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Law and Justice Interim Committee

58th Montana Legislature

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VALENCIA LANE, Staff Attorney
SANDRA SHEPHERD, Secretary

MINUTES

PUBLIC DEFENDER SUBCOMMITTEE

June 28, 2004

Room 152, State Capitol
Helena, 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

REP. JOHN PARKER, Vice Chair
SEN. DANIEL MCGEE
SEN. GARY PERRY
SEN. MICHAEL WHEAT
REP. JIM SHOCKLEY

STAFF PRESENT

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

Agenda & Visitors

Agenda Attachment #1
Visitors' list, Attachment #2

COMMITTEE ACTION

CALL TO ORDER AND ROLL CALL

Senator McGee called the meeting to order and the secretary noted the attendance (**Attachment #3**). The April 30, 2004 minutes were approved as written by a unanimous voice vote.

David Carroll, Director of Research and Evaluations, National Legal Aid & Defender

Association, introduced Phyllis Subin, who works with Mr. Carroll as an NLADA consultant and is a former chief public defender for the State of New Mexico. Mr. Carroll presented a PowerPoint summary of the Right to Counsel in America (**Exhibit 1 and 2**), and mentioned that the NLADA was working on a report about Montana's public defender system requested by the ACLU.

Ms. Subin talked about the system in New Mexico. She said that in New Mexico the Public Defender's Department has four statewide units that handle appeals, death penalty, mental health, and post conviction cases. She said there are district offices in the geographic centers and contract systems, all of which are accountable through an organized office of the Chief Public Defender. She also discussed the availability of data collection system technology, which allowed her to produce the kind of facts and figures that policy makers need to justify appropriations for the Public Defenders Department. She said that this data was critically important to prove to the legislators and to the Executive Branch that she was accountable and producing the kind of results expected.

Ms. Subin discussed training and development. She said that the training the Public Defenders Department was substantially expanded so staff had knowledge of new case decisions. The training also helped develop attorney abilities to go into the court room and do the task that was expected.

Mr. Carroll talked about the NLADA having done studies in about 45 of the 50 states regarding indigent issues and he said he is very well conversed in the other 5 states as well. He offered his assistance.

Senator Wheat asked Mr. Carroll if the report about Montana would be out soon. Mr. Carroll stated that there are discussions between the Attorney General and the ACLU about the release of that report. There is one data issue that is incomplete in the report and the issue is being worked on with Dana Corson at the Court Administrator's Office. Senator Wheat asked Mr. Carroll to share the report when it was ready.

Mr. Carroll said that it was his understanding that within two weeks of getting the data back, the report would be made public. He said he did not know if the national or the local ALCU would make the report public and that it would be a worthwhile document as a public education piece.

Sen. Wheat asked if the report would recommend the kind of system that would work best in Montana. Mr. Carroll stated that it would not. He stated that it was our role to measure against national standards and that it is the responsibility of the people of Montana to make the policy decisions. He stated that it was his opinion that Montana should end up with a flexible system that would have staffed offices as well as contracted services.

Rep. Shockley asked Mr. Carroll about his reference to parody between the defense and county attorney and what he meant by 70 %. Mr. Carroll explained that one of the ways of calculating parody is to look at the percentage of District Attorney cases that the indigent system actually handles. He said that district attorneys will always handle more cases than the indigent defense system. He said he meant that if there was a jurisdiction in which the indigent defense system handled 70% of the district attorney's cases, you would be looking at spending 70% of whatever the budget was for the district attorneys.

Sen. McGee asked Mr. Carroll if he had any confidence in the data from the courts. Mr. Carroll answered that he was confident enough in the district court case data that certain claims can be made about the number of attorneys that would be needed for those, but that he had no confidence whatsoever in what he had seen from justice court. He said that nationally, there are three misdemeanor cases for every felony within the jurisdiction. He stated that if the subcommittee could not get justice court data that we all think is valid, he suggested using the national experiential ratio as a way of calculating what the actual justice court public defender case load is.

Rep. Shockley stated that the district court data provided to the subcommittee showed 58% of the felony court case involved indigent defense. Representative Shockley stated that he does not believe this is true and asked Mr. Carroll's opinion. Mr. Carroll responded that nationally indigent defense cases are generally 80% of the total. Rep. Shockley asked Mr. Carroll if he believed it was 58% in Montana. Mr. Carroll responded that he would not question that figure.

Rep. Shockley asked, of the three methods of providing services (employees, contractors, or ad hoc appointments by judges) which did Mr. Carroll think provides the best service for the defendant? Mr. Carroll responded that if the three systems are adequately funded and meet national standards, any of them could provide the best services. He said he had seen horrible

examples of understaffed offices because they were under funded and did not have the structure built into them to meet national standards. However, he stated that there have been several studies out of West Virginia, North Carolina and Florida that suggest that staffed public defender offices are the most cost effective of those three models.

Ms. Subin stated that ultimately a well funded public defender's system that has supervision, training, and a quality review process, produces the best indigent legal services seen across the country.

Sen. McGee asked if Ms. Subin was saying that regardless of whether the public defender was a paid employee or on contract or whether the attorney worked out of his own office, a state office, or district office, it really would not matter. Ms. Subin said yes, as long as there was real teeth and meat to the ability of that supervisor to hold participants in the system to a standard level of quality.

Mr. Carroll said that there are standards to justify not reinventing the wheel. There are urban population centers such as Missoula, Billings, Bozeman, and Great Falls, that certainly the case load would justify a staffed office.

Sen. McGee paraphrased the difference between paying for these services at a local level versus paying for them at a state level. Sen. McGee said that all services of the government are paid by the people. He asked Mr. Carroll if it was his impression that there was somehow more stability in state tax dollars or state revenue sources as opposed to local jurisdictions. Mr. Carroll stated "that is exactly right".

Sen. McGee asked Mr. Carroll to explain the Oregon situation. Mr. Carroll said that Oregon is 100% state funded. Sen. McGee said that Oregon is 1 billion dollars in debt. Mr. Carroll said that Oregon made the decision to stop prosecuting cases as a way to get through the fiscal crisis. Oregon's population is 3.3 million. They spend approximately 90 to 100 million dollars for the state public defender system.

Rep. Parker asked that if Montana could have a large contract system, what steps could Montana take to ensure quality control.

Ms. Subin said that in New Mexico they had criminal trial and appellate performance standards. Those standards were incorporated into each of the contracts. The RFP was a controlled process for the attorneys. Level of performance was discussed with the people in the courts.

Quality control was imposed before contracts were awarded. There was a director of legal services who was very experienced. His responsibility was to go out into the communities, work in the court room and work with other lawyers on their case files. There were training programs that were offered on criminal defense.

Sen. Wheat asked Ms. Subin how the contract lawyers got into the system. He asked how they ensured that contract lawyers were adequately trained and had adequate qualifications to be in the system. Ms. Subin said that there was a request for proposal process having specific requirement levels of experience in terms of number of trials and recommendations that they had to produce. Also, they had to certify that they had a minimum amount of continuing legal education in criminal law and a certain number of hours appropriate to of the level of representation needed to fulfill the contract for which they were applying. Like Montana, New Mexico was a small legal community and relied upon people who were respected and practiced in those communities. If a brand new law graduate was contracted with, we might impose additional requirements on the senior lawyer in terms of case review or other kinds of supervision.

Sen. Wheat asked how the public defender system in New Mexico would respond to a contract lawyer in a small community in a rural area who was handling a high profile homicide who may not be qualified to take on the potential capital homicide case. Ms. Subin said that was one of the reasons why New Mexico felt strongly that there should be a statewide capital defense team. She said that the death penalty is a different kind of case and needs to be done right the first time. She said that the public defender system felt strongly about having a capital case unit. She said that they had a unit that consisted of six lawyers, a litigation specialist, paralegal, secretary and an investigator, all of whom were specially trained for handling capital cases.

Sen. Wheat asked about cases where rural contract lawyers felt that they were getting in over their head on a felony case and needed help. Ms. Subin said that they would monitor the assignment of what types of cases were given. There was quality control to make sure that a second year lawyer did not get a death or a murder one case assigned. There was a case assignment rotation rule so that the judge knew which lawyers had been screened and qualified by the public defender's office for those assignments. The appellate division was available and there was an appellate specialist in murder that was available to provide assistance on an on-call basis. The death penalty murder team was available as needed.

Sen. Wheat asked how large the administrative staff for the public defender system in New Mexico was. Ms. Subin said that the public defender's system was based in Santa Fe. There

was a chief public defender, two assistant chiefs, one for operation and one for personnel. Over the district offices there was a fiscal staff that had to process a great deal of paper work. She said that they payed the contractors out of the court's budget and there was about 20 FTE.

Sen. McGee asked Ms. Subin if she was appointed by the Governor. Ms. Subin said yes she was. She was asked if she could speak to the issue of appointment by the Governor versus a commission. Ms. Subin said that she was appointed twice by Governor Johnson. She said that the New Mexico system is not independent, that it is controlled by the Governor. She preferred a commission or an independent board who has oversight over the agency so that the agency is free to tell policy makers about fiscal and resource needs.

Sen McGee asked if Ms. Subin used the national standards of case loads or if she used what was going on in New Mexico commensurate with the prosecuting side. Ms. Subin said that they did not formally adopt case load standards. One of the issues she confronted when she became chief public defender was the credibility of her data and how many misdemeanor cases she had.

Sen. McGee asked if they had adopted case load requirements after Ms. Subin left. Ms. Subin said that as far as she knew, they had not.

Sen. McGee asked about special requirements that Ms. Subin had as chief public defender that should be considered for a chief public defender in the State of Montana. Sen. McGee said that the State of Oregon decided that the chief administrator should not be an attorney but should be a business type person or someone with a public administration background. Sen. McGee asked Ms. Subin if she could speak about the qualifications necessary not only for the chief public defender, but also any deputy or district administrator. Ms. Subin said that she believed that the chief needed to be an attorney who had a criminal indigent defense background and who had a commitment to the value and goals of a quality system.

Mr. Carroll said that a chief public defender should not necessarily be awarded to the best trial lawyer in the state. He said that it was important that the person have the ability to maneuver through the budgeting process and that often the skills that make a good trial lawyer are not always what makes a great chief public defender.

Ms. Subin said that New Mexico had a criminal and juvenile justice coordinating council which was a state level policy group that brought together the district attorney's association, criminal

defense lawyers, public defenders and the court system. She said that a state level policy group should be considered to assist Montana in transition along with a criminal justice coordinating council. Sen McGee said that was an excellent point.

Sen. Perry asked Ms. Subin about the five categories of expertise that she mentioned. Ms. Subin said she had an appellate unit that handled all of the appellate cases and contracted appellate attorneys that would handle the conflict of interest cases. There was also a state unit based in Albuquerque that handled all of the state's death penalty cases. Ms. Subin said that there were also contract lawyers that were qualified to handle death penalty cases and there was a statewide mental health unit. She said that the population that is indigent and significantly representative of criminal and juvenile delinquency system has significant diagnosable mental issues and increasingly complex issues are raised as to the mental competency of juveniles. She said that there was a post conviction unit handling habeas corpus and issues within the prison.

Ms. Pam Bucy, Assistant Attorney General, Prosecution Services Bureau, Department of Justice, said that the question of whether Montana's Public defender system was constitutionally inadequate had not been settled because the trial had been deferred until next May. Discovery had shown that there were problems with jurisdictions in Montana and the Department of Justice believed that it was a matter of public policy and that it was in Montana's best interest to develop some kind of a state wide system. She said that it was important that it was a fully integrative system. She said that accountability, training and standards also needed to be addressed and that it was key to limiting Montana's liability. The Attorney General's Office fully supported the ten principles adopted by the ABA and supported developing a system based on those principles. She said that they were also in favor of coming up with performance measures similar to what Ms. Subin spoke about in New Mexico.

Sen. McGee asked if the attorney general's office was able to gather more definitive data to a greater degree than the Committee had been successful in doing so far regarding case loads and costs. Ms. Bucy said that they had the same data that Sen. McGee had access to.

With regard to the ACLU and the report being done by the NLADA, Sen. Wheat asked if the Attorney General's Office had any problem with the NLADA report being released to the Committee. Ms. Bucy said that they have not seen the report but that they did not have a problem with its release. She said that the problem in getting the report was the data corrections.

Sen. McGee said that with regard to the litigation settlement that Ms. Bucy was currently working on, he would like that information to be dispensed to the Committee once the report is made available. He said that once the national association has made their report, if their client is willing, the Committee would look forward to that information also. Ms. Bucy said that they had no problem with that.

PUBLIC COMMENT

Margaret Borg, Chief Public Defender in Missoula County, said that she supported the state-wide system but she had some concerns. She said that she would welcome the promulgation of standards and performance guidelines for the public defender or indigent defense delivery system in Montana. She said that in Missoula County they have a system where a judge will ask a defendant if he is indigent and if he would like an attorney appointed. If he says yes, the appointment comes to the chief public defender's office and qualifications are determined for assignment of the case. She said that the criteria for determining client financial eligibility should be standardized and that it was important that establishing those standards be a function of the public defender system itself as opposed to the judicial system. She said that when the public defender's office advertises for attorneys, they advertise expecting one year of experience for misdemeanor attorneys and a minimum of two years of experience for felony attorneys. Ms. Borg said that if there were better resources, smaller case loads and more money to pay the attorneys, it might be possible to attract those with a higher level of experience. In Missoula County the attorneys get their continuing legal education credits only in the type of law that they practice. They are expected to be trained appropriately. Their continuing legal education credits and licenses are paid for by the office. Ms. Borg asked the Committee to consider providing those resources. Week long trial schools were offered to all of the felony attorneys and they found it very advantageous. Ms. Borg said that defense attorneys should be able to make enough money to feel that there is a return for their expert time and investment when they work on the weekends and evenings. She said she would urge the Committee to look at a system that allows the continuation of the jurisdictional cultural. She suggested a system in the state that matches judicial districts. She is concerned that the public defender's system will be lost. Ms. Borg said that she felt comfortable with the basic resources in Missoula County to run a reasonable public defender's system.

Sen. Perry asked about the parity of pay rates between the prosecutor's office and the public defender's office. Ms. Borg said that salary parity is mandatory between the prosecutor's office and the public defender's offices. She said that a senior attorney whether in the prosecutor's office or public defender's office should be paid the same.

Rep. Shockley said that two prosecutors should be able to handle from two to four felonies. Ms. Borg said that defense attorneys do a couple of things that prosecutors do not. The prosecutor does not have the attorney client contact as the defense attorney does. In addition, the prosecutors have law enforcement personnel who have interviewed all the witnesses, gathered all of the evidence, prepared the case and handed it prepared to the prosecutors. The amount of contact that the prosecutors have with the case is significantly less than the amount of time a defense attorney has to spend on the case. Ms. Borg said that these considerations needed to be factored in.

Sen. Wheat asked Ms. Borg if she would prefer to remain funded primarily by the County and let the statewide system be designed for oversight, setting standards and administrative overview, and let the local public defender's offices retain their flexibility. Ms. Borg said that she did not know what specific position the county would take. She said that county funding at least brings budget people closer in proximity to the funding source than in a funded state system.

Penelope Strong, Chief Public Defender for Yellowstone, said she has substantial experience in indigent defense. She is familiar with the Wisconsin system and has been in private practice. She also has experience in supervising attorneys nationwide for a major trucking company. There are three areas she would like to talk about regarding fiscal and management issues.

Ms. Strong urged the Committee to use a reasonable user fee. This is a fee that is paid up front by the applicant even for an indigent population. She said that with the establishment of a user fee you can fund part of the system. She said that the Spangenberg Group has done a study, which she provided to Ms. Heffelfinger. Ms. Strong said that the chief justice interviewed in the study indicated that there is a tangible benefit to the client. She said that if they are being charged a fee of \$5.00 or \$10.00 then they are financially participating in their representation and it is a benefit to them as well, but there must be a waiver provision for those clients who simply have no financial ability to pay any money into the system. She said that in King County, Washington, they have a user fee of \$25.00 and it is set by county ordinance.

The second fiscal issue that Ms. Strong addressed was the need for statewide standards establishing indigency. She said that how indigency is determined could vary according to rural or urban area and that standards are an important gate keeper for the system that involved tough public policy decisions. Ms. Strong said that costs in these criminal cases can vary from \$500.00 to \$1000.00 to a very serious case which could cost the price of a small home. She said it was something that needed to be done and it needed to be properly administered and

that it could be done through a court services officer or through an agency. She said that these are issues that needed to be tackled and be a part of the legislation.

The last of her three points is the need for a unified computerized system to report case load statistics. She said that the current system is antiquated with statistical reporting that was not reliable. She gave testimony with regard to a contract system versus employee or staff based system. Ms. Strong said she believes that there are benefits in a staff based system. The advantage of a staff attorney versus a contract attorney is that you can supervise, train, and monitor the staff attorney on a regular basis. There are a lot of young people that are interested in coming into the system, however, burnout is epidemic. She said that special training was needed for the longer term attorneys for handling the higher case loads and the more difficult cases. She said that with proper human resources and progressive discipline, the problem employee can be controlled. She said that it is more difficult to supervise contract attorneys and that with an employee based system, it would be easier to supervise the individual. She said that adequate funding and a base to provide support was needed, and that funding for the computer systems and other data management tools was absolutely essential. She said that she was in favor of establishing statewide standards. She said she adheres to the national legal defense association standards and she interacts directly with the conflict panel.

Rep. Shockley asked how many defendant cases there were against the teamsters and if the county public defender office in Billings was unionized. Ms. Strong said the office was unionized but she had not seen any problems with that.

Rep. Shockley asked why there could not be a user fee in Yellowstone County now. Ms. Strong said that because there was no enabling legislation, an ordinance could not be passed by the county commissioner. She that they had planned to charge a \$10.00 fee for juveniles, \$15.00 for misdemeanors, and \$25.00 for felonies.

Sen. Wheat asked for Ms. Strong's opinion on how to create a statewide public defender's system. He asked if it should be all state employees or if the county system should be involved. Ms. Strong said she would prefer to see a statewide system which would give statewide consistency. She said that would take it out of the political arena. She was concerned about funding and policies not being consistent.

Rep. Parker asked Ms. Strong what she would need for quality control to effectively supervise eight attorneys in Billings. She said that she would have some kind of specific performance

standards and she would want some type of regular supervision on the attorneys. She said that contract attorneys should not have a private practice or practice on the side because of not only ethical conflicts but conflict in terms of the time and dedication.

Rep. Parker asked how could one ask a contract attorney to take a fractional caseload and not have a private practice on the side. Ms. Strong said that some of them probably could not, unless they were given some kind of circuit rider allowing them to work in other places. She said that it was a tough issue.

Rep. Parker asked Ms. Strong that if she was running a regional public defender's office based out of Billings, what would her ability be to supervise attorneys in outlying towns, whether they were a state employee or a fractional contract attorney. Ms. Strong said that the time and geographical barrier would be a problem. The other question would be that if you were supervising full time in Billings or Bozeman, how would you get out to other areas. You would have to have someone out there on a regular basis. She said that we now have e-mail, fax machines and telephones that provide us opportunities that we did not have ten years ago but, that is not the same as having someone on site.

Chad Wright, Chief Appellate Defender for the Appellate Defender's office, said that his was the only office that worked under a commission, which was one of the models that was being considered. Mr. Wright said that his office consisted of himself, one other attorney, and one paralegal office manager. He said the office's annual operating cost was \$40,000 and the administrative cost was about \$9,000. He said that the question was whether to go contract or to a statewide system. He said he was available to discuss this. He said that his office, because of the statute, handles appeals only when there is a conflict of interest. He said that by statute, the trial attorney handles the appeal.

Rep. Parker asked Mr. Wright if there was a need to firewall the services in his office for protection. Mr. Wright said that there was no protection for job security in his office and that the system needed to be improved.

Mariah Eastman, Chief Public Defender for Gallatin County, said that her office just opened in October. She said that she went through the growing pains of what it takes to create a public defender's office. She said that Gallatin County was different from other counties because of an interlocal agreement between Gallatin County and the Cities of Bozeman and Belgrade. She said that the centralized office deals with felonies on all levels. Her greatest fear in establishing a new state system is the lack of funding and maintaining parity. If there isn't

sufficient funding it will not only be on a local level, but the state level as well. She said that she just went through budgeting in her county and the salary disparity between the public defenders office and the prosecutor's office ranges from \$5,000 to \$24,000 a year. The Chief Deputy Public Defender makes \$15,000 less than his counterpart. Ms. Eastman said that this disparity makes it difficult for those attorneys who like criminal law but find themselves in a position where they cannot afford to be a criminal lawyer.

Sen. McGee said that it seemed to him that there would always be public employees and contract people. He said that in Flathead County there are six attorneys that used to be in a public defender's office, but now they were all contract attorneys. There is no public defender's office in Flathead County and the public defenders, prosecutors and judges are all very satisfied with that system. There concerns are exactly the opposite of most of the concerns that have been heard here today, and, that is the fear of creating a bureaucratic monster.

Rep. Shockley asked how they made sure that the contract attorney was doing a good job. Ms. Eastman said that, for example, if you looked at Lewistown there would probably be five attorneys that are doing court-appointed work and there are three that she knows of that have more than 20 years of experience in criminal law. She said that she would recommend that there be a subcontract with one of them to be a supervisor, make appointments, and keep track of where these cases are and to ensure that the work is being done.

Sen. McGee asked for further comments from the public and seeing none, the public comments were closed.

STAFF REPORT

Sheri Heffelfinger, Research Analyst, Office of Research and Policy Analysis (Exhibits - Staff Update 1, 2, 3, and 4), said that she would go through some information that was in the packets and then Mr. Harry Freeborn from the Fiscal Analyst Office would go through some statistics and data. The first thing Ms. Heffelfinger went over was the staff update and what the data showed so far. **(Exhibit 2 - Staff Update)** Ms. Heffelfinger said that most of the District Judges are appointing counsel on an ad hoc case-by-case basis. The maps and spreadsheets showed the areas being discussed. She said that there was no specific pattern, and noted that in those counties that contract, ad hoc appointments are done to manage their conflict cases. She pointed out that Dawson County had one FTE. She said that with each of the public defender offices there are contracts for conflict cases or ad hoc appointments going on for conflict cases. She said that she has been trying to gather information on how many conflict

cases everybody has. She said that regarding the active district court caseload, she received data for FY04 through March 31, 2004, which is not a full year of data, but it was collected because the fiscal information will relate to this caseload. She said she could not get good fiscal information for 2003.

Sen. McGee said to both Rep. Parker and Ms. Eastman that according to the maps that were handed out there was no data shown for Gallatin and Cascade counties. Ms. Heffelfinger said that the way they attempted to capture the information was to ask the Court Administrator's Office Information Technology people to capture this particular data set for each county. The IT people had to write a program for each county's computer system that related to the District Court caseload management system. Cascade County had its own system. Ms. Heffelfinger was not sure about the Gallatin County system. She said that the data information that came in directly from Gallatin County showed a large caseload, but the data captured by the IT people only showed 208 cases. Ms. Heffelfinger said she did not record any data for Gallatin County because she knew that they were capturing all of the data. As far as Cascade County, she said Cascade did not respond to the request to provide data from their computer system.

Rep. Parker asked if Ms. Eastman had requested information from Cascade County Court and if so, what entity of Cascade County.

Ms. Heffelfinger said that the actual request went to the Court Administrator's Office, and their IT staff are working with the IT staff at Cascade County. The request was made through channels to the Court Administrator's Office. She said that the IP program was to count every case that had any activity on it that showed a public defender was involved in that case.

Eric Olson said that he was sure that Cascade County would end up being one of the larger counties in terms of caseload volume. Sen. McGee agreed.

Mariah Eastman said that because Gallatin County's public defender's office was new, they had their own computer system. She said there were 1100 cases open and 62.8 percent of those are cases were not paid for by the state. Ms. Heffelfinger said that would include lower courts. The intent was to capture only the district court cases. Ms. Heffelfinger said that the information she provided did not include all the data but it was the best that was available. She noted the high case load in Flathead County and said the county does not have an office, they have a contract system where they have a consortium of attorneys and there is one attorney who assigns to seven other attorneys the cases as they come forward on a rotational basis.

Sen. McGee said he was told that Flathead County has more cases than Cascade County and that information came from a reliable source.

(Exhibit 3 - Map Analysis: Public Defender Study) Ms. Heffelfinger said that the Third Judicial District, which includes Granite, Powell and Deer Lodge counties, has an office of two full time PD staff that handle all the cases and that office does not show up on the typical list. The two attorneys there are paid county employees, but the cost is shared between the three counties. She explained that the parentheses on the maps show FTE caseloads based on 200 cases per FTE. She said the standards are 150 felony cases, 200 misdemeanor cases, 400 juvenile case or 25 appeals per one FTE. She took an average of 200 cases per attorney as a broad look. She did not find any particular pattern except that the counties with the highest caseloads have staffed offices. She said another interesting thing to look at was if the county had a full-time county attorney or not. She explained that as the committee considers the issues of parity, it might be an good idea to know which counties actually have full-time versus part-time county attorneys. Ms. Heffelfinger said the next map shows the Justice Courts and City Courts and the Separate versus Combined Courts and explained that many of the lower courts are combined courts. Ms. Heffelfinger said she spoke to some Justices of the Peace about their public defender budget and asked them about how much it would cost the state to pick up the Justice Court cases. She said the response from one judge was that he did not see how he could actually separate out the city courts and justice court costs because he was in a combined jurisdiction. Ms. Heffelfinger said the last map showed each county's crime rate per 100,000 population which was another factor to consider.

(Exhibit 4 - Judicial District Characteristics Related to Public Defender Information Spreadsheet) Ms. Heffelfinger reviewed Exhibit 4 and noted the hourly rate paid to public defenders at the district court level and the hourly rate paid to public defenders at the justice court level. She also noted the contract pay rate at the district court level and a contract pay rate at the justice court level. She said that her data is incomplete and she is in the process of continuing the survey. She said the office by office survey is time-consuming because many of the courts surveyed did not respond. She said that most of the jurisdictions pay \$60.00 an hour. Senator McGee asked which jurisdictions actually had contracts. Ms. Heffelfinger said that most jurisdictions have a contract to handle conflicts and overload. Senator McGee asked how many times the jurisdictions used contract attorneys last year. Ms. Heffelfinger said she tried to get that information but the reporting was incomplete at best.

Ms. Heffelfinger said that Broadwater County does not pay hourly, they pay one public defender \$36,000 a year. She also noted that Lewis and Clark County pays contract public defenders

\$35.00 an hour, which is the lowest rate so far reported. She said that often, county contracts cover both justice court work and district court cases. She said that Mariah Eastman, the Chief Public Defender in Gallatin County, said that Gallatin County pays contract public defenders \$60.00 an hour for doing District Court cases and \$50.00 an hour for Justice Court cases. Ms. Heffelfinger noted that most of the counties are paying \$60.00 an hour no matter what and make no distinction between justice court cases or felony cases in district court. She said that while some jurisdictions in other states have pay rates that distinguish between in-court time and out-of-court time, she did not find an instance where Montana counties set pay different pay rates for in-court and out-of-court time.

Regarding the lower courts, Ms. Heffelfinger said there are combined justice and city courts in 35 of the 56 counties. She said that based on the district court data that was captured by the Office of Court Administrator staff, the public defender cases represent about 58 percent of the total district court criminal cases compared to national figures that indicate indigent defendants are involved in 80 percent of all district court criminal cases. Ms. Heffelfinger said that it is likely that public defender case loads in Montana will increase as public defender services are made more accessible.

(Exhibit 5 - Change in Public Defender Salaries) Ms. Heffelfinger reviewed Exhibit 5, which showed the Change in Public Defender Salary from 2001 to 2003. She said that the document was initially provided to the legislature by MACo during the 2003 session and would need to be updated at a later date.

Mr. Harry Freebourn, Legislative Fiscal Analyst, Legislative Fiscal Division, introduced a spreadsheet showing new district court cases filed in fiscal year 2004 and the cases that were filed prior to 2004 but are still open. **(Exhibit 6 - Legislative Fiscal Division - Public Defender and Non-Public Defender Cases)** He said that the total case load in this data base was 52,882. He said that the gray bars showed the detailed analysis. He said that these statistics will help show the total universe of the public defender and non-public defender cases in the district courts.

Rep. Shockley asked if the numbers were just district court numbers or if they included justice court as well. Mr. Freebourn said that they were just district court.

Mr. Freebourn introduced Exhibit 7 **(Exhibit 7 - Public Defender Expenditures and New Case Filings By Judicial District and County - July 1, 2003 - March 31, 2004)**, which showed expenditures and new case filing statistical data. He said that this worksheet was to show

dollars that were captured in the first nine months related to the case load captured in those first nine months.

Ms. Heffelfinger asked if the statistics included just the four categories of case types for which the state paid public defender costs. Mr. Freebourn said that is exactly right. Ms. Heffelfinger said that she wanted the committee to be clear that the four categories of cases for which the state currently paid public defender costs were DC (district court criminal), DI (mental health involuntary commitment), DJ (juvenile justice), and DN (abuse and neglect) cases. She said the other spreadsheets show other case type categories and that the committee needed to understand there were public defender cases in those categories but that the state was not currently paying public defender costs for those.

Mr. Freebourn said that after March 31, he intended to update the dollars and case loads. He said that he is working on a study/analysis for the total public defender cases whether new cases or cases from prior years.

Mr. Freebourn discussed the statistic sheet involving **Public Defender New Case Filings (July 1, 2003 - March 31, 2004 which is the third sheet of Exhibit 7)**. He said that this sheet will give new case filings with the public defender system by county and case type. Ms. Heffelfinger noted that other district court case types being handled by Public Defenders are the DD (developmentally disabled), DF (paternity), and DG (guardianship) cases. She further explained that the abbreviation DP was probate, DR was domestic relations, DA was adoptions and DV was civil.

Mr. Freebourn said that the most significant number of cases on the spreadsheet were the DC cases and that 2,238 cases out of the 4,133 total DC cases were public defender cases and there are 3,476 out of 4,133. He said that there were about 657 public defender cases that the state was not currently paying for. Mr. Freebourn continued to summarize the data in Exhibit 7.

Sen. Perry said that the data showed Gallatin County leads in criminal cases and in Yellowstone County there are 235 criminal and Juvenile cases, 19 cases in Yellowstone, 33 in Gallatin and 113 in Silver Bow. He asked Mr. Freeman to address the discrepancy. Mr. Freebourn said that he could not at this time give an analysis.

Rep. Shockley said that how cases are counted varies from county to county because there are no rules on how you count juvenile cases. Ms. Heffelfinger explained that, for example, if there are five children in one family involved in a case, then in one county it would be counted as five

cases while in another county it would be counted as just one case. Ms. Heffelfinger said that how the counties are reporting this information and putting it into their computer systems also has significant impact on the data. Mr. Freebourn said that in some counties, if there is a contact with the probation officer and the child does not actually appear in juvenile court, that would not be counted, but in other counties it would be counted. Sen. Wheat said that some counties, like in Missoula, open up an old case filing for the same person even though it is a new case.

Ms. Heffelfinger said that the key point she wanted to make was that in district court criminal cases, 60 percent of the case load involved a public defender. She said that the national number in these cases is about 80 percent so perhaps the Committee may want to project forward a public defender case load rate higher than 60 percent.

Sen. McGee said he had a problem with not knowing if 60 percent or 80 percent was the right number. He would like to budget at the correct number, but, he does not want to create a situation where he cannot justify those numbers. He said that it could be that in Montana they do not follow the national numbers.

Sen. Wheat said that the state should fund to the 60 percent level.

Sen. Parker said that he had been working mostly from the map and an old pie chart. He said that he was trying to go after the issue of cost effectiveness and he felt that when he compared the pie chart and the service delivery method it seemed that there was a disproportionate amount of money being spent on appointed state public defenders. Mr. Freebourn agreed. Sen. Parker asked Mr. Freebourn if he was coming to a conclusion about which method appeared to be more cost effective. Mr. Freebourn said it appeared that public defender offices are providing a lower cost service than contracted type services. Sen. Parker said there should be a broader analysis to determine the quality of service provided.

Sen. McGee talked about the difference between public employees and private contract. He said it was discussed that it cost \$60 an hour for an appointed attorney. However, Sen. McGee said that social security, taxes, retirement, vacation, and medical are direct overhead costs for public employees and that there were also indirect overhead costs included paper clips, light bulbs, buildings, cars, etc. He said that the only difference between public and private was a profit margin. Sen. McGee asked Mr. Freebourn and Ms. Heffelfinger if information about overhead costs could be gathered and compared to the per hour flat rate paid for appointed attorneys. Mr. Freebourn said that the follow-up analysis would have some of that information.

Mr. Freebourn said that the technology to gather this information is really lacking.

Sen. Perry gave a presentation and drew a chart describing what, based on all the testimony and the ten principles of a good public defender system, he thought would be a good structure for the public defender system. On his chart, he had the department of administration at the top of the chart with a public defender commission under it, and then the chief public defender. In the next column was the supreme court, and under that the district courts. He said that under the chief public defender, the space was divided into 22 judicial districts just like the district court system is divided now. Each of the districts coincided with the district courts. He said there should be a district administrator in each judicial district that would fall under a local board. He said that in Oregon the board was called a local commission or consortium. He said that there are always local people who are willing to volunteer and provide services which might include retired judges, lawyers or anybody who has served in some capacity in the past that is knowledgeable about the subject and wanted to volunteer their time. He suggested the following:

1. The local board would appoint a Public Defender
2. The District Court would receive the case
3. The District Court would refer the case to the local board
4. With the direction of the district administrator, the local board could list it by what type of a case it was
5. The local board would appoint a public defender who would appoint an appropriate person to handle the case.

He said that as far as the data needed, the department of administration would have to collect the data. He said each district administrator could be a non-lawyer who could determine qualifications for indigence or refer the information regarding the case to the board for a determination. He said that the money saved could go to increasing the pay to improve parity.

Sen. McGee suggested that the committee work through Senate Bill No. 218. **(Exhibit 8 - Senate Bill No.-218 Produced by McNutt)** Ms. Heffelfinger suggested that the committee refer to the staff outline of the general topics and structure its discussion accordingly.

Sen. Wheat discussed the problem in developing standards within the Senate Bill No. 218 system. He suggested using it as a format. He said that a system with flexibility needed to be created. He said that the system needed two things, structure and money. Sen. McGee agreed.

Sen. McGee made a list on the board. He suggested that the chief public defenders, along with the deputies that are in the state office, should establish the standards, evaluations, conflict resolutions and education components. He said that the language in Senate Bill No. 218 explains what the Commission will do. The Commission would appoint a chief public defender, and the chief public defender shall act as the secretary of the Commission and be a non-voting member. The Commission would establish qualifications, duties and priorities of the chief and deputies, assistant public defenders, and appellate defender. The commission would develop the policies and procedures for identifying conflicts of interest. Sen. McGee said he would want to include on Senate Bill No. 218, in section 46-8-202 under the duties of public defender, a section that said "in the creation of these offices that the chief public defender shall take into consideration the existing system and try to craft the office as nearest as possible to the existing conditions".

Sen. Wheat discussed dealing with areas such as Missoula County and Gallatin County offices that were all ready in place. He said that they need a sense of regional flexibility.

Rep. Shockley discussed the need for "firewalls" between offices to avoid conflicts of interest and insure confidential handling of cases.

Sen. McGee suggested that the committee work through Senate Bill No. 218. He referred to page two regarding the Public Defender Commission. Committee members discussed their thoughts about the commission's meeting schedule and composition.

Sen. McGee read page 3, line 25 (Number 10), "The commission shall establish qualifications, duties, and priorities for the chief public defender, deputy and assistant public defenders, and the appellate defender and deputy and assistant appellate defenders". Also, page 3, line 28, (Number 11), "The commission shall develop policies and procedures for identifying and addressing conflicts of interest and claims of ineffective assistance of counsel".

page 3, line 30, (Number 12), "The commission shall develop minimum standards for trial and appellate public defenders".

Sen. McGee said he had a problem with the following. "The commission shall submit the standards to the supreme court for the court's review and consideration". Ms. Lane said that the reason that wording was in there was because under the constitution of Montana, the Supreme Court regulated the practice of law. She said that the supreme court established the rules of practice. Rep. Parker and Sen. McGee agreed that the wording reviewed and considered by the Supreme Court should be changed. They said that the Supreme Court could

review and consider them if there was a violation, or where the standard was determined to be inadequate, either nationwide or statewide.

Sen. McGee read page 4, line 4 (Number 13), "The Commission shall compile and keep current a statewide roster of attorneys eligible for appointment by an appropriate court as trial and appellate defense counsel for indigent defendants. The roster must be supplied to all justices and judges in the state". Ms. Heffelfinger said that the initial intent was that judges do not appoint directly. She said that on blue sheet/Topics & Subtopics that on page 2, number 4. c. she had listed the policy question: Should judges directly assign counsel at all? The committee agreed that the answer was no.

Sen. McGee read from the Topics and Subtopics/blue sheet page 2 Number 4. Structure of Public Defender Office and Program. a. Regional, district, county? factors to consider. Sen. McGee spoke in favor of regional offices. He said they needed to talk about the public defender's program commensurate with the judicial districts.

Sen. McGee said that the second and more important issue was the caliber of attorneys in the State of Montana. He said that if we go to a public employees system where only certain people are going to be hired, it will not be the high caliber attorney who quits his private practice to become a public employee.

Sen. Perry suggested specific regions for public defender offices and having those regions headquartered in the key populated areas where current county public defender offices were located. Sen. Wheat suggested having as many regions as the Commission determined necessary to effectively administer the system. He said that an important factor is to have standards and qualifications, regardless of whether the person is a public employee or a contract attorney. Sen. McGee recommended that the Commission and the Chief Public Defender create what is needed in conformity with the autonomy in the existing offices to the maximum degree possible. He said that the public employees or contract attorneys are going to be subject to the same qualifications, standards and procedures statewide.

Sen. McGee said to Ms. Heffelfinger and Ms. Lane that the language in the bill needed to be made very clear with regard to the following. He said that number 1 was that the Commission or Chief Public Defender will have to determine the regions and districts, and number 2 was that all attorneys practicing indigent public defense in the State of Montana would adhere to the procedures, standards and qualifications established by the Commission. Ms. Heffelfinger said that she would write a purpose and intent for that section. Sen. McGee said that his experience

had been, that when things go to court, preambles do not matter. Ms. Heffelfinger said that she would put the language into a statutory section rather than a preamble.

Sen. McGee said that everything had to be subject to the Commission's approval. He said that the appointments of the deputy public defenders can be made by the Chief Public Defender but they have to be approved by the Commission.

Ms. Heffelfinger verified that under SB 218, the Chief Public Defender was hired directly by the Commission and the Chief Public Defender will hire, with the approval of the Commission, the deputies as necessary.

Ms. Heffelfinger asked if the committee wanted the Commission or the Chief Public Defender to determine whether to contract with or hire staff attorneys. Sen. McGee said that it was his intent to submit the plan to the Commission for approval. Rep. Shockley said he would like to give the system as much flexibility as possible. Sen. McGee said to Ms. Heffelfinger that in creating the regional or district offices, the Chief Public Defender should consider population and case loads. Rep. Parker suggested that they set a number of regions between ten and twelve. Within that number the Commission could determine what regions would be and how they would be divided. He said that every region may not have the same number of staff or dollars per region. Sen. McGee agreed. He said that Flathead already had an existing public defender system but they did not have a public defender office. The committee agreed on a maximum of eleven regions.

Ms. Heffelfinger talked about the blue sheet, Paragraph 4-b. and asked whether the chief public defender's office should contract or have FTE to cover conflict cases. Sen. McGee said that the Chief Public Defender's office is going to handle conflict resolution. Ms. Heffelfinger asked whether the chief public defender's office should also have FTE state attorneys available to help local public defenders upon request. Sen. McGee said yes. Ms. Heffelfinger asked if there should be special statutory language regarding juveniles and youth court cases. Sen. McGee said that regarding juveniles, the attorneys should have standards, procedures, qualifications and training for all special types of cases. He said that part of the Chief Public Defender's tasks would be to develop standards, procedures, qualifications and training.

Sen. McGee was asked how they would come up with the appropriate numbers for budget. Sen. McGee said that there was no specific method at this time.

Rep. Shockley asked if pay parity was addressed in Senate Bill No. 218. Sen. McGee said that

he did not want to use the word parity. Rep. Shockley read what it said in number 7. Under Chief Public Defender in Section 7, he read that "salary for this position must be established by the Commission and must be commensurate with the duties and responsibilities of the position". Sen. McGee said that was accurate. Rep. Shockley read what it said for the Public Defender's Office on Page 10, Section 8, Subsection 3. "Salaried Deputy Public Defenders, Assistant Public Defenders, and staff must be classified according to the state classification pay plan". Ms. Heffelfinger asked if the committee wanted the public defender staff to be excepted from the classification plan or to be classified positions. Sen. McGee said that they should move on and come back to this issue when they are working on budgets.

Ms. Heffelfinger addressed Number 4, e., (blue sheet) "Should the program encompass the Courts of Limited Jurisdiction? If so, to what extent?" She asked for a decision about going all the way out to City Courts. Sen. McGee said No. He did not want to go to City Courts. He said that one of the companion bills that they might have to do was making Justice Courts, Courts of record. Rep. Parker felt that the Justice Courts should be included for cost effectiveness. He said that when a felony is charged, it starts in Justice Court. Sen. McGee agreed.

Ms. Heffelfinger addressed Number 5. a. (blue sheet), Statutory rights to counsel, clean up and clarification of current language. Statute 3-5-901 was discussed. Ms. Heffelfinger addressed 5. b. "Should this bill encompass the recommendations of the CFHHS interim committee as follows: (1) Provide for appointment of counsel at the beginning of any proceeding that may result in the termination of parental rights? " She said that right now they do not have to be appointed until the petition for termination follows. Sen. McGee agreed with Number 1.

Ms. Heffelfinger asked about guardianship cases.

Ms. Margaret Borg, Chief Public Defender in Missoula County, said that in Missoula County they represent people who are not competent to make their own decisions or to manage their own funds. She said that they are entitled to be represented by an attorney of their own hiring, but a lot of those people do not have attorneys or the ability to make the decision for themselves. She said that many of them do not have family or friends who can assist them. Sen. McGee asked who was bringing the charge that they are incompetent. Ms. Borg said that in Missoula County, the office of the prosecuting attorney or the county attorneys office alleges that they are not competent. Sen. McGee asked that a note for the next meeting be made regarding this issue.

Ms. Heffelfinger referred to 5, b., (1) The answer was yes. Next was 5., b., (3) Request

additional data on number of indigent parents entitled to counsel currently and who would be affected by the change recommended in subsection (1). Sen. McGee said that there are two conditions where public defense comes in, (1) indigence or the inability to pay, and (2) potential loss of liberty. Rep. Shockley said that he thought it came down to the ability to pay. Sen. McGee said if it was just the inability to pay, but not a loss of liberty, he did not think that the people of the state of Montana would be obliged to provide defense counsel for them. Rep. Shockley thought that the inability to pay should be defined. Sen. McGee said that there are two conditions to decide if there is going to be a public defender, and one is indigence and the other is loss of liberty, whether it is a mental institution, jail, or prison. The committee discussed how to determine when it was appropriate for a person to receive indigent counsel. It was decided that staff would develop language to be looked at later.

Ms. Heffelfinger referred to 5, b., in Subsection 5, "Provide statutory language to address GAL issues with respect to who is entitled to a GAL and when, GAL qualifications and training, and GAL's specific responsibilities". She said that currently a Guardian Ad Litem (GAL) is appointed by a judge for the best interest of the child. Ms. Heffelfinger suggested that the committee clarify that the public defender is not a GAL.

Rep. Parker said that the issues in 5, b., (6) and (7) in dealing with the statewide PD program should be yes.

Ms. Heffelfinger referred to Number 6. on Page 3, Funding formulas and state/county responsibilities. a. is a given, b. user fee - yes. Sen. McGee said to skip c., d., and e. for now.

Ms. Heffelfinger skipped to Page 3, Number 7. Implementation. 7., a., "Transition work". She said that transition work was already done in SB 218. Ms. Heffelfinger moved to the next item b. Phased in implementation? (1) Establishment of commission; and (2) Phased in assumption of county offices. Ms. Heffelfinger said that a phased in transition period was needed. Sen. McGee agreed and said that it was important have draft standards in place first. Sen. McGee said that this bill would not come out until the end of the session. Ms. Heffelfinger said that she would draft a bill based on the decisions made by the committee so far and send it to the committee members in the mail before the next meeting.

Sen. McGee asked for comments from the committee. There were none. He said the next meeting will be the first week or so of August.

The meeting was Adjourned.

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