



Law and Justice Interim Committee

58th Montana Legislature

SENATE MEMBERS

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BRENT CROMLEY
DANIEL MCGEE
GERALD PEASE
GARY PERRY
MICHAEL WHEAT

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SHERI HEFFELFINGER, Research Analyst
VALENCIA LANE, Staff Attorney
SANDRA SHEPHERD, Secretary

SUBCOMMITTEE ON REFORMING MONTANA'S PUBLIC DEFENDER SYSTEM MINUTES

August 9, 2004

Rm. 152, Capitol Bldg.

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. DAN MCGEE, Chair

SEN. GARY PERRY
SEN. MICHAEL WHEAT

REP. JIM SHOCKLEY
REP. JOHN PARKER

STAFF PRESENT

SHERI HEFFELFINGER, Research Analyst
VALENCIA LANE, Staff Attorney
KIP DAVIS, Secretary

Agenda & Visitors

Agenda, Attachment #1.
Visitors' list, Attachment #2.

CALL TO ORDER AND ROLL CALL

CHAIRMAN MCGEE called the meeting to order at 10:00 a.m. and the secretary called the roll (see ATTACHMENT #3). Sen. Gerald Pease sat in on the meeting. The minutes from the June 28, 2004 meeting were not available for the Subcommittee's approval at this time.

I. Staff Presentation of the Bill Draft Establishing a Statewide Public Defender System

A report prepared by the National Legal Aid & Defender Association entitled "An Assessment of Indigent Defense Services In Montana" is included as *EXHIBIT #1*.

SHERI HEFFELFINGER reviewed the draft bill proposal that establishes the Public Defender Act (see *EXHIBIT #2*), pointing out to the Subcommittee the areas requiring that a policy decision be made.

II. Staff Update on Caseload and Fiscal Data, Review of Expected Costs and Funding Options (Review of Wyoming Funding Formula)

Harry Freebourn, Legislative Fiscal Analyst, presented a PowerPoint display offering the costs and assumptions involved with the development of a statewide public defender system (see *EXHIBIT #3*). **Mr. Freebourn** told the Subcommittee that the data in his report was gathered from three sources--the office of court administrator and captured by the accounting software system, county surveys, and the SB218 fiscal note.

SEN. WHEAT, noting that the Legislature had increased the court fees for criminal cases, asked if that source of funds would be available to assist in the development of an information technology system for the public defender's office. **Mr. Freebourn** answered that the sources of funds had not been modeled.

REP. SHOCKLEY asked if the estimated 88.5 FTEs anticipated for the public defender's offices throughout the state included the appellate defender's office. **Mr. Freebourn** answered that it did not, but he believed there would be an additional three FTEs for the appellate defender's office. REP. SHOCKLEY replied that it seems as if three FTEs would be inadequate to handle the workload. MS. HEFFELFINGER told the Subcommittee that the current appellate defender's office only handles cases with conflicts and, because trial attorneys are now handling the appellate work, if the Subcommittee chooses to have the public defender's office handle the all appellate work there would need to be additional costs and personnel added to the budget of the public defender's office.

REP. PARKER, noting that guardianship and conservatorship cases as well as youth in need of care cases all begin in district court, wondered if the estimate for justice's court was too high. MS. HEFFELFINGER replied that she had understood that those kinds of cases can begin in justice's court. REP. SHOCKLEY commented that he didn't believe that they did--civil cases involving minors start in district and involuntary commitments, although civil cases, always begin in district court with a court order.

REP. PARKER commented that he believed the estimated justice's court costs will come down, because it is difficult to believe that the costs of misdemeanor representation can be nearly the same as for criminal representation. REP. SHOCKLEY added that when he was bidding on public defender contracts misdemeanors represented only about 25% of the total.

CHAIRMAN MCGEE asked what the taxpayers are currently paying for public defense, regardless of whether it is the county or the state writing the check, and how does that compare to what this bill draft is proposing. **Mr. Freebourn** replied that he did have the answer for that.

CHAIRMAN MCGEE asked the Subcommittee to remember that the city courts keep 100% of

the fines that they levy while the justice's courts share 50% of the fines with the state. If the state is going to be picking up the costs and writing the checks, that revenue of the courts may need to come to the state.

REP. SHOCKLEY suggested that, in order to get a handle on the statistics, the state should initially pay only a portion of the costs of justice's court until it becomes clear exactly what the expenses are.

CHAIRMAN MCGEE commented that perhaps the question should be whether the justice's courts should be included in the public defender system at all during this beginning phase.

III. Public Comment on the Bill Draft

Written comments from the public, as received by staff, are included as *EXHIBIT #4*.

Randi Hood, Chief Public Defender, Lewis & Clark County, expressed her concern with the added job responsibilities of public defenders under the proposed bill draft, specifically representation in cases involving the Uniform Parentage Act, indigent parents in involuntary commitment of the developmentally disabled, waiver of parental notification for a minor's abortion, and a youth's parents in Youth Court. **Ms. Hood** told the Subcommittee that her office could not handle these additional functions with her current staff--an additional attorney would be needed. The basic structure of the office under the proposed bill draft is good, especially the requirement for standards for public defenders, but the \$25 fee for an application for a public defender is a bad idea, because the definition of indigent means the person doesn't have any money, as well as the problems involved with collecting the fee.

REP. SHOCKLEY asked **Ms. Hood** what percentage of her office's time is tied up with appellate work and **Ms. Hood** answered that, on average, appeals probably take up 66% of the time of one person per month.

Penny Martin, Court Reporter, 1st Judicial District, told the Subcommittee that she was concerned with the language in Section 18 referring to the "actual cost" of providing a transcript and urged elimination of that language. The "actual cost" language was added during the last Legislative session and has caused confusion. In Helena, court reporters grieved that language and the judges ruled in favor of the court reporters, because there are real costs involved besides paper and photocopying. The equipment the state anticipated that the court reporters would buy are also part of actual costs.

CHAIRMAN MCGEE asked what was the cost of preparation of the transcript of the school funding case. **Ms. Martin** replied that the rough draft cost about \$10,000 and the expedited copy for the Supreme Court cost about \$10,900. Preparation of the transcripts required 14-hour days, 7 days a week. Transcript fees are on a per-page basis.

REP. SHOCKLEY asked if the state would have to pay overtime if the court reporters said they would only work 8-hour days. **Ms. Martin** answered that the court reporters who elected to work on that basis would, but she had elected to keep the transcript fees rather than be eligible for overtime, unless she is in court over 40 hours per week.

Penelope Strong, Chief Public Defender, Yellowstone County, told the Subcommittee that a specific provision should be added to provide for a training director in the Helena office, along with a Chief Public Defender, noting that the ACLU report addresses tremendous deficiencies in

our current system that not only occur with some of the staff defender offices but also with some of the contract public defenders. A training director can provide on-the-spot ethical and research support, which the ACLU report identified as a pressing need. **Ms. Strong** commented that the proposed bill draft requires that one attorney on the commission be involved with the Montana Criminal Defense Group and suggested that affiliation with the National Association of Criminal Defense Attorneys or the National Legal Aid and Defender Association should be considered acceptable as well. **Ms. Strong** further commented that some kind of user fee could help provide fiscal support to the system but it must be waived if the person cannot afford it.

REP. SHOCKLEY asked **Ms. Strong** what percentage of attorney time, in her office, is required to handle appeals. **Ms. Strong** answered that her office was too busy as a trial office to routinely handle them, although she is currently working on two, so private counsel is appointed to handle the appeal work. The state Appellate Defender is out of budget at this point in time and is no longer accepting cases.

REP. PARKER asked Ms. Strong if she carried a caseload of her own and what, if any, kind of caseload would be reasonable for the new state Deputy Public Defenders to carry. **Ms. Strong** replied that she does carry a caseload of her own--currently about 50 cases, which is high because of temporary staff shortages. The caseloads for the Deputy Public Defenders should be minimal because otherwise they are too busy for the supervision, administrative, and management duties that are their responsibility.

Jim Oppedahl, Court Administrator, Montana Supreme Court, expressed his concern that the sections dealing with court-ordered evaluations and unfitness to proceed examinations offer as much clarity as possible about who is responsible for what costs because, as the statutes read now, the law can be interpreted differently by court administrators and county officials. The concerns of the court reporters are significant and, if the current language in the bill about "actual costs" remains the same, the state may need to reexamine the election the court reporters made, because this dramatically changes their employment situation. **Mr. Oppedahl** also expressed concern with what he felt was ambiguous language referring to actions taken "on the court's own motion" because the court has "orders", not "motions". Also, the assignment of pro se costs to the court administrator because they are neither prosecution nor defense is confusing, because pro se costs aren't really court costs--they are a cost of the defense.

Eric Olson, Chief Public Defender, Cascade County, told the Subcommittee that, speaking for his office, the public defenders of this state need help and this proposed bill draft promises relief of a critical nature. The most important elements of the proposed bill draft are the provisions that deal with the establishment of a public defender commission. The state will need a quality commission, with independence and authority, if these changes are going to work and some form of reimbursement for the expenses of commission members will be necessary. **Mr. Olson** said that he doesn't feel that the contract system is effective in Montana and warned against setting up a system requiring significant participation by contract public defenders and noted that while public defenders spend all their time on public defender cases, private attorneys do not, and full-time public defenders are better able to handle those cases. **Mr. Olson** stated his belief that the \$8 million estimate to fund the justice's courts is significantly high and that he would be happy to provide information about what resources are necessary to handle the misdemeanor caseload in Cascade County.

SEN. WHEAT, noting that **Mr. Olson** places great emphasis on the public defender commission, asked him if he had any suggestions for the makeup of the commission. **Mr. Olson** answered that he would recommend a larger commission of 9-13 people, which would allow the commission to be broad enough to have all of the points of view within the public defender community represented and he cautioned about being so specific as to qualifications as to hamper the appointment of the commission. Also, although there is a place on the commission for lay people, the predominant makeup of the commission should be attorneys.

CHAIRMAN MCGEE, noting that, as the proposed bill draft is written, the commission does not include prosecutorial attorneys, asked if **Mr. Olson** had any reason why prosecutorial attorneys should not be included on this commission. **Mr. Olson** answered that he felt it was neither appropriate nor relevant to involve prosecutorial or law enforcement representatives on a public defender commission.

Pam Bucy, Assistant Attorney General, told the Subcommittee that she had been co-counsel on the public defender lawsuit and this bill satisfies all of the requirements of the stipulation. Ms. Bucy urged inclusion of justice's court in the state public defender system, because not only is that a requirement of their stipulation but also because the cumulative nature of many crimes makes it critical to be able to prove that the defendant had adequate counsel on the earlier cases that led to the felony case. In addition, having appointment of counsel occur in justice's court would alleviate the problems of people sitting in jail and would provide greater consistency of representation.

Peter Funk, Attorney, informed the Subcommittee that he had been retained by the ACLU to work with the Department of Justice under the stipulation that has been filed in the existing lawsuit to attempt to get a bill through the Legislature to resolve the public defender issues. **Mr. Funk** expressed concerns about the size of the commission, stating his beliefs that having only seven members makes the commission too small. He said that it was important to ensure that the Chief Public Defender has sufficient authority and necessary flexibility to implement this new system. He said that having the Chief Public Defender position be exempt, while the staff under him is classified, could result in the Chief Public Defender lacking the necessary authority over the staff he oversees and supervises. **Mr. Funk** urged the inclusion of justice's courts under the system, saying coverage of misdemeanors is critical, and Supreme Court law says the right to representation includes most misdemeanors, and emphasizing that state funding of the entire system is critical to creating an effective system.

SEN. WHEAT, noting **Mr. Funk's** assessment of the size of the commission, asked what number **Mr. Funk** had in mind for the commission and what suggestions he had concerning the makeup of the commission. **Mr. Funk** replied that he didn't have a specific number in mind, but said it seems seven is too small, and there was a place on the commission for professionals involved in the areas of mental health, abuse and neglect, and involuntary commitment.

Kandi Matthews-Jenkins, Missoula, read a statement offering her views of the proposed bill draft (see *EXHIBIT #5*).

Melissa Worthan, Missoula, read a statement detailing her concerns with the current public defender system (see *EXHIBIT #6*).

Chad Wright, Appellate Defender, offered comments concerning the state appellate office, saying that to put all appeals under one office, as this proposed bill draft does, would require

significantly more attorneys than has been modeled for. The proposed appellate defender's office would handle more work than the Attorney General's office, which has 11 attorneys yet doesn't handle post-conviction work. Also, the conflict appeal cases being handled by the current appellate defender's office would probably have to be contracted out. **Mr. Wright** pointed out that the effective date for the repealer should be well after the Chief Public Defender has been hired and has had the opportunity hire an appellate defender and support staff.

SEN. WHEAT asked **Mr. Wright** if he felt that the new appellate defender's office would require as many attorneys as the appellate division of the Attorney General's office. **Mr. Wright** answered that it would, because the proposed appellate office will be handling many additional types of cases that aren't being handled now by the Attorney General's office, and perhaps even more attorneys will be necessary to handle the increased caseloads.

Sen. Gerald Pease stated his belief that the commission should be expanded in size and suggested requiring one attorney with expertise in the area of Indian child welfare, saying that requiring an attorney to have expertise in both juvenile delinquency and the Indian Child Welfare Act limits who could be qualified for the position.

IV. Committee Work Session and Final Action on the Bill as a Subcommittee

MS. HEFFELFINGER reviewed spreadsheets that break down the caseload data for statewide district courts, justice's courts, and city courts (see *EXHIBITS #7, #8, and #9*, respectively). MS. HEFFELFINGER explained that the data came from the annual report produced by the Supreme Court Administrator's office and are the best numbers available. She said that the categories on the spreadsheets are those of the court administrator's office and do not breakout cases by whether or not they involve a public defender. She said a survey was also sent to every justice's court in the state asking for actual expenditures in 2003 and the budget for 2004 and approximately one-third of the surveys were returned. The \$8 million estimate for operation of a public defender system for the statewide justice's courts was arrived at by a formula that took 80% of the criminal and 50% of the civil caseloads in justice's courts statewide and divided that number by the reported actual expenditures to come up with a per case expenditure of \$148. That per case expenditure was multiplied by the total caseload assumption for public defenders, which amounted to a total of \$7.8 million, which was rounded up to \$8 million. The assumption of 80% of criminal cases and 50% of civil cases requiring a public defender is a national assumption for district court cases and the Subcommittee can work with a different assumption.

REP. PARKER commented that Mr. Olson's assertion that the \$8 million for justice's courts is high because the Cascade County justice's courts handle 25% of the state's misdemeanor cases but do not spend \$2 million makes sense, and suggested surveying every county that has a full-time public defender's office and find out how many FTEs they allocate for public defender misdemeanor cases in justice's court to develop a model that could result in a defensible number that is more realistic, and lower, than \$8 million.

CHAIRMAN MCGEE proposed going through the proposed bill draft, page by page, and said that policy decisions will be discussed and decided as they arise.

1. Section 1 was accepted as is.
2. Section 2

REP. PARKER, referring to the language in (4) "employ state staff only . . .", suggested making this language more general to enable the commission to choose the most cost-effective method of providing the service, whether state staff or contract services. CHAIRMAN MCGEE agreed and suggested "employ state staff, contracted services, or other . . ." and changing "in the community" to "in the region", since the proposed bill draft establishes public defender regions.

SEN. WHEAT, noting the language in (3) referring to "traditional practices", commented that he wasn't sure this should be included, or what purpose it could serve, because it was traditional practices that got the state into litigation in the first place. CHAIRMAN MCGEE asked **Margaret Borg, Chief Public Defender, Missoula County**, if she, and by extension her office, wanted to be state employees. **Ms. Borg** answered not necessarily. CHAIRMAN MCGEE then asked her if not a state employee, then what? **Ms. Borg** replied that they did not want to be state employees because of what that might do to the salary and benefit packages. The staff of the Missoula County Public Defender Office is accustomed to being salaried employees and want to remain a body of employees that are paid a regular salary and function as it does now. CHAIRMAN MCGEE questioned if the consortium idea seems worthy. **Ms. Borg** told the Subcommittee that Missoula County had a consortium system in place during the late 1970s-early 1980s. The county commissioners felt that system was too expensive, as well as they had no control over expenses or the quality of service that was being delivered, so the decision was made to have an in-house system where they could manage both quality control and financial issues. CHAIRMAN MCGEE commented that he didn't see why groups like the Missoula County Public Defender's office couldn't continue to be county employees, because whether the public defender is a county employee, state employee, contract attorney, or member of an appellate office, they will all have to be adequately trained and meet statewide standards. REP. SHOCKLEY said that will be a problem, because the county employees are paid a whole lot more and that will result in a pay inequity among public defenders across the state that does not exist now. The Chief Public Defender is in charge of running the office and the people in the state office would work for him, but Missoula County employees, by definition, would not work for him. If a state employee, the Chief Public Defender would have the ability to hire and fire county employees, which could work. CHAIRMAN MCGEE said that pay could be tiered according to the size of the county, and that he isn't sure that making all 88.5 people in public defender offices across the state employees is a good idea. Flathead County is very happy with their contract system. The purpose is to be responsive and respectful of the community and we should keep this proposed bill draft as flexible as possible. SEN. WHEAT said the phrases "community interests" and "traditional practices" are perhaps incompatible and the Committee should keep focused on the fact that we are trying to develop a statewide system.

CHAIRMAN MCGEE commented that he has a problem with the language "adequately funded" in (5), and suggested striking "adequately".

3. Section 3

CHAIRMAN MCGEE said that (3) is the first place for dealing with the issue of whether justice's court, city court, and municipal court should be included under the system and asked what is the will of the Subcommittee on this issue. REP. SHOCKLEY said that the bill should force justice's courts and city courts into the system and have them pay a portion of the misdemeanor bill, because not only will that satisfy the lawsuit, but it will also provide proper training and supervision, resulting in adequate representation. If the justice's and city courts are kept out of the system, then the quality control is gone. SEN. WHEAT agreed, saying that if folks have

representation in justice's court it will make the system work better and smoother. MS. HEFFELFINGER, seeking clarification, asked if the Subcommittee wanted to include city courts in this definition and the consensus of the Subcommittee was that city courts would be included in this definition.

4. Section 4

REP. PARKER suggested, in (3), striking the language "shall assign a public defender designated by the office or" because the judge shouldn't be able to assign a case to a specific lawyer.

CHAIRMAN MCGEE suggested changing "coordinated" to "directed" in (1).

CHAIRMAN MCGEE called the Subcommittee's attention to (5). MS. HEFFELFINGER explained that, with the inclusion of city courts under the state public defender system, this subsection would need to be deleted.

REP. SHOCKLEY said that the specific case types listed in (6) amount to micromanaging, and could conceivably cause the same types of problems as the language "adequately funded". SEN. WHEAT agreed, saying that if the Committee wanted flexibility in the system the state shouldn't micromanage and this language could be misunderstood to require every public defender to be qualified in every area. CHAIRMAN MCGEE disagreed, saying that, for him, clarity is critical and assists the layperson to understand the law. REP. PARKER suggested striking both (6) and (7), because both issues are addressed more specifically in other sections. The Subcommittee agreed.

5. Section 5

REP. SHOCKLEY, in response to the policy question for this section, argued for removing the language in (3)(a) that lists specific types of cases, saying that when a statute that relates to a defendant is overly specific it opens up another opportunity for appeal. He said that on appeal it could be said that the defendant did not have adequate representation of counsel because the lawyer had no special training in whatever area and was therefore incompetent.

CHAIRMAN MCGEE disagreed, saying the law has to be specific. He said that one of the major reasons for the public defender act is to try to make sure the indigent persons of this state have adequately trained and competent counsel and, if this legislation is not going to specify exactly what that means and what that includes then the matter would again be open to debate. SEN. PERRY voiced an objection to the phrase "must encompass". MS. HEFFELFINGER suggested substituting "must consider" for "must encompass". REP. PARKER said that, in this subsection, the commission is charged with developing uniform statewide standards. He said that the standards aren't predetermined and maybe "qualified" will mean something besides attending a CLE. Keeping this language general will allow the commission to be creative, flexible, and practical. MS. HEFFELFINGER said the language "encompass, but are not limited to," would be stricken and "consider" would be inserted. MS. LANE pointed out the inconsistent use of "effective legal counsel" and "qualified assistance of counsel" and suggested that the language be consistent throughout the proposed bill draft. REP. SHOCKLEY said the correct term was "effective assistance of counsel". SEN. WHEAT said the directions to the commission should be that they should develop standards to provide effective assistance of counsel to indigent defendants of this state, and suggested the language "education and experience necessary to provide effective assistance of counsel" instead of listing particular case types. CHAIRMAN MCGEE argued in favor of maximum specificity in the

area of qualifications, saying that if the statute isn't specific the commission will adopt a rule and the rule will be borrowed from the National Legal Aid Defender Council, whether or not the people of Montana agree with it. SEN. PERRY suggested a compromise whereby the language offered by SEN. WHEAT would be used, followed by a listing of specific case type, as preferred by CHAIRMAN MCGEE.

REP. PARKER proposed striking (4) because it is the duty of commission to enumerate standards and it is the duty of the state office to provide training.

CHAIRMAN MCGEE said that he has a major issue with the commission being the one to determine indigence and eligibility, because the court is going to make the final determination. SEN. WHEAT explained that the judge is the one who makes the decision now, but under this system it is the people in the system who will determine indigency. MS. HEFFELFINGER pointed out that there is a provision within this proposed bill draft that provides for review by the court of an unfavorable determination of eligibility.

6. Section 6

CHAIRMAN MCGEE suggested, in subsection (2)(b)(i) changing "government agency operations" to "business management and contract administration".

REP. PARKER recommended, in subsection (2)(b)(iii), striking "local" and inserting "regional" and striking "upon request".

REP. PARKER suggested striking subsection (3)(d) in its entirety because, although the judge can order that counsel be appointed, it is the function of the statewide system to determine who the attorney will be and there is no reason to have a list.

REP. PARKER said that between (3)(e) and (3)(f) would be a good place to reinsert the language regarding the training function, and suggested that the new statutory language be modeled after 44-4-101, 44-4-102, and 44-4-103, which provides a training coordinator for county attorneys within the Department of Justice.

CHAIRMAN MCGEE expressed concerns with (3)(g), saying the public defender's office should work with the state's head of information technology to develop a system that will avoid duplication of effort. REP. SHOCKLEY suggested requiring that the district courts have systems that integrate with the Supreme Court's systems. MS. HEFFELFINGER pointed out that the fiscal note for this proposed bill draft will require an assessment of current information technologies systems, including what the Supreme Court has, what the Department of Administration has, and what a chief public defender's office needs, as well as whether or not they need to talk to each other and to what extent. She said she would draft an additional section to the proposed bill draft to discuss the development of the IT system for the public defender's office.

MS. LANE pointed out that subsection (2)(b)(ii) and (vi) makes reference to a chief appellate defender and deputy public defenders, but no mention is made of deputy appellate defenders and more appellate staff may be needed at the state level.

MS. HEFFELFINGER called the Subcommittee's attention to a policy decision of whether the deputies should be appointed or remain hired, classified staff. CHAIRMAN MCGEE said the deputies should be unclassified. REP. SHOCKLEY agreed, saying that all professionals should

be able to be relieved by their superiors. REP. SHOCKLEY pointed out that there were two other principal assistants to the chief public defender, the administrative director and the contracts manager, and they should be in the same category as the attorneys. The consensus of the Subcommittee was that the chief public defender and the deputies, as well as the administrative director and the contracts manager, would be exempt.

7. Section 7

CHAIRMAN MCGEE said this section should have a subsection providing for administration of contracts.

REP. PARKER suggested an amendment providing that the deputy public defenders handle some kind of case load. CHAIRMAN MCGEE suggested the language "and shall establish a caseload for deputy public defenders" be added to the end of (1).

SEN. PERRY said the words "submitted to" should be added before "the chief public defender" in (2)(c).

8. Section 8

SEN. WHEAT questioned if the phrase "competitive process" refers to the Montana Procurement Act and wondered if that should be required for the public defender's office and suggested including a requirement for a statement of qualifications. CHAIRMAN MCGEE said the section should have an exemption to the Montana Procurement Act and then refer to the SOQ (summary of qualifications) process.

CHAIRMAN MCGEE suggested substituting the words "that meet the standards established by the state office for public defender" for "including experience and training" in (4)(a).

CHAIRMAN MCGEE recommended the addition of a subsection providing for a conflict resolution process. He said that there should also be a subsection requiring continuing education in accordance with state standards, as set by the commission.

9. Section 9

CHAIRMAN MCGEE opened discussion on the policy decision of whether there should be an application fee. SEN. WHEAT said the fee should remain, but suggested changing "may" to "must" in (2)(b) to clarify that an indigent defendant does not have to pay the fee.

CHAIRMAN MCGEE said the percentages used to determine indigency should be decided by the full Committee.

SEN. WHEAT said, concerning the discussion of whether "liquid assets" should be included in the consideration of determination of indigency, that we should clarify that if someone has liquid assets above a certain level they are not entitled to a public defender. MS. HEFFELFINGER pointed out that, although establishing a threshold income level would streamline the process for those who need it, it does establish the risk that someone who could pay for private counsel for certain cases may receive public defender assistance. SEN. PERRY said one solution may be to eliminate (a) and tie it in with (b) so we have categories for above and below the poverty level while also considering liquid assets. MS. HEFFELFINGER said changing "or" at the end of (a) to "and" would create a 2-tiered evaluation.

CHAIRMAN MCGEE said he felt it would be wise to try to determine partial indigency, but it would need more discussion. MS. HEFFELFINGER said it would be easy for her to put the language into a subsequent draft, where it could be discussed later.

10. Section 10 was accepted.

11. Section 11

CHAIRMAN MCGEE said there should not be a statutory appropriation. SEN. WHEAT agreed. MS. HEFFELFINGER said that, for a situation such as this, it is better that it go through the regular appropriation process and she would delete the statutory appropriation and insert language saying that money in the account could only be used for the operations of the public defender's office.

12. Section 12

CHAIRMAN MCGEE told the Subcommittee that the policy decision regarding the percentage of the budget the cities or counties will contribute would be decided by the full Committee but they should keep in mind that if the system is going to include municipal courts, city courts, and justice's court then the state is going to have to get the fines. MS. HEFFELFINGER asked the Subcommittee if the factors listed in (3) were sufficient for the funding formula. REP. PARKER suggested the addition of wording referring to the amount of fines the court receives, because the formula factors may not have much to do with the raw dollars generated by writing tickets. CHAIRMAN MCGEE offered the language "amount of fines and other sources of income in cities and counties".

13. Section 13 was accepted.

14. Section 14 was accepted, with related discussion to follow.

15. Section 15

SEN. WHEAT, although noting that the Subcommittee had heard many comments that seven is too small, said perhaps the number of commission members could be left as it is for now and it can be changed later if it is deemed appropriate. CHAIRMAN MCGEE agreed, saying he thinks seven is sufficient for now, and added that he is in favor of spending \$50,000 for the commission, rather than \$20,000, because they should have per diems.

REP. PARKER, noting the inclusion in (2)(b)(iii) of membership in the Montana Association of Criminal Defense Lawyers, supported broadening this language to include other defense organizations as Ms. Strong recommended. SEN. WHEAT agreed, suggesting generic language referring to an organization of defense attorneys rather than naming a specific association.

CHAIRMAN MCGEE suggested striking "for a governmental agency or a public corporation" in (2)(b)(i), saying it is redundant and unnecessary.

MS. LANE reminded the Subcommittee of Sen. Pease's concerns with (2)(b)(ii) and the requirement that an attorney be experienced in these other areas in addition to the Indian Child Welfare Act. REP. PARKER suggested striking "family law proceedings", because this doesn't involve straight custody cases, and having the language read "experienced in juvenile

delinquency and abuse and neglect cases involving the Indian Child Welfare Act". SEN. WHEAT agreed, commenting that if an attorney is experienced in abuse and neglect cases involving the Indian Child Welfare Act then he will be well-versed in state-based abuse and neglect cases too.

SEN. WHEAT called the Subcommittee's attention to (6) and the issue of compensation for commission members, saying this is a big job and they deserve compensation of some sort. CHAIRMAN MCGEE agreed, suggesting the language "reimbursed for expenses and provided with a stipend in the amount of ---" and having the full Committee decide the amount, with a time limit on the stipend. MS. LANE advised against setting the time limit by sunset, because of resulting complications. MS. HEFFELFINGER suggested an addition to the implementation section.

16. Section 16 was accepted, with the additions discussed earlier.

MS. HEFFELFINGER explained that the policy decision on page 27 questions whether the responsibility for paying prosecutorial expenses should be moved. She said that the proposed bill draft places the responsibility with the Department of Justice, which would reimburse the counties. After much discussion, the Subcommittee decided to leave the responsibility for the prosecutorial expenses with the Office of Court Administrator and not to move it to the Department of Justice.

17. Sections 17 & 18 were accepted.

18. Section 19 was accepted.

MS. HEFFELFINGER said the amendments to this section were made to clarify who pays for what. She said that a policy decision will need to be made, at some point, defining responsibility for state and county shares of the costs concerning fitness to proceed examinations and psychiatric evaluations.

19. Section 20 will be removed.

20. Sections 21 through 28 were accepted.

21. Section 29

MS. HEFFELFINGER, during the discussions of who pays for a psychiatric evaluation or fitness to proceed evaluation, reminded the Subcommittee that there is more involved than the cost of the examination alone--there are transportation, lodging, and per diem expenses, as well.

Mr. Oppedahl commented to the Subcommittee that, for unfit to proceed evaluations, the DPHHS for the last several years hasn't been billing anybody so they have been paying it out of their budget, and they find now that the statute requires them to bill so they notified the court administrator that they are going to start billing the court administrator's office. He said that his office will pay, and then ask for a supplemental for an extra \$900,000, and pay to DPHHS, who won't be able to use it for anything except to put it back into the general fund. But it is \$900,000 for the process when the court is trying to determine whether or not they can commit someone to the hospital and get them healthy enough to come back and proceed to trial. If, at the end of the 90 days, the judge determines that they are never going to become fit to proceed, the criminal charges are dropped and the process for civil commitment begins. The state clearly

pays all the expenses while the defendant is at the Montana state hospital for an unfit to proceed evaluation. **Mr. Oppedahl** said that for court-ordered evaluations costs are paid out of the state court administrator funds only to the extent of the evaluation itself. All of the rest is a county responsibility. He said that there is a good deal of complaint about that amongst the counties. He said county costs were somewhere in the range of \$300,000-\$400,000 for court-ordered evaluations.

22. Sections 30 through 45 were accepted.

23. Section 46

CHAIRMAN MCGEE said that the ending date for the development of standards and procedures should be Dec. 31, 2005, instead of July 1, 2006, because he doesn't believe it will take that long to develop the standards. REP. PARKER suggested accelerating the July 1, 2005 date for appointing the commission. CHAIRMAN MCGEE pointed out that the bill will not be able to get through the session quickly because of the appropriation to fund the office, it will likely be signed by the Governor in early May, and that it can't happen any quicker than that. But once the commission is in place things can happen quickly. He said that July 1, 2006, for the office to be up and running isn't as timely as needed. SEN. WHEAT said that he feels a December deadline will be tough and overly optimistic. CHAIRMAN MCGEE said that the dates can be left as they are but suggested using the language "on or before".

24. Section 47

CHAIRMAN MCGEE, in an attempt to avoid problems caused by significant last-minute pay raises that occurred with the state assumption of district courts, suggested changing the 2006 dates in (2) to "[the effective date of this act]", with the intent being to limit any raises received after passage of the act to 4%. **Mr. Freebourn** raised the question of the county offices that do not want to become state employees, such as Missoula County, and said that situation should be considered. CHAIRMAN MCGEE pointed out that they may not get the opportunity to decide what they want--the decision belongs to the chief public defender.

SEN. WHEAT said (5) should be discussed. MS. HEFFELFINGER told the Subcommittee that the position of the Department of Administration was to take this subsection out. She said department labor negotiators said that new language needs to be drafted to allow a new collective bargaining agreement to be negotiated with the state.

25. Section 48 will be coordinated with Section 47.

26. Section 49 was accepted.

27. Section 50

SEN. WHEAT suggested changing the date to July 1, 2006.

28. Sections 51 through 53 were accepted.

CHAIRMAN MCGEE said he would present his report to the full Committee on August 10 based on his notes and MS. HEFFELFINGER would go over the bill in detail, highlighting the major decisions of the Subcommittee.

The Subcommittee adjourned at 7:25 p.m. This was the final meeting of the Subcommittee on Reforming Montana's Public Defender System.
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