

STAFFING ISSUES RE: SB 146

Current Lack of Adequate Staffing:

Montana currently has no statewide policies limiting the number of cases defenders may be assigned and no uniform policies or procedures for collecting, maintaining or analyzing data. It appears that many defenders handle caseloads in excess of the national standards. The new bill provides for the Chief Public Defender and the PD commission to promulgate such standards. However, there is no provision in the proposed fiscal note for the inevitable and significant increase in the number of full time public defenders that will be needed to handle even just the felony, misdemeanor and the related appellate caseload.

Felony Staffing:

- The current cost estimates assume that the new PD trial staff will consist of the 66.75 FTEs located in the 7 county public defender offices. Of these FTEs 40 are attorneys and 26.75 are support staff. The figure also assumes that these attorneys will handle felonies, juvenile cases, abuse and neglect cases and mental health commitments, misdemeanors and city court cases. However the current staffing plans are insufficient.
- Using national standards as a guide, we estimate that **Montana must employ 45-55 FTE attorneys just to handle Montana's non-homicide felony caseload consistent with national norms of representation.** Given the numbers of homicide cases in Montana and the State's capital case standards, the number of total felony attorneys would likely be closer to 55-65. The 45-55 FTE attorney figure was determined by adapting NLADA's public defender projected staffing formula to what we know about Montana.¹

¹ The NLADA's projected staffing formula is as follows:

(a) **Montana Indigent felony case filings = 6132.75**

According to 2003 Annual Supreme Court Report 8,036 felonies were filed that year - may be more because, as we know, the numbers in the report are not reliable. According to county clerk responses to our statewide FOIA requests, between 80-99% of felonies filed in each county are assigned to PDs. Using 85% as a guide, 8,036 divided by .85 = 6132.75

(b) **Public Defender Work Year = 1920 hours per year**

Assumes 40 hour work week for 48 weeks = 1920 work hours per year.

(c) **Average Hours-per-Felony Disposition = 12.8 hours per (non-homicide) felony**

NAC standards require that PD caseload should not exceed 150 felonies per full-time attorney per year. NLADA arrived at avg. hrs/disposition standard by dividing the PD work year (1920) by the NAC caseload limit (150) = 12.8 hours per felony disposition. Note: that the NAC does not make recommendations for homicide cases which will require a PD to handle a lesser number of cases than 150 and will raise the hours per disposition rate because they are more time-consuming and are less likely to be plea bargained.

(d) **Montana lawyers will have to work 78,500 hours to handle State's indigent felonies.**

Misdemeanor Staffing:

- Montana justice courts currently provide **little or no representation** for most of the indigent people charged with misdemeanors in violation of U.S. Supreme Court mandate.
- ***Constitutional right to counsel for misdemeanors.***
 - *Argersinger v. Hamlin*, 407 U.S. 25 (1972): Supreme Court requires appointment of counsel for indigents charged with misdemeanors involving possible imprisonment.
 - *Alabama v. Shelton*, 535 U.S. 654 (2002): requires appointment for indigents charged with misdemeanors involving a suspended sentence.
 - **In order to comply with the Supreme Court's ruling in *Shelton*, Montana must supply lawyers to indigents charged with misdemeanors in greater numbers than they do now.**
 - People charged with misdemeanors routinely appear before courts without counsel, even when taking guilty pleas.
 - Because these folks are unrepresented, they are not aware of the effect a criminal record may have on other aspects of their lives: employment, housing, eligibility for health or income-support benefits, or immigration status.
 - **Uncounseled pleas often generate future court actions at considerable public expense.**
 - Although inappropriate misdemeanor convictions may not mean lengthy jail sentences, the life consequences of convictions can be severe, including job loss, family breakup, substance abuse and deportation. These avoidable consequences will cost the indigent defense system in terms of abuse/neglect cases, youth in need of care, and recidivism in adult criminal cases.

To determine the number of hours necessary to dispose of all felonies statewide, NLADA multiplies the hrs/disposition (12.8) by the attorney caseload (6,132.75) = 78,499.2 hours. Thus, in a year, Montana felony lawyers will have to work approximately 78,500 hours to dispose of all felonies assigned.

(e). To project the number of full-time PD's needed to staff felonies statewide, NLADA divides the hours necessary per year (78,500) by the hours available to PDs per year (1920) = 40.8 FTE lawyers for felonies alone. For the reasons outlined above this is a very conservative estimate.

- For example, clients charged with a 4th DUI Felony (based upon 3 prior DUI misdemeanor convictions), often challenge the validity of their uncounseled convictions on the prior misdemeanors.
- Clients raise these issues during their felony cases, on appeal and when seeking post-conviction relief.
- Misdemeanor caseload data is unavailable. Legislative staffers estimate that there are 3 misdemeanors for 1 felony (i.e., 3 times as many). This unknown number would significantly affect an estimate of FTE positions required to handle the caseload.

Existing problems that would not be remedied unless the FTE estimates are increased in the proposed bill:

- Because the indigent defense programs are understaffed, public defenders have to juggle their in-court time, their client time and their office time. As a result:
 - Public defenders do not have adequate time to meet with their clients to obtain the necessary facts to defend against the charges
 - Many public defenders do not have the necessary regular and periodic substantive meetings with their clients to discuss the progress of the case. Letters from clients indicating that weeks, if not months, had passed since they had last heard from their attorneys are not uncommon.
 - It is not unusual for counsel to adjourn critical stages of their client's cases for months because of lack of time or preparedness.
 - Public defenders do not have the time to adequately prepare for hearings, trials and appeals or investigate the facts and the law.
 - Many public defenders are appointed dangerously late in the process and initial client contact is often put off for weeks.
 - Clients have their rights to appeal waived because the trial lawyers are too busy or ill trained to protect their right to appeal.

ESTIMATING COSTS OF THE NEW STATEWIDE PUBLIC DEFENDER SYSTEM

If current fiscal note budget figures continue to govern the funding allocation for the new public defender agency, it will fail before it begins. The funding figures are based upon inadequate current spending by the state for felony cases and the counties for misdemeanor cases. The county misdemeanor spending figures are supplied by MACO and are unaudited. The proposed budget is not based upon any knowledge of what an adequate PD personnel infrastructure would be, it does not reflect the necessary start up and recurring technology expansion costs, and it does not provide for the development of an appropriate appellate function or statewide training function.

The Current System

Under the current system, the indigent defense services are unconstitutional. The system has developed as a hodge-podge of 56 separate county systems with no uniform funding, administrative or practice policies or procedures to ensure that lawyer services are delivered in a constitutionally adequate manner across the state. As a result, virtually all of the indigent defense services in these counties are currently funded and staffed without regard to the basic necessities of an adequate defense.

The proposed legislation seeks to establish long overdue statewide policies and procedures through a public defender commission and a state public defender. However, **these entities will not be able to remedy the deficiencies of the current system unless they are provided with sufficient funds to design, implement and monitor the necessary standards, systems, personnel infrastructure and technology linkages that Montana has been without for close to 30 years.**

Current Lack of Funding:

Despite our best efforts, we have not been able to impact the fiscal notes. Harry Freeborn told us he could only work with the numbers supplied the Interim Law and Justice Committee and it was now in the hands of the Brent Doig. Brent Doig told us he had no authority to go beyond the numbers provided him. The day the governor's budget was released with no mention of indigent defense, ACLU staff went to David Ewer and expressed disappointment and concern. He said it is in his mind an entitlement and must be funded and that he did not trust numbers from the court administrator's office. We have also discussed the issue with Hal Harper of the Governor's staff who has essentially told us to be happy to get it funded and come back with a supplemental.

\$ 10.6 million current costs

The figures currently in the fiscal note represent the current expenditures for indigent defense by all government entities and are the basis for the new PD system's continuing costs going forward. However, these figures are inadequate and merely shift the current expenditures for indigent defense to the new state system without further analysis or significant increase. As a result, none of the deficiencies that stem from poor funding of the current system will be remedied under the new system.

Why Current State funding of indigent defense is inadequate:

- This figure is considered the actual state cost of indigent defense for FY 2004. The figure includes state expenditures for felonies, Juvenile cases, abuse and neglect cases and mental health commitments.
- Public defender offices and contract programs are understaffed, often have unmanageably high caseloads, and do not have access to or underutilize investigators, expert witnesses, and support staff.
- The figure **assumes no increase** in the number or compensation of lawyers assigned to cases by judge or working under a contract. It also assumes no increase in necessary support and professional staff.
- This figure simply enshrines the substandard practice of public defender systems around the state.

Why Current County Funding of indigent defense is inadequate:

District Courts:

This \$600,000 plus aggregate figure represents money, paid by 6 county public defender offices for district court cases (not including felonies), but NOT reimbursed by the state. The figure was self-reported by 6 of the current chief public defenders during telephone calls with the fiscal analyst. The chiefs did not break out what the money was spent on. The figure has not been audited.

Misdemeanors in Justice Courts:

This \$1,040,000 figure for misdemeanor representation is both insufficient and wholly unreliable. It is insufficient because it purports to be the cost of representation for misdemeanors in Montana's justice courts. However, most Montana justice courts provide **little or no representation** for most of the indigent people charged with misdemeanors in defiance of U.S. Supreme Court mandate. Assuming that the new public defender system will provide counsel for all eligible indigents charged with misdemeanors, this number will increase significantly. (Projecting justice court

expenditures on indigent defense to be \$8,000,000 based upon the 48,000 justice court criminal cases filed in 2003 and assuming an 80% indigency rate). Furthermore, the \$1M figure is unreliable because it was based on a survey conducted by MACO. The MACO figures have not been audited.

Existing problems that will not be remedied unless the funding of indigent defense services is increased:

- The failure of the State and Counties to adequately fund indigent defense services has resulted in woefully inadequate resources for indigent defense.
- Public defender offices are under-resourced. For example, as of June 2004, nine attorneys in the Missoula County Public Defender Office had to share one investigator, one paralegal and three secretaries.
- Public defenders who provide indigent defense services pursuant to a contract or are assigned by the judges are under-resourced. These lawyers must often pay for their own training, office overhead, computers, software, telephones, photo copying, secretarial and paralegal assistance. As a result, few attend criminal justice training; some do not have secretaries, some do not have computers.
- The Appellate Defender is under-resourced. The office is staffed by a Chief Defender, a deputy appellate defender and a paralegal. In recent years, the Office has had to turn down handling appeals because their office has been inadequately staffed. However, the trial lawyers have not been handling appeals for their clients on a consistent basis – in fact, no one has. The trial lawyers are often too busy or ill-trained in appellate work to protect their client's constitutional rights in the appellate process. Clients find that their rights to appeal have been "waived" without their knowledge or consent. In a series of cases over the last several years, the Montana Supreme Court has granted indigent clients the ability to file appeals "out of time" because their trial lawyers simply abandoned them in during appellate process.*

* HB 392, which passed the house and is in appropriations, proposes changes in existing law "All grounds for relief, whether raised in the original or an amended original petition, must be raised within the time period allowed for the filing of the petition under 46-21-102.