# Task Force on State Public Defender Operations
# Study Plan and Meeting Schedule

Prepared by Dave Bohyer, Research Director
Legislative Services Division
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## Introduction

The Task Force on State Public Defender Operations was created under House Bill No. 627 (2015). The 11-member Task Force is directed by the legislation to study the operations of the Office of State Public Defender and develop a long-term organizational plan that will allow the office to provide effective assistance of counsel to those who qualify.

In conducting the study, the Task Force is required to examine:

- the constitutional duties of the office;
- the statutory duties of the office;
- the ethics and professional responsibilities of attorneys employed at the office;
- how other states provide assistance of counsel to those who qualify for assistance, including how those states structure and fund their offices or programs and any litigation on the structure and funding of those offices and programs;
- the effects of compensation and workloads on the recruitment and retention of attorneys and administrative and support staff;
- measures and resources that could be implemented or assigned to improve staff and attorney recruitment and retention issues;
- the possibility, costs, and benefits of restructuring the office; and
- any other issues related to the duties, funding, and ethical obligation of the office that the Task Force determines are relevant to develop a long-term organizational plan that will allow the office to accomplish its constitutional and statutory duties.

The Task Force is also required to seek input from the various stakeholders of the office and the legal system, consult with outside experts about Montana's system and systems in other states, coordinate meetings with the law and justice interim committee, and conclude all activities prior to September 15, 2016, including a final report of its findings, conclusions, and recommendations.

Finally, HB 627 appropriates $24,000 for the Task Force's activities and limits the Task Force to a maximum of five meetings. The appropriation is sufficient to cover the travel, per diem, and legislator salary costs of the members, but little else.

Background

The history of the Office of State Public Defender (OPD) goes back only about 10 years in Montana to legislation adopted by the 2005 Legislature.[1] The legislation resulted from a stipulated agreement between the attorney general and the American Civil Liberties Union stemming from a 2002 lawsuit over the state's provision of legal defense for indigent individuals charged with felonies or other infractions. The ACLU had alleged that the state's method of providing criminal defense counsel to indigent individuals through a variety of county-administered options was not only inconsistent, but insufficient both constitutionally and practically. Rather than immediately litigate the issue, the attorney general committed to propose and support legislation to establish a state office of public defender. The issues of the lawsuit are described in the ACLU's pleadings[2] and in the stipulation reached by the attorney general and the ACLU.[3]

Pursuant to the stipulation, Senate Bill No. 146, the Montana Public Defender Act, was introduced in the 59th Legislature, then debated, amended, passed, and

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[1] SB 146, 59th Legislature (Chapter 449, Laws of Montana 2005)

[2] https://www.aclu.org/sites/default/files/field_document/white-martz%20amend%20cmplt.pdf

[3] http://leg.mt.gov/content/Committees/Interim/2015-2016/Public-Defender/History/Stip-2004.pdf

approved.[4] The OPD was established as of July 1, 2005, and a transition period provided for full implementation of the Act on July 1, 2006, although full implementation took somewhat longer. The codified provisions of the Act, found in Title 47, chapter 1, MCA, have been amended numerous times since enactment of the Act.

When implemented for the first full fiscal year, in July 2006 for fiscal year 2007, the OPD operated on a two-year $14 million appropriation.[5] The appropriation was intended to cover the costs of OPD operations, including administrative overhead and approximately one-half of the anticipated staffing levels due to the transition from county-administered services to state-administered services. Ultimately, OPD incurred additional expenses during the biennium and was provided an additional $5.36 million through a supplemental appropriation. Appropriations have increased an average of approximately 5.5 percent annually since full implementation of the OPD in FY 2007.[6] Notably, actual appropriation changed between -0.6% and 1.8% in seven of the ten fiscal years. Increases of 15% in FY 2012 and 2014 and 24% in FY 2016 account for the bulk of change in the level of appropriated funds between FY 2007 and FY 2017.[7]

During the 10-year existence of OPD, caseloads also changed. Little, if any, useful caseload data exists before FY 2010, i.e., before reporting was consolidated in and required from the OPD. However, in the five years of FY 2010 through 2014, total OPD caseloads, excluding appeals through Office of the Appellate Public Defender (OAPD), increased from 27,600 to 31,700, about 14.6%. The cost of providing indigent defense for the OPD cases also increased, by about $8.1 million or 42%, over the 5 fiscal years.

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[4] Chapter 449, Laws of 2005.

[5] Data from Greg Dewitt, Senior Analyst, Legislative Fiscal Division.

[6] The estimated annualized increase assumes that the $5.36 million supplemental appropriation appropriated in 2007 was for expenses incurred in FY 2007. Author's calculations based on data from Greg Dewitt, Senior Analyst, Legislative Fiscal Division.

[7] Author's calculations based on data from Greg Dewitt, Senior Analyst, Legislative Fiscal Division.

With the preceding information in hand, the 2015 Legislature passed HB 627 at the urging of the bill's sponsor and others. In passing the law, the 64th Legislature commissioned the Task Force to accomplish the seven items listed in the bullet points on page 1 and gave the Task Force essentially 10-12 months to get the job done.

Study Outline

Building an understanding of what "indigent defense" is required to do, why the Office of State Public Defender exists, where the services are to be performed, and how the services are provided seems to be a reasonable approach to conducting the study. Because each succeeding layer of information builds upon and relies on previous layers of information, conducting the study in phases is also reasonable. This proposal suggests that the study be conducted in four phases.

*Phase I*

Phase I of the study should be to develop an understanding of the legal requirements underlying the OPD. The requirements are embedded in the U.S. and Montana Constitutions, so thorough review of the relevant provisions and case law is appropriate and necessary. There are other, statutory requirements that the Task Force must also recognize and understand. Finally, there are professional, ethical, and administrative requirements imposed by various authorities that are integral to the operations of the OPD. Ensuring understanding of the legal, professional, ethical, and administrative requirements affecting the OPD will address the first three topics assigned by the bill to the Task Force:

- the constitutional duties of the office;
- the statutory duties of the office; and
- the ethics and professional responsibilities of attorneys employed at the office.

*Phase II*

The second phase of the study should be informing the Task Force members about how the OPD and, on a different level, the legislature, attempt to ensure that the legal, professional, ethical, and administrative requirements are met. This phase will include examinations of OPD operations through inputs and outputs that are measured, including:

- appropriations and expenditures;
- caseloads as measured by various indicators, e.g., type of case, geographic region, costs, etc., factors that affect caseloads, and how caseloads have changed over time;
- staff compensation as it relates to workloads and staff recruitment and retention;
- comparisons of costs, resources, and workloads with "benchmarks" established through law, including appropriations, by national entities, and by other states' structures through which indigent defense is provided; and
- other models of the ways in which other states provide indigent defense.

When Phase II is completed the Task Force will have accomplished two additional tasks assigned by HB 627:

- how other states provide assistance of counsel to those who qualify for assistance, including how those states structure and fund their offices or programs and any litigation on the structure and funding of those offices and programs; and
- the effects of compensation and workloads on the recruitment and retention of attorneys and (other professional) administrative and support staff.

Completing Phase II will also provide the Task Force with the information needed to responsibly and productively engage in the analysis phase of the study.

*Phase III*

During the third phase of the study, Task Force members should engage in focused discussions about how the structure of Montana's OPD, available resources, and administration of OPD comport with the legal, professional, ethical, and administrative requirements. This phase may involve staff or stakeholders developing and presenting additional information or preparing decision tools, but it should be primarily composed of discussion among Task Force members regarding how things are with regard to OPD and how those things might be "improved", loosely defined.

Completing Phase III will allow the Task Force to check off the remaining three elements assigned by the Legislature:

- measures and resources that could be implemented or assigned to improve staff and attorney recruitment and retention issues;
- the possibility, costs, and benefits of restructuring the office; and
- any other issues related to the duties, funding, and ethical obligations of the OPD that the Task Force determines are relevant to develop a long-term organizational plan that will allow the OPD to accomplish its constitutional and statutory duties.

*Phase IV*

The fourth and final phase of the study will involve the Task Force members synthesizing all of the information gathered with their individual understanding of how things are and what actions or changes would "improve" OPD operations. The results of Phase IV could include a list of findings, essentially facts discovered or recognized by the Task Force, that bear on the OPD operations, accompanied by recommendations that could be followed or implemented to achieve the "improved" OPD operations envisioned by the members. The product produced by the Task Force from this phase will be the final report required by the legislation, including any draft legislation commissioned by the Task Force and considered to be necessary to achieve the Task Force's recommendations.

Proposed Meeting and Work Schedule

When adopted in September 2015, the Task Force had about 12 months, until September 15, 2016, to complete all aspects of the study. Further, HB 627 limits the Task Force, both through language and appropriations, to a maximum of five meetings. To execute its charge, the Task Force adopted the following proposed meeting and work schedule.

**Meeting 1 -- September 17, 2015**

Meeting purpose: Gain understanding of legal, professional, and administrative requirements applicable to OPD.

- Panel presentations on:
  - ✓ Constitutional duties of OPD
  - ✓ Statutory duties of OPD
  - ✓ Professional and ethical requirements applicable to OPD
  - ✓ Historical background of indigent defense and creation of Montana OPD
  - ✓ Views from the trenches
  - ✓ Identify other states to compare Montana OPD to

**Meeting 2 -- December 10, 2015**

Meeting purpose: Gain understanding of Montana OPD and other states' indigent defense workloads and resources

- ✓ Overview of recognized benchmarks for workloads and resources
- ✓ Overview of OPD structure
- ✓ Overview of OPD staff resources
- ✓ Overview of OPD financial resources
- ✓ Overview of OPD physical infrastructure
- ✓ Overview of OPD workloads
- ✓ Comparison of Montana OPD with indigent defense structure, resources, infrastructure, and workloads of other states
- ✓ Preliminary assessment of convergence between benchmarks, other states, and OPD resources

**Meeting 3 -- February 5, 2016**

Meeting purpose: Task Force members engage in focused discussion to assess how Montana OPD meets legal, professional, ethical, and administrative requirements and how OPD compares to other states in terms of providing indigent defense services.

- ✓ Examine, discuss, and establish ways in which Montana OPD does and does not meet legal, professional, ethical, and administrative requirements
- ✓ Compare and contrast Montana OPD with other states' public defender services to determine what is working and not working in Montana OPD and specifically how another state's public defense structure/system is preferable
- ✓ Preliminary assessment of what should be changed to improve Montana OPD: structurally, statutorily, financially, administratively
- ✓ Identify possible legislative options

**Meeting 4 -- May 16, 2016**

Meeting purpose: Finalize factual information on Montana OPD operations, including structure, resources, financing, and administration. Reach agreement on problems identified and recommendations to improve Montana OPD.

- ✓ Review, discuss, revise, and adopt factual findings
- ✓ Discuss, revise, and adopt recommendations, including draft legislation requests
- ✓ Discuss and adopt outline for the Task Force's final report

**Meeting 5 -- September 12, 2016**

Meeting purpose: Review, revise, and adopt draft legislation recommendations. Review, revise, and adopt final report.

- ✓ Briefings on purpose and effect of draft legislation
- ✓ Presentation, review, discussion, and revision of draft final report
- ✓ Plans or actions following completion of HB 627 study

Summary and Conclusion

As a result of legal action based on various legal, professional, ethical, and administrative requirements, the 59th Legislature established the OPD in July 2005. Subsequently, OPD hired staff, developed resources, and instituted processes over the next 24 months and became fully operational in 2007. Since then, caseloads have continued to rise, as have appropriations and expenditures.

Ten years on, the 64th Legislature has commissioned the Task Force on State Public Defender Operations to review the legal, professional, ethical, and operational elements affecting the provision of indigent defense in Montana and in other states, to examine options for improving indigent defense operations, and to recommend a long-term organizational plan that will allow the OPD to accomplish its legal, professional, ethical, and administrative duties.

The study outline and the work and meeting plans provided for in this document propose an approach to the tasks specified in HB 627 that should allow the 11-member Task Force to complete its commission within the timeframe and resources provided. To be sure, other approaches exist and could be considered. The Task Force may also choose to revise this plan at any time. The plan and schedule provided in the preceding pages will guide the Task Force members, staff, and stakeholders for the remainder of the study.