Montana State Legislature

2013 Session

ADDITIONAL DOCUMENTS MAY INCLUDE THE FOLLWING:

- Business Report
- Roll Call – Attendance
- Standing Committee Reports
- Tabled Bills
- Fiscal Reports etc.
- Roll Call Votes
- Informational Items
- Witness Statements
- Any Documents; such as;
  - *Petitions if any.
  - *Any and all material handed end after the meeting ends.

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BUSINESS REPORT

MONTANA HOUSE OF REPRESENTATIVES
63rd LEGISLATURE - REGULAR SESSION

HOUSE JOINT APPROPS SUBCOM ON JUDICIAL BRANCH, LAW ENFORCEMENT, AND JUSTICE

Date: Tuesday, February 19, 2013
Place: Capitol

Time: 9:00 A.M.
Room: 335

BILLS and RESOLUTIONS HEARD:

EXECUTIVE ACTION TAKEN:

Comments:

REP. Steve Gibson, Chair

HOUSE OF REPRESENTATIVES
Roll Call
JUDICIAL BRANCH, LAW ENFORCEMENT, AND JUSTICE
JOINT SUBCOMMITTEE

DATE: 2/19/2013

NAME	PRESENT	ABSENT/ EXCUSED
SEN. ED WALKER, VICE CHAIR	✓	
REP. RANDY BRODEHL	✓	
REP. KIMBERLY DUDIK	✓	
SEN. ERIC MOORE		EX
SEN. MITCH TROPILA	✓	
REP. STEVE GIBSON, CHAIR	✓	

#1

HOUSE OF REPRESENTATIVES
Roll Call Vote
JUDICIAL BRANCH, LAW ENFORCEMENT, AND JUSTICE JOINT SUBCOMMITTEE

DATE: 2/19/2013 DATE _____ BILL NO Dept. of Corrections DP 202
MOTION: _____

NAME	AYE	NO	If Proxy Vote, check here & include signed Proxy Form with minutes
SEN. ED WALKER	✓		
REP. RANDY BRODEHL	✓		
REP. KIMBERLY DUDIK		✓	
SEN. ERIC MOORE	✓		
SEN. MITCH TROPILA		✓	
REP. STEVE GIBSON, CHAIR	✓		
	4		

#2

HOUSE OF REPRESENTATIVES
Roll Call Vote
JUDICIAL BRANCH, LAW ENFORCEMENT, AND JUSTICE JOINT SUBCOMMITTEE

DATE: 2/19/2013 DATE _____ BILL NO Dept. of Corrections DB 203
MOTION: _____

NAME	AYE	NO	If Proxy Vote, check here & include signed Proxy Form with minutes
SEN. ED WALKER		✓	
REP. RANDY BRODEHL		✓	
REP. KIMBERLY DUDIK	✓		
SEN. ERIC MOORE		✓	
SEN. MITCH TROPILA	✓		
REP. STEVE GIBSON, CHAIR	✓		
	3	3	

HOUSE OF REPRESENTATIVES
Roll Call Vote
JUDICIAL BRANCH, LAW ENFORCEMENT, AND JUSTICE
JOINT SUBCOMMITTEE

#3

DATE: 2/19/2013 DATE _____ BILL NO Dept. of Justice Budget
MOTION: Stand Up for Montana

NAME	AYE	NO	If Proxy Vote, check here & include signed Proxy Form with minutes
SEN. ED WALKER		✓	
REP. RANDY BRODEHL	✓		
REP. KIMBERLY DUDIK	✓		
SEN. ERIC MOORE		✓	
SEN. MITCH TROPILA	✓		
REP. STEVE GIBSON, CHAIR		✓	

MONTANA House of Representatives
Visitors Register
HOUSE JOINT APPROPS SUBCOM ON JUDICIAL BRANCH, LAW ENFORCEMENT, AND JUSTICE COMMITTEE

Tuesday, February 19, 2013

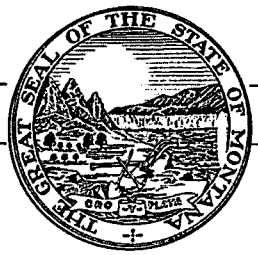
Sponsor: **No Bills to be Heard**

PLEASE PRINT

Name	Representing	Support	Oppose	Info

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

MONTANA PUBLIC DEFENDER COMMISSION



STEVE BULLOCK
GOVERNOR

RICHARD E. "FRITZ" GILLESPIE
CHAIR

STATE OF MONTANA

February 15, 2013

Rep. Steve Gibson
Chair, Section D
House Appropriations
Members, Section D
House Appropriations
Montana State Capitol
Helena, Montana 59620

Resolution Regarding the Limited Acceptance of New Case Assignments by the Office of the State Public Defender

Mr. Chairman and Members of the Committee:

Accompanying this letter is the resolution unanimously adopted by the Public Defender Commission at its February 15, 2013 meeting. This resolution authorizes the Chief Public Defender to take "all necessary and appropriate actions, in conjunction with and in consultation with judges and prosecutors, to limit acceptance of new case assignments, until OPD either receives additional resources to cover caseloads, or caseloads subside to a level that OPD can handle with current resources, or some combination of both."

Hundreds of open cases; the inexperience of the FTE personnel, lawyer and support; the insufficient availability of private sector contract attorneys; and a lack of funds were the contributing factors to the regrettable conclusion that the Helena office must notify the courts and prosecutors in Lewis and Clark, Broadwater, and Jefferson counties that the assignment of more cases must be limited so that the assistance of public defender counsel is not rendered ineffective. This decision was made after months of discussion and deliberation coupled with the urgency of the situation in Region 4. It is well understood that the criminal justice system will probably be disrupted. Charges may have to be dismissed. Jail time may not be imposed without the assistance of counsel. Surcharges, fees, fines, and costs may not be collected. However, the ethical obligations owed by the public defenders trump any disruption caused.

The 1993 third edition of the American Bar Association Standards for Criminal Justice prescribe the level of performance and professional conduct expected of all lawyers engaged in the criminal justice system. Of most significance for the Montana Office of the State Public Defender are the "Defense Function" and the "Appellate Review of Sentences" standards.

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The American Bar Association Standing Committee on Ethics and Professional Responsibility in Formal Opinion 06-441, dated May 13, 2006, concluded that all lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. A PDF copy of the Formal Opinion can be found using "ABA Formal Opinion 06-441" in Google. The nine page opinion is supported by many references to constitutional provisions, U.S. Supreme Court decisions, decisions of other courts, the Rules of Professional Conduct to which all lawyers must adhere including public defenders, the ABA Ten Principles of a Public Defender Delivery System, other ABA opinions, and study reports. The gist of Formal Opinion 06-441 is that if a lawyer's workload is such that if the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients; further, if a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, the supervisor is responsible for the subordinate's violation of the Rules of Professional Conduct.

The second of the Ten Principles of a Public Defender Delivery System says, "Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar." The Ten Principles of a Public Defense Delivery System can be found at the American Bar Association website. The commentary following this principle contemplates that members of the private bar, OPD's pool of contract attorneys, will be available to relieve the caseload pressure off of FTE lawyers when the rendering of quality representation becomes a concern. The commentary further notes that there should be sufficient state funding for the accomplishment of this goal.

The ABA Eight Guidelines of Public Defense Related to Excessive Workloads issued in August 2009 says in the introduction, "Although Formal Opinion 06-441 set forth *some* of the steps that those providing defense services should take when faced with excessive caseloads, neither the ethics opinion nor ABA Standards for Criminal Justice contain the kind of detailed action plan, set forth in these Guidelines, to which those providing public defense should adhere as they seek to comply with their professional responsibilities." The final paragraph of the introduction describes the reasons for developing the Guidelines:

> These Guidelines are intended for the use of public defense programs and for lawyers who provide the representation, when they are confronted with too many persons to represent and are thus prevented from discharging their responsibilities under professional conduct rules. In addition, because these Guidelines contain important considerations for those responsible for indigent defense services, they should be valuable to a number of other audiences, including members of boards and commissions that oversee public defense representation, policymakers responsible for funding indigent defense, and judges who are called upon to address the caseload concerns of those who provide public defense services. Since these Guidelines relate directly to the fair, impartial, and effective administration of justice in our courts, they also should be of special interest to bar leaders, as well as to the legal profession and to the public.

At the inception of the statewide public defender system the Public Defender Commission adopted standards for the performance and professional conduct in the delivery of indigent defense. Those standards can be found on the OPD website under "resources" or in the annual reports published by the agency. Many of those standards were taken from the ABA

Standards for Criminal Justice. All of the standards adopted and modified periodically are in line with the wisdom expressed in the previously cited publications.

OPD standard V.1.B provides that the caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Whenever the Chief Public Defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will, by reason of their excessive size and complexity, interfere with the rendering of quality representation, or the breach of professional obligations, the Chief Public Defender is required to inform the Montana Public Defender Commission, which in turn will inform the Law and Justice Interim Committee, the Legislative Finance Committee, and the Office of Budget and Program Planning and shall take all reasonable steps to alleviate the situation.

Recommendation 16 at page 62 of the October 2009 American University report on the Office of the State Public Defender said, "*When caseloads of staff lawyers are at maximum levels for assuring effective levels of service and contract lawyer resources are exhausted, the Defender Agency must refuse more cases.*" The implementation of this recommendation has been discussed at Commission meetings since, more earnestly since the fall of 2011. One of the first tasks given to the current Chief Public Defender when he went to work in March 2012 was to develop a plan for limiting case assignments when the caseloads overwhelm the lawyers, FTE and contract.

The point where the agency must take steps toward limiting case assignments has been reached in the opinion of the Regional Deputy of Region 4, Helena, the Chief Public Defender, and the Public Defender Commission.

Region 4 provides representation in the 11 courts, 3 district courts and 8 courts of limited jurisdiction, in Lewis and Clark, Broadwater, and Jefferson counties. 3,053 new cases were assigned to Region 4 lawyers in FY2012; 1,103 in the district courts and 1,950 in the other courts. Over 1,900 of those cases carried over into the first quarter of FY2013 and some 774 new cases were assigned in that quarter. 1,300 were carried over into the second quarter, during which more than 650 new cases were assigned. The open cases carried over into the current third quarter were 1,721.

Region 4 is authorized a Regional Deputy, 10 staff attorneys, 4 support staff, and 1 investigator. Since May 2012 the Regional Deputy, 6 staff attorneys, 3 office managers, a receptionist, and the investigator left. Only 2 of the 11 FTE attorneys currently working in the Helena office were working for OPD during the last legislative session. The four district court Judges in Helena each set aside a morning or afternoon for pretrial proceedings in criminal matters. The district court Judges for Broadwater and Jefferson counties set aside specific times each week for those proceedings, as do the Judges in the courts of limited jurisdiction. This means that the FTE attorneys may spend two days or more each week appearing in court on pretrial matters.

Attorneys in the private sector do not provide enough relief. Too few attorneys in private practice are willing to represent indigents at $60 per hour when their hourly rate is twice that amount or more. Those who will cannot absorb the caseload the FTE attorneys cannot. Currently, there are only 13 attorneys in private practice who will accept cases in Region 4. Some are only willing to take specific types of cases. OPD cannot make them take cases they do

not want. For the ethical obligations identified earlier, economics, or for any reason, the contract attorney has the option of rejecting an appointment offered by OPD.

In addition, OPD does not have sufficient funds in its FY 2013 budget to pay contract lawyers $14 per hour more than it is currently paying FTE lawyers. By example, when overhead is incorporated into the calculation, it costs OPD $21,000 per year more for using contract lawyers instead of an FTE lawyer if 1,500 hours is the level of production needed. If overhead is not incorporated, as OBPP does, the cost difference is $25 per hour between $60 per hour for the contract lawyer and $35 per hour for the FTE which increases the annual cost for 1,500 hours of work to $37,500 if done by a contract lawyer.

This letter fulfills the obligation of the Public Defender Commission to notify the Governor, the Supreme Court, and the appropriate Legislators and Legislative committees of this decision regrettably made. Because the Legislature is in session, the President of the Senate, the Speaker of the House, the Majority and Minority leaders, the Judiciary committees, Appropriations, and the Senate Finance and Claims committees are being notified. The Governor is being notified through the Chief Legal Counsel and the Office of Budget and Program Planning. The Chief Justice of the Montana Supreme Court is receiving notice.

Respectfully,

Richard E. Gillespie, Chair
Montana Public Defender Commission

PUBLIC DEFENDER COMMISSION RESOLUTION

Whereas, the Montana Legislature created in 2005 a statewide public defender system to deliver public defender services in all courts in this state; and

Whereas, the system is supervised by the Public Defender Commission (Commission) and administered by the Office of the State Public Defender (OPD); and

Whereas, the Commission is assigned by statute the duty to establish statewide standards for the qualification and training of attorneys providing public defender services to ensure that services are provided by competent counsel and in a manner that is fair and consistent throughout the state; and such standards must take into consideration a number of factors, including:

(a) the level of education and experience that is necessary to competently handle certain cases and case types, such as criminal, juvenile, abuse and neglect, civil commitment, capital, and other case types, including cases on appeal, in order to provide effective assistance of counsel;
(b) acceptable caseloads and workload monitoring protocols to ensure that public defender workloads are manageable;
(c) access to and use of necessary professional services, such as paralegal, investigator, and other services ~~that may be required to support a public~~ defender in a case;
(d) continuing education requirements for public defenders and support staff;
(e) practice standards;
(f) performance criteria; and
(g) performance evaluation protocols.

And,

Whereas, the Commission is assigned by statute the duty to establish policies and procedures for handling excess caseloads; and

Whereas, the Commission has promulgated Standards relating to attorney caseloads, with the goal that caseloads must not be oppressive, and should match counsel's experience, training, and expertise; and the following principles should govern attorney caseloads:

Counsel caseloads should be governed by the following:

A. Individual Public Defender. Caseload levels are the single biggest predictor of the quality of public defense representation. Not even the most able and industrious lawyers can provide effective representation when their work loads are unmanageable. Whenever a salaried or contracting counsel determines, in the exercise of counsel's best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases, will lead to furnishing representation lacking in quality or the breach of professional obligations, the attorney is required to inform the Regional Public Defender's Office, who shall inform the Chief Public Defender. The Chief Defender will then inform the Montana Public Defender Commission.

B. Chief Public Defender. The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Whenever the Chief Public Defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will, by reason of their excessive size and complexity, interfere with the rendering of quality representation, or the breach of professional obligations, the Chief Public Defender is required to inform the Montana Public Defender Commission, which in turn will inform the Law and Justice Interim Committee, the Legislative Finance Committee, and the Office of Budget and Program Planning and shall take all reasonable steps to alleviate the situation.

And,

Whereas, these Standards identify entities to notify during periods when the Legislature is not in session, and the Commission believes it appropriate to notify the Senate and House Judiciary Committees, the Section D Joint Appropriations Subcommittee , the Senate Finance and Claims Committee and the House Appropriations Committee during such time as the Legislature is in session; and

Whereas, the Commission has adopted OPD Policy Number 117, which states that a mission of OPD is to insure that no attorney doing public defender work, either as an employee or as a contract attorney, has a workload of such an amount that clients are not being adequately represented and/or the wellbeing of the attorney is jeopardized; which establishes that regional deputy public defenders and managing

attorneys in each public defender office are responsible for managing the workloads of the attorneys they supervise; which sets out a procedure to follow to monitor caseloads, steps to alleviate workload burdens; and which requires supervising attorneys to keep the Chief Public Defender fully informed; and which requires the Chief Public Defender to report to the Commission as workload problems arise; and

Whereas, the American Bar Association, Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 06-441, dated May 13, 2006, concluded that all lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. If a lawyer's workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients; further, if a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, the supervisor is responsible for the subordinate's violation of the Rules of Professional Conduct; and

Whereas, attorney workloads throughout the public defender system are becoming excessive for a number of reasons outside the control of the Commission and OPD, including, but not limited to:

- Caseloads in criminal and civil cases increased dramatically in Fiscal Year 2012, and continue to increase in Fiscal Year 2013;
- OPD's salary structure is not competitive with the salaries and benefits offered by municipalities, counties, other state agencies, and the private sector;
- OPD has experienced substantial turnover, including the loss of over 30 attorneys, or approximately 27% of its attorney work force, and 25 support staff, or approximately 36% of its staff work force;

And,

Whereas, funds appropriated by the 2011 Montana Legislature have not been sufficient to keep up with the increase in workloads or to alleviate the turnover, and OPD lacks the ability to obtain additional resources during the interim; and

Whereas, attorneys have ethical obligations to avoid caseloads which are excessive, and supervisors have ethical obligations not to require staff attorneys to be responsible for excessive caseloads; and

Whereas, the Chief Public Defender has fully informed the Commission that in certain of the OPD regions, the acceptance of additional case assignments will interfere with the rendering of quality representation, or the breach of professional obligations;

NOW, THEREFORE, BE IT RESOLVED BY THE PUBLIC DEFENDER COMMISSION OF THE STATE OF MONTANA:

1. When conditions exist such that OPD no longer can provide effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to assistance of counsel at public expense, OPD shall limit its case assignments in such a way as to match to the extent possible workload with available resources.

2. The Commission authorizes the Chief Public Defender to take any and all actions necessary to align caseloads with resources, including, but not limited to, taking all necessary and appropriate actions, in conjunction with and in consultation with judges and prosecutors, to limit acceptance of new case assignments, until OPD either receives additional resources to cover caseloads, or caseloads subside to a level that OPD can handle with current resources, or some combination of both.

Adopted February 15, 2013

Richard E. "Fritz" Gillespie, Chair
Montana Public Defender Commission