TASK FORCE ON STATE PUBLIC DEFENDER OPERATIONS

2015 - 2016

MEMBERS

<table>
<thead>
<tr>
<th>SENATORS</th>
<th>REPRESENTATIVES</th>
<th>PUBLIC MEMBERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>David Howard</td>
<td>Randy Brodehl</td>
<td>Hon. James Haynes (21st Judicial District)</td>
</tr>
<tr>
<td>(R - Park City)</td>
<td>(R - Kalispell)</td>
<td></td>
</tr>
<tr>
<td>Jim Keane</td>
<td>Kimberly Dudik</td>
<td>Mike Eakin (ICWA Attorney)</td>
</tr>
<tr>
<td>(D - Butte)</td>
<td>(D - Missoula)</td>
<td></td>
</tr>
<tr>
<td>Cynthia Wolken</td>
<td>Kenneth Holmlund</td>
<td>Juli Pierce (Yellowstone Deputy County Attorney)</td>
</tr>
<tr>
<td>(D - Missoula)</td>
<td>(R - Miles City)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Jason Trinity Holden (Defense Attorney)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Wendy Holton (Group Facilitator Defense Attorney)</td>
</tr>
</tbody>
</table>

STAFF

Sheri Scurr, Research Analyst
Julie Johnson, Staff Attorney
Fong Hom, Secretary

Legislative Services Division

PO Box 201706
Helena, MT  59620-1706
Phone: (406) 444-3064  FAX: 444-3036  Web: http://leg.mt.gov
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>1</td>
</tr>
<tr>
<td>Task Force</td>
<td>1</td>
</tr>
<tr>
<td>Purpose</td>
<td>1</td>
</tr>
<tr>
<td>Tasks</td>
<td>1</td>
</tr>
<tr>
<td>Meeting Summary</td>
<td>2</td>
</tr>
<tr>
<td>Final Recommendations</td>
<td>3</td>
</tr>
<tr>
<td><strong>About the Public Defender System</strong></td>
<td>5</td>
</tr>
<tr>
<td>ACLU Lawsuit</td>
<td>5</td>
</tr>
<tr>
<td>18-Month Study</td>
<td>5</td>
</tr>
<tr>
<td>Commission Structure Selected</td>
<td>6</td>
</tr>
<tr>
<td>State Assumption</td>
<td>6</td>
</tr>
<tr>
<td>Public Defender Commission</td>
<td>6</td>
</tr>
<tr>
<td>Current Organizational Structure</td>
<td>8</td>
</tr>
<tr>
<td>Chief Public Defender</td>
<td>10</td>
</tr>
<tr>
<td>Appellate Defender</td>
<td>11</td>
</tr>
<tr>
<td>Conflicts Manager</td>
<td>11</td>
</tr>
<tr>
<td>Staffing Report</td>
<td>11</td>
</tr>
<tr>
<td>Salaries</td>
<td>13</td>
</tr>
<tr>
<td>Contracting</td>
<td>13</td>
</tr>
<tr>
<td>Caseload Data</td>
<td>14</td>
</tr>
<tr>
<td>Budget History</td>
<td>18</td>
</tr>
<tr>
<td>Expenditures</td>
<td>18</td>
</tr>
<tr>
<td>Right to Counsel</td>
<td>21</td>
</tr>
<tr>
<td>Eligibility Determination</td>
<td>22</td>
</tr>
<tr>
<td>Fee Collection</td>
<td>23</td>
</tr>
<tr>
<td><strong>Appendices</strong></td>
<td>27</td>
</tr>
<tr>
<td>Appendix A - HB 627 (2015)</td>
<td></td>
</tr>
<tr>
<td>Appendix B - Proposed New Structure Under HB 77 (2017) As Introduced</td>
<td></td>
</tr>
<tr>
<td>Appendix C - Office of Public Defender Mitigation Plan/Commission Actions</td>
<td></td>
</tr>
<tr>
<td>Appendix D - Policy on Indigence Determination</td>
<td></td>
</tr>
</tbody>
</table>
Executive Summary

Task Force

The 11-member Task Force on State Public Defender Operations was established by House Bill No. 627 by the 2015 legislature in the wake of concerns about the increasing Office of State Public Defender (OPD) caseload and expenditures consistently exceeding appropriations. The bill specified how each member would be appointed, outlined the task force’s duties, limited the task force to five meetings, and appropriated $24,000 for costs.

Purpose

The bill instructed the Task Force to “study the operations of the office of state public defender and develop a long-term organizational plan for the next 6 to 10 years that will allow the office to provide effective assistance of counsel to those that qualify.”

Tasks

Study tasks were to examine:

- the constitutional duties of OPD;
- the statutory duties of OPD;
- the ethics and professional responsibilities of OPD attorneys;
- how other states provide assistance of counsel to those who qualify;
- the effects of compensation and workloads on recruitment/retention;
- measures to improve staff and attorney recruitment and retention issues;
- the possibility, costs, and benefits of restructuring OPD; and
- any other issues related to the duties, funding, and ethical obligations of OPD that the task force determines are relevant.

The full text of HB 627 is provided at Appendix A.
## Meeting Summary

Figure 1 lists the meeting dates and some but not all of the main agenda items for each meeting. Each meeting date is hyperlinked to the webpage with the agenda, minutes, and materials for the meeting.

### Figure 1 – Main Agenda Items

<table>
<thead>
<tr>
<th>Date</th>
<th>Main Agenda Items/Reports</th>
</tr>
</thead>
</table>
| **Sept. 17, 2015** | - Legal overviews on constitutional and statutory duties of OPD  
- Professional and ethical responsibilities of OPD attorneys  
- Historical background on creation of OPD and ACLU lawsuit |
| **Dec. 10, 2015** | - Policy guidelines affecting staff and contract attorneys  
- OPD Conflict coordination  
- Financial, personnel, management, and performance data  
- District court workload and public defender impacts  
- Principles and practices of public defense systems |
| **Feb. 1, 2016** | - Federal prosecution and public defense  
- Comparisons with other states  
- Montana advisory commissions  
- Dependent neglect cases pilot project, district courts  
- Legal memos on employer/employee relationships for contract vs. staff attorneys, guardian ad litem and court-appointed special advocates in neglect cases, and criminal penalties for misdemeanor offenses and impact on OPD  
- Eligibility determination for OPD services  
- Fee collection  
- OPD improvement plans |
| **May 16, 2016** | - Options for various administrative structures for OPD  
- Options for reorganizing the Public Defender Commission  
- Summary of responses on statewide survey about OPD  
- Guidelines for appointment of counsel in neglect cases  
- Indigence determinations  
- Public defender training, retention, caseloads, and accountability  
- OPD’s draft strategic plan  
- Holistic defense  
- Soft caps in caseloads |
| **Sept. 12, 2016** | - Review, public comment, on requested preliminary bill drafts  
- Final action on bill draft recommendations |
Final Recommendations

Figure 2 lists the bill drafts considered by the Task Force on Sept. 12, 2016, and approved as final recommendations. To track each bill through the 2017 session, go to the legislative branch’s LAWS website.

Figure 2 – Bills Approved as Final Recommendations

<table>
<thead>
<tr>
<th>LC no. / (working draft no.)</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>LC 432 (pd1a)</td>
<td>Provide an overall agency director appointed by the governor, convert the public defender commission to an advisory body, provide that the commission shall nominate three candidates for director, provide that the governor shall select a director from the list of nominees, and provide that the director would be a hired position, not a politically appointed position, so that the director could only be removed with cause. (See Appendix B for the related organizational chart.)</td>
</tr>
<tr>
<td>LC 437 (pd09)</td>
<td>Eliminate the statutory requirement for the chief appellate defender to confer with the chief public defender on the Office of the Appellate Defender’s budget.</td>
</tr>
<tr>
<td>LC 439 (pd04)</td>
<td>Transfer determination of eligibility for public defender services to the Department of Public Health and Human Services.</td>
</tr>
<tr>
<td>LC 440 (pd05)</td>
<td>Provide that the Montana Department of Revenue is responsible for collecting any fees for public defender services imposed by a judge pursuant to section 46-8-113, Montana Code Annotated (MCA).</td>
</tr>
<tr>
<td>LC 441 (pd06)</td>
<td>Establish a holistic defense pilot program in up to four public defender office locations across the state.</td>
</tr>
<tr>
<td>LC 442 (pd07)</td>
<td>Require OPD to contract for a workload assessment study.</td>
</tr>
<tr>
<td>LC 443 (pd10)</td>
<td>Revise the appointment of a public defender to a putative father in a dependent neglect case.</td>
</tr>
<tr>
<td>LC 444 (concept)</td>
<td>Revise the appointment of a public defender to an absent parent in a dependent neglect case.</td>
</tr>
</tbody>
</table>

Figure 3 lists the preliminary bill drafts that were considered but not approved by majority vote.

**Figure 3 – Preliminary Bills Considered but not Approved**

<table>
<thead>
<tr>
<th>Working draft no.</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>LC pd02</td>
<td>Provide that the administrative director position would become a chief administrator position appointed by the commission to be a co-equal office head with the chief public defender, the chief appellate defender, and the chief conflict defender, and make other changes as outlined in the OPD strategic plan.</td>
</tr>
<tr>
<td>LC pd03</td>
<td>Transfer eligibility determination to the presiding court.</td>
</tr>
<tr>
<td>LC pd08</td>
<td>Clearly grant to the Public Defender Commission and the OPD the authority to set different contractor rates in different areas of the state. (It was determined the OPD already has this authority.)</td>
</tr>
<tr>
<td>LC pd11</td>
<td>Statutorily require the Public Defender Commission to set “soft caps” for chief public defender, appellate defender, conflict defender, and contractor caseloads. (The commission has the authority but is not required to set soft caps.)</td>
</tr>
</tbody>
</table>

---

About the Public Defender System

ACLU Lawsuit

The statewide public defender system and the Office of State Public Defender (OPD) was established in 2005.1 The legislation establishing the system was developed by the Law and Justice Interim Committee in the wake of a stipulated agreement between the state’s attorney general and the American Civil Liberties Union (ACLU). The ACLU had filed a lawsuit in 2002 alleging that the constitutional right to effective assistance of counsel for indigent individuals was being violated in several counties named in the lawsuit. At that time, indigent defense was being provided at the county level and each county had its own way of providing public defender services. Determination of indigence also varied by court.

The issues raised by the lawsuit are described in the ACLU's pleadings2 and in the stipulation reached between the attorney general and the ACLU.3

18-Month Study

For nearly 18 months, the LJIC studied how public defender services were being provided for across the state in all city, county, and district courts. The LJIC also considered various options for reforming public defender services. The study included an examination of American Bar Association standards and other best practice guidelines for public defender services as well as the systems in other states. Policy options studied ranged from minor changes in county programs to establishing district-court level or regional programs to enacting a statewide public defender system encompassing all courts of limited jurisdictions as well as district courts. Each option was commented on, analyzed, and debated.

The LJIC's final report describes the policy issues considered, the research conducted, the testimony received, and the committee's decisionmaking process and rationale for its final recommendations.4

---

1 SB 146, 59th Legislature (Chapter 449, Laws of Montana 2005).
2 Available online at https://www.aclu.org/sites/default/files/field_document/white-martz%20amend%20cmplt.pdf
4 Sheri S. Heffelfinger, "For the Defense: Enacting a Public Defender System in Montana," Final Report of the Law and Justice Interim Committee, Montana Legislative Services Division
Commission Structure Selected

The product of the study was Senate Bill No. 146 (2005), the Montana Public Defender Act, which was codified as Title 47, chapter 1, Montana Code Annotated (MCA). The bill established a statewide system encompassing courts of limited jurisdiction as well as district courts. A voluntary commission was established to function as an oversight authority with day-to-day operations run by a chief public defender with the assistance of an administrative director. And, the agency was attached to the Department of Administration for administrative purposes only, so the department has no supervisory or budgetary role for the agency.

State Assumption

As introduced, SB 146 provided a funding formula whereby local government shared costs with the states according to actual caseload. However, amendments during the session replaced this funding formula with a reduction in the entitlement share for local governments. The amount of each local government’s reduction was based on a snapshot of caseloads in those jurisdictions at that time. And, the state assumed full funding responsibility.

Supporters of the amendment stated that the entitlement share calculation included an inflation factor that would compensate the state for costs related to future caseload increases.

The Montana Public Defender Act has been amended since the system was first established in 2005, and OPD was restructured as described later in this report.

Public Defender Commission

Membership

The Public Defender Commission consists of 11 members appointed by the governor as follows:

- two attorneys from nominees submitted by the supreme court;
- three attorneys from nominees submitted by the president of the state bar of Montana, as follows:

- one attorney experienced in the defense of felonies who has served a minimum of 1 year as a full-time public defender;
- one attorney experienced in the defense of juvenile delinquency and abuse and neglect cases involving the federal Indian Child Welfare Act; and
- one attorney who represents criminal defense lawyers;

- two members of the general public who are not attorneys or judges, active or retired, as follows:
  - one member from nominees submitted by the president of the senate; and
  - one member from nominees submitted by the speaker of the house;

- one person who is a member of an organization that advocates on behalf of indigent persons;

- one person who is a member of an organization that advocates on behalf of a racial minority population in Montana;

- one person who is a member of an organization that advocates on behalf of people with mental illness and developmental disabilities; and

- one person who is employed by an organization that provides addictive behavior counseling.³

Commission members are volunteers, so serve without compensation, except for reimbursement of travel expenses.

**Duties**

The commission is tasked under section 47-1-105, MCA, with the following duties:

- Supervise and direct the statewide public defender system.
- Appoint the chief public defender, chief appellate defender, and conflicts manager.
- Establish statewide standards for the qualification and training of public defenders.

³ Section 2-15-1028, MCA.
• Review and approve the strategic plan and budget proposals.

• Review and approve any proposal to create permanent staff positions.

• 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.

**Current Organizational Structure**

The commission appoints three co-equal office heads, as follows:

- Chief public defender – head of the Office of Chief Public Defender
- Appellate defender – head of the Appellate Defender Office
- Conflicts manager (an attorney) – head of the Conflicts Office

The basic structure of the current system with respect to hiring and oversight authority as set forth in statute is shown in Figure 4.
Figure 4 – Current Statutory Hiring Structure
(only showing positions specifically mentioned in statute)

Governor

Public Defender Commission

Chief Public Defender (exempt)*
Program 1**

Appellate Defender (exempt)
Program 2

Conflicts Manager (non-exempt)
Program 3

Notes:
*A position designated as “exempt” is a position that is not subject to the statewide classification and pay plan. This allows the hiring authority to set the salary. Exemption is typically appropriate when the job is unique enough that it cannot be compared with other jobs and grouped into a classification or pay band. Personnel in exempt positions are still covered by the health and retirement plans, but do not receive the statutory longevity allowance typically paid for each 5-year increment of service.

** The commission refers to the offices and operations headed by these positions as “programs”. This is not a statutory designation.
Chief Public Defender

The commission appoints the chief public defender. As previously mentioned, the Montana Public Defender Act originally provided that the chief public defender was the agency head for all of OPD. Amendments to the act passed by the 2011 legislature changed this by making the appellate defender and the conflict manager co-equal office heads, each appointed and supervised directly by the commission rather than under the chief public defender.

The act still specifies that the chief public defender shall hire an administrative director to handle the administrative operations of the agency. However, because of the co-equal status of the appellate defender’s office and the conflict manager’s office, the administrative director has no authority with respect to the operations of the other offices.

All trial-level cases are handled by the Office of Chief Public Defender. The Office of Chief Public Defender consists of a central office (including the administrative director, training coordinator, contract manager, and other support staff) and 11 regional offices. Each regional office is each run by a deputy public defender hired and supervised by the chief public defender.

The central office staff are under the Office of Chief Public Defender and supervised by the chief public defender. However, a draft strategic plan explained to the task force at its May 16, 2016, meeting indicated that the commission was planning to appoint a new administrative director (the administrative director hired by the chief public defender was retiring), which would place the administrative director under the supervisory authority of the commission rather than the chief public defender. The administrative director would then be a co-equal office with the other offices and in charge of a new “program 4” that would be similar to a centralized services division.\footnote{The Public Defender Commission hired a new administrative director on Aug. 22, 2016. However, according to a news article by that appeared in the Helena Independent Record on Nov. 25, the administrative director sent a letter of resignation to the commission chairman on Nov. 16 and a week later the commissioner chairman also resigned. The article is available at http://helenair.com/news/crime-and-courts/leaders-resign-from-public-defender-office/article_98296a3f-ba83-57ff-97fa-c853c9357b9a.html. According to the article, the resigning administrative director discussed in his letter of resignation his lack of authority over matters in other co-equal offices and resistance within the agency to the proposed mitigation plan to address a $3.5 million budget shortfall. For more information, see the section in this report about the agency’s mitigation plan.}
Appellate Defender

The Office of Appellate Defender handles all appellate-level cases. It was already a state entity in 2005. Under the Montana Public Defender Act, the office was placed under the supervision of the chief public defender. However, House Bill No. 97 in 2011 transferred supervisory authority over the appellate defender to the commission, thus making the appellate defender co-equal to the chief public defender.

Conflicts Manager

The conflicts manager position was not established by the original Montana Public Defender Act. It was established under Senate Bill 1No. 87 in 2011 as a position hired by and accountable to the commission. Thus, this office was placed on co-equal footing with the appellate defender and chief public defender offices.

The Conflicts Office handles any trial or appellate case that cannot be handled by the other offices because a case in that office involves a party with an interest that conflicts with another client’s interests.

Section 47-1-118, MCA, states that attorney services for conflict cases would be provided through contracted services. In practice, however, the commission has authorized staff positions.

Staffing Report

According to OPD’s FY 2016 annual report, as of June 30, 2016, there were a total of 237.5 FTE filled positions within the agency and 9.94 vacant FTE positions. Of the total filled positions, 126.5 FTE are attorneys and 101 FTE are non-attorney staff.

The number of unique contractors supporting the system as a whole was 252. Figure 5 is the staffing report table provided by the OPD in its FY 2016 annual report.
### Figure 5 – Staffing Report as of 6/30/16

<table>
<thead>
<tr>
<th>Region</th>
<th>Location</th>
<th>Regional Deputy Public Defenders</th>
<th>Current Number of Staff (FTE)</th>
<th>Number of Vacant Positions</th>
<th>FY 2016 Budget</th>
<th>Contractors*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chief</td>
<td></td>
<td>-</td>
<td>1.00</td>
<td>0.94</td>
<td>2.00</td>
<td></td>
</tr>
<tr>
<td>Central Office</td>
<td></td>
<td>-</td>
<td>19.75</td>
<td>19.75</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conflict Coordinator</td>
<td></td>
<td>-</td>
<td>4.50</td>
<td>1.00</td>
<td>5.50</td>
<td></td>
</tr>
<tr>
<td>1 Kalispell</td>
<td></td>
<td>1.00</td>
<td>17.50</td>
<td>11.00</td>
<td>29.75</td>
<td>48</td>
</tr>
<tr>
<td>2 Missoula</td>
<td></td>
<td>1.00</td>
<td>22.50</td>
<td>13.00</td>
<td>36.75</td>
<td>66</td>
</tr>
<tr>
<td>3 Great Falls</td>
<td></td>
<td>1.00</td>
<td>11.00</td>
<td>9.00</td>
<td>21.00</td>
<td>51</td>
</tr>
<tr>
<td>4 Helena</td>
<td></td>
<td>1.00</td>
<td>12.00</td>
<td>7.00</td>
<td>20.25</td>
<td>49</td>
</tr>
<tr>
<td>5 Butte</td>
<td></td>
<td>1.00</td>
<td>8.00</td>
<td>5.00</td>
<td>14.00</td>
<td>56</td>
</tr>
<tr>
<td>6 Havre</td>
<td></td>
<td>1.00</td>
<td>3.00</td>
<td>4.00</td>
<td>9.00</td>
<td>34</td>
</tr>
<tr>
<td>7 Lewistown</td>
<td></td>
<td>-</td>
<td>1.00</td>
<td>2.00</td>
<td>4.00</td>
<td>38</td>
</tr>
<tr>
<td>8 Bozeman</td>
<td></td>
<td>1.00</td>
<td>9.00</td>
<td>8.00</td>
<td>18.00</td>
<td>31</td>
</tr>
<tr>
<td>9 Billings</td>
<td></td>
<td>1.00</td>
<td>19.00</td>
<td>13.00</td>
<td>36.50</td>
<td>61</td>
</tr>
<tr>
<td>10 Glendive</td>
<td></td>
<td>1.00</td>
<td>2.00</td>
<td>2.25</td>
<td>5.50</td>
<td>27</td>
</tr>
<tr>
<td>11 Miles City</td>
<td></td>
<td>1.00</td>
<td>1.00</td>
<td>2.00</td>
<td>4.50</td>
<td>32</td>
</tr>
<tr>
<td>Major Crimes</td>
<td></td>
<td>-</td>
<td>3.00</td>
<td>1.00</td>
<td>6.00</td>
<td>5</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td></td>
<td>10.00</td>
<td>114.50</td>
<td>98.00</td>
<td>232.44</td>
<td></td>
</tr>
<tr>
<td>Appellate Defender</td>
<td></td>
<td>-</td>
<td>12.00</td>
<td>3.00</td>
<td>15.00</td>
<td>35</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>10.00</td>
<td>126.50</td>
<td>101.00</td>
<td>247.44</td>
<td>533</td>
</tr>
</tbody>
</table>

* 252 unique contractors
Salaries

Pay rates for OPD attorneys are set pursuant to a contract negotiated with a labor union.\(^5\) Figure 6 shows the pay rates negotiated to begin on Jan. 15, 2017.\(^6\)

<table>
<thead>
<tr>
<th>Figure 6 - Annual Pay Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>OPD Public Defenders</td>
</tr>
<tr>
<td>Starting Jan. 15, 2017</td>
</tr>
<tr>
<td>Entry level, license but no experience</td>
</tr>
<tr>
<td>$55,676 ($26.76/hour)</td>
</tr>
</tbody>
</table>

According to actual salaries reported and a market comparison by the Department of Administration:

OPD attorneys are paid:

- an average of ($70,554 annually) $33.92 an hour, which is 73% of the market rate.

Other attorneys in state government:

- an average of $37.58 per hour ($78,166 annually), which is 76% of the market rate.

Contracting

The 2005 Montana Public Defender Act authorized the commission to establish a contracting program to contract for attorney and non-attorney services and authorized the chief public defender and the regional deputies to oversee the program. In 2011, under House Bill No. 344, the appellate defender was given separate stand-alone authority (under the commission’s ultimate supervision) to contract for attorney and non-attorney positions. Contracting also occurs with respect to the Conflicts Office.

\(^5\) OPD attorneys belong to the American Federation of State, County, and Municipal Employees.  
According to information provided to the task force at its Dec. 10, 2015, meeting, in FY 2015, the typical fee paid for contract attorney services was $62 an hour and $25 per month as an office stipend. The task force requested comparison information with several other states. The research finding was that Montana’s $62 per hour rate for non-death penalty cases was the lowest when compared to surrounding states (Idaho, North Dakota, and South Dakota). The average rate among those states was $97.33 an hour for non-death penalty cases. See Figure 7.

<table>
<thead>
<tr>
<th>State</th>
<th>Contract Attorney Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Montana</td>
<td>$62</td>
</tr>
<tr>
<td>Idaho</td>
<td>$125</td>
</tr>
<tr>
<td>North Dakota</td>
<td>$75</td>
</tr>
<tr>
<td>South Dakota</td>
<td>$92</td>
</tr>
</tbody>
</table>

**Caseload Data**

*By case type*

Almost 50% of the OPD’s cases are in courts of limited jurisdiction. Of the cases in district court, slightly more than half are criminal cases. Civil cases include guardianship, involuntary commitment, juvenile, and dependent abuse and neglect cases.

Figure 8 shows the number of new trial-level cases assigned to the OPD in FY 2016, as a percentage of all cases. Additional details about these cases are available in OPD’s FY 2016 annual report.

---

7 See the Memorandum of Understanding for Contract Attorney Services provided to the Task Force on Dec. 10, 2015, and posted on the web page for that meeting.

Workload standards

The law requires the commission to adopt caseload standards to avoid excess workloads.\(^9\) When examining the ACLU’s lawsuit that led to the creation of the OPD, excess workloads were considered a main factor behind the failure of county public defenders being able to provide effective assistance of counsel to their clients.\(^{10}\)

The commission developed workload standards that assigned weights to certain types of cases based on how many attorney hours an average case of that type would require. The standards also set as a baseline the target number of productive hours each attorney should actually be able to work per year on assigned cases. The target caseload hours (i.e., hours spent directly on client cases) set by the commission for one full-time staff attorney is 1,500 hours a year.\(^{11}\)

---

\(^9\) See section 47-1-105, MCA.

\(^{10}\) See the final report of the Law and Justice Interim Committee entitled “For the Defense: Enacting a Statewide Public Defender System in Montana,” Montana Legislative Services Division, December 2014.

\(^{11}\) A detailed description of the OPD’s caseload standards is provided in the agency’s annual report. Additional information about how these standards were developed is provided in a publication entitled “Response to the 2009 American University Study and the 2011 American Civil Liberties Union of Montana Evaluation of the Statewide Public Defender System,” June 11, 2012, available online at http://www.publicdefender.mt.gov/AU-ACLUResponse.asp.
Figure 9 shows by region the extent to which target caseload hours at the trial-level were exceeded in FY 2016. Based on the 1,500 hours target per full-time staff attorney, the assigned caseloads in FY 2016 far exceeded the standards set. For OPD to meet the target of 1,500 caseload hours per attorney, it would have needed 44 additional attorneys statewide.

<table>
<thead>
<tr>
<th>Region</th>
<th>Actual Case Weight Hours</th>
<th>Target Case Weight Hours</th>
<th>Caseload Weight Hours Above Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 - Kalispell</td>
<td>34,049</td>
<td>24,375</td>
<td>9,674</td>
</tr>
<tr>
<td>2 – Missoula</td>
<td>47,718</td>
<td>31,375</td>
<td>16,343</td>
</tr>
<tr>
<td>3 – Great Falls</td>
<td>26,683</td>
<td>16,250</td>
<td>10,433</td>
</tr>
<tr>
<td>4 – Helena</td>
<td>24,583</td>
<td>16,750</td>
<td>7,833</td>
</tr>
<tr>
<td>5 – Butte</td>
<td>16,607</td>
<td>11,375</td>
<td>5,232</td>
</tr>
<tr>
<td>6 - Havre</td>
<td>7,082</td>
<td>4,250</td>
<td>2,832</td>
</tr>
<tr>
<td>7 – Lewistown</td>
<td>1,869</td>
<td>1,500</td>
<td>369</td>
</tr>
<tr>
<td>8 - Bozeman</td>
<td>15,058</td>
<td>13,500</td>
<td>1,568</td>
</tr>
<tr>
<td>9 – Billings</td>
<td>38,467</td>
<td>27,000</td>
<td>11,467</td>
</tr>
<tr>
<td>10 – Glendive</td>
<td>3,527</td>
<td>2,875</td>
<td>652</td>
</tr>
<tr>
<td>11 – Miles City</td>
<td>1,961</td>
<td>1,500</td>
<td>461</td>
</tr>
<tr>
<td>TOTAL</td>
<td>215,745</td>
<td>149,250</td>
<td>66,495</td>
</tr>
</tbody>
</table>

*Trends*

Caseload data from FY 2012 through FY 2016 shows significant increases in not only the number of cases, but also in the length of time cases are remaining open (which may be attributable to public defenders handling more cases) and in the average cost per case.
Figure 10 shows that the number of lower court cases has increased by more than 10%, but the number of district court cases has increased three times as much (32%) since FY 2012.

<table>
<thead>
<tr>
<th>Court Level</th>
<th>FY 2012</th>
<th>FY 2016</th>
<th>Percentage Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lower Courts</td>
<td>19,456</td>
<td>21,543</td>
<td>10.7%</td>
</tr>
<tr>
<td>District Courts</td>
<td>5,988</td>
<td>7,904</td>
<td>32.0%</td>
</tr>
</tbody>
</table>

Figure 11 shows that the most dramatic increases in district court cases have been in the dependent abuse and neglect cases (53.3%) and in criminal cases (32%). Testimony provided to the Task Force indicated that much of this increase is due to the sharp rise in the number of meth-related cases.

<table>
<thead>
<tr>
<th>Case Type</th>
<th>FY 2012</th>
<th>FY 2016</th>
<th>Percentage Increase (Increase)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal</td>
<td>5,988</td>
<td>7,904</td>
<td>32.0%</td>
</tr>
<tr>
<td>Neglect</td>
<td>3,061</td>
<td>4,691</td>
<td>53.3%</td>
</tr>
<tr>
<td>Juvenile</td>
<td>1,081</td>
<td>907</td>
<td>-16.1%</td>
</tr>
<tr>
<td>Involuntary Commitment</td>
<td>1,058</td>
<td>1,103</td>
<td>4.3%</td>
</tr>
<tr>
<td>Guardianship</td>
<td>268</td>
<td>200</td>
<td>-25.4%</td>
</tr>
</tbody>
</table>

The OPD’s FY 2016 annual report includes an analysis of FY 2012 – FY 2016 caseload by type, duration, cost, and region.
Budget History

Figure 12 compares total appropriations to OPD for the FY 2012-2013 biennium and the FY 2015-16 biennium.

<table>
<thead>
<tr>
<th>Biennium</th>
<th>Total Amount Appropriated (including supplemental)</th>
<th>Percentage Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 2012-13</td>
<td>$49,443,545</td>
<td>33.1%</td>
</tr>
<tr>
<td>FY 2015-16</td>
<td>$65,796,590</td>
<td></td>
</tr>
</tbody>
</table>

Expenditures

Figures 13 and 14 show a break out of expenditures by type for each main office within the public defender system. Further detail is available in OPD’s annual report.

<table>
<thead>
<tr>
<th>Office</th>
<th>Payroll</th>
<th>Rent</th>
<th>Contract Attorney</th>
<th>Contract Other</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chief Public Defender (includes 11 regional offices)</td>
<td>$16,285,725</td>
<td>$952,545</td>
<td>$3,437,180</td>
<td>$1,131,077</td>
<td>$1,147,219</td>
</tr>
<tr>
<td>Appellate Defender</td>
<td>$1,263,505</td>
<td>$69,438</td>
<td>$149,079</td>
<td>$157,268</td>
<td>$66,646</td>
</tr>
<tr>
<td>Conflicts Manager</td>
<td>$540,292</td>
<td>$15,963</td>
<td>$7,087,963</td>
<td>$655,159</td>
<td>$43,974</td>
</tr>
<tr>
<td>Central Office</td>
<td>$1,447,659</td>
<td>$134,763</td>
<td>$0</td>
<td>$0</td>
<td>$749,405</td>
</tr>
</tbody>
</table>
OFFICE OF THE STATE PUBLIC DEFENDER
EXPENDITURES BY PROGRAM
FY 2016

Program 1 - PUBLIC DEFENDER
Payroll $16,285,725 71%
Contract Attorney $3,437,180 15%
Contract Other $1,131,077 5%
Rent $952,545 4%
Other $1,147,219 5%
P1 Total $22,953,746

Program 2 - APPELLATE DEFENDER
Payroll $1,263,505
Contract Attorney $7,087,963 85%
Contract Other $655,159 8%
Rent $69,438 4%
Other $66,646 4%
Other $43,974 1%
Rent $15,963 0%
P2 Total $8,343,351

Program 3 - CONFLICT COORDINATOR
Payroll $540,292 6%
Contract Attorney $7,087,963 85%
Contract Other $655,159 8%
Rent $134,763 6%
Other $43,974 1%
Rent $15,963 0%
P3 Total $8,343,351

Program 4 - CHIEF ADMINISTRATOR
Payroll $1,447,659
Contract Attorney $749,405 32%
Contract Other $749,405 32%
Rent $134,763 6%
Other $43,974 1%
Rent $15,963 0%
P4 Total $2,331,826
Figure 14 details OPD’s budget requests compared to what the legislature appropriated since FY 2006. The supplemental appropriations were authorized by the legislature because the agency’s expenses exceeded its initial appropriation.

**Figure 14**  
**History of OPD Budget Requests and Appropriations**

<table>
<thead>
<tr>
<th>Year</th>
<th>Requested FTE</th>
<th>Requested Budget</th>
<th>Appropriated FTE</th>
<th>Appropriated Budget</th>
<th>Supplemental Appropriation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2005 Legislative Session (note 1)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY 2006</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appellate Defender</td>
<td>N/A</td>
<td>N/A</td>
<td>3.00</td>
<td>216,959</td>
<td></td>
</tr>
<tr>
<td>Public Defender</td>
<td>N/A</td>
<td>N/A</td>
<td>5.50</td>
<td>527,729</td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>8.50</td>
<td>744,688</td>
<td></td>
</tr>
<tr>
<td>FY 2007</td>
<td></td>
<td></td>
<td>90.25</td>
<td>14,134,117</td>
<td>5,363,042</td>
</tr>
<tr>
<td><strong>2007 Legislative Session</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY 2008</td>
<td>192.50</td>
<td>18,185,680</td>
<td>192.50</td>
<td>19,802,489</td>
<td></td>
</tr>
<tr>
<td>FY 2009</td>
<td>192.50</td>
<td>19,174,124</td>
<td>192.50</td>
<td>20,151,042</td>
<td>292,000</td>
</tr>
<tr>
<td><strong>2009 Legislative Session</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY 2010</td>
<td>200.50</td>
<td>20,816,781</td>
<td>200.50</td>
<td>20,022,492</td>
<td></td>
</tr>
<tr>
<td>FY 2011</td>
<td>200.50</td>
<td>20,820,855</td>
<td>200.50</td>
<td>20,012,055</td>
<td>1,350,000</td>
</tr>
<tr>
<td><strong>2011 Legislative Session</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY 2012</td>
<td>216.50</td>
<td>21,845,230</td>
<td>208.50</td>
<td>23,049,014</td>
<td></td>
</tr>
<tr>
<td>FY 2013</td>
<td>216.50</td>
<td>21,771,045</td>
<td>209.50</td>
<td>22,994,531</td>
<td>3,400,000</td>
</tr>
<tr>
<td><strong>2013 Legislative Session (note 2)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY 2014</td>
<td>246.50</td>
<td>26,958,618</td>
<td>209.44</td>
<td>26,445,191</td>
<td></td>
</tr>
<tr>
<td>FY 2015</td>
<td>246.50</td>
<td>27,188,512</td>
<td>209.44</td>
<td>26,501,007</td>
<td>1,700,000</td>
</tr>
<tr>
<td><strong>2015 Legislative Session</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY 2016</td>
<td>265.00</td>
<td>34,021,316</td>
<td>235.94</td>
<td>32,917,528</td>
<td></td>
</tr>
<tr>
<td>FY 2017</td>
<td>256.00</td>
<td>34,249,496</td>
<td>235.94</td>
<td>32,879,062</td>
<td></td>
</tr>
</tbody>
</table>

Note 1: The Public Defender Office began in the 2005 Legislative Session out of SB 146. In FY 2006 the Appellate Defender was an independent program and the Public Defender was budgeted to for a commission and start an office. In FY 2007 the Appellate Defender became a part of the consolidated Office of the State Public Defender.

Note 2: The FTE numbers for FY 2014 and 2015 in the Appropriated column are net of the FTE reduction in the HB 2 boilerplate (an equivalent of 8.06 FTE reduction).

---

12 Table prepared by Legislative Fiscal Division.
Mitigation Plan

Because of concerns about OPD expenditures consistently exceeding appropriations, the 2015 legislature made the biennial appropriation for the FY 2016-17 biennium as a one-time-only appropriation. The OPD did ask for a supplemental appropriation to cover $3.5 million in expenditures above the appropriation. But, OPD’s request was denied and OPD was instructed by the governor’s office to develop a mitigation plan.

At a commission meeting on Oct. 3, 2016, the commission considered and took action on the draft mitigation plan presented by the administrative director, who later resigned. 13

The draft plan and a memorandum summarizing the commission’s Oct. 3 actions on the plan is provided at Appendix C.

Commission meeting materials are available online at http://publicdefender.mt.gov/meetings/meetings2016.asp.

Right to Counsel

The right of indigent individuals to the effective assistance of counsel is a constitutional right under the Sixth Amendment to the U.S. Constitution, which reads:

In all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the U.S. Constitution requires states to recognize this right. Through a series of landmark decisions by the U.S. Supreme Court, the right to counsel has been extended to all criminal prosecutions, felony or misdemeanor, that carry a sentence of incarceration.

Statutory provisions and case law also provide a right to counsel in certain civil cases involving the loss of liberty, such as involuntary commitment, or the loss of parental rights, such as in child abuse and neglect cases. Furthermore, the

13 See Footnote 2 concerning the administrative director.
Montana Public Defender Act expanded the right to counsel to include children in neglect cases.\textsuperscript{14}

**Eligibility Determination**

**Income threshold**

The Montana Public Defender Act sets out the income threshold for determining eligibility as follows:

\[(3)\text{ An applicant is indigent if:}\]
\[\text{(a) the applicant's gross household income, as defined in 15-30-2337, is at or less than 133\% of the poverty level set according to the most current federal poverty guidelines updated periodically in the Federal Register by the United States department of health and human services under the authority of 42 U.S.C. 9902(2); or}\]
\[\text{(b) the disposable income and assets of the applicant and the members of the applicant's household are insufficient to retain competent private counsel without substantial hardship to the applicant or the members of the applicant's household.}\textsuperscript{15}\]

**Process**

The basic process for eligibility determinations is as follows:

- Client requests appointment of counsel.
- Court appoints OPD, and a public defender is assigned.
- OPD requests client application and income documentation.
- Client provides application and income documentation within 10 days:
  - If requested documentation is not provided within 10 days, OPD files a motion to rescind appointment of counsel.

\textsuperscript{14} A summary of the constitutional and statutory duties of the OPD was provided to the task force at its Feb. 1, 2016, meeting. It is available at: \url{http://leg.mt.gov/content/Committees/Interim/2015-2016/Public-Defender/Meetings/Feb-2016/081715-Constitutional%20Duties.pdf}.

\textsuperscript{15} Section 47-1-111(3), MCA.
Based on information and documentation provided, the OPD determines if statutory income or hardship guidelines are met:
- If guidelines not met, OPD files a motion to rescind appointment of counsel.
- If guidelines are met, client is approved for OPD services.

The OPD’s policy regarding indigence determination, which includes a table showing the 2016 federal poverty guidelines, is provided at Appendix D.

Court’s authority

Because of the constitutional nature of the right to counsel, the court retains ultimately authority to determine a client’s eligibility for services and may override or modify an eligibility determination.

Fee Collection

Court’s authority

The court may order a convicted defendant to pay the costs incurred by the OPD for providing services.\textsuperscript{16} However, offenders may also be ordered to pay numerous other cost and state statute sets the order of priority for the collection of these charges. Courts may modify or waive the imposition of these costs based on the offender’s ability to pay.

The statutory order of priority for collection of court-ordered charges is as follows:

1. 50\% of all money collected from a defendant must first go toward the payment of court-ordered restitution to the victim.

2. Of the other 50\%, the following is the order of priority for collection:

   1) a conviction fee ($15 for each misdemeanor charge; the greater of $20 or 10\% of the fine levied for each felony charge; and an additional $50 for each misdemeanor and felony charge).\textsuperscript{17}

\textsuperscript{16} Section 46-8-113, MCA.
\textsuperscript{17} Section 46-18-236, MCA.
2) a supervisory fee of no less than $120 a year and no more than $360 a year, prorated at no less than $10 a month for the number of months under supervision; or under continuous satellite-based monitoring shall pay to the department a supervisory fee of no more than $4,000 a year.  

3) costs of prosecution, including jury costs.  

4) additional fines for conviction of certain violent or sexual offenses. For example, an offender convicted of assault with a weapon or sexual intercourse without consent may be fined up to $50,000.  

5) any other costs, which include the public defender costs.  

The Montana Public Defender Act does not include a statute requiring OPD to be a collections agency for court-ordered fees for public defender services. Rather, other statutes provide that all court-ordered fees are to be paid to the sentencing court because the court has the sole authority to determine whether an offender is in contempt of court for not paying the fees or whether the offender does not have the ability to pay.

Payment process

If fees are paid to the court for public defender services, the fees are to be deposited in OPD’s special revenue account. This process is set forth in section 46-8-114, MCA, which reads as follows:

46-8-114. Time and method of payment. (1) Except as provided in subsection (2), when a defendant is sentenced to pay the costs of assigned counsel pursuant to 46-8-113, the court may order
payment to be made within a specified period of time or in specified installments.

(2) A defendant's obligation to make payments for the cost of counsel is suspended during periods of incarceration.

(3) Payments must be made to the clerk of the sentencing court for allocation as provided in 46-18-201, 46-18-232, and 46-18-251 and deposited in the account established in 47-1-110.

**Legislative audit**

A financial compliance audit by the Legislative Audit Division states that OPD is owed about $3.95 million in court-ordered fee assessments.\(^{23}\)

The public defender commission stated in a document provided to the task force at the task force’s Feb. 1, 2016, meeting that OPD has no way of knowing and no authority to determine whether an offender has an ability to pay the court-ordered fees and that the law specifies that the only sentencing court may determine whether the amount owed is uncollectable, i.e., a bad debt. Also, the public defender commission estimated that the cost for OPD staff to coordinate with sentencing courts and for billing and collection activities would be significant (about 6 FTE, plus operating costs for tracking accounts and mailing bills).\(^{24}\)


\(^{24}\) The public defender commission’s document is available on the task force web page for the Feb. 1, 2016, meeting or by clicking on the following link: http://leg.mt.gov/content/Committees/Interim/2015-2016/Public-Defender/Meetings/Feb-2016/Processes-Procedures-Collecting-Fee-Assessments.pdf.
Appendix A - HB 627 (2015)
AN ACT CREATING AN INTERIM TASK FORCE TO STUDY THE OPERATIONS OF THE OFFICE OF STATE PUBLIC DEFENDER TO DEVELOP A LONG-TERM ORGANIZATIONAL PLAN THAT WILL ALLOW THE OPD TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL TO THOSE THAT QUALIFY; SPECIFYING MEMBERS AND DUTIES; PROVIDING AN APPROPRIATION; AND PROVIDING EFFECTIVE DATES AND A TERMINATION DATE.

WHEREAS, the Office of State Public Defender (OPD) was established in the Montana Public Defender Act by the 2005 Montana Legislature; and

WHEREAS, OPD is supervised by the Montana Public Defender Commission, whose members are appointed by the Governor; and

WHEREAS, the organizational structure of the OPD has changed over time in response to court rulings to include three programs: the Public Defender Program, the Appellate Defender Program, and the Conflict Coordinator, each with its own chief; and

WHEREAS, the number of cases assigned to the Public Defender Program has grown by 14.6% since fiscal year 2010, and, despite a yearly case closing rate of 91.8% during fiscal year 2014, the Public Defender Program had nearly 21,000 open, active cases at the end of that fiscal year; and

WHEREAS, the Appellate Defender Program experienced a 42% increase in caseload from fiscal year 2012 to 2014; and

WHEREAS, abuse and neglect cases made up 34% of the case growth in the Public Defender Program from fiscal year 2010 to fiscal year 2014, and in the Appellate Defender Program these cases were projected to increase 43% between fiscal year 2013 and fiscal year 2015; and

WHEREAS, in February 2013 the Commission unanimously approved a resolution to authorize the Chief Public Defender to take necessary and appropriate actions to limit acceptance of new cases until further resources were available or caseloads decreased to a manageable number.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
Section 1. Task force on state public defender operations -- membership. (1) There is a task force on state public defender operations.

(2) The task force consists of 11 members appointed as follows:

(a) three members of the house of representatives, two of whom must be appointed by the speaker of the house and one of whom must be appointed by the house minority leader;

(b) three members of the senate, one of whom must be appointed by the senate president and two of whom must be appointed by the senate minority leader;

(c) one district court judge appointed by the chief justice of the supreme court; and

(d) four members appointed by the governor, none of whom may be a currently serving legislator, including:

(i) one attorney experienced in the federal Indian Child Welfare Act advocating on behalf of racial minorities in Montana;

(ii) one attorney with experience in the prosecution of misdemeanor and felony offenses in Montana;

(iii) one attorney with experience in the criminal defense of misdemeanor and felony offenses in Montana; and

(iv) one individual assigned to act as a group facilitator.

(3) If possible, the senate president and senate minority leader and the speaker of the house and house minority leader shall select members who served on the joint appropriations subcommittee on judicial branch, law enforcement, and justice during the 2015 legislative session.

(4) Legislative members are entitled to receive compensation and expenses as provided in 5-2-302. Members appointed pursuant to subsections (2)(c) through (2)(e) are entitled to reimbursement for travel expenses as provided in 2-18-501 through 2-18-503.

(5) The task force shall select a presiding officer and vice presiding officer by majority vote. The presiding officer and vice presiding officer must be legislative members.

(6) The legislative services division shall provide staff assistance to the task force. The legislative fiscal division, the office of state public defender, and the judicial branch shall provide information upon request.

Section 2. Task force duties. (1) The task force shall study the operations of the office of state public
defender and develop a long-term organizational plan for the next 6 to 10 years that will allow the office to provide effective assistance of counsel to those that qualify.

(2) The study must examine:
   (a) the constitutional duties of the office;
   (b) the statutory duties of the office;
   (c) the ethics and professional responsibilities of attorneys employed at the office;
   (d) how other states provide assistance of counsel to those who qualify for assistance, including how those states structure and fund their offices or programs and any litigation on the structure and funding of those offices and programs;
   (e) the effects of compensation and workloads on the recruitment and retention of attorneys and administrative and support staff;
   (f) measures and resources that could be implemented or assigned to improve staff and attorney recruitment and retention issues;
   (g) the possibility, costs, and benefits of restructuring the office; and
   (h) any other issues related to the duties, funding, and ethical obligation of the office that the task force determines are relevant to develop a long-term organizational plan that will allow the office to accomplish its constitutional and statutory duties.

(3) The task force shall involve input from the various stakeholders of the office and the legal system and, to the extent possible, consult with outside experts about Montana's system and systems in other states.

(4) The task force shall coordinate meetings with the law and justice interim committee and may hold no more than five meetings.

(5) All aspects of the task force, including reporting requirements, must be concluded prior to September 15, 2016. The task force shall prepare a final report of its findings, conclusions, and recommendations and shall prepare draft legislation whenever appropriate. The task force shall submit the final report to the governor, the chief justice of the supreme court, and the 65th legislature as provided in 5-11-210.

Section 3. Appropriation. There is appropriated $24,000 from the general fund to the legislative services division for the biennium beginning July 1, 2015, to support the activities of the task force established in [section 1].
Section 4. Effective dates. (1) Except as provided in subsection (2), [this act] is effective on passage and approval.

(2) [Section 3] is effective July 1, 2015.


- END -
Appendix B
As Introduced
New Appointment/Hiring Structure
Public Defender System

Governor

OPD Director (exempt)

Central Services Administrator (exempt)

Contract Manager (exempt)

Training Coordinator (exempt)

Chief Public Defender (exempt)

Regional Deputies (exempt)

Chief Appellate Defender (exempt)

Chief Conflict Defender (exempt)

Public Defender Advisory Commission

Staff notes: HB 77 (2017) as introduced would make the commission advisory, provide for a director hired by the governor from a list of 3 nominees by the commission. The director would not be subject to senate confirmation and could not be removed without cause.

Central administrative services would become a separate office instead of being under the chief public defender.

The OPD director would hire and supervise the four main office chiefs instead of the commission. The contract coordinator title would be changed to Chief Conflict Defender, and the position would become exempt.
Appendix C
Office of State Public Defender
Mitigation Plan and Commission Actions
(Oct. 3, 2016)
ESTIMATED COST SAVINGS FOR MITIGATION PLAN PROPOSALS

1. **HIRING FREEZE**
   
   Not hiring five modified positions – will save OPD approximately $360,000 by the end of the Fiscal year.

   If the commission were to increase this to not replacing any vacancies which arose, we would save approximately 57,600 per employee over the nine-month period left in the Fiscal Year (based average attorney salary of $40 per hour which includes salary and benefits at $6,400 per month.

   *Entry to Max rate for an attorney with 5 years (based upon the successful candidate’s relevant years of experience defined under the union contract) – ($26.26 - $35.39) per hour. Benefits 17.7% per hour ($4.65 - $6.35 per hour). Insurance per hour ($6.10 - $6.59 per hour). Total $37.01 - $48.33 per hour*

2. **OVERTIME RESTRICTIONS**
   
   Analysis indicated that most employees take comp time, so overtime would only save an estimated $20,000 over the next nine months.

   With Comp-time we are also adding liability that the agency will need to pay at a later time, but this is preferable to overtime for the short term. Comp Time would need prior supervisor approval to control long-term liabilities.

3. **DISCRETIONARY FUNDS - $209,000** Revert back to pay down the shortfall.

4. **POST CONVICTON DRUG TREATMENT COURTS** – OPD does not break out data for drug courts from the underlying cases, so estimates are not available.

5. **CONTRACT INVESTIGATORS**
   
   Stop using Contract Investigators for both program 1 and 3 in Billings, Kalispell, and Missoula Regions and hire 2 modified FT Investigators and place them in Program 3 to work in Missoula and Billings to perform investigations for both programs (Only Billings had Contract Investigator expenses for Program 1). OPD in both programs spent $216,651 to hire Contract Investigators in all three regions last year. We pay $46 per hour for contract investigators and approximately $30 per hour for FTE Investigators. We can hire two Modified FT investigators for approximately $115,000, which is a savings of $100,000 over the course of a year. For the remainder of the Fiscal year, our savings is estimated to be approximately $75,000 by implementing this practice.

6. **SOFT-CAPS**
   
   Wendy will provide update on soft-cap initiative.

7. **DN CASES and PUTATIVE FATHERS**
   
   The data in the case management system does not segregate cases that involve putative fathers, but if we assume that 25% of the cases have putative fathers, then the estimated savings would be $1,200,000.00 by the end of the Fiscal Year.

8. **DN CASES and representing only one person (You decide who that is)**
   
   Not every case is the same, so our projections are rough estimates and are based on there being an average of 4 attorneys per case (attorney for mother, two fathers, and one for the children), which in FY...
2016 cost OPD $3,400,000.00 per year. If representation were limited to one attorney per case for the next nine months, it is estimated that OPD would save $3,600,000.00

9. LOWER COURT CASES:
In Fiscal Year 2016 OPD provided contract representation in 5601 cases at the cost of approximately $2,600,000.00. The FTE Attorney’s working Misdemeanor cases for the same period cost OPD approximately $3,900,000.00 for the same period and they were assigned 15,942 cases. If you add those two together, OPD spent approximately $6,500,000.00 for a year. With overhead costs, this goes up to 9 million.

10. DISCONTINUANCE OF CONTRACT ATTORNEYS in LOWER COURT CASES and adding Modified part-time ATTORNEYS TO REPLACE THEM is believed to be more cost efficient.
5600 cases x 7 hours (Using the high end of case weighting system) = 39,200 hours. 39,200 hours x $62 (cost of Contract Attorney) = approximately $2,400,000.00. By discontinuing the use of Contract ATTORNEYS in lower court cases and replacing with Modified FTE’s on a part basis. 39,200 hours x $40 (Middle of the road figure for OPD attorney with benefits) = $1,568,000.00. $2,400,000 (Contractor Costs) - $1,568,000.00 (FTE Costs) = $832,000 per year. Savings for the rest of the Fiscal year would be $624,000.

11. DISCONTINUE USING CONTRACT ATTORNEYS FOR DISTRICT COURT CASES IN REGIONS 1, 2, 3, 4, AND NINE AND REPLACE THEM WITH MODIFIED PART-TIME ATTORNEYS.

<table>
<thead>
<tr>
<th>Region</th>
<th>FTE</th>
<th>FTE Cost</th>
<th>FTE Cost/Case</th>
<th>Contract Att.</th>
<th>Contract Cost</th>
<th>Contract Cost/Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1,305</td>
<td>$1,183,072</td>
<td>$907</td>
<td>840</td>
<td>$957,062</td>
<td>$1,139</td>
</tr>
<tr>
<td>2</td>
<td>1,568</td>
<td>$1,317,868</td>
<td>$840</td>
<td>671</td>
<td>$1,386,755</td>
<td>$2,067</td>
</tr>
<tr>
<td>3</td>
<td>1,763</td>
<td>$1,046,296</td>
<td>$828</td>
<td>816</td>
<td>$843,692</td>
<td>$1,034</td>
</tr>
<tr>
<td>4</td>
<td>826</td>
<td>$939,010</td>
<td>$1,137</td>
<td>408</td>
<td>$763,399</td>
<td>$1,871</td>
</tr>
<tr>
<td>9</td>
<td>1,571</td>
<td>$1,390,751</td>
<td>$885</td>
<td>1,780</td>
<td>$1,645,845</td>
<td>$925</td>
</tr>
</tbody>
</table>

SAVINGS - Assuming no growth in the number of cases, 4515 (number of contract cases) / 12 months = 376 (cases per month performed by CAS). Then 376 x 9 (months until the end of the FY) = 3400 (contract cases until the end of the FY) x $487 (savings per case for using an FTE) = $1,600,000.00 saved by the end of the FY. (is a very rough estimate since this analysis did not consider case complexity or costs.)

12. FURLOUGH OPTION
OPD MONTHLY PAYROLL – 1.6 million per month
OPD DAILY PAYROLL - $80,000 per day
Total required to significantly impact shortfall – 44 days

Rolling Furlough would require – If we had each employee take off 4 days per month (1 day per week), starting now, OPD would save $2,880,000.00 by the end of the Fiscal Year in June.

If we chose to go with only the highlighted areas, we could exceed the shortfall with an estimated savings of 4.1 million
PUBLIC DEFENDER COMMISSION ACTION ON DRAFT MITIGATION PLAN

At their October 3, 2016 meeting, the Public Defender Commission took action on items presented as part of a proposed mitigation plan to offset an anticipated $3.5 million shortfall in FY 17. Action was based on the estimated cost savings presented at the meeting.

1. **HIRING FREEZE**
   The Commission voted in favor of hiring two social worker positions and freezing the other three unfilled modified positions (one paralegal and two eligibility specialists).
   
   *Anticipated savings is $153,400 for FY 17. (Note: the original estimate of $360,000 included the two social work positions and leaving the MCU supervisor position unfilled.)*

2. **ESTABLISH OVERTIME RESTRICTIONS**
   Motion failed.

3. **DISCRETIONARY FUNDS**
   The Commission voted to apply the unobligated discretionary funds to the shortfall.
   
   *$209,000*

4. **CEASE REPRESENTATION IN POST CONVICTION TREATMENT COURTS**
   The Commission voted to strike this from the plan.

5. **CONTRACT INVESTIGATORS**
   Stop using Contract Investigators for Programs 1 and 3 in Regions 9, 1, and 2 (Billings, Kalispell, and Missoula). Hire two modified full time investigators in Program 3 to work in Missoula and Billings to perform investigations for Programs 1 and 3.
   
   *Savings expected is $75,000 through the end of the fiscal year.*

6. **SOFT-CAPS**
   The Commission voted to strike this from the plan.

7. **DN CASES -- PUTATIVE FATHERS**
   The Commission voted to discontinue representation of putative or unknown fathers in DN cases.
   
   *The estimated cost savings assumes that 25% of DN cases include putative fathers.*
   
   *The estimated savings would be $1.2 million by the end of the fiscal year.*

8. **DN CASES -- REPRESENTING ONLY ONE PERSON**
   The Commission voted to strike this from the plan.

9. **LOWER COURT CASES**
   This item was consolidated with #10.

10. **DISCONTINUE USING CONTRACT ATTORNEYS IN ALL LOWER COURT CASES; ADD MODIFIED PART-TIME ATTORNEYS**
    The Commission voted to discontinue assigning misdemeanors to contract attorneys, and to hire modified part-time attorneys as a cost efficient alternative.
    
    *Estimated savings for the rest of the fiscal year would be $624,000.*
11. DISCONTINUE USING CONTRACT ATTORNEYS IN DISTRICT COURT CASES IN CERTAIN REGIONS; ADD MODIFIED PART-TIME ATTORNEYS
The Commission voted to discontinue using contract attorneys in Regions 1, 2, 3, 4, and 9 (Kalispell, Missoula, Great Falls, Helena, and Billings), and to hire modified part-time attorneys as a cost efficient alternative. The estimated cost savings assumes no caseload growth, and does not consider case complexity.
Estimated savings for the rest of the fiscal year is $1.6 million

12. FURLOUGH OPTION
The Commission voted to strike this from the plan.

The Commission also took action on two items from the September 22, 2016 draft mitigation plan:

16. MODIFY DUTIES TO ACCOMMODATE INCREASED CASELOADS
The Commission voted to make no recommendation on this item since they are management decisions.

17. SUSPEND ASSIGNMENT OF ALL MISDEMEANOR CASES, INCLUDING FTE.
The Commission voted to strike this item from the plan.
Appendix D
Policy on Indigence Determination
Office of the State Public Defender
Administrative Policies

<table>
<thead>
<tr>
<th>Subject: Eligibility Determination</th>
<th>Policy No.: 105</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title 47</td>
<td>Pages: 8</td>
</tr>
<tr>
<td>Section: 1-111</td>
<td>Last Review Date: 2-24-14</td>
</tr>
<tr>
<td>Effective Date: 5-6-14</td>
<td>Revision Date: 2-24-14</td>
</tr>
</tbody>
</table>

1.0 POLICY
1.1 The Office of the State Public Defender (OPD) will provide public defender services to applicants who qualify under 47-1-111, MCA.
1.2 Certain clients determined to be eligible for public defender services may be required to pay for the cost of counsel per 46-8-113.

2.0 DEFINITIONS
2.1 Household: an association of persons who live in the same dwelling, sharing its furnishings, facilities, accommodations, and expenses.
   2.1.1 The term does not include bona fide lessees, tenants, or roomers and boarders on contract.
2.2 Hardship: When evaluation of an applicant's disposable household income (gross household income less reasonable and necessary expenses), extent and liquidity of assets, severity of crime(s) charged, time period until next court hearing date, and local private counsel rates demonstrate an individual would incur substantial hardship to his/her family to retain competent private counsel, the applicant qualifies for public defender services.
2.3 Presumptive Eligibility: An applicant who is a current verified or documented recipient of a state or federally administered public assistance program such as TANF, SNAP or SSI/SSDI shall be considered presumptively eligible and, therefore, qualified for public defender services.
2.4 Presumptive Indigence: An individual who is unable to complete the application process for good cause may be considered qualified for public defender services, unless the Eligibility Specialist (ES) has independent information that the applicant has sufficient, independent financial resources to hire private counsel.
2.5 Current Client Status: An applicant who has been approved for public defender services based upon the gross income guidelines or certain hardship determinations will remain qualified for services in any new cases for a three month period from the original approval date. Upon expiration of the three month period, the applicant must submit a new application and financial documentation for any subsequent cases.
3.0 **APPOINTMENT OF COUNSEL**

3.1 All district courts and courts of limited jurisdiction shall send appointment forms to Regional Public Defender Offices. The appointment form is provided by the Central Office, and provides information about the applicant for public defender services.

3.2 When a regional office receives an appointment from the court, OPD shall immediately assign counsel to the individual who, in turn, shall promptly complete the application for public defender services. OPD’s representation of the individual shall continue unless OPD determines that the individual is not eligible for services and a motion to rescind is filed and granted by the Court.

4.0 **APPLICATION FORM**

4.1 The Central Office shall provide the Regional Public Defender Offices with the Application for Court-Appointed Counsel forms as prepared by OPD and approved by the Montana Public Defender Commission.

4.2 Regional Deputy Public Defenders or their staff will make forms available to all jails and courthouses and any other venues deemed appropriate.

5.0 **APPLICATION PROCEDURE**

5.1 An applicant for public defender services must complete the Application for Court-Appointed Counsel form, sign it, and return it to the Regional Public Defender Office within ten days of appointment. The Regional Office will move to rescind the appointment if the required materials are not provided as requested.

5.1.1 Certain applicants may be considered qualified for public defender services under special circumstances, including, but not limited to, Presumptive Eligibility, Presumptive Indigence and Current Client Status (see 2.0, Definitions). In some instances application requirements may be waived.

5.1.2 An applicant may be required to provide documentation to verify income, expenses and assets. The office may move to rescind the appointment if the requested materials are not provided in a timely manner.

5.1.3 Information on the Application for Court-Appointed Counsel form and all supporting documentation is confidential.

5.2 An ES will aid any applicant requesting assistance in completing the application.
6.0 **ELIGIBILITY DETERMINATION**

6.1 Each Regional Deputy Public Defender will appoint an ES and a backup for the region. This information will be maintained in the Central Office.

6.2 Regional Deputy Public Defenders are an integral part of the eligibility determination process. They will sign motions to rescind appointments when required and will appear in court as needed. They will also assist the ES in making difficult determinations. However, the RDPD will not act as the ES and will not be involved in the eligibility determination process for any of their own cases.

6.3 The ES will review the Application for Court-Appointed Counsel form, obtain missing information, and assure that the form is signed by the applicant.

6.4 If Presumptive Eligibility, Presumptive Indigence or Current Client Status is not indicated, the ES will determine eligibility for services based on:

6.4.1 Income: Gross household income falls within the Gross Income Guidelines (Attachment A), which are based on the federal poverty level; or

6.4.2 Hardship: Retaining private counsel would result in substantial hardship to the applicant or his/her household (see 2.2, Definitions).

6.5 The income and assets of another household member will not be considered in the eligibility determination if the household member is the alleged victim of the offense(s) allegedly committed by the applicant.

7.0 **ELIGIBILITY VERIFICATION**

7.1 The ES will verify income and assets for 10% of all applicants seeking qualification under the gross income guidelines 6.4.1.

7.2 The ES will verify the information on the application form for all applicants seeking a hardship qualification under 6.4.2, including but not limited to income and assets. Verification may include, but is not limited to, production of paystubs, monthly bank statements, unemployment, food stamps/SNAP, TANF, Social Security, SSI, SSDI, Worker’s Compensation, pension/retirement and financial aid benefit statements, and/or other documentation requested by the ES. The ES will also do a property records search when indicated.

7.3 New or additional information regarding an applicant’s income, assets and/or expenses may result in a redetermination of eligibility.

8.0 **DISQUALIFIED APPLICANTS**

8.1 If the applicant does not qualify for public defender services, the ES shall send the applicant a written notice of disqualification together with a notice of right to judicial review of eligibility determination (see Attachment B, Standard Letter of Notification of Denial).

8.2 The Regional Deputy Public Defender shall immediately notify the court of record upon determination that an applicant does not qualify for public defender services (see Attachment C, Motion to Rescind Appointment).
8.3 The public defender shall continue to provide representation to the applicant until receipt of a signed order from the judge rescinding the appointment of counsel.

8.4 A judge may overrule a determination that an applicant is ineligible for public defender services. If overruled, OPD will provide public defender services to the applicant.

9.0 COMPLIANCE MONITORING
OPD will monitor, on a systematic basis, regional compliance with statutory and administrative policies governing the eligibility determination process.

10.0 CLOSING
Questions about this policy should be directed to the OPD Central Office at the following address:

Office of the State Public Defender
Administrative Service Division
44 West Park
Butte, MT 59701
Phone 406-496-6080
## ATTACHMENT A

### GROSS INCOME GUIDELINES

#### 2016

<table>
<thead>
<tr>
<th>Household Size</th>
<th>Federal Poverty 100%</th>
<th>133% Annual</th>
<th>133% Monthly</th>
<th>133% Bi-Weekly</th>
<th>133% Weekly</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$11,880</td>
<td>15,800</td>
<td>1,317</td>
<td>608</td>
<td>304</td>
</tr>
<tr>
<td>2</td>
<td>16,020</td>
<td>21,307</td>
<td>1,776</td>
<td>819</td>
<td>410</td>
</tr>
<tr>
<td>3</td>
<td>20,160</td>
<td>26,813</td>
<td>2,234</td>
<td>1,031</td>
<td>516</td>
</tr>
<tr>
<td>4</td>
<td>24,300</td>
<td>32,319</td>
<td>2,693</td>
<td>1,243</td>
<td>622</td>
</tr>
<tr>
<td>5</td>
<td>28,440</td>
<td>37,825</td>
<td>3,152</td>
<td>1,455</td>
<td>727</td>
</tr>
<tr>
<td>6</td>
<td>32,580</td>
<td>43,331</td>
<td>3,611</td>
<td>1,667</td>
<td>833</td>
</tr>
<tr>
<td>7</td>
<td>36,730</td>
<td>48,851</td>
<td>4,071</td>
<td>1,879</td>
<td>939</td>
</tr>
<tr>
<td>8</td>
<td>40,890</td>
<td>54,384</td>
<td>4,532</td>
<td>2,092</td>
<td>1,046</td>
</tr>
<tr>
<td>Each Addtl</td>
<td>4,160</td>
<td>5,533</td>
<td>461</td>
<td>213</td>
<td>106</td>
</tr>
</tbody>
</table>
Name  
Regional Deputy Public Defender  
Region (#)  
(Address)  

(Date)  

(Client Name)  
(Client Address)  

Dear (Client):  

Please be advised that in applying the criteria outlined in Section 47-1-111 MCA to the information you provided on your application form, I have determined that you do not qualify for public defender services. The Office of the State Public Defender will ask the Court to rescind the appointment of a public defender. You must hire a private attorney within 10 days of this letter or represent yourself.  

Your next court appearance is scheduled for (date) (time) in ________________ Court.  

If you do not agree with this determination, you have the right to ask the judge in your case to review your financial status. If you do ask for review, we are required to make your application form available to the judge for inspection.  

Sincerely,  

Name  
Regional Deputy Public Defender
ATTACHMENT C

MOTION TO RESCIND APPOINTMENT OF PUBLIC DEFENDER

Name
Regional Deputy Public Defender
Region (#)
(Address)

Telephone:

MONTANA (XXXXX) JUDICIAL DISTRICT COURT, (XXXX) COUNTY

STATE OF MONTANA,        )
         ) Cause No. _________________
         )
         ) Plaintiff,
         )
                   v.             )
         ) MOTION TO RESCIND
         ) APPOINTMENT OF PUBLIC
         ) DEFENDER
         )
         ) ________________,
         )
         ) Defendant.

COMES NOW, (RDPD), attorney for Defendant, (Name), and hereby moves the Court to rescind the appointment of the Office of the State Public Defender because the Defendant does not meet the criteria set out in Section 47-1-111, MCA, to be eligible for representation by the Office of the State Public Defender.

The Defendant has been notified of this determination as well as his right to ask this Court to review the determination.
DATED this _____day of ________________, 20__.  

________________________________________

(Name)  
Regional Deputy Public Defender  
Region (#)  

CERTIFICATE OF SERVICE  

I hereby certify that I caused to be mailed a true and accurate copy of the foregoing MOTION TO RESCIND APPOINTMENT, postage prepaid, by U.S. mail, to the following:  

Dated this _____day of ________________, 20__.  

________________________________________