



Law and Justice Interim Committee

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58th Montana Legislature

SENATE MEMBERS

DUANE GRIMES--Chair
BRENT CROMLEY
DANIEL MCGEE
GERALD PEASE
GARY PERRY
MICHAEL WHEAT

HOUSE MEMBERS

JOHN PARKER--Vice Chair
GAIL GUTSCHE
MICHAEL LANGE
DIANE RICE
JIM SHOCKLEY
FRANK SMITH

COMMITTEE STAFF

SHERI HEFFELFINGER, Research Analyst
VALENCIA LANE, Staff Attorney
REBECCA SATTLER, Secretary

MINUTES

March 20, 2004

Best Western Yellowstone Inn
Livingston, Montana

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division.

Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.

COMMITTEE MEMBERS PRESENT

SEN. DUANE GRIMES, Chair
REP. JOHN PARKER, Vice Chair

SEN. BRENT CROMLEY
SEN. DANIEL MCGEE
SEN. GERALD PEASE
SEN. GARY PERRY
SEN. MICHAEL WHEAT

REP. MICHAEL LANGE
REP. JIM SHOCKLEY
REP. FRANK SMITH

COMMITTEE MEMBERS EXCUSED

REP. GAIL GUTSCHE
REP. DIANE RICE

STAFF PRESENT

SHERI HEFFELFINGER, Research Analyst
VALENCIA LANE, Staff Attorney
CYNTHIA A. PETERSON, Secretary

AGENDA AND VISITORS

Agenda, ATTACHMENT 1
Visitors' list, ATTACHMENT 2

COMMITTEE ACTION

- Minutes of the October 23, 2003, meeting were adopted.
- The Committee adopted as a philosophy Option C, and by adopting Option C, adopted SB 218 from the 2003 Session as a working tool upon which they can apply information they are learning.

CALL TO ORDER AND ROLL CALL

The meeting was called to order by Law and Justice Interim Committee Chairman Duane Grimes at 8:30 a.m. The secretary noted the roll (ATTACHMENT 3).

APPROVAL OF MINUTES

Senator Wheat moved the minutes of the October 23, 2003, meeting of the Law and Justice Committee be adopted. The motion carried unanimously.

Chairman Grimes informed the Committee that he received a call from Attorney General Mike McGrath, who indicated settlement negotiations have occurred pending legislative action taken by the Law and Justice Interim Committee. Chairman Grimes emphasized the Committee should remain focused on the public defender issue since it could possibly affect the outcome of the lawsuit.

STAFF REVIEW OF PUBLIC DEFENDER CASELOAD DATA, OTHER STATES, ISSUES AND OPTIONS

- **Sheri Heffelfinger, Research Analyst, Legislative Services Division**

Sheri Heffelfinger, Legislative Services Division, gave a power point presentation to the Committee on Montana's Public defender system, Issues and Options #1 (EXHIBIT 1) and submitted a background report (EXHIBIT 2). Ms. Heffelfinger's presentation included a preview of the options, review of the current structure, an examination of the funding responsibilities, and identification of policy considerations. Ms. Heffelfinger submitted an Options Chart to the Committee (EXHIBIT 3).

Sen. Brent Cromley asked whether public defenders were county employees. Ms. Heffelfinger responded that in counties with public defender offices, they were county employees. Under Option B, they would remain county employees, but would have to comply with state standards; and, under Option C. they would become state employees.

Sen. Cromley asked where costs come from in counties where the public defender is appointed by the court. Ms. Heffelfinger explained those costs are paid directly by the Office of the Court

Administrator, which is now state funded. If it is a county contract, the state will receive a copy and pay the contract directly. Sen. Cromley clarified he was not referring to counties that contract for services, but rather counties where they are appointed by the court on an ad hoc basis. Ms. Heffelfinger responded those services are paid directly by the state as well.

Ms. Heffelfinger reviewed the caseload standards adopted by the ABA and referred the Committee to Figure 2, Exhibit 2. Ms. Heffelfinger added her statistics assume 80 percent of total caseload, including defendants or respondents entitled to court-appointed counsel. She noted that there are differences in how counties count caseloads. Ms. Heffelfinger asked for direction from the Committee as to whether they would like an individual survey conducted of each county. This survey would accumulate information regarding total expenditures and ascertain whether the counties are incurring expenses that are non-allowable by the state. If the state takes responsibility for the public defender system, it would be important to know whether the state would then be responsible for the non-allowable expenses as well.

Sen. Wheat thought the information was already being collected and tabulated by the Supreme Court through its Administration Office. Ms. Heffelfinger replied she has received a lot of information from the Court Administrative Office, but stated they are in the mode of paying bills rather than actively collecting statistics and do not capture all the information. In addition, they are not concerned about lower courts or non-allowable expenses. Ms. Heffelfinger found that if the clerk of court understands what is an allowable expense, they only bill for those expenses. Therefore, the Court Administrator will only see what the county knows to be an allowable expense. Ms. Heffelfinger explained the way cases are billed varies between the counties. Sen. Wheat found the information interesting and commented this was everything they had contemplated through the session on SB 218. Sen. Wheat was surprised something was not in place to gather this information, and that now they are contemplating doing more research and a survey through the interim.

Rep. Jim Shockley added that when the Senate and House passed SB 176, the assumption bill for district courts, the supporting data was inadequate, and there were a lot of surprises, and, in essence, it cost more than anticipated.

Chairman Grimes commented he was not sure what the SB 218 subcommittee asked for or expected to receive, but he felt the information would be necessary for an accurate fiscal note. Ms. Heffelfinger agreed and added they are working with the Court Administrator's Office as best they can, and the Court Administrator's Office believes they are obtaining 100 percent of the costs and does not believe there are significant non-allowable costs. Ms. Heffelfinger commented she could not be certain without conducting a survey of each county.

Ms. Heffelfinger explained the other issue is the percentage of the workload which is attributable to the lower courts, and this is something the Court Administrator is not interested in. In looking at the FTEs, they are carrying a caseload which will include cases in the lower courts and not just district courts. If these public defenders become state employees, a question will arise as to how the public defender caseloads in lower courts will be handled. Ms. Heffelfinger felt the survey would be useful in determining the percentages between district court and lower court workload. In addressing the rest of the counties that operate under contracts and appointed counsel, Ms. Heffelfinger would need to know which counties contract and which appoint, what fees they pay, and the size of the caseload.

Ms. Heffelfinger noted it was very challenging to carve out the fiscal data, but that new accounting codes have been established by the Office of Court Administrator, and that they were very helpful. Ms. Heffelfinger emphasized the data was only for the six-month period from July 1, 2003, until December 31, 2003. Transcripts, medical evaluations, and witness fees are costs that are paid in a criminal case regardless of whether the person is indigent. Therefore, in order to say how much of that cost should go to the public defender office, she had to break those accounts out. Ms. Heffelfinger said she assumed 80 percent of the costs were for indigent defense because it is estimated that 80 percent of the total caseload is for indigent defendants.

Ms. Heffelfinger explained that cost drivers include the number of cases, hourly pay, and complexity of the case. Salary positions could be utilized to provide stability to the costs, and these positions could be staffed based on an average caseload. If the caseload goes over, they could contract with outside counsel.

Ms. Heffelfinger suggested a uniform definition for "indigence" would be needed and that the criteria currently varies between jurisdictions. Sen. McGee felt defining "indigence" was a statutory issue, and suggested that keeping the status quo and providing definitions could help remedy the situation. Ms. Heffelfinger continued and suggested they could also implement a sliding scale which would require the party to pay at least some of the cost, and that it does not necessarily have to be an all or nothing determination. Currently, the statute says the court may require a convicted defendant to pay, but this is problematic especially if the defendant is convicted. Ms. Heffelfinger was not able to determine how often this happens.

Sen. McGee asked if it was a constitutional or statutory requirement that juveniles have appointed counsel. Ms. Heffelfinger responded it was required by statute, and that case law indicates they are constitutionally entitled to court counsel under the Sixth Amendment to the U.S. Constitution. In general, if the issue is about loss of liberty, placing someone in an institution, or termination of parental rights, the respondent is entitled to appointed counsel.

(Tape 1; Side B)

Rep. John Parker believed this also included the commitment of a developmentally disabled individual or an involuntary mental health commitment to Warm Springs. This is why the issue of indigent representation goes beyond criminal cases to instances where individuals are being held in a certain place where they may not necessarily want to be held.

Ms. Heffelfinger highly recommended the Committee consider statutory changes that would clarify the role of the District Court Council and the Appellate Defender Commission. The Appellate Defender Commission has statutory duties to establish a state-wide list of qualified attorneys to provide public defense. The District Court Council has the statutory obligation to implement the state funding of the district court program. Therefore, there are overlapping issues about who is responsible for what and clarification is needed.

FISCAL BRIEFING ON THE STATE DISTRICT COURT PROGRAM AND PUBLIC DEFENSE COSTS

- **Harry Freebourn, Legislative Fiscal Analyst, Legislative Services Division**

Mr. Harry Freebourn, Legislative Fiscal Division, gave a power point presentation to the Committee entitled "Public Defender Study" (EXHIBIT 4). Mr. Freebourn noted on page 9 of Exhibit 4, zeros were missing from the figures of \$308,540 and \$2,366,740, and asked that the figures be corrected. Mr. Freebourn estimated the projected Public Defender costs for FY 2004 to be \$7.8 million.

Sen. Cromley asked if statistics were available regarding attorneys' caseloads and how those statistics relate to case type. Mr. Freebourn directed the Committee to the last page of Exhibit 4 which gave a cost breakdown by case type. Ms. Heffelfinger added they do not have 2004 caseload data, but directed the Committee to pp. 10-12, Exhibit 2.

Sen. McGee noticed on page 15, Exhibit 4, the chart shows "Estimated FY 2004 from July 1 - December 31," and the total estimate is \$7.8 million. On page 17, the total "Estimated FY 2004 Total Expenditures," are also \$7.8 million. Sen. McGee wondered how these numbers could be the same for a six-month period and then a one-year period. Mr. Freebourn responded there was an error on page 15, and it should read "Estimated FY 2004 From July 1 - June 30."

Mr. Freebourn spoke about the last page of Exhibit 4, Public Defender Costs by Account and Case Type, and suggested 73 percent of all the costs are criminal-type costs, and the largest cost within that category is the appointed public defender attorney fees. Ms. Heffelfinger stated that since the District Court Council adopted the \$60 per hour maximum, some attorney fees have moved up to that maximum. Both options B and C would require eliminating judicial appointments on an ad hoc basis since that provides the least amount of cost control.

Sen. Wheat spoke about SB 218 and the attached fiscal note and wondered if Mr. Freebourn looked at the fiscal note when he prepared his presentation (EXHIBIT 5). Mr. Freebourn responded his presentation was based on historical costs currently being captured by the district court program. SB 218 and the fiscal note contemplated a future system that would include more of a state-wide administered program. Ms. Heffelfinger directed Sen. Wheat and the Committee to the back page of Exhibit 3, which contains the cost estimates for Options A, B, and C, and Ms. Heffelfinger had suggested Mr. Freebourn use SB 218 and its Fiscal note to come up with the cost estimates for Option C. Ms. Heffelfinger thought a survey of the counties could cause these numbers to change.

Sen. McGee stated that as he reviews public defenders' cost by account and case type on Exhibit 4, he notices the total for criminal cases is approximately \$5.7 million, which is fairly close to what he sees in Item 9 of the fiscal note of \$5.5 million. In trying to figure out where the additional overrun comes from, Sen. McGee asked Mr. Freebourn if he would be able to comment on whether it was because of an increase in criminal cases, criminal costs, or whether they just forgot to include things such as involuntary commitments, juvenile cases, abuse and neglect cases. Mr. Freebourn replied that he recently reported on the cost overruns to the Legislative Finance Committee, and there were two potential causes for the overruns. Caseload was the first, which has increased at six percent per year and calculated to be \$500,000. In addition, many of the costs were being driven by attorneys' fees. Mr. Freebourn felt when the \$60 per hour fee was set, it not only became a ceiling, but also became a potential floor.

Sen. McGee asked if there was any increase in the other case types, and whether any of that factored into the overall increase, and whether the increase attached only to criminal cases. Mr. Freebourn stated significant dollars are spent in criminal cases, and it is his opinion the costs are being driven by criminal caseload and dollar amounts paid to attorneys to provide defense.

Ms. Heffelfinger brought it to the Committee's attention that new accounting codes were put in place July 1, 2003, and the fiscal note for SB 218 was prepared prior to that time. Ms. Heffelfinger said the new accounting codes may have captured more of the actual costs.

Sen. McGee stated he and Sen. Wheat spent significant time trying to get answers to what it really costs. Sen. McGee felt it was very coincidental that they estimated the total public defender offices would be \$5.5 million, and that's what it is for the criminal side only. Sen. McGee now wonders if when the fiscal note was prepared whether it ever included involuntary commitments and other non-criminal cases. Ms. Valencia Lane replied those cases were always considered. Ms. Heffelfinger identified Matt Bugni as the person who worked on the fiscal note, and Chairman Grimes suggested Mr. Bugni could be contacted to provide clarification.

Mr. Harold Blattie, Assistant Director, Montana Association of Counties, worked with Mr. Bugni on the preparation of the fiscal note and testified the dollar amounts were based upon actual prior reported costs of FY 2001 and the costs Sen. McGee was concerned about were definitely included.

SPECIAL GUEST PANEL: What are the various ways of organizing public defender services and what are the strengths and weaknesses of these methods?

Rep. John Parker, Vice Chairman, chaired the next portion of the meeting and reminded the audience that the Law and Justice Interim Committee voted to make the public defender issue its number one priority. In October, the Law and Justice Interim Committee fleshed out the problems in Montana's current public defender program. While the Committee did not want to have its discussion be directly responsive to the ACLU lawsuit, many of the issues were parallel to the lawsuit. Rep. Parker summarized the two major issues as (1) quality of representation; and (2) cost management by state government. The Committee is seeking ways to raise the standard of practice, as well as generate better value out of the dollars currently being spent.

• **Mr. Dave Kaplan, Colorado Public Defender**

Mr. Dave Kaplan is the appointed State Public Defender in Colorado and was appointed four years ago. Mr. Kaplan felt if the Committee was looking for the most bang for the buck it should consider a state-wide system of representation. Mr. Kaplan's office in Colorado covers all misdemeanor cases, felonies, district court cases, and juvenile delinquency cases, and they do not cover dependency neglect cases. In addition, they do not cover involuntary commitment unless it is the result of an insanity plea in a criminal case. Qualification is based on indigence guidelines adopted by the Colorado Supreme Court and it is roughly 125 percent of poverty level.

(Tape 2; Side A)

Mr. Kaplan's agency is comprised of 21 trial offices, one state office, and one appellate division that covers the entire state. The agency falls under the judicial branch of Colorado State Government, although they present their budget request as a separate step and as part of the judicial system (EXHIBIT 6).

In order to address conflict matters that arise, Colorado has an Office of Alternative Defense Counsel. Mr. Kaplan mentioned this because the Office of Alternative Defense Counsel is an office of four or five individuals that do state-wide appointments, and Mr. Kaplan noted it costs much more for the state to hire someone from that office than it does to hire someone from the state public defender office. Therefore, they try to minimize the number of conflicts because of the expense involved.

The offices in the state tend to focus around the metropolitan areas, but there is another office in the western part of the state that serves the rest of the state. These offices are much smaller and cover a large geographical area. Mr. Kaplan stated this would be similar to Montana and consideration would need to be made not only to distance, but how often the court meets. Offices in Colorado are staffed based on caseload, and resources are shared to the greatest extent possible to achieve the greatest amount of fiscal efficiency. The Colorado Public Defender's Office has been able to maintain the same funding level for the past four years.

- **Mr. Ken Koski, Wyoming State Public Defender**

Mr. Ken Koski has served as Wyoming Public Defender since January 2001. Mr. Koski felt that Montana's system is broken, but suggested the Committee focus on the high points of the system such as the County Public Defender Offices. Mr. Koski commended Ms. Heffelfinger for her work and research on the public defender system. Mr. Koski submitted a packet of information on the Wyoming Public defender system (EXHIBIT 7). This packet contained information on caseload, the enabling legislation, and a definition of "indigency." In FY 2001 the Wyoming Public Defender's Office spent \$7.52 per capita, which included representation, appellate representation, misdemeanors, felonies, and post-conviction matters. In contrast, in FY 2001, Montana spent \$8.70 per capita for indigent representation just in district courts. Today, Wyoming's budget is \$10.70 per capita. Mr. Koski had difficulty understanding why Montana would provide indigent representation only for felonies and felt Montana has the same constitutional obligation to provide representation for misdemeanors.

Mr. Koski's office pays all staff costs, transportation, expert witness fees, investigation costs, and any other costs associated with representing an indigent defendant. Occasionally, they have to hire assigned conflict counsel, and they are paid \$25 per hour for transportation, \$40-\$45 an hour for out-of-court work, and \$60 an hour in court. Wyoming spends approximately \$200,000 annually for assigned counsel fees where conflicts exist. Mr. Koski reported 85 percent of his budget is state funded; 15 percent is county augmented revenue. The county's revenue is based upon serious crime rate, population, and assessed valuation of counties. The county also has the obligation to provide suitable office space for public defenders.

Mr. Koski serves at the pleasure of the Governor, answers to the Legislature, and must answer to the state court with regard to effective assistance in counsel. The Wyoming Public Defender's Office includes an administrative office and four divisions. The divisions, include an administrative division and an appellate division. The trial division has 13 field offices, and many

of the field offices are staffed by part-time independent contractor public defenders. The legislature has authorized those independent contractors to be paid \$40 - \$45 an hour. There is also a post-conviction unit, staffed by one attorney, and a capital case unit.

Casper, Wyoming, is the busiest office and handles 18 percent of the caseload, and they have five full-time attorneys, two full-time secretaries, and one full-time investigator. In addition, they have three part-time independent contractors. Mr. Koski pointed out this enables his office to handle four co-defendants without having to hire additional counsel for conflicts and gives depth to the system. Mr. Koski cited one of the advantages to a state-wide system is the ability to shift resources when necessary. Mr. Koski asked the Committee to note that most of his public defender attorneys have at least five years' experience in criminal defense.

The Wyoming Public Defender's Office does not do involuntary commitments or abuse and neglect cases, and those are the counties' obligations. Mr. Koski felt the numbers of these cases in Wyoming are not substantial.

- **Mr. Jim Ganji, North Dakota Indigent Defense Commission**

Mr. Jim Ganji, Staff Attorney, North Dakota Indigent Defense Commission testified the North Dakota Commission is advisory and has attempted to structure North Dakota's indigent defense system for the better. North Dakota is the only state that operates exclusively on a contract basis. The contracts are issued on a judicial district basis and are administered at that level. The presiding judge oversees the management of the contract. Mr. Ganji admitted there are pitfalls to the contract system, and North Dakota is in the process of reviewing the best way to reorganize its system. Mr. Ganji felt because district court judges oversee public defenders, they are placed in an awkward position. Mr. Ganji anticipated the system will take on a whole new direction in the future.

Mr. Ganji complimented Ms. Heffelfinger on the information she collected and stated this is a difficult issue to comprehend. North Dakota currently budgets approximately \$4 million per biennium for indigent defense, which works out to approximately \$3.40 per capita. Mr. Ganji commented this amount is woefully inadequate. The structuring alternative currently being considered will cost approximately \$7.5 million per year and will cover approximately 33,000 cases per year including felonies, misdemeanor, and juvenile cases, as well as a plethora of other cases. Mr. Ganji felt one of the pitfalls to the contract system is the minimal amount of accountability and oversight.

When a contract counsel cannot handle a case because of a conflict, the court will appoint an attorney outside the contract on an hourly basis of \$65. They have tried to maintain hourly compensation at \$65 per hour, but when contract counsel signs on for two years at a flat fixed rate contract, a per-hour figure is not feasible since they would have to project what the fiscal commitment would be.

Mr. Ganji explained their public defender system includes misdemeanors, because all cases are tried at a single-level trial court.

Three things have been agreed on since they have begun research on North Dakota's public defender system: (1) the dollars that run the system have to reflect the workload of the attorneys

involved; (2) you need to have the infrastructure and administration to support the system; and (3) there needs to be some level of uniform oversight. Although there will be changes to the system, Mr. Ganji felt North Dakota would continue with the contract system as opposed to a state-wide system.

- **Jennifer Riggs, Research Analyst, Spangenburg Group**

Jennifer Riggs, Research Analyst for The Spangenburg Group, a research and consulting group based in Massachusetts that specializes in studying indigent defense and provides technical support, thanked the Committee for inviting her to Montana. Ms. Riggs agreed Ms. Heffelfinger has done an outstanding job on a problem with complicated issues and no simple solutions. Ms. Riggs provided an overview of five considerations if Montana decides to implement a state-wide indigent defense system.

The first issue is the organization and policy of state-wide indigent defense system. Currently, 32 states and the District of Columbia have some sort of state-wide body responsible for indigent defense services. Of those cases, seven states have a commission or body responsible only for appellate cases. The purpose of the state-wide body is to provide independent oversight and accountability for indigent defense services, and to provide some degree of uniformity in the delivery of these services. Thirteen of these states also have state-wide public defender programs. In other states, the state-wide commissions have less than full state-wide oversight. Some state-wide systems incorporate a variety of local indigent defense delivery systems, including public defender offices, appointed counsel, and contract programs. Typically, public defender offices are located in the metropolitan, highly populated areas.

The second issue is where the state-wide system should be located within government. Ms. Riggs cited several options, including the executive or judicial branches. Sometimes, the agency is located under one of these branches only for budgetary purposes, but otherwise acts as an independent agency. Of the states with a state-wide system at the appellate level, there is an even split as to where that body is located. Two states, Idaho and Florida, as well as the District of Columbia, have truly independent agencies. Ms. Riggs believed the best model is to have the independent agency within the Executive or Judicial Branches, but only for budgetary purposes, and this is the case in Massachusetts, Connecticut, Missouri, New Hampshire, Iowa, Kentucky, and Wisconsin. Ms. Riggs suggested the systems in place in Colorado, Indiana, Kentucky, and North Carolina are successful. Ms. Riggs referred the Committee to the "Comparison of States by Trial Level Administration" prepared by Ms. Heffelfinger (EXHIBIT 8).

Ms. Riggs identified the third issue as the right to counsel and deciding which cases the state will be responsible for providing indigent defense. Montana currently has a broad right to counsel, since criminal and juvenile defense cases includes cases such as abuse, neglect, and involuntary commitments. Ms. Riggs felt it was significant that Montana is currently not responsible for funding public defenders for misdemeanor offenses, and most state-wide systems do cover misdemeanor cases. There are now 24 states where indigent defense is 100 percent state funded, 6 states that provide 75 percent of the funding, and only 8 states provide less than 10 percent funding. The remaining states fall somewhere in between.

In looking at the primary delivery system at the trial level, 28 states have a state-funded primary delivery system at the trial level, and models vary depending on case type. Arkansas, Alaska,

Colorado, Delaware, Hawaii, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Wisconsin, and Wyoming currently operate state-wide, state-funded public defender systems at the trial level. Florida and Tennessee have state-funded district public defender offices where the district public defender is an elected position. Five states have state-funded public defender programs that cover only certain case types or do not cover the entire state.

Ms. Riggs gave an update of recent successes of other states toward state-wide oversight and delivery of services. In Virginia, indigent defense is 100 percent state funded and there are 20 regional public defender offices, and their assigned counsel is used in areas without a public defender, as well as for conflict cases. Virginia has mandatory case caps, which means even though the hourly rate for court appointed attorney is \$90 an hour, case caps are quite low. Virginia has a severely flawed system, which has resulted in inadequate indigent defense. A new bill has just recently passed the Virginia Legislature which would establish the Virginia Indigent Defense Commission. This Commission will consist of 12 members and will provide oversight of indigent defense including qualification, training, and practice standards for both public defender offices and court-appointed attorneys. The Commission will also be responsible for establishing public defender offices, caseload limits, and ensuring caseload data is maintained. Ms. Riggs said data is an important issue to be considered. The Commission will also maintain a list of eligible court-appointed attorneys and will distribute the list to local courts for appointments.

(Tape 2; Side B)

Questions from the Committee—Moderated by Rep. Parker

Rep. Parker posed a hypothetical situation where an individual client in the Colorado court system registered a complaint about their public defender and asked how the complaint would be handled. Mr. Kaplan responded the complaint could be filed with himself or with the Office of Attorney Regulation Counsel. Usually, the client would contact the head office. If it comes to Mr. Kaplan's office, his Chief Deputy will field questions, review the complaint, and, if necessary, contact the attorney involved and request an explanation. Occasionally, they do find an attorney is not adequately representing the client, but many times it is simply the reality of the client's situation. If they find there is a problem with the attorney, they have a corrective mechanism in place, as well as a disciplinary action plan. Each attorney in the Colorado Public Defender Office goes through an extensive annual review process. Annual training conferences are held to enhance public defender skills. Mr. Kaplan felt Colorado provides a lot of oversight, and this helps to keep problems at a minimum. The Colorado Bar Association also has an Attorney Regulation Council, and Mr. Kaplan maintains a good relationship with that office.

Rep. Parker modified the same question for Mr. Koski and wanted to know how he assured supervision and quality performance for his contract employees, and how a similar complaint would be handled in Wyoming's system. Mr. Koski answered Wyoming's process is similar to Colorado's. Mr. Koski added if he has an independent contractor who is not producing, he will terminate the contract. Mr. Koski currently has one case of an attorney on staff who has received enough complaints to justify terminating the attorney's services. If there is a bona fide grievance against one of their attorneys, they immediately replace that attorney. Mr. Koski added

that people cannot pick and choose their public defender. Mr. Koski added Wyoming sends public defender attorneys to Colorado for training.

Mr. Ganji explained in North Dakota, they require client contact within 24 hours if the client is in custody, or 72 hours if the client is not in custody, but admitted it does not always work that way. Typically, complaints are handled by the District Court Administrators. The District Court Administrator would then contact contract counsel to determine the problem.

Ms. Riggs suggested it is important to have a state-wide oversight entity. This entity can develop attorney performance and qualification standards. Ms. Riggs' understanding was that the Montana Appellate Defender Commission was responsible for creating standards.

Rep. Parker felt there was a consensus at the last meeting that the American Bar Association's "Ten Commandments" were good standards. Rep. Parker wondered if there was a problem with Montana adopting those rules, or if Ms. Riggs felt there was need for additional work. Ms. Riggs felt the American Bar Association standards were a good litmus test for the state when they are trying to assess the quality of services. Ms. Riggs felt the reality is some of those standards are aspirations, and there are specific fiscal and caseload standards that should also be considered.

In addressing quality of services, Rep. Parker wanted to know what resources are being used besides continuing legal education. Mr. Kaplan felt the three most important things for effective representation is to hire good people and assign appropriate caseloads with an appropriate salary. Mr. Kaplan felt having a state-wide appellate division is a wonderful resource within the state public defender system to educate the entire system. In the last few years, Colorado has done a comprehensive intranet, which functions as an Internet just within the Colorado state public defender system. Mr. Kaplan reported Colorado has a brief bank containing 200 legal briefs from the appellate division. Each attorney within the public defender system must inform Mr. Kaplan which briefs they have placed on the intranet to assure the brief bank is growing. The briefs placed on that system must also be accompanied by the appropriate motions. Investigators in Colorado's system are also shared resources.

Rep. Parker wondered if one area is under-burdened, whether resources could easily be shifted and shared between offices. While Mr. Kaplan responded it is done, he cautioned most of the offices need more FTEs and the question is which office is the most stressed. Conceptually and theoretically this should happen, but practically speaking, all offices could use help. Therefore, sharing attorneys only happens in extreme situations.

Rep. Parker asked if there were any attorneys in Mr. Kaplan's centralized state office whose explicit job it is to go out to a rural location and assist with a challenging homicide case, for example. Mr. Kaplan stated they do have that capacity, but they do not have a capital litigation office or team dedicated to death penalty cases. Mr. Kaplan has two individuals, a trial assistant and an administrative assistant, who help with those cases. Mr. Kaplan spoke to the inability to staff offices appropriately in anticipation of capital cases.

Rep. Parker turned the focus of the discussion to Wyoming, and wondered what Wyoming does to help individual attorneys to represent their clients effectively and efficiently. Mr. Koski replied they have a brief bank, publish a monthly newsletter, and provide access to training. In addition,

they have access to the state crime lab, as well as various research tools. Mr. Koski cited the largest asset as the ability to exchange concepts and ideas among attorneys.

Rep. Parker stated that given North Dakota has more of a decentralized contract system, he wanted to know what opportunities existed for attorneys to improve their practices. Mr. Ganji said North Dakota is woefully inadequate in this area, and noted North Dakota has a small criminal bar. In terms of formalized support for public defenders, North Dakota does not provide this service. Mr. Ganji felt this is a major disadvantage of having indigent defense within a judicial branch budget. Mr. Ganji also said they attempted to obtain access to Westlaw for their attorneys, but were unable to procure access to Westlaw at a reasonable price.

Mr. Parker requested information from around the nation that has raised the standards of practice and provided resources to individual public defenders. Ms. Riggs suggested a state-wide public defender program as the best resource both for advocating for indigent defense and providing training for assigned counsel and contract counsel. Ms. Riggs identified New Hampshire's public defender training program as being very effective and well-attended by both assigned counsel and contract counsel.

Sen. Brent Cromley wanted to know who provides oversight in Montana's Public defender system, how complaints are handled, and what happens when special technical assistance is required. Ms. Heffelfinger responded that if it involved a public defender office, it is handled similar to Colorado and Wyoming where the Chief Public Defender in the office would handle complaints. In the counties where there is a contract situation or a case-by-case appointment, the judge would receive complaints.

Mr. Mike Sherwood, a member of the Appellate Defender Commission, said he does not do court-appointed work, but information he has received indicates complaints are handled in a diverse manner throughout the state. Mr. Sherwood explained the Appellate Defender

Commission is trying to develop a uniform standard as to how a person should file a grievance if they felt they were receiving inadequate or inappropriate representation. Currently, complaints are directed to someone within the Public Defender Office or to the court.

Ms. Margaret Borg, Chief Public Defender in Missoula, explained that in her jurisdiction, either she or the judge would receive the complaint. Judges have to go through a process to determine whether there has been ineffective assistance of counsel and whether an attorney should be replaced. Case law in Montana provides for an inquiry by the judge with the individual defendants to determine whether there are appropriate grounds to remove the attorney and have someone else appointed. Ms. Borg reiterated that when someone receives appointed counsel, they do not have the right to choose that counsel.

Sen. Wheat asked Ms. Riggs if she had an opportunity to review SB 218 (2003), which would create a state-wide public defender system. Ms. Riggs was aware of the legislation, but had not reviewed it in detail. Ms. Riggs was unable to comment in detail, but from her general overview, she felt the legislation would have been a positive move for Montana.

Sen. Wheat stated SB 218 would have created regional offices that would have been semi-autonomous from the public defender's office and wondered whether the branch offices in Colorado had any autonomy for purposes of hiring/firing staff or whether it was all left up to Colorado's main office. Mr. Kaplan responded each of the branch offices has an appointed person in charge, and the main office does not try to micro-manage those offices, but does provide oversight and has the ability to audit files.

(Tape 3; Side A)

In terms of hiring/firing, Mr. Kaplan hires all attorneys and then sends them to individual offices. In terms of staff, individual offices will do their own hiring from within their individual communities. Individual offices cannot spend any money without prior approval from the main state office.

Mr. Koski added the Wyoming procedure is similar to Colorado, but all of their attorneys are appointed by the Governor, including independent contractors. Before a name can be submitted to the Governor for approval, Mr. Koski has to get the advice and consent from the county commissioners and district court judges. Field offices have a certain amount of autonomy, but Mr. Koski has total authority when it comes to hiring/firing, and all attorneys serve at his pleasure. All offices are governed by the same personnel rules. Like Colorado, absolutely no funds can be expended without prior authorization from the main office.

Sen. McGee wondered if the contract system compensation rate included operational costs such as building rent, social security, and other office supplies. Mr. Ganje replied contract attorneys pick up all incidental expenses that fall outside the standard reimbursable expenses such as transcript fees, service of process, and witness fees. Mr. Ganje cited this as a serious shortcoming in North Dakota's system. One of the major complaints of contract defense counsel is that North Dakota is providing defense counsel services off the backs of private

attorneys since their hourly rate does not cover the cost of their services and other expenses such as secretarial support and office supplies. One of the proposals North Dakota is considering adding is a ten percent overhead compensation to cover these items.

In speaking in terms of proposed budgets to the Legislature, Sen. McGee asked Mr. Koski how Wyoming addresses the additional expenses other than salary. Mr. Koski replied the only thing not in his budget is the physical office structure. They have the obligation to provide anyone who is an employee or part-time employee with the necessary tools to perform the job. For independent contractors, Mr. Koski admitted, to a large extent, the private sector is carrying some of the burden. Any case-related expense, such as postage or long-distance telephone calls, are reimbursed. Mr. Koski stated Wyoming's budget for FY 2003-04 is \$10.7 million.

Mr. Kaplan answered the same question by comparing Colorado's system with their conflict office which operates on a contract basis. Mr. Kaplan explained the public defender system is the better deal even though it does not include support staff and office supplies. When a large case, such as death penalty case, is handled by the conflict office, they would be charged by every hour they are required to work. Mr. Kaplan used a death-sentence case as an example and explained when he submits his hours to the Legislature, he can submit annual salaries for individuals working on the case. Mr. Kaplan emphasized these individuals work more than 40 hours per week, but receive the same salary. Contract lawyers get paid an hourly rate for the number of hours actually worked.

UPDATE ON ACLU LITIGATION

- **Montana Attorney General Mike McGrath**

Mike McGrath, Attorney General for the State of Montana, spoke about the lawsuit against the state regarding indigent defense and the way this defense is provided in the various counties and communities across Montana. This case is scheduled to go to trial on May 17, 2004, and trial is expected to last five weeks. To date, the parties have taken approximately 100 depositions and anticipate taking 30 or 40 more. Experts have been hired, and those expert depositions remain to be taken and are expected to be the more lengthy and involved. Attorney General McGrath could not predict how the case will go, but emphasized litigation is not the best way to get involved with complicated public policy issues. Chief Justice Karla Gray is a defendant in the lawsuit and she and Attorney General McGrath have been involved in a number of discussions regarding the costs of the public defender system. One of the problems is that they have no way of controlling these costs. Attorney General McGrath approached the Plaintiffs in this lawsuit about finding a legislative solution to the problem, as opposed to continuing with the litigation. Attorney General McGrath felt the court case would not be decided before the 2005 Legislature, and he felt it would be important to develop a solution during the 2005 Legislature. Attorney General McGrath asked the Committee to consider working with him and Chief Justice Gray to develop a legislative solution. This would mean recommending a state-wide public defender system outside of the court system. Chief Justice Gray has been adamant the system should be outside of the court system and does not want the courts administering public defense because of inherent conflicts. Attorney General McGrath suggested the Committee agree to work with him and Chief Justice Gray to come up with figures and numbers and develop a bill to be presented to the 2005 Legislature to address this issue. A stipulation could be obtained from the Plaintiffs to hold the litigation in abeyance. Attorney General McGrath felt

there would be complications for both sides of the litigation by stalling, but he felt everyone would be better off in the long run by solving the issue legislatively. Attorney General McGrath spoke about a high-profile homicide/aggravated kidnapping case in Dawson County where there were seven Defendants. The bill for just one Defendant was \$300,000. The bill in the Barjona case was also over \$300,000. Attorney General McGrath warned these kinds of lawsuits cannot be planned for, and costs cannot be controlled. Attorney General McGrath felt a legislative commitment or resolution to adopt a state-wide system would help negotiations for settlement in the ACLU lawsuit.

Sen. McGee stated he did not have a problem philosophically, but in whatever regard Plaintiffs and Defendant have reached an agreement as to what the proposed legislation should or should not include, Sen. McGee wanted to know if any specific conditions were attached to the legislation. Sen. McGee stated he would not vote in favor of resolution without having the specific information. Attorney General McGrath understood Sen. McGee's concern and stated the agreement is simply the broad outline he described. Attorney General McGrath suggested the legislation would be drafted by Legislative Services and Fiscal Services since the numbers will be complicated. Attorney General McGrath suggested there would be a number of people involved in the drafting and adoption of the legislation. The agreement will be to hold the litigation in abeyance in order to reach a legislative solution.

Chairman Grimes asked if there were any other players who would need to be included. Attorney General McGrath explained Norm Grosfield was representing the counties and all of the counties, with the exception of Missoula County, have been dismissed from the litigation.

Sen. McGee asked Attorney General McGrath whether SB 218 was a direction that would be amenable to both sides of the litigation. Attorney General McGrath, speaking for himself, identified SB 218 as a huge step in the right direction.

Rep. Lange wondered how much money taxpayers would save by not having to move forward with a five-week trial. Attorney General McGrath could not give an exact figure, but stated the cost of a five-week trial would be substantial and asked the Committee to keep in mind there is always the potential of losing the case and being required to pay Plaintiffs' attorney fees.

Sen. Wheat requested Mr. Scott Crichton, Executive Director of the ACLU, to comment on Attorney General McGrath's proposal of obtaining a resolution from the Committee and working cooperatively with the Attorney General and the Supreme Court toward a legislative solution to the issues raised in the ACLU lawsuit. Mr. Crichton, responded he is aware of the letter sent to Attorney General McGrath and the intent of that letter, and he hopes the intent is to go forward with a concerted and sincere effort to resolve the issue through the next legislative session. Mr. Crichton felt everyone involved understood there are serious problems that need to be addressed. Mr. Crichton commented the bottom line is they would like to see a decent system established which would provide parity for people without resources to have their day in court.

Rep. Shockley stated he would like to get away from contracting and wanted to know if there was a system where the divisions of a state agency were autonomous in their administration, and whether this would alleviate conflict issues. Rep. Shockley asked if there would be ethical problems. Mr. Kaplan commented that they tried to walk that line in Colorado and found there was a beneficial component and a negative component. Mr. Kaplan felt part of what he was saying about the state-wide system and allowing for the sharing of resources may impact the ability to have an ethical wall that would allow for a conflict case to be assigned counsel from two different offices. Making offices truly independent would sacrifice some of the benefits of having a state-wide system. In addition, having one administrative body could impact whether the divisions are truly independent for conflict purposes. Mr. Kaplan stated they do have ethical walls between their offices and within offices. There is a new set of American Bar Association standards being developed that will minimize one of the largest areas of conflict, imputed knowledge conflicts. Fundamentally, Mr. Kaplan felt keeping autonomy between the offices will further reduce conflicts.

Rep. Shockley wondered if they could get around the conflict problem by stating in statute that there is no conflict unless a specific problem could be demonstrated. Mr. Kaplan felt there may be constitutional considerations that may not be remedied by a statute.

Mr. Koski directed the Committee to the case in Exhibit 7, Asch v. State of Wyoming, 62 P.3d 945 (Wyo. 2003) which says it is not a per se disqualification in regard to imputed counsel, and it is on a case-by-case basis. Mr. Koski stated Wyoming meets the constitutional standard regarding imputed disqualification. Mr. Koski stated Wyoming has a conflict policy they expect their attorneys to adhere to.

Rep. Lange said there have been questions in Montana about the ability of the Public Defender to make decisions on witnesses and proper ways of conducting a defense, and sometimes there is a perspective the court has a closer relationship with some state agencies. Rep. Lange wanted to know if the Wyoming Public Defender's Office had an adequate sense of autonomy. Mr. Koski identified two main issues as being how and when money would be spent, and assignment of cases. Mr. Koski felt the Wyoming courts were glad to get out of the business of finding attorneys to take cases and generally, it was better to take judges out of the picture.

(Tape 3; Side B)

Sen. Wheat inquired about who sets indigent defense guidelines and what constitutional level is acceptable. Sen. Wheat also wondered if the defendants are required to pay any amount of money for their defense. Mr. Koski explained that in Wyoming, they do not become actively involved in a case until a judge has asked them to represent an indigent defendant. The defendant fills out an affidavit, and a judge makes the appointment based upon information contained in the affidavit. Wyoming requires judges to make a determination on the record that either the individual does not have the ability to reimburse for certain public defender services, or the court can order reimbursement. Through this system, Wyoming only recoups approximately \$300,000 per year within their \$10 million annual budget.

Mr. Kaplan explained the process is similar in Colorado, and after the affidavit is completed by the public defender's office, there is a recommendation as to whether the defendant qualifies. They also ask for proof of indigence. The Colorado Supreme Court sets indigence guidelines. The court can also find that a person is entitled to indigent defense even if the person does not quite meet the guidelines. Mr. Kaplan explained there will be a processing fee of \$25 at the end of a case, but this fee can be waived. In the past, Colorado had a partial indigence category, but it was discontinued because it was not worth the trouble.

Mr. Ganje added North Dakota has guidelines published by the Indigent Defense Commission that are 125 percent of poverty. Mr. Ganje felt this was a more formal mechanism and there would be too much disparity if each judge set his own guidelines. In addition, there is a \$25 application fee paid up front, and that fee can be waived. Whatever money is recovered is appropriated back to the Judiciary for indigent defense. Statutorily, defendants are required to pay, to the extent that they are able, costs incurred on their behalf. When that money is recovered, it does not appropriate back to the Judiciary, but reverts back to the general fund. Mr. Ganje stated a procedure has been implemented by the North Dakota Legislature where every criminal defendant must pay \$100. This money goes into the indigent defense fund and has been quite successful.

STAKEHOLDER INTERESTS, CONCERNS, AND RECOMMENDATIONS WITH RESPECT TO THE STRUCTURE AND FUNDING OF A STATEWIDE PUBLIC DEFENDER SYSTEM IN MONTANA

- **Michael Sherwood, Appellate Defender Commission**

Michael Sherwood, a member of the Appellate Defender Commission, submitted written testimony to the Committee (EXHIBIT 9).

- **Brant Light, Montana County Attorneys' Association**

Brant Light, President, Montana County Attorneys' Association and Cascade County Attorney, testified that as prosecutors it is very important to have qualified, dedicated attorneys to represent indigent defendants. Mr. Light emphasized it is much easier to prosecute a case when there is a well-qualified public defender on the other side. Mr. Light also represents the counties in civil matters and wants to be able to protect the counties' liability in providing indigent defense. The Montana County Attorneys' Association (MCAA) met and discussed in detail the structure and funding of the state-wide public defender system and the three options before the Committee. Mr. Light explained they were unable to come up with a specific consensus, but the MCAA supports moving forward with a state-wide public defender system. Mr. Light identified SB 218 as a good start and a good model for legislation. Mr. Light voiced a couple of his concerns and explained his idea of parody would be to assure that both the money and the time between prosecution and defense is fair enough to ensure both the quality and competency are fairly even. Mr. Light was at first concerned with public defenders becoming a state agency and relying on the county for funding and raises and thought this could create a salary gap between public defender salaries and county attorney salaries. Mr. Light explained in Cascade County they keep salaries level between his office and the Cascade county public defender's office.

- **John Smith, Montana Association of Criminal Defense Lawyers**

John Smith, Montana Association of Criminal Defense Lawyers, just attended the annual seminar for the Montana Association of Criminal Defense Lawyers, and stated they are committed to providing the very best representation they can for accused persons in the state. Mr. Smith felt that people who represent indigent defense believe and hope changes to the system will improve the system.

(Tape 4; Side A)

Areas of importance highlighted at the annual meeting were fiscal considerations, investigation, and rehabilitation. Mr. Smith felt risk management is important and expenditures on resources for public defenders, such as investigators, will provide a mechanism to manage the risk. Mr. Smith emphasized the system is set up to uncover the truth of the matter, and the need for independent investigation could not be understated. Without independent investigation, public defenders are not doing their jobs and are being ineffective. Mr. Smith testified he rarely goes to trial because he is unable to perform thorough factual investigations. Mr. Smith identified trust between the client and lawyer as crucial, and if the facts have not been fully flushed out, the trust is compromised; therefore, cases tend to settle. Mr. Smith felt with proper investigation, many cases can be dismissed because the prosecutors do not have a strong case, and this is efficient for the system overall.

Mr. Smith felt evaluation by mental health professionals will also help manage risk by providing damage control and will help curb recidivism. Sometimes the proper treatment could have prevented a person from committing a crime in the first place. Mr. Smith testified he has less than a five percent recidivism rate among his clientele because his clients have the resources to obtain the proper kind of treatment. Mr. Smith opined most people go to prison not because they committed a crime, but because they have violated their probation. Mr. Smith emphasized people need to get better, and that he works hard to achieve that.

Mr. Smith identified proper training for defense counsel and management of caseloads as two ways to increase the quality of representation and make the system run more smoothly. Mr. Smith also felt this would result in fewer post-conviction relief cases since many of those cases now involve ineffective assistance of counsel allegations.

Mr. Smith disagreed with flat fee contracts and felt those contracts force defense attorneys to guess what the future will hold in terms of number and type of cases. The client ultimately controls whether he will get a trial. Judges have the final decision whether to allow a plea bargain. Therefore, a defense attorney should not be required to bid a flat fee for the next year's services.

Mr. Smith asked the Committee to remember that a person accused of a crime who cannot afford to hire a private attorney should get the same level of services as those who can afford to hire a private attorney.

- **Honorable John C. McKeon, Montana Judges' Association and District Court Council**

John C. McKeon, District Judge, appeared on behalf of the Montana Judges' Association and the District Court Council. Judge McKeon explained the Montana Judges' Association consists of all district judges in Montana, as well as the all the Supreme Court Justices, and also enjoys the benefit of receiving advice from all retired judges. Judge McKeon stated the Judges' Association did not have an opportunity to meet and consider in detail the three proposed options. The Judges' Association's Board of Directors discussed the three options by telephone, and Judge McKeon submitted a letter to the Committee stating the Montana Judges' Association's position (EXHIBIT 10). Judge McKeon felt strongly that the Public defender system should fall outside the Judiciary branch. Judge McKeon submitted a letter from Karla Gray, Chief Justice of the Montana Supreme Court, stating the District Court Council cannot undertake the responsibilities set forth in Option B (EXHIBIT 11).

Questions from the Committee

Upon request from Chairman Grimes, Mr. Sherwood added his personal comments regarding the public defender system. Mr. Sherwood felt there is a perception in the Legislature that there are sociopathic criminals in society, while at the same time they believe their family and friends are not criminals. Mr. Sherwood stated most of his clients are the sons and daughters of citizens and, for the most part, he represents nice people who have made mistakes. Mr. Sherwood asked the Committee to note that crime rates have been falling for the past 15 years; however, he remains busy because the state and federal government have created new felonies. Mr. Sherwood asked the Committee to remember every time they create a new crime, it will cost the state money. Mr. Sherwood has been hired as an expert witness in an increasing number of cases where attorneys are being sued for ineffective representation. Mr. Sherwood noted not spending the money up front for public defense costs the state money in the long run. Mr. Sherwood felt there is a huge under-funding of public rehabilitation services which causes a higher recidivism rate and that most street crime in Montana is alcohol related.

Rep. Shockley asked if any of the cases Mr. Sherwood appeared in were out of Ravalli County. Mr. Sherwood replied he was an expert in one case from Ravalli County and that was a flat-fee contract.

Public Comment

Harold Blattie, representing the Montana Association of Counties, wished everyone in the state would have had the opportunity to hear the testimony provided to the Committee at this meeting. Mr. Blattie felt if they had been better informed, SB 218 may have had a better outcome in the last legislative session. Mr. Blattie did not believe the counties have any business becoming involved with the public defender system. Prior to the meeting, Ms. Heffelfinger had asked whether MACo or others had discussed whether the state should assume all of the public defender operations, including justice court. Mr. Blattie felt that would resolve a lot of conflicts and problems, and while change is quite often not without pain, he

would support this option. Mr. Blattie felt the financial problems experienced by SB 218 were due to the inability to get an accurate handle on how costs should be broken down. Mr. Blattie suggested SB 218 as a good place to start again.

Sen. Jerry O'Neil, SD 42, said he believed Montana should have a state-wide public defender office and favored Option C, but believed the contracts should be done on a voucher basis. Sen. O'Neil suggested vouchers could be sold for an amount contingent upon a person's income and funds available from the state. If a person wants to go further with their defense and had expended their vouchers, they would be required to purchase additional vouchers at a higher rate. Sen. O'Neil felt this system would give the client more control over the hiring/firing of their own attorney and will put quality back on the free-market system. Sen. O'Neil felt the free-market system is the best way to run the whole system.

Committee Discussion

Sen. McGee would like to address Option C (Exhibit 11), and Attorney General McGrath's proposal that the Committee adopt a resolution addressing settlement of the ACLU lawsuit. Sen. McGee wanted to know whether Attorney General McGrath felt SB 218 was a direction that might assist a settlement between the parties. Attorney General McGrath said SB 218 represented a positive direction. Sen. McGee moved the Committee adopt as a philosophy Option C and by adopting Option C, adopt SB 218 from the 2003 Session as a working tool upon which the Committee can apply the information they are learning, and that the motion reflect the Committee's intent to work with the Attorney General's Office and other parties to effect a resolution of the pending court case.

Chairman Grimes commented that while this is procedurally unusual for an Interim Committee, Sen. McGee's motion was definitive and would bring Option C into SB 218, or visa versa, and combine the two concepts.

Sen. McGee added that adopting the motion would be a statement of the Committee's commitment to work with the Attorney General's Office and other parties to bring about a resolution of the ACLU lawsuit.

(Tape 4; Side B)

Rep. Shockley liked Sen. McGee's idea, but suggested deleting reference to the litigation and simply say the Committee will use SB 218 as a working model. Rep. Shockley stated he would anticipate some of the brethren would not like rolling over for the ACLU lawsuit. Rep. Shockley recalled that money was the only reason SB 218 did not pass the last session, and that the intent was already there to change the system.

Chairman Grimes agreed and felt there were compelling reasons for legislation and if by passing legislation they help with the lawsuit, so be it.

Sen. McGee agreed to amend his motion to delete reference to the litigation.

Chairman Grimes asked staff to comment. Ms. Heffelfinger stated there are some issues outside the scope of SB 218 that need to be resolved, but the motion includes incorporating the Option C ideas and other loose ends and working on those through the structure of SB 218. Ms. Heffelfinger stated it would be good to have structure to work with.

Sen. McGee felt the first point would be to bring to the table a document that could be worked with, and he was not proposing to adopt SB 218 the way it was written in 2003, but that SB 218 be used as a tool to expand on.

Rep. Lange concurred with Sen. McGee and Rep. Shockley and felt the reference to the litigation should be deleted. In the event the motion is adopted, Rep. Lange felt a follow up motion might be in order that the full Committee reserve a date unspecified at this point in time to sit down and work on proposed legislation.

Sen. Wheat felt the Committee has to adopt Option C and was very sensitive to what the Judge's Association expressed about Option B, and felt Option A was not an option at all. In response to Rep. Lange's suggestion, Sen. Wheat would like to see a small subcommittee be formed to work through SB 218 and other issues heard about in testimony, together with staff, to put together draft legislation for approval by the full Committee. Sen. Wheat suggested this would more efficient use of time. Sen. Wheat volunteered to be on the subcommittee since he helped to draft SB 218.

Chairman Grimes summarized SB 218 would be a Commission-driven centralized public defender system and a line item under Administration. Sen. Wheat clarified SB 218 was designed to take the Public defender system and attach it administratively to the Department of Administration. SB 218 required a chief public defender and an administrative officer in Helena. It would then be combined with the appellate defender system and the Appellate Defender Commission would be expanded to include the public defender system. Therefore, the public defender system and the appellate defender system would be merged into one system. In addition, county public defender systems would also be absorbed into the system, and they would become the regional offices. Sen. Wheat recalled the Fiscal note being \$5.5 million annually.

Rep. Lange agreed with the concept of forming a subcommittee, and asked if once the subcommittee makes its recommendation, the Committee as a whole would take an adequate amount of time to go through the subcommittee's recommendation.

Sen. Cromley wondered about justice of the peace courts and wondered if they would be included as part of the process. Sen. McGee stated SB 218 did not envision lower court participation, but based on testimony, he thought new legislation should include lower courts.

Public Comment

Mr. Sherwood stated this will necessitate a lot of work and he was concerned how quickly the Appellate Defender Commission could move based on its current structure. Mr. Sherwood noted it is difficult to get five lawyers together. Mr. Sherwood wondered if the Commission had the ability to do what is being asked. With respect to the lower courts, Mr. Sherwood

commented the Commission would want to see vertical representation between the lower courts and district courts.

Chairman Grimes explained the Committee would attempt to incorporate ideas from various participants and would send out draft legislation for review and comment.

Mr. Smith reviewed SB 218 and commented Section 46-8-201, MCA, mentions a judge or justice of the Supreme Court would certify reasonable compensation. Mr. Smith reiterated he would like to see the judicial branch omitted from the procedure. In terms of costs, Mr. Smith noted that Section 3-5-901, MCA, provides a list of covered costs and hopes psychologist examinations would be included. Mr. Smith was adamant that including these costs would go far in providing risk management.

Mr. Smith was confused by the name of Section 12 "District court assumption and indigent defense and contingent expense account." Sen. McGee said it went to the original intent of the bill and the state assumption of district court costs and also public defenders. Sen. McGee said this title would not apply any more. Sen. Wheat added SB 218 contemplated a gradual implementation of the bill. In other words, the bill would not have taken effect immediately, so there would be costs that needed to be reimbursed to the county and later there were direct costs to the state. Sen. Wheat identified this as an area which would now need to be amended.

Rep. Shockley felt flexibility should be provided to meet different situations in various parts of the state. Rep. Shockley would like to see a head public defender who would have the option to hire full-time employees, part-time employees, or contract employees. Rep. Shockley referenced Mr. Sherwood's formula as a good starting point. Rep. Shockley also felt there would be a big difference in costs assessed in Missoula versus those in Glendive.

Chairman Grimes asked for comment from the Supreme Court Administrator's office.

Jim Oppedahl, Court Administrator's Office, testified he believed the Committee has a good working tool and was committed to helping the Committee through the process of developing a new public defender system.

Mr. Blattie clarified that the contingent expense account in SB 218 was created to keep the bill alive past the deadline, and as fully reported costs were allocated between public defense and other district court costs, there were dollars that were not identified and could not be allocated. Those monies were placed in a separate account that could be drawn on as needed. Mr. Blattie reasoned this went back to the inadequate information the Committee had to work with.

Chairman Grimes asked Rep. Edith Clark, HD 88 (attending as an interested person and member of the Children, Families, Health and Human Services Interim Committee and 2003 member of House Appropriations Committee), how she viewed the proposal from a fiscal note standpoint. Rep. Clark stated the concept of SB 218 was very well taken and complimented Sen. McGee and Sen. Wheat on their hard work. Rep. Clark explained she voted no on SB 218 because of the inability to have evidence-based data on the financial end of the bill. Rep.

Clark stated she would support a new bill especially in view of the vested interest of Children, Families, Health and Human Services Interim Committee.

Ms. Heffelfinger stated she would appreciate as much direction from the Committee as possible, and added SB 218 would be helpful. Ms. Heffelfinger felt the details could be worked out in a subcommittee, but data would need to be accumulated to answer some outstanding questions. Ms. Heffelfinger suggested the Committee authorize her to perform a survey of the individual counties.

Rep. Parker supported Sen. McGee's motion and felt a consensus had emerged that would allow the Committee to move ahead and begin evaluating details.

Sen. McGee provided clarification by stating many people worked on SB 218 during the session, and those people diligently worked every Tuesday and Thursday night for months. Sen. McGee did not want anyone on the Committee to feel he was trying to force feed them SB 218, but rather to look at SB 218 as a place to start. Sen. McGee listed some of the issues he believed needed to be addressed in a new bill. Those issues included providing a definition of "indigence," lower court issues and misdemeanors, definitions for public defender and their duties, ensuring the judiciary branch is not fundamentally involved, psychological examinations for indigents, neglect and commitment, the contingency expense account, the fully-reportable costs, Mr. Sherwood's formulas and attorney-client relations issues.

Sen. McGee's motion that the Committee adopt as a philosophy Option C, and by adopting Option C, adopt SB 218 from the 2003 Session as a working tool upon which they can apply the information they are learning, carried unanimously, with Rep. Gutsche and Sen. Rice voting by proxy.

Chairman Grimes appointed Sen. McGee, Sen. Wheat, Sen. Perry, Rep. Parker, and Rep. Shockley as the subcommittee to work on the public defender system issue. Sen. McGee will chair the subcommittee. The next full Committee meeting will be scheduled after the subcommittee has met.

Attorney General McGrath thanked the Committee and added the Committee was moving in the right direction and stated he would work with the subcommittee. Attorney General McGrath identified the budget as the big issue.

Chairman Grimes stated he anticipates a committee bill will emerge from the work. The Committee and Attorney General McGrath agreed.

Public Comment

John Jenkins, a concerned parent from Missoula, Montana, felt there has not been adequate accountability shown by public defenders. Mr. Jenkins recommended a state public defender system be adopted and accountability be shifted from judges to the state. Mr. Jenkins felt the system should provide equal resources and support staff to the public defender system as it does to the prosecution system.

Melissa C. Worthan, a concerned parent from Missoula, Montana, submitted written testimony to the Committee (EXHIBIT 12) depicting her experience with public defenders and how, in her experience, the current system does not work.

(Tape 5; Side A)

Chairman Grimes asked Ms. Worthan if she was able to file a grievance with anyone about the matter, and Ms. Worthan replied no one would touch it. Ms. Worthan added she has not seen her children since April 28. Rep. Shockley suggested Ms. Worthan file a complaint with the State Bar of Montana.

Dawn Humphrey, a concerned parent from Missoula, Montana, submitted written testimony to the Committee regarding her involvement with Child Protection Services and the public defender system (EXHIBIT 13).

Pastor David Cook, a minister for over thirty years, works with troubled churches and lives in Ravalli County. Pastor Cook recounted his experience with the public defender system and the impact on him and his family.

Pastor Cook implored the Committee to do something about the public defender system and recognized that there is a money issue, but also an attitude difference that must be dealt with. Pastor Cook emphasized there are a lot of good attorneys, but they all get a bad name when bad lawyers are allowed to walk away. Pastor Cook named Ravalli County as particularly in need of help since many people in Ravalli County had been judged more harshly than they deserved. Pastor Cook would like to a system that works, is properly funded, and would include an investigative branch.

Kandi Mathew-Jenkins, a family advocate for families falsely accused of child abuse and neglect from Missoula, Montana, submitted written testimony to the Committee (EXHIBIT 15). Ms. Mathew-Jenkins spoke about recent legislation passed in Utah establishing a separate public defender system for indigent parents. Chairman Grimes requested Ms. Mathew-Jenkins forward him a copy of the legislation. Ms. Mathew-Jenkins would like to see a place established which would listen to the concerns and evidence of indigent parents who are involved with Child Protective Services. Ms. Mathew-Jenkins felt the problem is not so much with public defenders, but rather the problem many times lies with judges who rubber stamp the department and do not listen to the public defenders or give the public defenders the resources they need to defend their clients.

Steve Crawford supports revamping the public defender system. Mr. Crawford left two large files with Rep. Lange, and urged the Committee to review those files and that those files would indicate a need for change.

Mr. Crawford submitted documents to the Committee related to Western Towing and Storage (EXHIBIT 14).

Richard Stevens testified he had sent the Committee information on how his rights and the state laws have been violated by attorneys who conspired with DNRC to forge documents. Mr.

Stevens was adamant no water appropriation permit was ever issued, and he has now lost everything because parties all point fingers at someone else.

Ms. Heffelfinger added she had previously mailed the Committee members a letter from Mr. Stevens, and she has two binders of information she would make available to the Committee.

COMMITTEE MEMBER ISSUES

- **Homeland Security, Sen. Daniel McGee**

Sen. McGee explained there are issues regarding Homeland Security and the constitutional provisions of right-to-know that could potentially conflict. As the Homeland Security Task Force moves forward, it has become clear that it may be impossible for the federal government to allow the state government to know certain pieces of information because releasing that information to the state would make that information a document and open to the public. Sen. McGee continued saying all states are looking at critical infrastructure and things that may be susceptible to terrorist attack. Sen. McGee suggested if a list were made of those infrastructures, it would result in a document subject to public disclosure and could ultimately create a blueprint for terrorists. Sen. McGee suggested it may become important for the Law and Justice Committee to entertain a discussion regarding these issues.

Chairman Grimes asked if there were legislative remedies that he foresees or what other states were doing. Sen. McGee replied Ms. Heffelfinger has written a paper addressing the issue and added it is his opinion the issue will have to be addressed by Constitutional Amendment regarding the right-to-know laws with language about public safety. Currently, the only way the public does not have the right-to-know about anything having to do with government is if an individual's right of privacy is at stake. Sen. McGee noted the people who wrote the Constitution did not contemplate terrorist activity in Montana and what the government might have to do to keep some things confidential.

COMMITTEE MEMBER ISSUES

Chairman Grimes said the issue of Homeland Security could be addressed at a future meeting of the Law and Justice Interim Committee. Ms. Heffelfinger said the next meeting was scheduled for May 20, 2004, with meetings to follow in July and September and noted the Committee is running a meeting behind and could make up that meeting as well. Chairman Grimes stated the next meeting would be subject to work done by the subcommittee.

Rep. Shockley stated it is some judges' practice that when children are removed from the home, the parents are appointed an attorney at that time, but it is not required. In Yellowstone County an attorney is not appointed until documents are filed to terminate parental rights. Rep. Shockley felt if the state was considering removing the children, the state should provide an attorney for the parents at the beginning of the process. Rep. Shockley asked that this concept be contemplated in any proposed legislation.

Chairman Grimes asked whether the Committee had any desire to review SB 37, the DUI legislation, and introduce the bill in the next session. Rep. Lange stated that he and Rep. Noennig meet with the Yellowstone County DUI Task Force and discussed legislation that both

passed and failed in the 2003 Session. At the conclusion of that meeting, the Task Force members had agreed to contact other interested parties across the state, including county attorneys, to assess the types of legislation they might be pursuing. Therefore, Rep. Lange felt it might be premature to discuss SB 37. Rep. Lange felt it would be better to ask the county attorneys and task forces across the state for their input.

Rep. Shockley commented SB 37 had no support from law enforcement, county attorneys, or judges. Rep. Shockley felt SB 37 should be left in the ground.

(Tape 5; Side B)

The public defender subcommittee will decide whether Ms. Heffelfinger should survey all Montana Counties in an attempt to capture more data regarding the public defender system.

ADJOURNMENT

There being no further business to come before the Law and Justice Interim Committee, the meeting was adjourned at 3:55 p.m.

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