



Montana Legislative Services Division
Office of Research and Policy Analysis
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TO: Members of the Task Force on State Public Defender Operations
FROM: Dave Bohyer
RE: Options for reorganizing the Public Defender Commission

Introduction

At the February 1 meeting of the Task Force on State Public Defender Operations, the Task Force requested staff to identify options for reorganizing the Public Defender Commission. Please accept this memorandum as my initial response to the request.

Overview

The Public Defender Commission is provided for in section 2-15-1028, MCA. The Commission's duties are outlined in section 41-1-105, MCA.

A review of the relevant MCA sections indicates that the Commission is composed of several elements, some of which are intertwined with others and some of which stand alone. The organizational elements can be categorized as follows:

- size of the Commission, i.e., number of members;
- nominating and appointing authorities, i.e., who nominates potential Commissioners and who appoints Commissioners;
- qualifications of Commissioners, i.e., what group(s) does the nominee represent and what qualifications or experience must the nominee possess;
- term of service; i.e., how long does a Commissioner serve;
- administrative attachment; i.e., to what entity of state government, if any, is the Commission attached for administrative purposes;
- authority and limitations; i.e., what specifically may the Commission do and what is the Commission specifically prohibited from doing;
- disqualifiers from service; i.e., what occupations disqualify an individual from serving on the Commission;
- volunteer membership; i.e., Commission members may not be compensated;
- duties; i.e., tasks the Commission is required to perform and responsibilities the Commission is required to shoulder.

Review and decision points

Before the Task Force embarks on an effort to reorganize the Commission, it is worth noting that HB 627 directs the Task Force only to study and examine the Office of the State Public Defender (OPD). As provided for in the MCA, the OPD, while governed by the Commission, is a distinct entity and separate from the Commission.

Therefore, the language of the legislation suggests that study and examination of the Commission itself was not contemplated as a component of the study.

However, because the Task Force has indicated an interest in the organization and reorganization of the Commission, the members may want to discuss and identify the problems underlying the Commission's organization and how the Task Force's recommendations, if any, resolve the problems.

Commission Size

Proceeding through the various elements of the Commission's organization, the Task Force might first look at the *size of the Commission*. The Commission is statutorily prescribed as 11 members. (Section 2-15-1028(2), MCA.) Among the jurisdictions examined for comparison, Montana's 11 member commission compares to Colorado's 5-member commission, New Mexico's 11-member commission, Clark County, Nevada's 3-member commission¹, and the 11-member Washington, D.C. commission. Among the remaining comparison jurisdictions, the states of Alaska, Rhode Island, and Vermont do not have commissions.

Options:

- (1) Increase the size of the Commission to more than 11 members.
- (2) Reduce the size of the Commission to fewer than 11 members. (Ultimately, a reduction to zero would eliminate the Commission.)
- (3) Maintain the size of the Commission at 11 members.

Appointing Authority

From nominees submitted for consideration as potential commission appointees, the governor has sole authority to appoint commission members.

Options:

- (1) Reassign the authority to appoint commission members to individuals or entities other than the governor.
- (2) Distribute the authority to appoint commission members to individuals or entities in addition to the governor.
- (3) Maintain the governor as the sole appointing authority.

¹ In Clark County, Nevada, the 3-member Board of County Commissioners appoints the public defender and is the "commission" referred to in the comparisons.

Nominations

Nominations for consideration as commission appointees are made to the governor by two entities as prescribed in section 2-15-1028(2)(a) and (2)(b), MCA. The nominating entities are the Supreme Court (at least two nominees) and the president of the state bar of Montana (at least three nominees).

Each nominee from the Supreme Court must be an attorney and "must have significant experience in the defense of criminal or other cases subject to the provisions of Title 47, chapter 1, or must have demonstrated a strong commitment to quality representation of indigent defendants.. The Supreme Court's nominees need no other qualifications.²

Each nominee from the president of the state bar must also be an attorney. The state bar president's nominees must include:

- at least one nominee who is experienced in the defense of felonies who has served a minimum of 1 year as a full-time public defender;
- at least one attorney experienced in the defense of juvenile delinquency and abuse and neglect cases involving the federal Indian Child Welfare Act; and
- at least one attorney who represents criminal defense lawyers;²

Qualifications of Commissioners

The statute specifies qualifications for all of the nominees in that they must either be an attorney or not an attorney (or judge) who practices law in a specialized area of the law or who is member of a certain group or who is knowledgeable about or represents certain issues.

The Task Force could review and revise the qualifications for any or all of the nominees and appointed members.

Term of Service

Commissioners currently serve staggered 3-year terms. The Task Force could recommend revising all or some of the members' terms of service to something less than or greater than 3 years or all or some of the members' terms to be staggered

² An attorney may not serve on the Commission, i.e., an attorney would be *disqualified*, under section 2-15-1028(7), MCA, if the attorney is or becomes during a term of service on the Commission "a judge, a public defender employed by or under contract with the office of state public defender established in 47-1-201, a county attorney or a deputy county attorney, the attorney general or an assistant attorney general, the United States district attorney or an assistant United States district attorney, or a law enforcement official."

differently or not at all.

Administrative Attachment

The OPD is administratively attached to the Department of Administration, which comports with the first principle of the American Bar Association's *Ten Principles of a Public Defense Delivery System*, i.e., independence from the judiciary and from political influence. Options the Task Force could consider or recommend include that the OPD be administratively attached to a different agency or that OPD be established a stand-alone entity, akin to the Montana State Fund.

Authority and Limitations

Actions that the Commission may undertake and are prohibited from taking are stated or outlined in the enabling statute, primarily sections 2-15-1028 and 47-1-105, MCA. The Task Force could consider or recommend what existing authority should be expanded or curtailed or what limitations should be expanded, reduced, or eliminated.

Disqualifiers from Service

Under section 2-15-2018, MCA, membership of nominees in certain occupations may disqualify an individual from serving on the Commission. Subsection (7) of 2-15-1028, MCA, states:

2-15-1028. Public defender commission. (1)...

(7) While serving a term on the commission, a member of the commission may not serve as a judge, a public defender employed by or under contract with the office of state public defender established in 47-1-201, a county attorney or a deputy county attorney, the attorney general or an assistant attorney general, the United States district attorney or an assistant United States district attorney, or a law enforcement official.

(8) ...

The Task Force could consider if the disqualifiers stated in subsection (7) or elsewhere and considered to be appropriate when the Commission was organizationally established in 2005 remain appropriate public policy. If the Task Force determines that the disqualifiers are anachronistic or inappropriate, they could recommend to the Legislature revisions considered to be more appropriate.

Volunteer Membership

Under section 2-18-1028(8), MCA, Commission members may not be compensated. The Task Force could consider whether volunteer service remains good policy or whether the Legislature should provide some level of compensation to the Commissioners for the public service they provide.

Duties of the Commission

Sections 2-15-1028 and 47-1-105, MCA, and perhaps others outline a number and variety of duties and tasks that the Commission is required to perform and responsibilities the Commission is required to shoulder. The Task Force could review each duty, task, and responsibility, determine the merits of each, and recommend revising or repealing any or all of them. The Task Force could also recommend clarifying the existing or establishing new, additional duties, tasks, and responsibilities

Summary

There are many elements to the Public Defender Commission as statutorily organized and the Task Force could recommend that any element be clarified, revised or repealed or that new elements be added. In considering the options and potential recommendations, the Task Force should consider and articulate why the status quo needs to be changed and how or why recommended changes are preferable to the existing elements.

Respectfully submitted.

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