



January 9, 2014

Michael W. Cotter
United States Attorney
District of Montana
901 Front Street, Suite 1100
Helena, MT 59626

RE: DOJ Investigation of the Missoula County Attorney's Office

Dear Mr. Cotter,

I am writing in response to the proposed settlement agreement with the Department of Justice (DOJ) delivered to me on December 11, 2013. The proposal essentially demands that the Missoula County Attorney's Office (MCAO) change how it handles the prosecution of sexual assault offenses and inappropriately interferes with the operation of the office.

The proposal is not acceptable for a number of reasons:

First, MCAO does not need to enter into an agreement with DOJ to protect victims of sexual assault; MCAO has actively assisted victims for years. As the DOJ should already know, our office has a long history of cooperation with the Missoula Police Department (MPD) and other community partners. The MCAO has been a partner in a multi-disciplinary team (MDT) under the umbrella of the First Step program ensuring a collaborative response to child, adolescent, and adult sexual assault for longer than my entire tenure as Missoula County Attorney. Our office has played an extremely active part in the development of First Step and the MDT for over fifteen years. We have seen great progress and great success in improving trust, communication, and collaboration between agencies involved in serving sexual assault victims.

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First Step also has an active Advisory Board, of which I am a member. First Step and the MDT are constantly assessing and working to improve responses to victims and communication between agencies and will continue to do so. In fact, there is currently an effort being made to combine Missoula's sexual assault MDT with Just Response, Missoula's coordinated community response to intimate partner violence, to better serve victims and improve the response of the criminal justice system to sexual violence against victims of all ages and intimate partner violence, which often overlap.

Additionally, MCAO has already taken many steps to improve the services provided to victims of sexual assault. These include:

1. We have recently entered into a Memorandum of Understanding with the MPD providing for the timely review of sexual assault cases referred to our office by the MPD for prosecution or review. This agreement also provides that attorneys in our office will meet face-to-face with victims, advocates and police investigators to discuss the outcome of sexual assault case referrals from the MPD. Finally, the agreement provides that our office will be a collaborative participant in a community sexual assault safety and accountability audit along with the MPD and the UM Office of Public Safety.

2. A number of attorneys in our office have already received specialized training in the area of sexual assault prosecutions. One of our more experienced attorneys has attended over twenty specialized trainings since she came to work in our office. While most of those trainings were not specifically on the subject of sexual assault prosecutions, some were and most were in the related areas of domestic violence and assaults on children. That same attorney and three others attended a two day training session sponsored by the MPD and led by Ann Munch and Tom Tremblay in August, 2013; and one other attended a similar one day session in September, 2013. Two other attorneys attended a week long sexual assault prosecution training session put on by the National District Attorneys Association in August, 2013. As opportunities present themselves, other attorneys will attend similar sexual assault prosecution trainings in the future.

3. Our office has historically provided training to local law enforcement officers and has also engaged in numerous educational outreach efforts in the community. We will continue to do so and, as appropriate, will focus such efforts on the issue of sexual assault in our community.

4. While the MCAO would like to have an in-house victim advocate, the community of Missoula has previously made the decision to establish an independent victim advocate office. With over eight employees and an annual budget of approximately \$850,000, this shows a serious commitment by Missoula County for these services. That model has worked well in our community and it is totally inappropriate that some federal agency attempt to impose a different method of delivering victim advocate services in our community.

5. Our office has done an excellent job of prosecuting sexual assault offenses in our community and has obtained numerous convictions and lengthy prison sentences in appropriate cases. Even when we haven't been successful in obtaining a conviction, we have done everything possible to prove the State's case, including providing testimony from Dr. David Lisak, one of the nation's leading experts in the field of acquaintance related sexual assaults. Given such history, the DOJ cannot make a good faith argument that the MCAO has engaged in a pattern or practice of sex discrimination – the legal standard it must meet.

Second, the proposed agreement assumes that the DOJ has the legal authority to impose the proposed requirements on this office. Since May 2012, I have been asking DOJ to provide a legal basis for its alleged authority. The DOJ has cited two federal statutes. Neither the plain language of federal law, nor case law interpreting federal law provides the DOJ any authority over a local prosecutor's office. In addition, I believe the legislative history of the statute indicates it was only intended to apply to police agencies.

The DOJ has failed to demonstrate that it has any legal authority under 42 U.S.C.14141 to investigate or seek relief in court against a prosecuting attorney or his office. This statute was enacted by Congress to deal with situations where law enforcement agencies violated citizens' civil rights.

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We are not a law enforcement agency. Even though the DOJ assumed we had investigators on our staff (which in their opinion meant we were a law enforcement agency), we do not have any investigators. In addition, the DOJ has failed to demonstrate that our office receives any federal funding that subjects it to any civil rights enforcement action under 42 U.S.C. 3789d.

The DOJ's attempted use of these statutory provisions, which it freely admits have never been used against any prosecutor's office in the United States, is an abuse of DOJ's official authority. Indeed, it is ironic that DOJ claims prosecutors are "law enforcement officers" when the DOJ takes precisely the opposite position in terms of its own prosecutors. When a person sues a DOJ prosecutor for acting improperly, the DOJ successfully argues that its prosecutors are not "investigative or law enforcement officers," thereby shielding them from potential liability under the Federal Tort Claims Act. See e.g. *Tri-State Hosp. Supply Corp. v. United States*, 142 F. Supp. 2d 93, 98 (D.D.C. 2001), reversed on other grounds, 341 F.3d 571 (D.C. Cir. 2003); see also *Trupej v. United States*, 304 Fed. Appx. 776 (11th Cir. 2008); *Moore v. United States*, 213 F.3d 705 (D.C. Cir. 2000).

Third, the DOJ has failed to even acknowledge the applicability of the U.S. Supreme Court doctrine of prosecutorial immunity with respect to its claimed authority to seek relief under the above referenced statutes. Even if the DOJ files suit against our office, I believe the suit will be dismissed in short order as a result of long standing case law upholding a prosecutor's immunity from suit when acting in his prosecutorial capacity. All of the cited instances in the proposed settlement agreement relate directly to the prosecutorial function.

Fourth, and most important, the DOJ has presented no evidence whatsoever that our office has violated anyone's civil rights. Our office routinely provides criminal defendants with all of the evidence we have against them so they can fully evaluate the strength of the State's case against them. The DOJ apparently feels that it has no duty whatsoever to set out its evidence of alleged civil rights violations and simply expects our office to bend to its will. The use of such a tactic is the opposite of justice.

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The women and men serving as prosecutors in the MCAO (currently and in the past) have not and do not discriminate against victims of sexual assault. Rather, these individuals are devoted public servants who work hard every day to seek justice for our community. To argue that intentional discrimination has occurred in this office is without merit and the DOJ's refusal to provide any facts to support such allegations is telling.

Fifth, the DOJ should be well aware of the vital and positive role the MCAO has played in this community to serve victims of sexual assault. Yet, the DOJ is demanding MCAO unnecessarily spend hundreds of thousands of tax payer dollars to do what it already does: prosecute sexual assault crimes and protect victims. I have made it very clear in past discussions, I cannot agree to any proposed settlement that imposes significant new financial burdens on Missoula County or its taxpayers. DOJ's proposed agreement would have the effect of requiring our office to hire two to three new employees (sexual assault investigator(s) and an in-house victim advocate); it would impose significant duplicative training obligations on the staff; and, it would undoubtedly require Missoula County to pay the cost of contracting for an expensive, independent reviewer to report to Washington, D.C. about implementation of the proposed agreement. As submitted, I estimate the proposed agreement would cost Missoula County \$150,000 to \$200,000 annually, at a minimum, for as long as the agreement is in place or until the DOJ unilaterally determines that all of the provisions in the agreement have been fully satisfied.

In conclusion, let me say that if, instead of continuing to try to impose its own solution on our office, the DOJ wants to resolve this matter amicably, I am willing to negotiate a Memorandum of Agreement that puts in place a commitment on the part of our office to assist the Missoula Police Department and the University of Montana Office of Public Safety in meeting their obligations under their respective agreements with the DOJ. On the other hand, since the DOJ has been the cause of delaying a resolution of this matter for nearly 20 months now, if the DOJ does not affirmatively indicate in the next two weeks that it is willing to enter into the kind of agreement I am proposing, I am prepared to take any action

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necessary to prevent the DOJ from imposing an unacceptable solution on our office.

Sincerely,


Fred VanValkenburg
Missoula County Attorney