

1 HOUSE BILL NO. 97

2 INTRODUCED BY M. MENAHAN

3 BY REQUEST OF THE PUBLIC DEFENDER COMMISSION

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TRANSFERRING THE RESPONSIBILITY FOR THE SUPERVISION
6 OF THE OFFICE OF APPELLATE DEFENDER FROM THE CHIEF PUBLIC DEFENDER TO THE PUBLIC
7 DEFENDER COMMISSION; AMENDING SECTIONS 2-18-103, 47-1-103, 47-1-104, 47-1-105, 47-1-201,
8 47-1-205, AND 47-1-216, MCA; AND PROVIDING AN EFFECTIVE DATE."

9

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11

12 **Section 1.** Section 2-18-103, MCA, is amended to read:

13 **"2-18-103. Officers and employees excepted.** Parts 1 through 3 and 10 do not apply to the following
14 officers and employees in state government:

15 (1) elected officials;

16 (2) county assessors and their chief deputies;

17 (3) employees of the office of consumer counsel;

18 (4) judges and employees of the judicial branch;

19 (5) members of boards and commissions appointed by the governor, the legislature, or other elected
20 state officials;

21 (6) officers or members of the militia;

22 (7) agency heads appointed by the governor;

23 (8) academic and professional administrative personnel with individual contracts under the authority of
24 the board of regents of higher education;

25 (9) academic and professional administrative personnel and live-in houseparents who have entered into
26 individual contracts with the state school for the deaf and blind under the authority of the state board of public
27 education;

28 (10) investment officer, assistant investment officer, executive director, and five professional staff
29 positions of the board of investments;

30 (11) four professional staff positions under the board of oil and gas conservation;

- 1 (12) assistant director for security of the Montana state lottery;
- 2 (13) executive director and employees of the state compensation insurance fund;
- 3 (14) state racing stewards employed by the executive secretary of the Montana board of horseracing;
- 4 (15) executive director of the Montana wheat and barley committee;
- 5 (16) commissioner of banking and financial institutions;
- 6 (17) training coordinator for county attorneys;
- 7 (18) employees of an entity of the legislative branch consolidated, as provided in 5-2-504;
- 8 (19) chief information officer in the department of administration;
- 9 (20) chief business development officer and six professional staff positions in the office of economic
10 development provided for in 2-15-218;
- 11 (21) chief public defender appointed by the public defender commission pursuant to the Montana Public
12 Defender Act, Title 47, chapter 1, and the employees in the positions listed in 47-1-201(3)(a), who are appointed
13 by the chief public defender; and
- 14 (22) chief appellate defender in the office of appellate defender."
- 15

16 **Section 2.** Section 47-1-103, MCA, is amended to read:

17 **"47-1-103. Definitions.** As used in this chapter, the following definitions apply:

- 18 (1) "Commission" means the public defender commission established in 2-15-1028.
- 19 (2) "Court" means the supreme court, a district court, a youth court, a justice's court, a municipal court,
20 or a city court.
- 21 (3) "Indigent" means that a person has been determined under the provisions of 47-1-111 to be indigent
22 and financially unable to retain private counsel.
- 23 (4) "Office" means the office of state public defender established in 47-1-201.
- 24 (5) "Public defender" means an attorney employed by or under contract with the office and assigned to
25 provide legal counsel to a person under the provisions of this chapter, including attorneys employed by or under
26 contract with the office of appellate defender.
- 27 (6) "Statewide public defender system", "state system", or "system" means the system of public defender
28 services established pursuant to this chapter."
- 29

30 **Section 3.** Section 47-1-104, MCA, is amended to read:

1 **"47-1-104. Statewide system -- structure and scope of services -- assignment of counsel at public**
2 **expense.** (1) ~~(a)~~ There is a statewide public defender system, which ~~must~~ is required to deliver public defender
3 services in all courts in this state. ~~The~~ Except as provided in subsection (1)(b), the system is supervised by the
4 commission and administered by the office.

5 (b) The office of the appellate defender is supervised and administered by the commission as provided
6 in this chapter.

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

12 ~~(3) Beginning July 1, 2006, when~~ When a court orders the office or the office of appellate defender to
13 assign counsel, the appropriate office shall immediately assign a public defender qualified to provide the required
14 services. The commission shall establish protocols to ensure that the ~~office makes~~ offices make appropriate
15 assignments in a timely manner.

16 ~~(4) Beginning July 1, 2006, a~~ A court may order ~~the~~ an office to assign counsel under this chapter in the
17 following cases:

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

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

22 (ii) for a party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in
23 40-6-119;

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

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

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

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

30 (vii) for a parent or guardian in a proceeding for the involuntary commitment of a developmentally

1 disabled person to a residential facility, as provided in 53-20-112;

2 (viii) for a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in
3 53-21-116;

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

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

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

9 (i) as provided for in 41-3-425;

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

13 (iii) for a juvenile entitled to assigned counsel in a proceeding under the Interstate Compact on Juveniles,
14 as provided in 41-6-101;

15 (iv) for a minor who petitions for a waiver of parental notification requirements under the Parental Notice
16 of Abortion Act, as provided in 50-20-212;

17 (v) for a respondent in a proceeding for the involuntary commitment of a developmentally disabled
18 person to a residential facility, as provided in 53-20-112;

19 (vi) for a minor voluntarily committed to a mental health facility, as provided in 53-21-112;

20 (vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a
21 proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5;

22 (viii) for a ward when the ward's guardian has filed a petition to require medical treatment for a mental
23 disorder of the ward, as provided in 72-5-322; and

24 (c) for an eligible appellant in an appeal of a proceeding listed in this subsection (4).

25 (5) (a) Except as provided in subsection (5)(b), a public defender may not be assigned to act as a
26 court-appointed special advocate or guardian ad litem in a proceeding under the Montana Youth Court Act, Title
27 41, chapter 5, or in an abuse and neglect proceeding under Title 41, chapter 3.

28 (b) A private attorney who is contracted with under the provisions of 47-1-216 to provide public defender
29 services under this chapter may be appointed as a court-appointed special advocate or guardian ad litem in a
30 proceeding described in subsection (5)(a) if the appointment is separate from the attorney's service for the

1 statewide public defender system and does not result in a conflict of interest."

2

3 **Section 4.** Section 47-1-105, MCA, is amended to read:

4 **"47-1-105. Commission -- duties -- report -- rules.** The commission shall supervise and direct the
5 system. In addition to other duties assigned pursuant to this chapter, the commission shall:

6 (1) (a) establish the qualifications, duties, and compensation of the chief public defender, as provided
7 in 47-1-201, appoint a chief public defender after considering qualified applicants, and regularly evaluate the
8 performance of the chief public defender; and

9 (b) establish the qualifications, duties, and compensation of the chief appellate defender, as provided
10 in 47-1-205, appoint a chief appellate defender after considering qualified applicants, and regularly evaluate the
11 performance of the chief appellate defender;

12 (2) establish statewide standards for the qualification and training of attorneys providing public defender
13 services to ensure that services are provided by competent counsel and in a manner that is fair and consistent
14 throughout the state. The standards must take into consideration:

15 (a) the level of education and experience that is necessary to competently handle certain cases and case
16 types, such as criminal, juvenile, abuse and neglect, civil commitment, capital, and other case types, including
17 cases on appeal, in order to provide effective assistance of counsel;

18 (b) acceptable caseloads and workload monitoring protocols to ensure that public defender workloads
19 are manageable;

20 (c) access to and use of necessary professional services, such as paralegal, investigator, and other
21 services that may be required to support a public defender in a case;

22 (d) continuing education requirements for public defenders and support staff;

23 (e) practice standards;

24 (f) performance criteria; and

25 (g) performance evaluation protocols.

26 (3) review and approve the strategic plan and budget proposals submitted by the chief public defender,
27 and the administrative director, and the chief appellate defender;

28 (4) review and approve any proposal to create permanent staff positions;

29 (5) establish policies and procedures for identifying cases in which public defenders may have a conflict
30 of interest and for ensuring that cases involving a conflict of interest are handled according to professional ethical

1 standards;

2 (6) establish policies and procedures for handling excess caseloads;

3 (7) establish policies and procedures to ensure that detailed expenditure and caseload data is collected,
4 recorded, and reported to support strategic planning efforts for the system;

5 (8) adopt administrative rules pursuant to the Montana Administrative Procedure Act to implement the
6 provisions of this chapter; and

7 (9) submit a biennial report to the governor, the supreme court, and the legislature, as provided in
8 5-11-210. Each interim, the commission shall also specifically report to the law and justice interim committee
9 established pursuant to 5-5-202 and 5-5-226. The report must cover the preceding biennium and include:

10 (a) all policies or procedures in effect for the operation and administration of the statewide public
11 defender system;

12 (b) all standards established or being considered by the commission, ~~or the chief public defender, or the~~
13 chief appellate defender;

14 (c) the number of deputy public defenders and the region supervised by each;

15 (d) the number of public defenders employed or contracted with in the system, identified by region;

16 (e) the number of attorney and nonattorney staff supervised by each deputy public defender;

17 (f) the number of new cases in which counsel was assigned to represent a party, identified by region,
18 court, and case type;

19 (g) the total number of persons represented by the office and the office of appellate defender, identified
20 by region, court, and case type;

21 (h) the annual caseload and workload of each public defender and the office of appellate defender,
22 identified by region, court, and case type;

23 (i) the training programs conducted by the office and the number of attorney and nonattorney staff who
24 attended each program;

25 (j) the continuing education courses on criminal defense or criminal procedure attended by each public
26 defender employed or contracted with in the system; and

27 (k) detailed expenditure data by court and case type."
28

29 **Section 5.** Section 47-1-201, MCA, is amended to read:

30 **"47-1-201. Office of state public defender -- personnel -- compensation -- expenses -- reports. (1)**

1 There is an office of state public defender. The office must be located in Butte, Montana. The head of the office
2 is the chief public defender, who is supervised by the commission.

3 (2) The chief public defender must be an attorney licensed to practice law in the state. The chief public
4 defender is appointed by and serves at the pleasure of the commission. The position of chief public defender is
5 exempt from the state classification and pay plan; as provided in 2-18-103. The commission shall establish
6 compensation for the position commensurate with the position's duties and responsibilities, taking into account
7 the compensation paid to prosecutors with similar responsibilities.

8 (3) The chief public defender shall hire or contract for and supervise other personnel necessary to
9 perform the function of the office of state public defender and to implement the provisions of this chapter,
10 including but not limited to:

11 (a) the following personnel who are exempt from the state classification and pay plan; as provided in
12 2-18-103:

13 (i) an administrative director, who must be experienced in business management and contract
14 management;

15 ~~(ii) a chief appellate defender;~~

16 ~~(iii)~~(ii) a chief contract manager to oversee and enforce the contracting program;

17 ~~(iv)~~(iii) a training coordinator, appointed as provided in 47-1-210;

18 ~~(v)~~(iv) deputy public defenders, as provided in 47-1-215;

19 (b) assistant public defenders; and

20 (c) other necessary administrative and professional support staff for the office.

21 (4) Positions established pursuant to subsections (3)(b) and (3)(c) are classified positions, and persons
22 in those positions are entitled to salaries, wages, benefits, and expenses as provided in Title 2, chapter 18.

23 (5) The following expenses are payable by the office if the expense is incurred at the request of a public
24 defender:

25 (a) witness and interpreter fees and expenses provided in Title 26, chapter 2, part 5, and 46-15-116; and

26 (b) transcript fees, as provided in 3-5-604.

27 (6) If the costs to be paid pursuant to this section are not paid directly, reimbursement must be made
28 within 30 days of the receipt of a claim.

29 (7) The office may accept gifts, grants, or donations, which must be deposited in the account provided
30 for in 47-1-110.

1 (8) The office shall provide assistance with the budgeting, reporting, and related administrative functions
 2 of the office of appellate defender as provided in 47-1-205.

3 ~~(8)(9)~~ The chief public defender shall establish procedures to provide for the approval, payment,
 4 recording, reporting, and management of defense expenses paid pursuant to this section, including defense
 5 expenses paid for work performed by or for the office of appellate defender.

6 ~~(9)(10)~~ (a) The office of public defender is required to report data for each fiscal year by September 30
 7 of the subsequent fiscal year representing the caseload for the entire public defender system to the legislative
 8 finance committee. The report must include data for both employee and contract attorneys, the number of new
 9 cases opened, the number of cases closed, the number of cases that remain open and active, the number of
 10 cases that remain open but are inactive, and the average number of days between case opening and closure for
 11 each case type. ~~The report for fiscal year 2009 must be provided to the legislative finance committee by January~~
 12 ~~1, 2010, and the report for fiscal year 2010 must be provided to the legislative finance committee by September~~
 13 ~~30, 2010.~~

14 (b) The office of public defender is required to report to the legislative finance committee for each fiscal
 15 year by September 30 of the subsequent fiscal year on the amount of funds collected as reimbursement for
 16 services rendered, including the number of cases for which a collection is made, the number of cases for which
 17 an amount is owed, the amount collected, and the amount remaining unpaid. ~~The report for fiscal year 2009 must~~
 18 ~~be provided to the legislative finance committee by January 1, 2010, and the report for fiscal year 2010 must be~~
 19 ~~provided to the legislative finance committee by September 30, 2010."~~

20

21 **Section 6.** Section 47-1-205, MCA, is amended to read:

22 **"47-1-205. Office of appellate defender -- chief appellate defender.** (1) There is ~~within the office~~ an
 23 office of appellate defender. The office of appellate defender must be located in Helena, Montana.

24 (2) ~~(a) Beginning July 1, 2006, the chief public defender~~ The commission shall hire and supervise a chief
 25 appellate defender to manage and supervise the office of appellate defender. The chief appellate defender is
 26 appointed by and serves at the pleasure of the commission. The commission shall establish compensation for
 27 the position commensurate with the position's duties and responsibilities, taking into account the compensation
 28 paid to prosecutors with similar responsibilities.

29 (b) The chief appellate defender must be an attorney licensed to practice law in the state.

30 (c) The position of chief appellate defender is exempt from the state classification and pay plan as

1 provided in 2-18-103.

2 (3) The chief appellate defender shall:

3 (a) direct, manage, and supervise all public defender services provided by the office of appellate
4 defender, including budgeting, reporting, and related functions;

5 (b) ensure that when a court orders the office of appellate defender to assign an appellate lawyer or
6 when a defendant or petitioner is otherwise entitled to an appellate public defender, the assignment is made
7 promptly to a qualified and appropriate appellate defender who is immediately available to the defendant or
8 petitioner when necessary;

9 (c) ensure that appellate defender assignments comply with the provisions of 47-1-202(7) and standards
10 for counsel for indigent persons in capital cases issued by the Montana supreme court;

11 (d) hire and supervise the work of office of appellate defender personnel as authorized by the appellate
12 defender;

13 (e) contract for services as provided in 47-1-216 and as authorized by the ~~chief public defender~~
14 commission according to the strategic plan for the delivery of public defender services;

15 (f) keep a record of appellate defender services and expenses of the office of appellate defender office
16 and submit records and reports to the ~~chief public defender~~ commission as requested through the office of state
17 public defender;

18 (g) implement standards and procedures established by the commission ~~and the chief public defender~~
19 for the office of appellate defender;

20 (h) maintain a minimum client caseload as determined by the ~~chief public defender~~ commission; and

21 (i) confer with the chief public defender on budgetary issues and submit budgetary requests and the
22 reports required by law or by the governor through the chief public defender; and

23 ~~(j)~~ (i) perform all other duties assigned to the chief appellate defender by the ~~chief public defender~~
24 commission."

25

26 **Section 7.** Section 47-1-216, MCA, is amended to read:

27 **"47-1-216. Contracted services -- rules.** (1) The commission shall establish standards for a statewide
28 contracted services program that ensures that contracting for public defender services is done fairly and
29 consistently statewide and within each public defender region and that contracting for appellate defender services
30 is done fairly and consistently statewide.

1 (2) ~~Beginning July 1, 2006, the~~ The state public defender office and each regional office, in a manner
2 consistent with statewide standards adopted by the commission pursuant to this section, may contract to provide
3 public defender, professional nonattorney, and other personal services necessary to deliver public defender
4 services within each public defender region. The chief appellate defender, in a manner consistent with statewide
5 standards adopted by the commission pursuant to this section, may contract to provide appellate defender,
6 professional nonattorney, and other personal services necessary to deliver appellate defender services in the
7 state. All contracting pursuant to this section is exempt from the Montana Procurement Act; as provided in
8 18-4-132.

9 (3) Contracts may not be awarded based solely on the lowest bid or provide compensation to contractors
10 based solely on a fixed fee paid irrespective of the number of cases assigned.

11 (4) Contracting for public defender and appellate defender services must be done through a competitive
12 process that must, at a minimum, involve the following considerations:

13 (a) attorney qualifications necessary to provide effective assistance of counsel that meets the standards
14 established by the commission;

15 (b) attorney qualifications necessary to provide effective assistance of counsel that meet the standards
16 issued by the Montana supreme court for counsel for indigent persons in capital cases;

17 (c) attorney access to support services, such as paralegal and investigator services;

18 (d) attorney caseload, including the amount of private practice engaged in outside the contract;

19 (e) reporting protocols and caseload monitoring processes;

20 (f) a process for the supervision and evaluation of performance;

21 (g) a process for conflict resolution; and

22 (h) continuing education requirements in accordance with standards set by the commission.

23 (5) The chief public defender, and deputy public defenders, and the chief appellate defender shall
24 provide for contract oversight and enforcement to ensure compliance with established standards.

25 (6) The commission shall adopt rules to establish reasonable compensation for attorneys contracted to
26 provide public defender and appellate defender services and for others contracted to provide nonattorney
27 services."

28

29 NEW SECTION. Section 8. Effective date. [This act] is effective July 1, 2011.

30

- END -