PUBLIC DEFENDER SYSTEM: FOLLOW UP REPORT

A Report Prepared for the

Legislative Finance Committee

By

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Legislative Fiscal Division

www.leg.mt.gov/css/fiscal

PURPOSE

The purpose of this report is to provide the Legislative Finance Committee (LFC) additional information regarding selected items related to the Public Defender System. At its March 2010 meeting the LFC heard a report about the public defender system and determined that it would like additional information regarding selected action items included in that report. This report provides information on two topics: 1) impacting caseload and costs; and, 2) minimum caseload requirements. The report builds on the previous report and provides the LFC with additional information for potential legislative action.

IMPACTING CASELOAD AND COST

The report titled Public Defender System that was presented at the March 2010 LFC meeting included four items with potential caseload and costs impacts that the LFC determined should receive further research and consideration. Those four items are:

1. Changes to the statutory definition of indigence (including increased statutory guidance on the criteria to be used to determine that someone does not have sufficient resources to hire a private attorney).
2. Changes to who the agency is statutorily mandated to serve. For example, should the agency continue to represent parents and guardians in child removal and placement proceedings or should representation be provided only when termination of parental rights is sought?
3. Review of statutory penalties for some offenses where incarceration is possible but rarely ordered. In these cases, the potential for incarceration (loss of liberty) drives the need for a public defender to represent eligible individuals. If incarceration was not included in statute as a potential penalty, a public defender would not be required. Agency staff and the Public Defender Commission have expressed some interest in this area.
4. Potential changes included in commission chairman Sherwood's correspondence dated January 29, 2010 to "the front-line troops".

The following sections of this report discuss items one through three separately.

Indigence

The legislation creating the statewide public defender system established two avenues through which individuals could be determined indigent or meeting the financial criteria to receive state funded services. Section 47-1-111 (3), MCA states that an applicant for services is indigent if:

1. The applicant's gross household income is at or less than 133 percent of the most current federal poverty level (FPL) guidelines, or
2. The disposable income and assets of the applicant and members of the applicant's household are insufficient to retain competent private counsel without substantial hardship.

Each of these avenues is discussed in more detail in the following paragraphs.

Household Income

Statute provides that an individual is eligible for public defender services if the gross household income is at or below 133 percent of the current FPL. Under the most current federal guidelines, for 2010 this equates to an income level of $29,326.50 for a family of four or $14,403.90 for one individual. The definition of what gross household income is comprised of is not contained in statute, administrative rules, or department policy. The department's application for services does list a number of categories of income including wages, several sources of unearned income, and publicly funded benefits such as Temporary Assistance for Needy Families and food stamps. The application form indicates that applicants may be required to provide proof of income (such as pay stubs and tax returns). The various public defender regions vary to some degree in frequency and extent to which proof of income is required. Legislative staff has requested clarification of verification process.

Changes to this avenue of eligibility that the legislature could consider include:

- Defining gross household income or any income exclusions that should be considered such as exclusion of public assistance benefits or disability income

- Requiring that proof of income be provided in all cases

Hardship

In adopting the Public Defender Act, the legislature recognized that there were cases where the cost of defense counsel could exceed an individual's financial resources even for those individuals above 133 percent of the FPL and provided for a second avenue that may be used to determine indigence and eligibility for services. While statute provides for this option it does not provide guidance, criteria, or a definition of what constitutes a hardship. Additionally, neither the department's administrative rules nor policy provide guidance or definition of the criteria that constitutes a hardship. The department's policy (Appendix A) states:

> "This test is rather subjective in that the IDS must make the determination that the applicant can obtain, without substantial hardship, competent private legal counsel by paying legal retainers from net monthly income or borrowings on assets."

It is legislative staff understanding that no guidelines or criteria have been provided to staff performing the eligibility determination leaving room for a great deal of individual interpretation and variance among regions of the state. Eligibility determinations made under this option are reviewed by the Regional Deputy Public Defender. Applicants may also request that the court review eligibility determinations. The current process increases the potential for inconsistency in the determination of indigence among areas within the state.

Criteria that might be appropriate for use in determining eligibility under this provision include:

- Defining which incomes sources, expenses, and debt payment should be included. Currently, department policy defines disposable income as gross household income less all expenses (rent, utilities food, medical and loan payments, child support, etc.).
- Application of financial ratios such as:
    - A debt to income ratio. For example, those with a debt to income ratio of 30 percent or less would not be eligible and those with a debt to income ratio of 30 percent or more would be eligible. Additionally, using different ranges of this ratio in combination with what offense is charged and the typical cost of obtaining private counsel for this offense might be beneficial
    - A debt to asset ratio. This ratio could be used as an indicator of the applicant's ability to borrow against existing assets. And, if used injunction with the debt to income ratio, the applicants' ability to repay a lender

If the legislature wishes to see criteria such as that above used when determining eligibility it has two options:

1. Propose legislation that would require the department to define income and expenses and use financial ratios for eligibility determination purposes, combined with using proof of eligibility for public assistance programs such as Medicaid, food stamps, and temporary assistance for needy families (TANF) as the basis for eligibility for public defender services. Require that the department adopt rules to implement this statutory provision.
2. Rather than propose legislation as stated in number 1 above the LFC could make this as a recommendation to the department. The agency could then choose whether or not to implement the LFC's recommendation in full, in part, or not at all.

The legislature could also choose to take no action at this time and allow the department to continue to implement existing statutes as the department deems appropriate.

Service Mandate

The right to competent counsel is a right guaranteed in the constitution and the bulk of the services provided by the public defender system are to fulfill constitutional requirements. However, the legislature also included some statutory provisions requiring representation by a public defender. The following requirements for the provision of public defender services are included in statute but may not be constitutionally required services. Statute states that services must be provided for:

- A party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in 40-6-119, MCA

- A parent, guardian, or other person with physical or legal custody of a child or youth in any removal or placement proceeding pursuant 41-3-422, MCA
- A parent or guardian in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112, MCA
- A witness in a criminal grand jury proceeding, as provided in 46-4-304, MCA
- A person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5

A complete legal analysis of whether or not there is a constitutional mandate to provide services in these situations has not been completed. In the event the LFC wishes to proceed with statutory changes eliminating the provision of public defender services in these situations, it may wish to request a formal legal analysis prior to or in conjunction with the drafting of legislation.

Jail Time

Part of the LFC action from the March meeting was to further review offenses that carry the potential for jail time but where jail time was rarely imposed. Since the potential for incarceration (loss of liberty) drives the need for a public defender to represent eligible individuals, if incarceration is not included in statute as a potential penalty a public defender would not be required. This is an item that agency staff and the Public Defender Commission expressed interest in reviewing.

State Statute Misdemeanors

In an effort to identify statutes for review, legislative staff took two approaches: 1) requesting data from the Judicial Branch central repository for court data; and, 2) requesting a list of suggestions developed by the Office of Public Defender. The data from the court central repository was then sorted by legislative staff based upon the number of times the offense was charged and a calculated percentage of charges that resulted in jail time being ordered. In order to provide a more workable number of offenses for consideration by the LFC staff included offenses that were charged more than 500 times in calendar year 2009 and resulted in jail time being ordered less than 33 percent (or one third) of the times the offense was charged. Applying these criteria resulted in a list of sixteen items for review by the LFC. Those items are listed in the table below.

Office of Court Administrator Information For Office of Public Defender Report to the Legislative Finance Committee Misdeamour Offenses Frequency of Jail Time Ordered - State Statutes Offenses Charged More Than 500 Times in Calendar Year 2009								
Statute	Statute_Literal	Jail_Min	Jail_Max	CY2009 Charges Filed	Convictions to Date	Jail Time Ordered as Condition of Sentence	Jail or Portion of Jail Time Suspended	Jail as % of charged
61-6-302(2) [1st]	Fail To Carry Proof Or Exhibit/Insurance In Vehicle - 1st Offense	0	10 Days	11,698	2,723	478	461	4%
45-6-316	Issuing A Bad Check - Misd	0	6 Mo	1,024	380	63	57	6%
61-6-301(4) [1st]	Operating Without Liability Insurance In Effect - 1st Offense	0	10 Days	11,263	4,286	706	679	6%
61-7-108	Fail To Give Notice Of Accident By Quickest Means/Apparent Damage Over $500	0	20 Days	913	471	83	78	9%
61-5-102(1) [1]	Driving Without a Valid Drivers License - Expired Less Than 180 Days	0	6 Mo	3,508	2,580	407	386	12%
45-9-102(1)	Criminal Possession Of Dangerous Drugs	0	5 Yrs	1,348	601	182	167	14%
61-5-102(1) [2]	Driving Without a Valid Drivers License - Expired More Than 180 Days	0	6 Mo	941	708	149	140	16%
45-10-103	Criminal Possession Of Drug Paraphernalia	0	6 Mo	1,805	928	336	309	19%
61-6-302(2) [2nd]	Fail To Carry Proof Or Exhibit/Insurance In Vehicle - 2nd Offense	0	10 Days	912	474	174	157	19%
61-6-302(2) [3rd+]	Fail To Carry Proof Or Exhibit/Insurance In Vehicle - 3rd Or Subsequent Offense	0	6 Mo	575	290	141	135	25%
45-5-206 [1st]	Partner Or Family Member Assault -1st Offense	24 Hrs	1 Yr	2,075	778	533	493	26%
45-7-301	Resisting Arrest	0	6 Mo	602	261	169	145	28%
45-6-101(3) [1]	Criminal Mischief - Misdemeanor	0	6 Mo	1,237	605	356	336	29%
61-6-301(4) [2nd]	Operating Without Liability Insurance In Effect - 2nd Offense	0	10 Days	2,088	1,269	639	585	31%
45-5-201	Assault - Misdemeanor	0	6 Mo	1,590	858	496	467	31%
61-8-301(1)(a)	Reckless Driving	0	90 Days	1,285	910	423	401	33%

Legislative staff also requested that the OPD provide a list of offenses for consideration of removal of jail time. The OPD provided a list of seven items (one of which relates to two different statutes). Three of the items identified by OPD were also included in the list of 16 offenses developed from court data.

Office of Court Administrator Information For Office of Public Defender Report to the Legislative Finance Committee Misdeamour Offenses Frequency of Jail Time Ordered - State Statutes Office of Public Defender List of Offenses for Review								
Statute	Statute_Literal	Jail_Min	Jail_Max	CY2009 Charges Filed	Convictions to Date	Jail Time Ordered as Condition of Sentence	Jail or Portion of Jail Time Suspended	Jail as % of charged
61-6-302(2) [1st]	Fail To Carry Proof Or Exhibit/Insurance In Vehicle - 1st Offense	0	10 Days	11,698	2,723	478	461	4%
45-6-316	Issuing A Bad Check - Misd	0	6 Mo	1,024	380	63	57	6%
61-6-301(4) [1st]	Operating Without Liability Insurance In Effect - 1st Offense	0	10 Days	11,263	4,286	706	679	6%
45-8-111	Public Nuisance	0	6 Mo	35	12	3	2	9%
45-6-301(1) [1st]	Theft - 1st Offense	0	6 Mo	2,902	1,815	1,020	953	35%
45-8-101(2)	Disorderly Conduct	0	10 Days	3,587	2,592	1,397	1,045	39%
61-5-212(1)(i)	Driving a Motor Vehicle While Privilege To Do So Is Suspended Or Revoked - OPD sugggest maintain jail time for DUI related offense, remove for non-payment of child support or court fines	2 Days	6 Mo	7,761	4,470	3,052	2,617	39%
45-8-114	Failure to Yield Party Line	0	10 Days	0	0	0	0	0

The calendar year 2009 data from the court indicated that one of the items identified by OPD (failure to yield party line, 45-8-114, MCA) was never charged during the year. Given that there are no multiple party phone lines in operation within the state at this time and no charges are made, no public defender resources would be saved.

The lists discussed above were provided by staff to the Judicial Branch, Office of Public Defender, Department of Justice, Montana Association of Counties, and the Montana County Attorneys Association with a request for comment. As of this writing the comments and concerns received indicate concern that the data provided by

the court is not accurate and generally, is not supportive of this concept. Copies of any written comments received are attached to this report in Appendix B.

Local Ordinance Misdemeanors

In addition to misdemeanors included in statute that provide for jail time, there are also local government ordinances that provide for the potential of jail time (and public defender). Because the legal reference and specific verbage assigned to these ordinances varies by location, it is somewhat difficult to group like ordinances. The list of local ordinances with jail time is included in Appendix C and is based upon data provided from the court central data repository. A review of this list shows that open container, speeding, and animal control related offenses are the most common local ordinances with a potential for jail time to be ordered.

To impact the provision of services in cases arising from local ordinances the LFC could:

- Consider statutory amendments (Title 7, Local Government) that would restrict local government powers
- Consider statutory amendments that would require local governments to provide public defenders in these cases or to reimburse the state for the cost of these services

Financial Implications

The Office of Public Defender does not currently have cost data specific to representation in these types of cases available. Given that about 59 percent of the OPD budget is personal services costs, not including the costs of contracted attorneys, in order to impact the agency expenditures the reduction in workload must be great enough to eliminate positions or reduce the need for contract attorneys. Currently, the department estimated hourly cost for an attorney employed by the state is between $70 and $75 per hour and the base cost for a contract attorney is $60 per hour. The average cost to hire one full time equivalent attorney for FY 2010 was estimated at about $72,470 in the 2011 biennium budget. Some of the more common misdemeanors were charged about 11,500 times in calendar year 2009 but without specific data to translate this to defense cost it is difficult to estimate savings. Because it is likely that this offense could be only one of a number of charges against a client, there may still be a need for public defender representation related to other charges. Thus, the savings to the public defender system is likely to be marginal savings that enable the system to operate within the current resource allocation rather than savings that result in the reduction of positions.

MINIMUM CASELOAD REQUIREMENTS

In addition to the items impacting caseload and costs, the LFC also took action to gather additional information related to an American University (AU) report finding on minimum caseload requirements.

Statute (47-1-202, MCA) assigns a number of duties to the chief public defender among them are:

1. Act as secretary to the commission and provide administrative staff support to the commission
2. Establish processes and procedures to ensure that office and contract personnel use information technology and caseload management systems so that detailed expenditure and caseload data is accurately collected, recorded, and reported
3. Establish administrative management procedures for regional offices
4. Establish procedures for managing caseloads and assigning cases in a manner that ensures that public defenders are assigned cases according to experience, training, and manageable caseloads and taking into account case complexity, the severity of charges and potential punishments, and the legal skills required to provide effective assistance of counsel
5. Maintain a minimum client caseload, as determined by the commission
6. Establish and supervise a training and performance evaluation program for attorneys and nonattorney staff members and contractors
7. Actively seek gifts, grants, and donations that may be available through the federal government or other sources to help fund the system; and

8. Perform all other duties assigned by the commission

Statute provides that the Chief Public Defender maintain a minimum caseload as determined by the commission. At the time of the March report the commission had established a minimum caseload for the Chief Public Defender of five cases. Statute also provides that each Regional Deputy Public Defender shall maintain a minimum caseload as determined by the Chief Public Defender.

The AU report includes a recommendation that the statutory requirement that the Chief Defender, Contract Manager, and Regional Public Defenders carry a caseload be removed. This recommendation was made in conjunction with concerns about completion of management duties by those employed in management positions within the system. The AU report recommendations indicate that system improvements are desirable in areas related to caseload data, management procedures for regional offices, and completion of employee and contractor performance reviews.

One difficulty with establishing caseload is the variance in complexity and time for completion among cases. The minimum caseload of five for the Chief Public Defender could be relatively insignificant if the cases are less complex cases involving misdemeanor charges or an overwhelming caseload if the cases are five complex cases involving homicide or the death penalty. The impact of this minimal caseload standard is largely dependent upon how staff within the system choose to assign cases.

At its April meeting the public defender commission considered a policy for regional public defender caseloads. This policy expresses guidelines for the maximum caseload for regional public defenders in terms of the maximum number of hours per year. The policy provides for a maximum caseload that varies among regions and from 600 to 1400 hours per year or a range equivalent to between 0.28 to 0.67 FTE per year. Assuming the remaining hours are allocated to management functions the percentage of the position that would be devoted to management duties would range from about 75 percent to as little as 33 percent. Per the OPD policy among the factors that will be considered with regard to regional public defender's caseloads are size of region, number of personnel supervised, and management structure and travel requirements of the region.

The March report to the LFC included four options for LFC action. The LFC could:

1. Remove the requirement from statute as recommended by the AU report. However, removal of this requirement from statute may not change the practice within the system with regard to number or complexity of casework completed by individuals in these positions.
2. Amend statute to define the term "minimum client caseload". The legislature may also wish to go a step further and define the maximum client caseload of these management positions. Client caseload could be defined in terms of number and type or complexity of cases assigned to managers.
3. Provide comments, suggestions, and recommendations regarding management functions that should be achieved and client caseload limits for managers. Suggestions or recommendations by the legislature that are not included in statute are not binding upon the agency and may or may not result in changes.
4. Do nothing – The legislature could chose to take no action on this issue at this time.

Given that the commission and staff of the OPD are pursuing improvements consistent with the recommendations included in the AU report, rather than pursuing one of the options outlined in the March report the LFC may wish to consider legislation requiring periodic (semi-annual or annual) reports to the LFC regarding:

1. Managerial caseloads including the number and complexity of managerial caseloads
2. The status of completion of managerial functions such as performance reviews, employee and contractor recruitment and retention, and operational challenges experience by each region
3. Status and progress in use the of information systems and development of budgeting and managerial data
4. Other items of interest to the LFC

CONCLUSION

This report builds upon the report about the public defender system provided to the LFC in March 2010 and discusses options for impacting caseloads and costs. The report also discusses topic of minimum caseloads for managerial staff. The various options for LFC consideration that were previously discussed in this report are summarized below with initial decision points posed as questions for the LFC action. The LFC may choose to take action on some or none of these items.

1) Does the LFC wish to consider changes to the statutory provision for determination of indigence based upon household income? If so, the LFC could propose:
   a) Defining gross household income or any income exclusions that should be considered
   b) Requiring that proof of income be provided in all cases

2) Does the LFC wish to consider changes to the statutory provisions for determination of indigence based upon hardship? If so, the LFC could:
   a) Propose legislation that would require the department to define income and expenses and use financial ratios for eligibility determination purposes, combined with using proof of eligibility for public assistance programs such as Medicaid, food stamps, and temporary assistance for needy families (TANF) as the basis for eligibility for public defender services. Require that the department adopt rules to implement this statutory provision
   b) Make a recommendation to the department regarding the criteria that should be used when determining eligibility under the statutory provision related to hardship. The agency could choose whether or not to implement this recommendation in full, in part, or not at all

3) Does the LFC wish to consider changes to the statutory provisions specifying who will be provided a public defender? If so, the LFC may wish to request a formal legal analysis whether or not there is a constitutional mandate for public defense services in certain circumstances.

4) Does the LFC wish to consider statutory changes removing the potential for jail time from some misdemeanor offenses? If so, the LFC may propose changes to all, some, or none of the offenses listed in the tables on page 5.

5) Does the LFC wish consider statutory changes impacting the potential for jail time attached to local government ordinances? If so, the LFC could propose:
   a) Changes to Title 7 (Local Government) that would restrict local government powers
   b) Changes that would require local governments to provide public defenders in these cases or to reimburse the state for the cost of these services

6) Does the LFC wish to take action regarding the AU recommendation that certain minimum caseload requirements be removed from statute? If so, the LFC may wish to:
   a) Propose legislation to remove the requirement from statute as recommended by the AU report.
   b) Propose amendments to statute to define the term “minimum client caseload”. The legislature may also wish to go a step further and define the maximum client caseload of these management positions.
   c) Provide comments, suggestions, and recommendations regarding management functions that should be achieved and client caseload limits for managers. Suggestions or recommendations by the legislature that are not included in statute are not binding upon the agency and may or may not result in changes.
   d) Propose legislation requiring periodic (semi-annual or annual) reports to the LFC regarding:
      i) Managerial caseloads including the number and complexity of managerial caseloads
      ii) The status of completion of managerial functions such as performance reviews, employee and contractor recruitment and retention, and operational challenges experience by each region
      iii) Status and progress in use the of information systems and development of budgeting and managerial data
      iv) Other items of interest to the LFC

Office of the State Public Defender
Administrative Policies

Subject: **Determination of Indigence**	Policy No.: **105**
Title **47**	Pages: **7**
Section: **1-111**	Last Review Date: **2-20-09**
Effective Date: **7-1-06**	Revision Date: **7-1-09**

1.0 POLICY

1.1 The Office of the State Public Defender (hereinafter OPD) will provide public defender services to applicants that qualify under 47-1-111, MCA.

1.2 When a court orders OPD to assign counsel, the office shall immediately assign counsel prior to a determination of indigence.

2.0 PREPARATION AND DELIVERY OF INDIGENCE FORM

2.1 All district and limited courts will 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.

2.2 The Central Office shall provide the Regional Public Defender Offices with Indigence Determination (ID) forms as prepared by OPD and approved by the Montana Public Defender Commission.

2.3 Regional Deputy Public Defenders or their staff will deliver forms to all jails and courthouses and any other venue deemed appropriate.

2.4 An applicant for public defender services will be assigned provisional counsel prior to the determination of the applicant's indigence.

2.5 An applicant for public defender services must complete the ID form, sign it, and return it to the Regional Public Defender Office within ten days of appointment. The office will move to rescind the appointment if the required materials are not provided.

2.5.1 An applicant may be required to provide documentation of income, which might include pay stubs or tax returns.

2.6 Indigence Determination Specialists (IDS), appointed by each Regional Public Defender Office, will aid any applicant requesting assistance. Information on the ID form is confidential.

3.0 DETERMINATION OF INDIGENCE

3.1 The IDS will review the ID form, fill in any missing information, and assure that the ID form is signed by the applicant.

3.2 The IDS will conduct two tests to determine if an applicant is eligible for state public defender services.

A. The first test is a "Gross Household Income Test" that gathers all gross income from all occupants in the applicant's household. This Gross

Household Income is compared to the Gross Income Guidelines as provided in Attachment A to this policy. If the Gross Household Income dollar amount is less than the dollar amount listed on the Gross Income Guidelines, the applicant passes this test. If the applicant fails the first test the IDS must go to the second test.

B. When the IDS determines that an applicant seeking public defender services is not clearly indigent within the meaning of subsection A above, the IDS shall then determine if the applicant qualifies because retaining competent private counsel would result in substantial hardship to the applicant or his household. This second test reviews both the disposable income and assets of the applicant. Disposable income is Gross Household Income less all expenses (rent, utilities, food, medical and loan payments, child support, etc). Assets are things that can be used as collateral to obtain loans, like homes, land, automobiles, investments, etc. This test is rather subjective in that the IDS must make the determination that the applicant can obtain, without substantial hardship, competent private legal counsel by paying legal retainers from net monthly income or borrowings on assets. The crime charged shall also be a factor considered in this determination.

3.3 If the applicant passes either test they are eligible for services. If qualifying under subsection A or B above, the person may, as appropriate, be asked to repay some or all of the costs of representation.

3.4 If qualified under either subsection, the court before which the person is appearing will be advised that the person has qualified for public defender representation.

3.5 If the IDS has a question regarding an applicant's eligibility for public defender services, the Indigence Determination Officer (as appointed by the Chief Public Defender) will make a ruling.

3.6 If the applicant is eligible for public defender services, a written notice of approval shall be sent to the applicant, and the appropriate public defender office, contract attorney, or conflict coordinator.

3.7 Applicants approved for public defender services will be subject to eligibility review by the IDS every six months. If an applicant is found to be financially able to provide for their own defense they will be notified by the IDS and parts 3.8 through 3.11 of this policy and procedure will apply.

3.8 If the applicant does not qualify for public defender services, a written notice of disqualification and notice of the right to have the court review the finding will be sent to the applicant.

3.9 The Regional Deputy Public Defender shall immediately notify the court of record when it is determined that an applicant does not qualify for public defender services (refer to Attachment B, Standard Letter of Notification of Denial, and Attachment C, Motion to Rescind Appointment).

3.10 The judge must rescind the appointment of counsel when notified that an applicant does not qualify for public defender services.

3.11 A judge may overrule a determination that an applicant is not eligible for public defender services. If overruled, OPD will provide public defender services to the applicant.

4.0 RECOVERY OF ATTORNEY FEES BY OPD

4.1 If the applicant qualified under 3.2, and the applicant is found guilty by plea or trial, the Regional Deputy Public Defender or his/her designee shall determine the amount owed for public defender services.

4.2 If the defendant has some ability to pay, then in determining both the amount and method of payment any payment plan must take into consideration the financial resources of the defendant and the nature of the burden that payment of costs will impose.

4.3 The hourly rate for public defender services is set at $67.00 plus third-party costs;

A. The amount of time spent on a case shall conform to the amount of time reported on the public defender's timesheet.

B. A copy of the bill along with notification of where payments shall be made will be provided to the client and placed in the client's file.

4.4 If the person is acquitted or the charges are dismissed, no reimbursement will be sought.

5.0 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

2009

Number of Persons in Household	Gross Household Income Guidelines
1	$14,404
2	$19,378
3	$24,352
4	$29,327
5	$34,301
6	$39,275
7	$44,249
8	$49,223
Each Additional Member Add:	$4,974

ATTACHMENT B

STANDARD LETTER OF NOTIFICATION OF DENIAL

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 indigency questionnaire, 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 indigency questionnaire available to the judge and the prosecutor for inspection.

Sincerely,

Regional Deputy Public Defender
Region (#)

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 _____, 200__.

_____
(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 _____, 200___.

_____

Appendix B

From: Lambert, Marty [mailto:Marty.Lambert@gallatin.mt.gov]
Sent: Wednesday, May 26, 2010 3:05 PM
To: Gervais, Pat (LEG)
Subject: LFC consideration of jail time for misdemenaor offenses

Pat : attached please find a letter from me on behalf of the Montana County Attorneys Association. Thanks and let me know if I can be of further help.

Marty Lambert, Gallatin County Attorney

Phone: 406.582.3745 Fax: 406.582.3758

Gallatin County Attorney
Marty Lambert, County Attorney

Judge Guenther Memorial Center
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May 26, 2010

Pat Gervais
Legislative Fiscal Division
P.O. Box 201711
Helena, MT 59620-1711

Sent by e-mail attachment to pagervais@mt.gov; original follows by First Class U.S. Mail

Dear Ms. Gervais:

Re: Statutory amendments to remove jail time from misdemeanor offenses

I write in response to the LFC consideration of elimination of potential jail time for certain misdemeanor offenses. I make this response on behalf of the Montana County Attorneys Association as well as my own office.

The list of offenses for which statutory change is being considered contains some very serious crimes such as 1st Offense Partner and Family Member Assault. All domestic violence situations are potentially dangerous. A judge needs the ability to jail a person convicted of this offense. Further, as a person arrested for Partner and Family Member Assault cannot be admitted to bail without appearing before a judge, the defendant is going to serve some jail time whenever that defendant has been arrested for that offense.

It takes taxpayer time and money to investigate, prosecute and defend criminal cases. It seems to me and my fellow county attorneys that the Office of Public Defender needs to do its job and defend persons accused of all the crimes on the list. Law enforcement does not shy away from its responsibilities to investigate these offenses. We county attorneys do not seek to make any of these crimes civil offenses to spare our time in prosecuting persons who commit these offenses. As the State has assumed responsibility for funding OPD the State should provide sufficient revenues for OPD to properly defend persons accused of these offenses.

In our criminal justice system judges are given the responsibility to sentence criminal defendants. When sentencing an individual offender judges weigh factors such as the severity of the offense, the offender's criminal record, and input from the victims. If, given all the evidence available at the time of sentencing, a judge believes the offense merits jail time then that particular offender ought to serve time in jail. It is important that offenders be held accountable for their crimes. Legislative fiscal considerations ought not to trump the importance of holding an individual accountable to society through imposition of a jail sentence.

We oppose LFC's consideration of removing possible jail time through amendment of these offenses. Thanks very much for the opportunity to provide input. If I can be of further help please contact me.

Marty Lambert
County Attorney

Appendix B

From: Jim Smith [mailto:jimesmith@mt.net]
Sent: Wednesday, May 26, 2010 8:36 AM
To: Gervais, Pat (LEG)
Subject: Removal of Jail Time

Ms. Gervais....Pat,

Please accept these comments on behalf of the Montana County Attorneys Association. Thanks for the invitation to comment on the proposal to reduce the workload at the Office of Public Defender by eliminating jail time for certain offenses.

I sent your request for comments to all of the county attorneys and received a number of insightful replies that I'll share with you in this email.

First, there are questions with regard to the data provided by the Office of Court Administrator. I'll share the comment below with you. It is from Mark Westveer, Judith Basin County Attorney:

Jim I reviewed the statistics you sent to me. I didn't get any memo from the Public Defender. However, I reviewed the statistic sheet with our Justice of the Peace as they are being asked as an organization for comment as well. The statistics kept simply can't be correct. I know of no case where any county attorney or judge would not impose jail time on a resisting arrest charge and yet the conviction rate is reported at about 33%, and the jail time imposed for those convictions is only about 63%. If one looks through the list there are more examples of the same thing. The record keeping is obviously flawed somehow. I am not smart enough to know how it happened. What does everyone else say? I would expect you have received the same from many other CA's as I do not generally have original thoughts.
Mark

I (Jim Smith) am not in a first hand position to evaluate the accuracy of the data provided; but I would urge another look at the data; or a look at other, similar data that might be available elsewhere, in other agencies. In any case, the county attorneys would request that no action be taken with regard to eliminating jail time until the questions about the information presented are resolved to the satisfaction of all parties.

In terms of the actual offenses for which jail time is proposed to be eliminated, quite a bit of concern was expressed over eliminating jail time for the vast majority of these offenses. Typical and illustrative is the following comment from Flathead County Attorney, Ed Corrigan:

Good morning Jim:
Eliminating jail time for 1st offense No Insurance and Drug Paraphernalia makes some sense. However, given the number of people who are hit by uninsured motorists, there should be jail time at least for the 3rd, even the 2nd, No Insurance offense. To eliminate the possibility of jail time for the other offenses listed, including Reckless Driving (which can be a significant offense particularly when alcohol is involved), is absurd. I think law enforcement would be somewhat peeved if Resisting Arrest was nothing more than a civil infraction Misdemeanor assaults can, of course, be very serious, albeit short of a felony, and call for jail time. And as far as Partner Assault goes, how often is a first offense the first time an offender has assaulted his wife—not very; of course this offense should carry jail time as a possible offense. I think we need to take a position on this issue and not let the OPD jam it through the legislature simply as a cost saving measure.
ED

Mr. Corrigan's comment--- that it is very seldom that an abuser's first abuse (PFMA) comes to the attention of law enforcement--- is quite consistent with the testimony on DUI given to the Law and Justice Interim Committee over the last 6-8 months. The LJIC has heard testimony from individuals in the WATCH program that they drove drunk repeatedly, in some cases for years, before getting their first DUI.

The county attorneys of Montana believe that swift, certain, timely punishment can and does have a deterrent effect on criminals and potential criminals. The combination of enforcement, treatment and prevention can be successful in reducing crime. It is not wise to undercut the value of enforcement by the blanket elimination of jail time for certain offenses.

Thanks once again for the invitation to offer these comments. I am available for any questions or follow up you may have; as are any and all of the county attorneys.

Jim Smith
443-1570 (O)
949-1002 (cel)

Appendix B

From: Kelsen Young [mailto:kyoung@MCADSV.com]
Sent: Thursday, May 27, 2010 4:13 PM
To: Gervais, Pat (LEG)
Subject: RE: Report
Importance: High

Pat,

Thank you for talking with me the other day about the proposal that the Legislative Finance Committee will be considering at their next meeting in regards to removing jail time for certain misdemeanor offenses. I would like to express our concerns regarding a number of the misdemeanor crimes that are being reviewed. We feel strongly that the jail time option should not be removed for the following statutes: 1) 45-5-206 Partner Family Member Assault; 2) 45-6-103 Criminal Mischief; 3) 45-5-201 Assault; 4) 61-8-301 Reckless Driving. Most importantly, we strongly oppose the removal of jail time for the PFMA statute and the misdemeanor Assault statute. The fact that jail time is a possibility for sentencing, and yet does not often result in actual jail time served is an indication that our current system does not deal appropriately with PFMA situations – not that we should remove jail time as a potential sentence. The jail time served in PFMA situations is crucial to providing safety for victims of family/domestic violence and holding offenders accountable.

I will be providing much more extensive comments to the Committee during the next committee hearing and will provide a further written statement at that time.

Thank you for incorporating our feedback in this process. Please let me know if you have any questions.

Kelsen Young
Executive Director
Montana Coalition Against Domestic and Sexual Violence
kyoung@mcadsv.com
(406) 443-7794 ext 115

From: Gervais, Pat (LEG) [mailto:pagervais@mt.gov]
Sent: Tuesday, May 25, 2010 2:46 PM
To: Kelsen Young
Subject: Report

Kelsen,
Just wanted to let you know there will be an opportunity for public comment (about the Office of Public Defender report) at the Legislative Finance Committee (LFC) meeting on June 14 and 15.
Pat

Pat Gervais
Senior Fiscal Analyst
Montana Legislature
pagervais@mt.gov
406-444-1795

The Supreme Court of Montana
Office of Court Administrator

Lois Menzies
Court Administrator
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TO: Pat Gervais, Senior Fiscal Analyst

FROM: Lois Menzies, Court Administrator

DATE: June 7, 2010

SUBJECT: Clarification of Court Data for Certain Offenses

Thank you for the opportunity to offer clarification on your follow-up report on the Office of Public Defender and on the comments received to date. Our comments are in reference to your table entitled "Office of Court Administrator Information For Office of Public Defender Report to the Legislative Finance Committee."

- We believe that it is important to clarify for readers that the Office of Court Administrator (OCA) did not compile the table referenced above and that the table was not part of the report we submitted in response to your request for information. We did supply the numbers for CY 2009 charges filed, convictions to date, jail time ordered as condition of sentence, and jail or portion of jail time suspended; however, we did not calculate the final column of the table, "Jail as % of charged."

- The Montana County Attorney Association expressed concerns about the accuracy of the OCA data. These concerns were triggered by comments submitted by Mark Westveer, Judith Basin County Attorney. We called Mr. Westveer to discuss the data and his concerns. We respectfully submit that the last column of your table – "Jail time as % of charged" – may be somewhat misleading because only partial conviction and sentencing data were available for charges filed in CY 2009. In other words, not all charges filed in CY 2009 were resolved at the time that the snapshot of the data was taken in March. We believe that it would be more accurate to calculate jail time as a percentage of <u>convictions to date</u> rather than as a percentage of charges filed.

Thank you for sharing these comments with the Legislative Finance Committee. Please let us know if you need additional information.

Appenix C

Office of Court Administrator Information							
For Office of Public Defender Report to the Legislative Finance Committee							
Misdeamour Offenses Frequency of Jail Time Ordered - Local Ordinances							
Calendar Year 2009							
Category	Ordinance	Ordinance Description	CY2009 Charges Filed	Convictions to Date	Jail Time Ordered as a Condition of Sentence	Jail or Portion of Jail Time Suspended	Jail as % of charged
Local	6.8.1220	Abandonment	6	1	1	1	17%
Local	04390-015	Alcoholic Beverage in Park Without a Permit	4	4	1	1	25%
Local	Ord 201-A	Allow Trash, Tall Weeds, Litter & Junk Vehicles on Property	4	3	2	2	50%
Local	8.51.030	Allowing Rubbish To Accumulate	52	10	8	8	15%
Local	27-601(b)(3)	CI Zoning - Open Storage of Junk Vehicle(s) over 5 Consecutive Days	1	1	1	1	100%
Local	12-40-10	City Park After Hours	59	42	1	1	2%
Local	15.01.010.304.6	Exterior Walls Maintained	2	1	1	1	50%
Local	15.01.010.R105.1	Fail To Obtain A Permit Residential	1	1	1	1	100%
Local	19-205	Hunting,trapping,firewood, motor vehicle or any activity inconsistent with park policy prohibited	6	5	1	1	17%
Local	15.05.010	IPMC Violation	3	1	1	1	33%
Local	18-701	Loitering/Prowling	25	18	6	4	16%
Local	13-423	No City Business License	9	3	1	1	11%
Local	3-202	Open Container	909	751	18	8	1%
Local	9-26-20	Open Container	753	554	2	1	0%
Local	6-1-16	Open Container	20	20	3	2	10%
Local	5.12.100	Open Container	5	4	1	1	20%
Local	9.10.010(A)	Park Hours	12	5	1	1	8%
Local	6-1-12	Pedestrian Interference	126	114	106	13	10%
Local	18-202	Poss. of BB Gun/Slingshot	8	7	2	1	13%
Local	8.60.010	Public Criminal Nuisance - Appliances	13	3	3	3	23%
Local	6-10-02	Public Drinking, Display, Exib Prohibited	14	11	2	2	14%
Local	6-3-2	Public Drinking/Public Display of Alcohol	206	178	149	22	11%
Local	18-306	Public Urination	85	72	2	1	1%
Local	6-1-13	Public Urination	37	35	32	5	14%
Local	18-309	Public Urination and Defecation is Prohibited	38	28	3	1	3%
Local	27-601-(a)(8)	Resd Zoning - Open Storage of Junk/Salvage/Trash over 5 Consecutive Days	9	2	1	1	11%
Local	27-601(a)(2)	Resd Zoning - Open Storage/Parking of Junk Vehicle(s) over 5 Consecutive Days	17	8	2	2	12%
Local	9.3.10.020	Skate Park Violation	5	4	1	1	20%
Local	18-1203	Social Host Ordinance Violation	25	22	7	7	28%
Local	24-301	Speeding	1591	1475	2	1	0%

Appenix C

Category	Ordinance	Ordinance Description	CY2009 Charges Filed	Convictions to Date	Jail Time Ordered as a Condition of Sentence	Jail or Portion of Jail Time Suspended	Jail as % of charged
Local	19-20	Trespass in City Park	4	2	1	1	25%
Local	10.61.030	Vehicle 72 Hours	48	10	9	9	19%
Local	6.8.1140	Animals Running at Large	122	100	1	1	1%
Local	7-23-2108	County Control of Dogs	11	8	1	1	9%
Local	2-23	Cruelty to Animals	1	1	1	1	100%
Local	6.8.1160	DANGEROUS ANIMAL	20	13	2	2	10%
Local	4-405(5)	Dangerous Dog	14	11	5	5	36%
Local	3-7	Dog / Cat	5	4	1	1	20%
Local	04380-130	Dog At Large	18	14	2	2	11%
Local	8.02.080	Dog at Large	10	10	3	3	30%
Local	4-406(3rd offense)	Dog At Large (3rd Offense)	3	3	3	3	100%
Local	4-406(2nd offense)	Dog at Large Second Offense	14	11	2	2	14%
Local	4-406	Dog At Large(1st offense)	323	282	9	9	3%
Local	6.04.270	Failure To Have Leash	161	56	2	1	1%
Local	04380-180	Harboring Vicious Dog	7	7	1	1	14%
Local	7.04.020	Licenses - No license/expired tags on dogs	14	9	2	2	14%
Local	4-404	Noisy Animal	8	7	1	1	13%
Local	6-2-14	Nuisance Animals	25	19	3	3	12%
Local	6.16.030	Nuisance Dog	15	14	2	2	13%
Local	6.8.1070	Number of Dogs/Cats	12	5	1	1	8%
Local	4-405	Potentially Dangerous Dog	145	115	36	36	25%
Local	6.08.220	Run Over Animal	1	1	1	1	100%
Local	6.04.150	Unlicensed Dog	158	33	2	1	1%
Local	6.8.1030	Vacination Required	46	19	3	3	7%
Local	5-4-2	Vicious Dog	9	7	1	1	11%
Local	3.7 [1st]	Vicious Dog - 1st Offense	28	17	1	1	4%
Local	7-23-2109	Vicious Dog Control - Licensed or Unlicensed	15	8	2	2	13%
Local	2-2009	Violation of Animal Control Ordinance	6	5	1	1	17%