



MONTANA STATE

**PUBLIC DEFENDER**

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## **OPD Response to Interim Budget Committee’s Information Requests for September 13, 2023, Hearing**

Report on the cases in FY 2023 in which the office of state public defender moved for waiver of the cost of counsel pursuant to 46-8-113(1) and the basis for the motion.

OPD attorneys are required to represent the client and their interests at all stages in a proceeding, which includes advocating for the client’s position on any number of issues, including the waiver or imposition of any financial obligations stemming from a client’s matter. Montana Code Annotated § 46-8-113(4) explicitly mandates that courts may not sentence defendants to pay the costs of appointed counsel “unless the defendant is or will be able to pay the costs imposed,” and ultimately, the decision to impose any financial obligations, including OPD fees, is at the courts’ discretion. As all OPD clients that are defendant in a criminal matter must qualify for OPD services by demonstrating either financial indigency or a severe financial hardship in retaining private counsel, it is the normal and typical practice to request an ability to pay determination which could lead to a full or partial waiver of all financial obligations related to their matters, such as fines, fees, surcharges, etc., including OPD fee assessments.

To provide additional insight into this question, OPD has prepared the attached spreadsheet titled “Attachment A – Matters Closed and OPD Fees Ordered” that details how many times an OPD Fee was assessed in Fiscal Year 2023 by court.

Report, for FY 2023, on the time spent by employees and contractors in cases involving defendants in capital cases in fiscal year [2023] for each defendant.

Please see the attached spreadsheet titled “Attachment B – Attorney and Investigator Hours for Capital Matters” which details hours submitted by attorney and investigators for work done on capital matters in Fiscal Year 2023 which have been paid by OPD as of August 29, 2023.

Report (for the LAST quarter of FY 2023) on the number of employees of the office of state public defender qualified to be appointed as counsel for defendants in cases in which the state has elected to seek the death penalty.

Currently, there are no FTE attorneys who are death qualified pursuant to the rules set by the Supreme Court here—found here: [Standards for Counsel in Capital Cases](#). Subsection 3(d) of those standards requires:

The nature and volume of the workload of both appointed counsel is such that they will have the ability to spend the time necessary to defend a capital case.

Due to the volume of existing work in every part of the state, OPD does not have the resources nor ability to reassign or absorb two additional FTE attorneys' worth of work. Nor is OPD in a position to assign that additional volume of work to the private contracting pool given the existing difficulty of assignments with OPD's existing rate and the shortfall of contractors for the volume of work already necessary to be assigned. Further, OPD does not currently employ a mitigation specialist. If a new capital case is filed this biennium, OPD would again seek to work with private attorneys to represent such a capital defendant. OPD's use of death penalty qualified contractors has worked well as these cases have been resolved without the death penalty being imposed—avoiding years of mandatory appellate and post-conviction litigation.

### [Were there any protocols issued/adopted pursuant to 47-1-104 in FY 2023?](#)

OPD is still in the process of formalizing Ethical Case Management (ECM) into an omnibus policy, protocol, and standard operating procedure, and expects to have this effort completed by the end of FY 2024. However, OPD has had, and has been operating under, a caseload management protocol for years, which has been formalized in several discrete places. In response to the subcommittee's similar question during the 2023 Legislation Session, OPD provided the following response which details the OPD Caseload Management System and relevant sources: [OPD-Supplemental-Response-to-Sub-D.pdf \(mt.gov\)](#). The following adjustments have been made since that time, which are reflected in the updated Guide attached as "Attachment C - ECM Matter Weights Operating Document":

- **Travel Weights:** Travel weights are now a running 90 day average of each attorney's actual time spent traveling instead of a flat travel weight of 5 weight hours per case or a 20 weight hours per month. OPD is running this methodology through calendar year 2023 and will reevaluate the methodology at that time.
- **Individual Matter Weight Adjustments:** The following matters were adjusted after evaluation of employee and contractor time data to be a more accurate reflection of the work represented by a matter of these types. OPD is running this methodology through calendar year 2023 and will reevaluate the methodology at that time.
  - **Developmental Disability:** matter weight adjusted from 2.5 to 4.5 weight hours
  - **Misdemeanor Revocation:** matter weight adjusted from 5 to 3.5 weight hours
  - **Felony Revocation:** matter weight adjusted from 7 to 6 weight hours

Report: by county or judicial district (whichever makes more sense) for last Quarter of FY 2023

- the number of cases in which the office of state public defender was appointed to represent defendants in the previous quarter in each county, including a separate disclosure of the number of appointments to employees of the office of public defender compared to contract attorneys.

Please see the attached spreadsheet titled “Attachment D - Matters Received in Q4 FY 23 with FTE and Contractor Counts.”

- regarding the number of appointments reported above, the number of appointments made in each county for cases in which the offense or offenses charged allege violations of local ordinances and not state statutes.

Please see the attached spreadsheet titled “Attachment E - Matters Received in Q4 FY 23 with Charges by Source.”

- regarding the number of appointments reported above, the costs incurred in each county to compensate contractors.

Please see the attached spreadsheet titled “Attachment F - Expenditures for Matters Received in Q4 2023 Through September 6 2023.”

Provide the number of employees hired and actively working at each OFFICE compared to the number of budgeted FTE. Where were you at the end of EACH quarter in FY 2023, and where are you today? – Sorted by type of position (attorneys, investigators, all else, etc).

Please see the attached spreadsheet titled “Attachment G – Active FTEs by OPD Office.”

Provide an update on current caseload numbers (per county or district).

Please see the attached spreadsheet titled “Attached H – Active Matters by County as of September 6, 2023”