



**Montana Legislative Services Division**  
**Legal Services Office**

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**OVERVIEW OF DUTIES AND STRUCTURE OF THE OFFICE OF THE STATE  
PUBLIC DEFENDER**

The purpose of this document is to provide a brief overview of the following:

- constitutional basis for indigent defense in Montana
- statutory duties under the Montana Public Defender Act
- structure of Offices of State Public Defender and Appellate Defender
- ethical rules and considerations that apply to attorneys who provide indigent defense

**CONSTITUTIONAL DUTIES**

**I. United States Constitution**

**A. 6th Amendment**

*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

## **B. United States Supreme Court Case Law Interpreting the 6<sup>th</sup> Amendment**

- A defendant's right to court-appointed counsel applies to all state court felony prosecutions. In the seminal case of Gideon v. Wainwright, the United States Supreme Court held that the Sixth Amendment's guarantee of counsel is a fundamental right essential to a fair trial and, as such, applies to the states through the Due Process Clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963).
- This right attaches no later than the preliminary hearing stage. White v. Maryland, 373 U.S. 59 (1963).
- The United States Supreme Court extended the right to court-appointed counsel to indigents facing misdemeanor prosecution in state court. Argersinger v. Hamlin, 407 U.S. 25 (1972).
- The right applies even when the prison sentence imposed is suspended. Alabama v. Shelton, 535 U.S. 654 (2002).
- The Sixth Amendment right to counsel is the right to the "effective assistance of counsel," Strickland v. Washington, 466 U.S. 668 (1984). A defendant who believes that he or she has not received effective assistance of counsel may file a claim for "ineffective assistance of counsel" (IAC). In an IAC claim, courts apply what is known as the Strickland test:
  1. Was counsel's performance deficient?
  2. If so, did the deficient performance prejudice the defense so as to deprive the defendant of a fair trial?
- If a court determines that the defendant did receive ineffective assistance of counsel, it may set aside the conviction or reverse the matter back to the trial court for a new trial.

## I. Montana Constitution

### A. Article II, section 24

*Rights of the accused. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.*

### B. Montana Case Law Interpreting Art. II, sec. 24

- The Sixth Amendment of the United States Constitution and Article II, section 24, of the Montana Constitution guarantee the fundamental right to the assistance of counsel. State v. Craig, 274 Mont. 140, 906 P.2d 683 (1995) (citing State v. Langford, 267 Mont. 95, 99, 882 P.2d 490, 492 (1994) (overruled on [141] other grounds by State v. Gallagher, 2001 MT 39, 304 Mont. 215, 19 P.3d 817).
- Indigent defendants are entitled to legal representation by court-appointed counsel at public expense. State v. Enright, 233 Mont. 225, 758 P.2d 779 (1988).
- The right to "conflict-free representation" guaranteed in the Sixth Amendment is applied to the states through the Due Process Clause of the Fourteenth Amendment. State v. St. Dennis, 2010 MT 229, 358 Mont. 88, 244 P.3d 292.
- The fundamental right to counsel does not extend to defendants who waive the right. State v. Craig, 274 Mont. 140, 906 P.2d 683 (1995).
- Waiver of the right to counsel requires a knowing and intelligent relinquishment [7] of a known right. State v. Blakney, 197 Mont. 131, 641 P.2d 1045 (1982).
- Courts indulge in every reasonable presumption against waiver of fundamental constitutional rights and will not indulge in any presumption of waiver. State v. Mann, 2006 MT 33, 331 Mont. 137, 130 P.3d 164.
- The right to effective assistance [8] of counsel, however, does not grant defendants a right to counsel of their choice. An indigent defendant may not demand substitution of

counsel as long as the appointed counsel has been providing effective assistance. State v. Dethman, 2010 MT 268, 358 Mont. 384, 245 P.3d 30.

### **A. Montana Case Law Applying Strickland v. Washington**

- Actual or constructive denial of the assistance of counsel is presumed to result in prejudice, as are various kinds of state interference with counsel's assistance. State v. Lamere, 2005 MT 118, 327 Mont. 115, 112 P.3d 1005.
- In considering ineffective assistance of counsel claims on direct appeal, the Montana Supreme Court applies the two-pronged test set forth by the United States Supreme Court in Strickland, 466 U.S. 668 (1984). The defendant must establish: (1) "that counsel's performance [11] was deficient or fell below an objective standard of reasonableness" and (2) "prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Deschon, 2004 MT 32, 320 Mont. 1, 85 P.3d 756.
- The Strickland test has been applied in criminal cases, St. v. Gieser, 2011 MT 2, 359 Mont. 95, 248 P.3d 300, and in parental termination proceedings In re J.J.L., D.J.L., and R.D.L.L., 2010 MT 4, 355 Mont. 23, 223 P.3d 921.

## **STATUTORY DUTIES**

### **I. Montana Public Defender Act, Title 47, chapter 1, MCA**

- A. 47-1-102. Purpose.** The purposes of this chapter are to: (1) establish a statewide public defender system to provide effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to assistance of counsel at public expense; (2) ensure that the system is free from undue political interference and conflicts of interest; (3) provide that public defender services are delivered by qualified and competent counsel in a manner that is fair and consistent throughout the state; (4) establish a system that utilizes state employees, contracted services, or other methods of providing services in a manner that is responsive to and respectful of regional and community needs and interests; (5) ensure that adequate public funding of the statewide public defender system is provided and managed in a fiscally responsible manner; and (6) ensure that clients of the statewide public defender system pay reasonable costs for services provided by the system based on the clients' financial ability to pay.

# Montana Code Annotated 2014

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**47-1-104. Statewide system -- structure and scope of services -- assignment of counsel at public expense.** (1) There is a statewide public defender system, which is required to deliver public defender services in all courts in this state. The system is supervised by the commission and administered by the office.

(2) The commission shall approve a strategic plan for service delivery and divide the state into not more than 11 public defender regions. The commission may establish a regional office to provide public defender services in each region, as provided in [47-1-215](#), establish a contracted services program to provide services in the region, or utilize other service delivery methods as appropriate and consistent with the purposes described in [47-1-102](#).

(3) When a court orders the office or the office of appellate defender to assign counsel, the appropriate office shall immediately assign a public defender qualified to provide the required services. The commission shall establish protocols to ensure that the offices make appropriate assignments in a timely manner.

(4) A court may order an office to assign counsel under this chapter in the following cases:

(a) in cases in which a person is entitled to assistance of counsel at public expense because of financial inability to retain private counsel, subject to a determination of indigence pursuant to [47-1-111](#), as follows:

(i) for a person charged with a felony or charged with a misdemeanor for which there is a possibility of incarceration, as provided in [46-8-101](#);

(ii) for a party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in [40-6-119](#);

(iii) for a parent, guardian, or other person with physical or legal custody of a child or youth in any removal, placement, or termination proceeding pursuant [41-3-422](#) and as required under the federal Indian Child Welfare Act, as provided in [41-3-425](#);

(iv) for an applicant for sentence review pursuant to Title 46, chapter 18, part 9;

(v) for a petitioner in a proceeding for postconviction relief, as provided in [46-21-201](#);

(vi) for a petitioner in a habeas corpus proceeding pursuant to Title 46, chapter 22;

(vii) for a parent or guardian in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in [53-20-112](#);

(viii) for a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in [53-21-116](#);

(ix) for a respondent in a proceeding for the involuntary commitment of a person for alcoholism, as provided in [53-24-302](#); and

(x) for a witness in a criminal grand jury proceeding, as provided in [46-4-304](#).

(b) in cases in which a person is entitled by law to the assistance of counsel at public expense regardless of the person's financial ability to retain private counsel, as follows:

(i) as provided for in [41-3-425](#);

(ii) for a youth in a proceeding under the Montana Youth Court Act alleging a youth is delinquent or in need of intervention, as provided in [41-5-1413](#), and in a prosecution under the Extended Jurisdiction Prosecution Act, as provided in [41-5-1607](#);

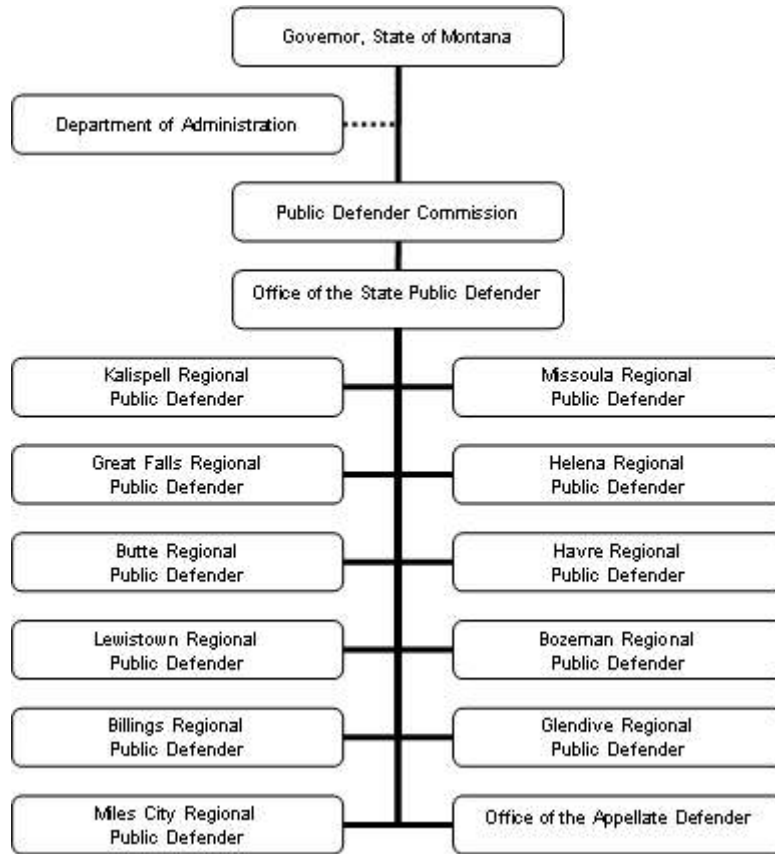
- (iii) for a juvenile entitled to assigned counsel in a proceeding under the Interstate Compact on Juveniles, as provided in [41-6-101](#);
  - (iv) for a minor who petitions for a waiver of parental consent requirements under the Parental Consent for Abortion Act of 2013, as provided in [50-20-509](#);
  - (v) for a respondent in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in [53-20-112](#);
  - (vi) for a minor voluntarily committed to a mental health facility, as provided in [53-21-112](#);
  - (vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5;
  - (viii) for a ward when the ward's guardian has filed a petition to require medical treatment for a mental disorder of the ward, as provided in [72-5-322](#); and
- (c) for an eligible appellant in an appeal of a proceeding listed in this subsection (4).
- (5) (a) Except as provided in subsection (5)(b), a public defender may not be assigned to act as a court-appointed special advocate or guardian ad litem in a proceeding under the Montana Youth Court Act, Title 41, chapter 5, or in an abuse and neglect proceeding under Title 41, chapter 3.
- (b) A private attorney who is contracted with under the provisions of [47-1-216](#) to provide public defender services under this chapter may be appointed as a court-appointed special advocate or guardian ad litem in a proceeding described in subsection (5)(a) if the appointment is separate from the attorney's service for the statewide public defender system and does not result in a conflict of interest.

**History:** En. Sec. 4, Ch. 449, L. 2005; amd. Sec. 3, Ch. 24, L. 2011; amd. Sec. 11, Ch. 307, L. 2011; amd. Sec. 13, Ch. 307, L. 2013.

*Provided by Montana Legislative Services*



## STATUTORY STRUCTURE OF OSPD



### ARM 2.69.101

#### I. Public Defender Commission

Section 2-15-1028, MCA, establishes the Public Defender Commission which supervises the statewide public defender system. The Commission consists of 11 members appointed by the Governor. § 2-15-1028, MCA. A person appointed to the Commission must have significant experience in the defense of criminal or other cases subject to the provisions of Title 47, chapter 1, MCA, or must have demonstrated a strong commitment to quality representation of indigent defendants. § 2-15-1028(3), MCA. The Commission is allocated to the Department of Administration for administrative purposes only. § 2-15-1028(6), MCA.

The Public Defender Commission is charged with the following duties under § 47-1-105, MCA:

- supervise and directs the statewide public defender system
- appoint the Chief Public Defender and Chief Appellate Defender
- establish statewide standards for the qualification and training of attorneys providing public defender services to ensure that services are provided by competent counsel and in a manner that is fair and consistent throughout the state
- review and approve the strategic plan and budget proposals submitted by the Chief Public Defender, the administrative director, and the Chief Appellate Defender
- review and approve any proposal to create permanent staff positions
- establish and oversee a conflicts office with a conflicts manager responsible for conflicts of interest and for ensuring that cases involving a conflict of interest are handled according to professional ethical standards
- establish policies and procedures for handling excess caseloads
- establish policies and procedures to ensure that detailed expenditure and caseload data is collected, recorded, and reported to support strategic planning efforts for the system
- adopt administrative rules pursuant to the Montana Administrative Procedure Act
- submit a biennial report to the Governor, the Montana Supreme Court, and the Legislature

**I. Office of State Public Defender: Sections 47-1-201 and 47-1-202, MCA**

The Chief Public Defender administers the Office of the State Public Defender. The office of the Chief Public Defender is in Butte. Among the Chief Public Defender's duties under § 47-1-202, MCA, are the following:

- assist the Commission in establishing the state system and establishing the standards, policies, and procedures
- develop and present for the Commission's approval a regional strategic plan for the delivery of public defender services



- establish processes and procedures to ensure that office and contract personnel use information technology and caseload management systems so that detailed expenditure and caseload data is accurately collected, recorded, and reported
- establish administrative management procedures for regional offices
- establish procedures for managing caseloads and assigning cases in a manner that ensures that public defenders are assigned cases according to experience, training, and manageable caseloads
- establish policies and procedures for assigning counsel in capital cases
- establish and supervise a training and performance evaluation program for attorneys and nonattorney staff members and contractors
- establish procedures to handle complaints about public defender performance

The Chief Public Defender may not maintain a client caseload.

#### **I. Office of Appellate Defender: Section 47-1-205, MCA**

The Office of the Appellate Defender is located in Helena. The Chief Appellate Defender manages and supervises the Office of Appellate Defender. Among the Chief Appellate Defender's duties under § 47-1-205, MCA, are the following:

- direct, manage, and supervise all public defender services provided by the office of Appellate Defender, including budgeting, reporting, and related functions
- ensure assignment of a case is made promptly to a qualified and appropriate appellate defender
- ensure that appellate defender assignments comply with the provisions of 47-1-202(1)(f) and standards for counsel for indigent persons in capital cases issued by the Montana Supreme Court
- hire and supervise the work of Office of Appellate Defender personnel
- contract for services as provided in § 47-1-216, MCA, and as authorized by the Commission according to the strategic plan for the delivery of public defender services

- keep a record of appellate defender services and expenses of the Office of Appellate Defender and submit records and reports to the Commission as requested through the Office of State Public Defender
- implement standards and procedures established by the Commission for the Office of Appellate Defender
- maintain a minimum client caseload as determined by the Commission
- confer with the Chief Public Defender on budgetary issues and submit budgetary requests and the reports required by law or by the Governor through the Chief Public Defender
- perform all other duties assigned to the Chief Appellate Defender by the Commission

**I. Conflicts Manager, 47-1-118, MCA**

The Public Defender Commission must:

- establish a conflicts office to contract for attorneys to represent indigent defendants in circumstances where, because of conflict of interest, the public defender program is unable to provide representation to a defendant.
- appoint a conflicts manager to oversee the office. The conflicts manager reports directly to the Commission and not to the Chief Public Defender. The conflicts manager may not handle cases. All attorneys contracted for conflict of interest cases shall report to the conflicts

## PROFESSIONAL AND ETHICAL DUTIES

### I. Montana Rules of Professional Conduct<sup>1</sup>

The Montana Supreme Court is granted the authority to regulate the practice of law by Article VII, section 2(3) of the Montana Constitution. The Montana Rules of Professional Conduct are an Order by the Montana Supreme Court and every attorney licensed to practice law in Montana is bound by the Rules of Professional Conduct. Montana's Rules of Professional Conduct have used the Model Rules from the American Bar Association as a template. In 2004,

the Supreme Court of Montana adopted a comprehensive re write of the Rules. While the Rules

are still similar to those promulgated by the American Bar Association, the Supreme Court did enact a series of significant Montana specific amendments to them.

#### A. Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

#### B. Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

#### C. Rule 1.4: Communication

- (a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(g), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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<sup>1</sup> Full text of the Montana Rules of Professional Conduct are located on the web at: [http://c.ymcdn.com/sites/www.montanabar.org/resource/resmgr/attorney\\_rules\\_and\\_regulations/rules\\_of\\_professional\\_conduc.pdf](http://c.ymcdn.com/sites/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/rules_of_professional_conduc.pdf)

**D. Rule 8.3 Reporting Professional Misconduct**

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

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