



# Law and Justice Interim Committee

PO BOX 201706  
Helena, MT 59620-1706  
(406) 444-3064  
FAX (406) 444-3036

## 58th Montana Legislature

### SENATE MEMBERS

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

### HOUSE MEMBERS

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

### COMMITTEE STAFF

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

## Law and Justice Public Defender Subcommittee

# MINUTES

April 30, 2004

Room 172, State Capitol Building

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.**

### SUBCOMMITTEE MEMBERS PRESENT

SEN. DANIEL MCGEE  
SEN. GARY PERRY  
SEN. MICHAEL WHEAT

REP. JIM SHOCKLEY  
REP. JOHN PARKER

### STAFF PRESENT

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

### Visitors

Visitors' list, ATTACHMENT 1  
Agenda, ATTACHMENT 2

### COMMITTEE ACTION

None.

## **CALL TO ORDER AND ROLL CALL**

Sen. Daniel McGee, Chairman of the Law and Justice Public Defender Subcommittee called the April 30, 2004, meeting to order at 8:40 a.m., in Room 172, Montana State Capitol Building. The secretary noted the roll (ATTACHMENT 3).

## **STAFF OVERVIEW: A CLOSER LOOK AT DIFFERENT MODELS FOR A STATEWIDE PUBLIC DEFENDER SYSTEM**

Ms. Heffelfinger reviewed information provided in the Subcommittee member packets. Chairman McGee made three points: First, something needs to be done with the public defender system; second, data will need to be collected to try to determine how to change the public defender system; and, third, the funding aspect will need to be addressed. Chairman McGee recalled data was sketchy when they were working on SB 218. Ms. Heffelfinger stated she has received caseload data from one-half of the counties, for FY 03 and FY 04 to March 31, 2004. Ms. Heffelfinger noted this information will only be for district court cases and felt it would be difficult to extract information relating to justice courts. The caseload information will be used to test the assumption that 80 percent of the district court caseload is public defender related. Ms. Heffelfinger reported she has also developed and sent a survey requesting fiscal information from each county. The survey is not limited to reimbursable court costs, but also includes offices, IT support, and other costs that are not reimbursable. Ms. Heffelfinger felt it would be valuable to know the rates counties are paying for court-appointed attorneys in counties where they have no public defender office. Ms. Heffelfinger suggested that if the data from the counties cannot be reconstructed, at a minimum, counties should begin collecting data in a way that would be helpful in the future.

Sen. Mike Wheat recalled from legislative hearings that the Judiciary said data collection was under control and would be available by the next legislative session. Chairman McGee agreed with Sen. Wheat's recollection. Rep. Jim Shockley recalled funding was provided to collect data. Sen. Wheat commented it was a surcharge that was increased this past legislative session. Ms. Heffelfinger suggested it would be helpful to have the Court Administrator, Mr. Jim Oppedahl, address the Subcommittee and explain plans for development of the court's IT program. Sen. McGee inquired if the funding applied to justice courts. Ms. Heffelfinger replied it did not.

Ms. Heffelfinger distributed "Selected Models for a Statewide System" (EXHIBIT 1), which contained information regarding current state contracting practices for defense counsel in Colorado, Wyoming, Oregon, and New Hampshire. Ms. Heffelfinger reviewed the differences between the various types of contracts for public defense presented in "Contracting for Indigent Defense Services, A Special Report" (EXHIBIT 2). Ms. Heffelfinger reviewed the characteristics of a deficient contract system and the characteristics of an effective contract system.

**FOCUS ON OREGON'S STATEWIDE CONTRACTING PROGRAM—PETER OZANNE,  
CHIEF PUBLIC DEFENDER, OREGON**

Peter Ozanne, Executive Director of the Public Defense Services Commission and Executive Director of the Office of Public Defense Services, summarized his background in public defense. Mr. Ozanne noted that even though there is a difference between Montana's population and Oregon's population, both states experience problems of the same dimensions. Mr. Ozanne was pleased the State of Montana will be assuming the funding for the public defender system, and noted that while Oregon may be considered a model, in reality it is a hybrid of several different models. Mr. Ozanne suggested the choice of structure for a good public defender system is dependent on economics, politics, substantive law, criminal procedure, judicial practices and policies, and sentencing guidelines. Mr. Ozanne identified the prosecution function as being a key factor in indigent defense. Mr. Ozanne noted there are 56 elected county attorneys in Montana, and that those elected officials have different plea bargaining practices. Mr. Ozanne stated these plea bargaining decisions drive the budget. Mr. Ozanne agreed that good data should also be used to develop the system. Mr. Ozanne urged the Subcommittee to develop a Commission system with the appointing authority delegated to the CEO of the Commission.

***(Tape 1; Side B)***

Currently, the appointing authority in Oregon is with the judiciary rather than the Commission. Mr. Ozanne spoke of the difficulties they experienced with this, and stated he felt strongly that the appointing authority should be with the Commission.

Mr. Ozanne said that whatever structure Montana chooses, public management is key. Secondly, Mr. Ozanne suggested institutionalizing the public defense system and that it should be viewed as part of the public safety system. Mr. Ozanne explained how the Commission in Oregon is working with prosecutors to develop early disposition programs to help resolve minor offenses expeditiously. Mr. Ozanne identified a good centralized data system as crucial to good management.

Mr. Ozanne provided an "Overview of Oregon's Public Defense Program (EXHIBIT 3) and presented a background on Oregon's Public Defense system. Mr. Ozanne identified the biggest threat to public safety in Oregon as the absence of a lawyer at probation violation hearings. The lack of appropriate counsel at these hearings disarms the parole/ probation officer from enforcing violations.

Mr. Ozanne explained that Oregon employs analysts to determine whether contract counsel are staying within their respective contracts. Rep. Shockley admitted that as an attorney he sometimes has difficulty keeping track of his billable hours. Rep. Shockley recognized the difference in mentality between trial lawyers and accountants. Mr. Ozanne agreed some people are not natural managers and stated their contracts do not generally require hourly compensation. Mr. Ozanne reviewed the average per-case rates contained on page 3 of Exhibit 3.

Sen. Wheat asked if the Oregon system functions better than a system run entirely by the state. Mr. Ozanne said he could argue for both systems, but stated it would be difficult to get a state FTE system running in Montana. Mr. Ozanne suggested pilot projects be implemented in some of the 22 Judicial Districts to try different models. Mr. Ozanne said that in any system, irrespective of the model used, good management is crucial.

Sen. Wheat explained the Subcommittee is attempting to determine what the best system for the State of Montana will be. Mr. Ozanne believes in a state-wide system with a Commission and professional management. Mr. Ozanne stated there are pros and cons to why a full-time professional core of public defenders should run the system versus the innovation and variation of private lawyers. Mr. Ozanne noted that a public FTE system will necessarily spin off approximately 20 to 30 percent of its cases to the private sector due to conflicts.

Rep. Parker identified quality control as a problem in Montana and spoke about the quality of representation allegations contained in the ACLU lawsuit. Rep. Parker wanted to know how Oregon handles complaints against attorneys and how Oregon assures quality representation. Mr. Ozanne said that the major flaw with some contracting systems is that the market can drive the system and not professional quality. To provide a check and balance, Oregon raises the competency bar for lawyers on public defender appointment lists, and those lawyers on the list are screened and evaluated. For contractors, lawyers are subject to annual 360-degree performance reviews with input from judges, prosecutors, and peers. In addition, Oregon is developing a service-delivery plan by region.

Rep. Parker asked if there are methods to supervise contract attorneys during the course of the contract or during the course of a case. Mr. Ozanne replied that in Oregon a contract will be terminated for under performance. Mr. Ozanne said the problem of under performance is a problem that will need to be addressed regardless of the system.

***(Tape 2; Side A)***

Mr. Ozanne noted Oregon has one of the strongest Criminal Defense Lawyer Associations in the country, and that the organization has both non-public and public defenders. Mr. Ozanne uses that Association to help set standards, provide continuing legal education, and as a resource to obtain peers for evaluation purposes. Mr. Ozanne said a strong professional organization in Montana would be a valuable resource.

Rep. Shockley asked if when there are between five and ten attorneys in an office, one of the attorneys will assume the role of manager. Mr. Ozanne agreed that management has to occur at about ten attorneys, but he said that person did not necessarily have to be an attorney. Rep. Shockley thought it was important to have an attorney who would manage caseloads. Mr. Ozanne explained investigation and expert witness expenses are reviewed by his office, and that Oregon has saved a substantial amount of money by operating under a centralized system for extraordinary expenses.

Sen. Perry asked Mr. Ozanne if he felt there was an opportunity, and a corresponding realistic possibility, for streamlining Oregon's system that could accommodate a 10 percent reduction in expenditures. Mr. Ozanne responded that there are four ways to accomplish this at the beginning of the biennium: (1) more efficient management; (2) changing the criminal code; (3)

changing prosecutors' charging decisions; or (4) implementing more efficient ways to dispose of cases by implementing early-disposition programs.

Sen. McGee said he served on the Montana Sentencing Commission approximately ten years ago, and that he recalled that Montanans, at that time, wanted sentencing discretion left with the court. Thus, Montana has not adopted sentencing guidelines.

Sen. McGee asked Mr. Ozanne if it would be more difficult to determine the funding level for a public defender's office in a state which has no sentencing guidelines. Mr. Ozanne replied it would be more difficult and inquired whether Montana's citizens had the ability to amend the Montana State Constitution with a popular vote. Sen. McGee replied that it is not done often, but the potential is present. Mr. Ozanne thought it would be difficult to get control of the system without some form of regulation on judicial sentencing practices. Mr. Ozanne cautioned prosecution discretion must be regulated in conjunction with sentencing regulation, otherwise power will shift from the court to the prosecutors.

In addressing the flat per-case cost cases, which in Oregon represents 95 percent of the caseload, Sen. Perry inquired whether those cases were handled adequately. Mr. Ozanne felt that criminal defense does not pay enough money to ensure quality, but felt the per-case rate creates incentive for attorneys to do the cases more efficiently. On the other hand, Mr. Ozanne said it could also encourage attorneys to take shortcuts on cases at the expense of the client. Mr. Ozanne stated that on the other hand, charging hourly rates can be a recipe for breaking the bank and suggested caps be implemented. Mr. Ozanne stated it is a matter of determining whether you want the risk to lie with the client or with the bank account.

Sen. Perry thought extraordinary expenses could not be anticipated, but wondered if they could be reasonably projected. Mr. Ozanne agreed they could be projected and noted the term "extraordinary expenses" may not be the right term since they are not extraordinary in the sense that these costs are suspect or unjustifiable. Rather, these expenses are extraordinary in the sense they present challenges to predictability. In statute, these expenses are referred to as "non-routine expenses." Mr. Ozanne identified some of these expenses as investigation, witness experts, travel, and other non-attorney costs expended to develop a case. Mr. Ozanne felt these costs could be predicted based on presumptions of what is reasonable. Mr. Ozanne identified the extraordinary expenses in death penalty cases as extreme since they require hiring more specialized experts.

Ms. Heffelfinger asked Mr. Ozanne to expand on the requirement that the consortia have governing boards. Mr. Ozanne noted that in dealing with the contracting system the tight employer/employee relationship does not exist and the question is how to build that relationship into those contractor organizations to ensure accountability. Mr. Ozanne suggested there should be several board members who are independent to ensure there is an internal mechanism to sanction under performance and to provide an evaluation system. Mr. Ozanne said that equally important was the connection to the community offered by the independent board members. In addition, in Oregon there are 22 individual capital defenders that are contracted with, but Oregon avoids contracting with individual attorneys so it contracts with the law firms or with the governing boards of consortia.

Ms. Heffelfinger spoke about speciality defense cases such as those presented in family law and inquired if consortia have attorneys that specialize or whether the attorneys carry mixed caseloads. Mr. Ozanne stated some localities have only general practice lawyers, but noted that in a larger locality, law firms prefer to have specialized attorneys. Mr. Ozanne noted that there has been an increase in speciality courts as well, and attorneys can be assigned to a particular court. The Oregon State Bar distinguishes consortia from law firms, so if one lawyer in the consortia has a conflict, another lawyer within the consortia would be able to handle the case.

Rep. Parker wondered if early disposition provides a release from the regular trial docket and how many cases receive early disposition. Mr. Ozanne replied these cases were mostly misdemeanor cases but guessed the number was approximately 10 percent. Non-criminal offenses are now called "violations," and these violations do not require incarceration. Mr. Ozanne identified early disposition as an integral part of large prosecutor offices.

Chairman McGee wanted to know if indigent defense is required by Oregon statute for misdemeanor cases and children and family cases. Mr. Ozanne stated it is constitutionally mandated that if there is a risk of incarceration, the right to counsel exists, and stated Oregon has statutes that further expand this constitutional right to counsel. Mr. Ozanne noted that this is frequently a topic discussed by the Oregon Legislature. The practice in Oregon is to appoint counsel for both children and parents in cases where there may be a termination of parental rights.

Mr. Ozanne agreed with Chairman McGee that the average person does not usually consider public defense as including cases such as family law and juvenile law. Mr. Ozanne said he will provide the Subcommittee with information on the costs for these particular cases.

***(Tape 2; Side B)***

**STAFF SECTION-BY-SECTION REVIEW OF SB 218 AND THE DECISION POINTS FOR EACH SECTION—SHERI HEFFELFINGER, LEGISLATIVE RESEARCH ANALYST**

Chairman McGee cautioned that the Subcommittee is in the process of gathering data and conclusions could not be made at this point since a great deal of information still needs to be gathered.

Ms. Heffelfinger submitted decision points for the SB 218 work session to the Subcommittee, as well as a copy of SB 218 and its fiscal note (EXHIBIT 4) and walked the Subcommittee through each section of SB 218.

Chairman McGee asked about the language on page 4, lines 1-3, of SB 218 and Valencia Lane explained these rules will apply to the Commission and its own affairs, and the Subcommittee in the 2003 session had reasoned that because the Supreme Court regulates the practice of law under the Montana Constitution, it should also set standards for public defenders. Ms. Lane said the decision as to who will qualify for indigent services will also need to be determined and suggested it could be addressed in the bill or that standards could be set by the Montana Supreme Court.

Chairman McGee said that “indigence” should be defined statutorily. Ms. Lane pointed out that the form required to be filled out for appointment of a public defender simply asks the applicant to state why they are indigent, and that the final determination of indigence rests with the presiding judge.

Chairman McGee asked if a constitutional mandate requires public defenders or public prosecutors to codify their standards and then seek approval from the Supreme Court. Ms. Lane replied there was nothing requiring that procedure, and under the Montana Constitution, the Supreme Court is given the authority to govern the practice of courts and the practice of law. There are, however, statutes on the practice of law, and the Supreme Court has allowed the Legislature to pass these laws, as long as it does not overstep its bounds. Ms. Lane noted the Constitution provides that a person must be given an attorney if the person cannot afford one and if loss of liberty is at issue. This has been the Court’s interpretation of the Constitution and basic human rights. Ms. Lane explained the ACLU lawsuit questions whether people are receiving appropriate and adequate representation.

Ms. Lane recalled that the way the bill was originally drafted, the Commission was going to set the standards, but at some point, there was an acquiescence to the Supreme Court’s constitutional authority.

Sen. Wheat said that in Gallatin County a person is required to fill out a financial affidavit, which is then reviewed by the public defender. He said he thought the issue of indigence would be worked out within the public defender system. If a person disagreed with the finding of the public defender, he would then be able to take the matter up with the presiding judge.

Rep. Shockley recalled it was up to the discretion of the judge and that drawing a line would result in increased litigation. Rep. Shockley felt it was better to leave the matter with the judge and noted it creates a difficult situation when a defendant is represented *pro se*.

Chairman McGee was concerned that the Supreme Court would not rubber stamp all the rules set by the Legislature. Sen. Wheat responded the Supreme Court has complete authority to oversee the conduct of attorneys. Sen. Wheat did not perceive the Supreme Court as wanting to oversee the public defender system procedurally. Sen. Wheat said that the standards the Supreme Court would like to oversee would be the things directly related to qualifications and ongoing competency of lawyers as they practice in the public defender system.

Chairman McGee wondered how the standards in the Great Falls Public Defender Office compare with other counties. Rep. Parker replied there are a number of different ways they apply standards, including license to practice law and the Rules of Professional Conduct. Rep. Parker noted prosecutors have special requirements and rules, and defense attorneys are subject to standards on effective assistance of counsel. Rep. Parker said that there are rules on the bare minimum standards of practice and that additional requirements are set by case decisions. Rep. Parker suggested the Subcommittee should create a mechanism for establishing the standards of conduct for the public defender agency being contemplated, and that those standards should be high enough that they do not fall below the constitutional standards that emerge in case decisions. Rep. Parker thought court decisions would be an indicator of whether the standards are high enough. Rep. Parker suggested an effective step

would be to develop a mechanism for the Commission to set a standard of practice it considers to be minimum, and that minimum should be higher than what is seen in case decisions.

Chairman McGee admitted confusion on how the Legislature would submit standards to the Supreme Court and wanted to know if it was required by the Montana Constitution. Ms. Lane responded it was not.

Rep. Shockley noted the Supreme Court has a constitutional mandate to supervise the courts and attorneys in Montana. Rep. Shockley explained if the standards do not meet the approval of the Montana Supreme Court, it will become apparent in court decisions.

Ms. Heffelfinger explained that the decision point she was outlining for the Subcommittee's consideration was whether the new public defender agency would need a formal grant of executive rulemaking authority or whether it would be adopting internal rules of procedure. Chairman McGee suggested the Supreme Court would not have to formally approve the standards of practice adopted by a public defender entity. Ms. Lane cautioned that the Legislature will be creating an entity and delegating authority to the entity and to consider separation of powers between the Executive, Judicial, and Legislative Branches. The Supreme Court has the authority to regulate the practice of law, and Ms. Lane asked the Subcommittee to keep in mind the constitutional parameters. Ms. Lane said initially the Public Defender Commission would develop rules governing public defender attorneys, and submit those rules to the Montana Supreme Court for adoption. Ms. Lane noticed language used later in the bill assumes the rules will be adopted by the Public Defender Commission and urged caution since the regulation of lawyers is vested with the Montana Supreme Court. Ms. Lane noted the Commission does have rulemaking authority under the Montana Administrative Procedure Act (MAPA).

***(Tape 3; Side A)***

**The SB 218 FISCAL NOTE IN PERSPECTIVE—MR. MATT BUGNI, BUDGET ANALYST,  
GOVERNOR'S OFFICE OF BUDGET AND PROGRAM PLANNING**

Mr. Matt Bugni, formerly with the Governor's Office of Budget and Program Planning and currently with the Department of Health and Human Services (DPHHS), submitted a memorandum to the Committee on SB 218 (2003) (EXHIBIT 5).

Rep. Shockley noted that the counties have been relieved of a tremendous burden and, in light of the fact that the State is looking for a way to save money, perhaps the State could request free rent for offices. Rep. Shockley suggested the State would provide the personnel and the counties could provide space.

Sen. Wheat recalled that SB 218 required the counties to provide the space, and the counties were willing to do so. Sen. Wheat thought this requirement was only for the biennium.

Mr. Bugni noted that the \$1.8 million in unidentifiable costs was per year, and while consideration was given to setting up a contingency fund, Mr. Bugni did not believe anything was ever done with the money.

Sen. Wheat recalled that the new Section 16 of SB 218 provided just under \$2 million be transferred from the general fund into the district court assumption fund and indigent defense contingent expense account. Sen. Wheat recalled that money was there either for indigent defense or for Supreme Court district court expenses. Sen. Wheat stated this was done because they could not get a handle on where the expenses were coming from and whether the expenses were being generated by indigent defense or by the Supreme Court.

Mr. Bugni commented that at the time of the SB 218 Fiscal Note, the data was not consistent enough to be able to project forward. Mr. Bugni was confident that data for FY 2004 will be much better in identifying court-appointed counsel costs.

**UPDATE ON FISCAL ANALYSIS OF CURRENT PUBLIC DEFENDER EXPENSES—MR. HARRY FREEBOURN, LEGISLATIVE FISCAL ANALYST**

Harry Freebourn, Legislative Fiscal Analyst, submitted an update and provided information about public defender expenditures (EXHIBIT 6). Mr. Freebourn explained that the estimated shortfall in the indigent defense budget for FY 2004 was approximately \$2.4 and cited three reasons for the shortfall. Last year, the Office of Court Administrator allocated \$6.6 million to the Judiciary's variable budget. However, the previous year's budget allocation was \$7.4 million. Therefore, the Court Administrator has allocated 900,000 less to the public defender program and \$900,000 more to the fixed budget. The actual appropriation was made to the district court program, which includes both fixed and variable costs. Sen. Wheat noted the \$7.4 million for variable expenses and asked what the actual expenses were. Mr. Freebourn said actual expenses were \$7.5 million because the Court Administrator spent up to the allowable authorization of \$7.5 million, and any costs above that level were covered by the counties. In FY 2003, the allocated variable budget was \$7.5 million, and for FY 2004 the variable budget is \$6.6 million. Mr. Freebourn explained that the total appropriation was \$14.4 million, which the Court Administrator split into a fixed budget and a variable budget. The fixed budget was increased by \$900,000 in FY 2004, and the variable budget was decreased by \$900,000, but the total appropriation remained at \$14.4 million.

Sen. Perry commented that if fixed costs increased by \$900,000, they should not be considered "fixed." Mr. Freebourn responded the Legislative Fiscal Division is researching why there are cost changes in both the fixed and variable area. Sen. Wheat asked if the Subcommittee would receive an audit report. Mr. Freebourn responded that Legislative Fiscal Division performs budget analysis, not audits. He could not estimate when the results of his analysis would be available, but planned to have the results available to the Legislative Finance Committee in mid-June.

Rep. Parker suggested inviting Jim Oppedahl to address the Subcommittee about the transfer of the \$900,000. Chairman McGee suspected the \$900,000 was transferred to cover raises given to county employees just prior to state assumption.

Sen. Perry noted if this were a private business looking at financial statements, a transfer from variable costs to fixed costs would throw up a red flag.

Mr. Freebourn identified the second reason for the budget shortfall as raising the maximum fixed fee for hourly-appointed attorneys to \$60. He said that there were attorneys, prior to that change who were receiving less than \$60 per hour. The third reason for the shortfall was identified as increased caseloads. Mr. Freebourn has calculated the increase in caseloads as six percent annually.

Mr. Freebourn reviewed public defender costs by account and case type. Mr. Freebourn identified costs in all case types as costs related to public defender offices, costs that relate to contracts, and costs that relate to appointed public defenders. Mr. Freebourn reported that appointed counsel represented 49 percent of the total costs for indigent defense, public defender office costs represented 28 percent of total costs, and contract costs with attorneys represented 9 percent. Thus, costs for attorney services amount to 86 percent of total costs for indigent defense.

***(Tape 3; Side B)***

Ms. Heffelfinger pointed out that there may be costs associated with other case types such as conservatorships and adult guardian ad litem cases. She said she is collecting data that may help identify those case types.

Rep. Parker was interested in knowing the percentage of felony cases handled by appointed attorneys versus the percentage handled by public defender offices. Rep. Parker thought this information would be useful in determining cost effectiveness.

Mr. Freebourn replied that when the Court Administrator pays bills, it identifies expenditures by case type with specific accounts within each case type. However, the Judiciary does not have a case management system that identifies each case and that tracks the costs associated with each case. He said it would be helpful if the courts could establish such a case management system in the future.

Rep. Shockley observed that the bulk of appointed cases occur in rural areas in Montana. Mr. Freebourn stated he could provide this information by judicial district, and offered to obtain the information for Rep. Shockley.

Mr. Freebourn reviewed additional categories of public defender costs not paid by the Office of the Court Administrator contained in Exhibit 6.

Chairman McGee announced that he did not want to go forward and propose a budget to the full Law and Justice Interim Committee until he has the fiscal analysis for the past year. Mr. Freebourn stated the numbers should be available to him by mid-July, and he should have figures available to the Subcommittee by the end of July.

**PUBLIC COMMENT**

Larry LaFountain, Cascade County Public Defender's Office, reported that the Cascade County Public Defender's Office had been awarded a grant from the Montana Board of Crime Control to study the prospects for reducing juvenile crime. Mr. LaFountain explained that the American Bar Association (ABA) performed a survey of Montana's juvenile crime and right to counsel and said

that the results of that survey were not very favorable. The results of the ABA survey made the following findings: (1) Montana's youth were not receiving counsel at critical stages; (2) Montana lacks resources to help the mentally ill; (3) there is no zealous advocacy for juveniles; (4) there is a lack of community-based placement options; (5) Montana lacks sufficient resources and support services for juvenile defenders; (6) juvenile defenders are not well-trained; (7) there is a disproportionate number of minority youth being held and charged.

Mr. LaFountain explained that the Cascade County Public Defender Office would be establishing a resource center to assist counsel in representing juveniles and to provide training opportunities. The grant will also enable Montana to access federal "weed and seed" money to reduce juvenile crime. Mr. LaFountain is hoping to bring education to the communities and to public defenders to raise the level of representation and address the problems identified by the ABA study. Mr. LaFountain noted juvenile crime in Montana has been consistently dropping since 1997. Mr. LaFountain suggested any changes in the adult public defender system should also be made in the juvenile system.

Responding to a question from Rep. Parker, Mr. LaFountain explained "training" would refer to continuing legal education programs for attorneys, as well as up-to-date resources.

Rep. Parker asked if the resource center would provide opportunities for clinical internships for law students. Mr. LaFountain replied that it would provide internships and training opportunities for law students not only at the resource center, but also in public defender offices.

In speaking about the ABA study, Mr. LaFountain acknowledged there was disagreement with the results, but Mr. LaFountain felt that to some degree the findings were accurate.

Chairman McGee asked Mr. LaFountain to speak about the decline in juvenile delinquency rates since 1997 and how the decline relates to the insufficiencies in the system identified by the ABA study. Mr. LaFountain explained juvenile crime is declining across the nation because of societal changes. Mr. LaFountain commented that although juvenile crime is declining, Montana can still do a better job. Mr. LaFountain agreed a reduction in overall crime would be a mitigating factor to some of the deficiencies noted by the ABA study.

**REVIEW OF CURRENT STATUTES ON RIGHT TO COUNSEL IN ABUSE AND NEGLECT, JUVENILE DELINQUENCY, AND INVOLUNTARY COMMITMENT PROCEEDINGS—SHERI HEFFELFINGER, LEGISLATIVE RESEARCH ANALYST**

Ms. Heffelfinger referred to MCA sections distributed to subcommittee members (EXHIBIT 7).

**REPORT FROM THE CHILDREN, FAMILIES, HEALTH AND HUMAN SERVICES INTERIM COMMITTEE—MS. SUSAN FOX, LEGISLATIVE RESEARCH ANALYST**

Susan Fox, Legislative Research Analyst for Children, Families, Health and Human Services Interim Committee (CFHHS), reported that CFHHS is making the following recommendations regarding court-appointed representation for families and children:

- Consider statutory changes to require appointment of legal counsel at an earlier point in the process for all parents, guardians, or those with legal custody who are involved in

child abuse and neglect proceedings which may result in removal or placement of a child or in the termination of parental rights.

- Request that the State Court Administrator and Department of Public Health and Human Services (DPHHS), Child and Family Services Division, try and determine how many parents this may affect.
- Provide special training for attorneys regarding child abuse and neglect issues.
- “Indigency” should be defined in statute. However, income may not be the only criteria that should be used to determine eligibility for court-appointed counsel, and a sliding fee scale may be beneficial.
- In 20 states, separate counsel is appointed for the child in abuse and neglect cases. This counsel could include a guardian ad litem who may not necessarily have to be an attorney. Ms. Fox said it would be appropriate to have one guardian ad litem assigned to a sibling group, rather than a guardian ad litem for each child.
- Request the State Court Administrator and DPHHS perform an accurate assessment of the costs of guardians ad litem.
- Develop standards for guardians ad litem.
- Any costs for a public defender who participates on a treatment team should be included as a public defender cost.
- Reasonable caseloads and consistency and continuity in representation should be achieved.

Sen. Wheat asked what would happen in a case where domestic violence is an issue, as well as child abuse and neglect. Ms. Fox acknowledged this is a problem, especially in rural Montana, and suggested that the Law and Justice Interim Committee could consider that issue.

Chairman McGee stated that when the state public defender entity is created, training and standards for all cases should be a consideration.

Rep. Shockley suggested Ravalli County would be a good place to obtain statistics since it provides indigent people with representation at the instant children are removed. Ms. Fox stated she is gathering information on which counties provide representation early in the process and which counties provide representation at the end of the process. Ms. Fox felt representation should be provided consistently. Rep. Shockley said there were horror stories in Yellowstone County because the indigent person did not receive representation until their parental rights were terminated. Ms. Fox responded that Yellowstone County and Silver Bow County now appoint counsel at the beginning of the proceeding.

In addressing the Court-Appointed Special Advocate/Guardian Ad Litem (CASA/GAL) program and where that program should be administered, Ms. Fox suggested it would be appropriate to leave the program with the Court Administrator's Office rather than put it in with the state public defender office.

Rep. Parker stated Cascade County has received a federal grant for a treatment court pilot program which requires one of the eight people on the treatment team be a public defender. Rep. Parker expressed concern about peeling public defenders away from the process and losing eligibility for federal funding.

***(Tape 4; Side A)***

Sen. Perry asked why CFHHS recommended CASA/GAL be left with the Court Administrator's Office. Ms. Fox replied these individuals are intended to assist the judge in determining the best interests of the child, and that many of these individuals are volunteers; therefore, CFHHS views this more as a judicial function.

**WORK SESSION AND DISCUSSION OF SB 218 DECISION POINTS**

This agenda topic was deferred until the next Subcommittee meeting.

**PUBLIC COMMENT**

Mr. Kelly Worthan and Ms. Melissa Worthan, concerned parents from Missoula, submitted written testimony concerning their experiences with Child Protective Services in Ravalli County (EXHIBIT 7).

Responding to questions from the Subcommittee, Ms. Worthan explained she and her husband have had two attorneys whom they personally hired and also a court-appointed attorney, and that they were unsatisfied with the services they received.

Kandi Matthew-Jenkins, Missoula, testified that DPHHS is not advising parents of their right to counsel. Ms. Matthew-Jenkins felt social workers with DPHHS should be educated about the applicable laws under which DPHHS operates. Ms. Matthew-Jenkins said DPHHS is not operating within the parameters of the law, and that treating child abuse and neglect as a civil case rather than criminal case has created problems because of the difference in court proceedings. She said that in civil proceedings, there is less of a burden of proof on the prosecution than in a criminal proceeding. Ms. Matthew-Jenkins felt strongly that legal representation for children should be included in the public defender system. She expressed

concern that Mr. and Mrs. Worthan were not present with counsel when their treatment plan was drafted. Ms. Matthew-Jenkins felt the CASA/GAL program is a good program, but that it should be outside the public defender system. Ms. Matthew-Jenkins said she would like to ensure that the laws are clear and suggested that there be specific definitions for "endangerment" and "psychological abuse."

#### **INSTRUCTIONS TO STAFF AND NEXT MEETING AGENDA AND DATE**

Ms. Heffelfinger said she hopes to have received all the necessary data from the counties by May 30, 2004, and would then begin her analysis. Chairman McGee suggested holding the next Subcommittee meeting after the next meeting of the full Law and Justice Interim Committee on May 20, 2004, and requested a status report for that meeting.

Chairman McGee requested more information from Mr. Ozanne and Oregon's consortium structures, and thanked Mr. Ozanne for attending the meeting. Sen. Wheat also requested information about the structure of nonprofits in Oregon's public defender contracting system..

#### **ADJOURNMENT**

There being no further business to come before the Subcommittee, the meeting adjourned at 3:15 p.m.

CI0429 4159dfxb.