeopardy of losing its head, as almost happened at the start of 2007. I understand that the County plans to open 2008 contract negotiations soon and is considering offering multi-year contracts. At this point, I am hopeful that the 2008 contracts will provide greater long-term stability to the program.

### **Staffing/Caseloads**

The County has gone to great lengths to increase staffing for 2007. Currently, the County has seven full-time public defenders and five part-time public defenders. Based upon the first two quarters of 2007, the County expects to assign approximately 1250 case equivalents for the year. The capacity of existing staff is approximately 1300 case equivalents. This fifty case “cushion” should provide sufficient flexibility to accommodate fluctuations in case assignments through the end of the year. Nonetheless, the County will need to be vigilant in monitoring staff caseloads and may need to add capacity if monthly caseload numbers increase significantly in the second half of the year. A single “extraordinary” case can drastically alter staffing needs. For example, Grant County Superior Court recently declined juvenile jurisdiction in a complex murder case. This case alone may absorb much of the current “cushion.”

In order to better control caseloads, the County has agreed to implement monthly and quarterly caseload limits. Full-time defenders will be assigned no more than 16 cases per month and 40 cases per quarter.<sup>1</sup> These limits will spread each defender’s workload more evenly throughout the year while also ensuring that the County reserves some capacity to make case assignments late in the year. Alan White used these limits as a target in June and was able to keep all of the full-time defenders at 16 cases or less for the month and all but one under the quarterly limit of 40.

Distribution of case assignments appears to be fairly even at the half-way point in the year. The annual caseload limit is 150 case equivalents. Five of the seven full-time defenders are on pace for a caseload of 159 credits or less for the year. Two defenders are off-track but not by so much that the problem can’t be corrected within a month or two. The part-time defenders all appear to be receiving cases at an appropriate pace, with approximately half their yearly caseload capacity available for use in the second half of the year. Alan White has worked diligently to even out the caseload distributions and should be commended for his success thus far. Although it would be preferable to have the full-time defenders at slightly lower caseloads at this point in the year, the current figures are within an acceptable range. The County recently added a fifth part-time attorney which should relieve some of the caseload pressure on the other defenders.

The number of part-time public defenders is a matter of some concern as it relates to the system’s total caseload capacity for the year. The Settlement Agreement allows Grant County to hire no more than two part-time defenders. Yet the County currently employs five. Without these additional part-time defenders, the County does not have sufficient attorney capacity to cover its anticipated needs. I understand that the parties are working

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<sup>1</sup> In the fourth quarter, a higher limit of 44 cases will be used.

together to resolve this issue. Absent some agreement permitting more than two part-time defenders, the County will have an immediate need to hire additional full-time defenders in order to avoid staffing shortfalls at the end of 2007.

Supervising Attorney Alan White has already recommended reducing the number of part-time attorneys and hiring at least one additional full-time defender. I concur in that recommendation. It is my understanding that the County is exploring its options in this area, and I am hopeful that at least one additional full-time defender will be on staff before year's end.

Given the County's past difficulties in recruiting qualified full-time defenders, I am also concerned about the potential for attorney turnover. All of the full-time defenders are working under one year contracts and could walk away at the end of 2007. Needless to say, that would be a disaster. In 2006, the County did not begin contract negotiations for 2007 until very late in the year. This created morale problems and forced many of the defenders to consider other options. To avoid such problems this year, the County has expressed its intention to begin 2008 contract negotiations very soon. I strongly support that decision. I also understand that the County is considering offering multi-year contracts this year. Multi-year contracts make sense for at least some of the defenders who now have an established track record of providing quality representation. Such contracts also demonstrate the County's commitment to public defense and give the program greater stability. I am encouraged that the County is willing to consider such a commitment.

### **Training**

Grant County public defenders seem to have adequate training opportunities available. It is my understanding that one of the more experienced public defenders, Robert Schiffner, has been elected the group's unofficial training director. He conducted two trainings this quarter, one on recent appellate decisions and another on search and seizure issues. Alan White also arranged a presentation on work release options.

In addition to in-house trainings, the County has been supportive of defenders interested in comprehensive trial training programs such as the National Criminal Defense College in Macon, Georgia. Several defenders attended that program last year and benefited greatly from the experience. Although the County encouraged additional defenders to attend the program this year, none of the defenders was able to attend.

In coming months, I plan to assist Alan White in organizing additional in-house trainings for the defenders. I also hope that some of the defenders will attend an intensive trial training program being offered by the Washington Association of Criminal Defense Lawyers this fall.

## **Jail Visits**

Supervising Attorney Alan White expects 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 reviewing 2006 compliance issues, I discovered that many defenders failed to visit their clients as required by their Supervising Attorney. In December 2006 and January 2007, visits by the coverage attorney prior to first appearance occurred only sporadically, and visits by the assigned attorney rarely occurred prior to arraignment. Indigent defendants often sat in jail for a month or more before being visited by their assigned defender for the first time. On a few occasions, there was no visit at all. In light of the prior problems with jail visits, I plan to pay particular attention to this issue in the future.

During the second quarter, available records suggest that some of the defenders were still not regularly visiting in-custody defendants prior to the first appearance. I cross-referenced jail visit logs with case assignment information and determined that only a few defenders consistently made the required visits. Some defenders made visits during one coverage week but not in another. Others made no visits at all.

I observed a similar pattern with respect to jail visits by defenders after being assigned as permanent counsel. Some regularly visited clients in a timely fashion. Others waited weeks to visit their clients in jail or failed to visit at all.

Many of the defenders seem to consider client contact in and around the courtroom to be an acceptable alternative to jail visits. When asked about contact with in-custody clients, the attorneys often point to last-minute meetings in a "secure corridor" near the courtroom. Such meetings are not an adequate substitute for a more private and less hurried consultation with each client at the jail. Indigent defendants should have the opportunity to meet with their lawyers in a private setting that encourages candor, allows for a thorough exploration of relevant issues, and provides the client with sufficient time to consider available options in advance of court.

Some of the defenders complain that timely jail visits are not particularly productive due to delays in receiving discovery from the Grant County Prosecutor's Office. The Prosecutor's Office apparently refuses to provide defenders with criminal history and is slow to produce police reports. The failure of prosecutors to provide this crucial information in a timely fashion undoubtedly makes it more difficult for defenders to properly advise their clients, but it does not relieve the defenders of their obligation to

visit in-custody clients as required. The defendant may have valuable exculpatory information, pressing legal questions, or some other need to promptly consult with counsel. Moreover, the appropriate response to the prosecutors' recalcitrance is not to forego jail visits but to ask the court to require that the prosecutors comply with their discovery obligations.

### **Investigation**

The County currently has contracts with four different investigators, three individuals and one agency. The number of investigators appears to be sufficient to meet existing needs except in cases with a large number of co-defendants. I assume that such cases are rare and that the County would seek out additional investigators if needed on a case-by-case basis.

The Settlement Agreement requires the Monitor to approve all public defense investigators. To date, none of the current investigators has been approved. Accordingly, I am in the process of evaluating the qualifications and experience of each investigator currently under contract. In addition to reviewing their credentials, I intend to meet with the investigators individually and to solicit input from the public defenders who have worked with them. I have received a number of serious complaints about one of the investigators, and I will take those complaints into account in determining whether the investigator should be approved.

Most of the public defenders appear to make regular use of investigators on their cases. In Grant County, the prosecutor's office provides little to no opportunity for early resolution of criminal cases. This practice necessitates far more defense investigation than would otherwise be necessary, because the defenders must prepare virtually every case for trial. Under the circumstances, it would be reasonable for the defenders to investigate every case. At least one part-time defender has adopted that approach. Most defenders, however, appear to exercise some discretion in determining when investigation is appropriate. Overall, the defenders are requesting investigators in approximately 34% of their criminal cases in 2007.

While the general rate of investigation is adequate, the individual rates for a few defenders are worrisome. One full-time defender requests an investigator in only 7% of his cases. The rate for another is only 9%. One part-time defender requests investigation in only 6% of his cases. Another uses an investigator only 12% of the time. These rates are unacceptably low. It is clear that at least some of the defenders would benefit from more training and mentoring regarding the importance 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 toll-free 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 logged and dealt with as appropriate.

Previously, the Monitor relied on the Supervising Attorney's Monthly Reports for complaint information. After reviewing the actual complaint logs for December 2006 and January 2007, I became concerned that some relevant information was not being reported. Accordingly, in the future, I intend to review copies of the original complaint logs to ensure my review is as thorough as possible. Alan White has also changed the way he reports complaints to be more all-inclusive. For this report, I reviewed the actual complaint logs for June but otherwise relied on the Supervising Attorney's Monthly Reports.

My review of the complaint logs suggests that the root of most complaints is a lack of contact with the assigned attorney. This is not surprising given the apparent problems with jail visits. Moreover, I recently learned that most of the defenders do not accept telephone calls from in-custody clients. The refusal to accept calls from jailed clients is completely unacceptable. I have discussed the issue with Alan White, and he has agreed to take steps to remedy the situation. Currently, most complaints regarding lack of attorney contact are simply forwarded to the assigned attorney. The scope and ongoing nature of this problem, however, suggest that more follow-up may be needed.

Aside from contact issues, clients made very few substantive complaints during the second quarter. When such complaints are made, the Supervising Attorney seems to be taking appropriate steps to investigate and resolve the complaint.

### **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. Although I have not had sufficient time to fully evaluate the quality of representation being provided, the current Grant County public defense system appears to be a substantial improvement over that which allegedly existed prior to the Settlement.

After observing court proceedings, reviewing court files, and meeting with public defenders, it is my impression that the quality of representation provided by Grant County remains somewhat uneven. Most of the defenders are quite capable and dedicated. In my review of court files, for example, I found several instances in which defenders filed appropriate motions and obtained favorable results. I also observed defenders ably representing clients in court.

At the same time, however, I reviewed a number of court files in which I concluded that the quality of representation was unacceptable. In at least three cases, I found that the



assigned defenders had failed to litigate what appeared to be winning legal issues. In each case, the client ended up with a felony conviction rather than a dismissal or at least a misdemeanor because the assigned attorney did not bother to file the necessary motions. The problem was particularly glaring in two of the three cases because the co-defendants in those cases had defenders who did litigate the identical issues and obtained substantially better outcomes. Alan White has reviewed each of these cases with the assigned defender, and I am optimistic that such problems can be avoided in the future with further training and mentoring.

I am concerned with the overall number of trials by defenders in Grant County. During the second quarter, the defenders had one jury trial and one bench trial. For the year, there have been a total of three jury trials and two bench trials. That represents a trial rate of approximately 1% of felony cases assigned this year. The dearth of trials in Grant County is not new. Only one of the full-time defenders has had more than one trial since the start of 2006. Three full-time defenders have not had a single trial during that time. For any individual defender, there may be a valid explanation for the lack of trials, but the total number of trials by the Grant County public defenders as a group seems unusually low.

### **Law Library**

One area of great concern to the defenders has been the change in location of the law library. The new location has meant the loss of after-hours access to legal research materials. In addition, the defenders no longer have a convenient private location to meet with out of custody clients. To its credit, the County has agreed to create two attorney-client meeting rooms near the former location of the library. I understand that substantial progress has been made in re-designing the space, and I hope that construction will be completed in the near future. I also plan to discuss with the County the possibility of moving one of the law library's Westlaw terminals into this new area so that the attorneys can again have after-hours access to online legal research.

### **Other Issues**

I do not have sufficient information at this time to evaluate several areas covered by the Settlement Agreement such as the use and availability of interpreters, the conflicts check system, the administrative support for individual defenders, and the use of expert services. I plan to address these issues during the upcoming quarter.

### **Conclusion**

The second quarter of 2007 has been an eventful one for the Grant County public defense system. In addition to adjusting to a new Settlement Monitor, the parties spent a great deal of time and effort addressing unfinished business from 2006. Despite dealing with

some contentious issues, all involved seem committed to being constructive and working together to ensure that indigent defendants in Grant County receive quality representation. At this point, the most pressing issues for the parties are the 2008 contracts and achieving some resolution as to the number of part-time defenders that may be used for the remainder of 2007. The parties are well aware of the importance of these issues, and I expect to be able to report significant progress in addressing them in my next report.