

STATUTORY DUTIES OF THE OFFICE OF THE STATE PUBLIC DEFENDER

Summary

The State of Montana has a constitutional duty to provide effective assistance of counsel to indigent persons in criminal cases and in certain “civil” cases. The Office of the State Public Defender [OPD] was created through SB 146 by the 2005 Legislature and began operations on July 1, 2006, to fulfill the State’s constitutional duty. ¶1.

The statutory duties are found primarily in the Montana Public Defender Act codified in Title 47. The source of other statutory duties are identified throughout the paper. ¶2.

The public defender commissioners [PDC] are appointed by the Governor and are nominated by the President of the Senate, the Speaker of the House, and other stakeholders. ¶3. The commissioners and the full time employees of OPD are public employees and must comply with applicable laws and must abide by the rules of conduct for public employees. ¶4.

Primary statutory duties of the PDC are setting direction and supervising the public defender system, ensuring that effective assistance of counsel is delivered by qualified and competent counsel consistently throughout the State, striving for adequate public funding for the public defender system, guarding the system from undue political interference and conflicts of interest, and providing public defender services in a fiscally responsible manner. ¶¶5-10. The PDC approves a strategic plan for the delivery of public defender services. ¶11.

The PDC and OPD must comply with Title 17 in budgeting, expending appropriations, and accounting. ¶12. Significant changes in agency or program scope, objectives, activities, or expenditures must be explained in a submission to the Governor, the legislative fiscal analyst, the legislative finance committee, and the Law and Justice Interim Committee before making the changes. ¶13. Services are provided with the occupations of public employees approved by DOA in the numbers approved by the budget director and the Legislature along with contracted services. ¶14.

The PDC has established standards for a statewide contracted services program. ¶15. A conflicts office has been established and a conflicts manager has been appointed. ¶16. Flat fee contracts are prohibited with one exception. ¶17. OPD must maintain an independent contractor status with individuals it contracts with for public defender services. ¶18.

M.C.A. §47-1-105 assigns the PDC with a host of other duties not already mentioned including the appointment of and doing performance evaluations of the chief public defender and the chief appellate defender, establishing standards for the qualifications and training of attorneys, dealing with excess caseloads, data collection, adopting administrative rules, and submitting an annual report. ¶19.

OPD assigns a public defender when one of the 208 courts orders an appointment in one of the 19 categories of cases listed in M.C.A. §47-1-104(4). ¶¶20-21.

Other statutory duties are found in Titles 2, 10, 17, 18, 37, 41, and 46. ¶20 and ¶¶22-25.

¶1 The State of Montana has a constitutional duty, rooted in the Constitutions of the United States and Montana, to provide effective assistance of counsel to indigent persons in criminal cases and in certain “civil” cases. That duty is discussed in a companion paper. The genesis of the Montana Public Defender Act was a class action suit filed in 2002 by the ACLU against the State and seven counties for not fulfilling the duty.¹ The Law and Justice Interim Committee [LJIC] issued a report to the Legislature in December 2004.² The Montana Public Defender Act was introduced and enacted as SB 146 during the 2005 Legislature. The Office of the State Public Defender [OPD] began operations on July 1, 2006.

¶2 The statutory duties of the agency are found primarily in the Montana Public Defender Act codified in *Title 47* of the Montana Code Annotated [*M.C.A.*]. Additional statutory and regulatory duties found elsewhere will be identified.

¶3 SB 146 (2005) created the Public Defender Commission [PDC] comprised of eleven members variously nominated by stakeholders and appointed by the Governor.³

¶4 The public defender commissioners and full time employees of OPD are public employees and must comply with applicable laws and must abide by the rules of conduct for public employees.⁴

¶5 Before OPD it was noted that “Montana's indigent defense services are not sufficiently independent from undue political influence that can be exercised by judges when they directly appoint counsel, set compensation, and approve or disapprove the defense's expenses, or that can be exercised by county executive branch officials in counties where the county attorney is allowed to review the public defender budget.”⁵ Hence, the PDC is obligated with others to “ensure that the system is free from undue political interference and conflicts of interest.”⁶

¶6 That duty is accomplished in part by excluding currently serving judges, county attorneys, deputy county attorneys, the attorney general, assistant attorneys general, the United States district attorney, assistant United States district attorneys, law enforcement officials, and public defenders employed by or under contract with OPD from membership on the PDC.⁷

¶7 Another example of maintaining independence is the PDC and staff being charged with the duty of preparing and presenting budget requests to the Legislature and the Governor in accordance with *M.C.A. §17-7-111* independently of the Department of Administration [DOA].⁸ Included is a duty for trying to ensure adequate public funding for the public defender system.⁹

¶8 The utmost statutory duty of the PDC and OPD that arises out of the constitutional obligation of the State is providing effective assistance of counsel delivered by qualified and competent counsel consistently throughout the State.¹⁰

¶9 A primary statutory duty of the PDC is setting direction and supervising the statewide public defender system, *i.e.*, OPD.¹¹ The PDC conducts business in accordance with *Title 2, chapter 3*, for public participation in governmental affairs.

¶10 Supervision encompasses the assurance that effective assistance of counsel is delivered by qualified and competent counsel consistently throughout the State, striving for adequate public funding for the public defender system, guarding the system from undue political interference and conflicts of interest, and providing public defender services in a fiscally responsible manner.¹²

¶11 The PDC approves a strategic plan¹³ for the delivery of public defender services in no more than eleven regions, establishes regional offices, establishes and maintains a contracted services program, and utilizes other service delivery methods that are appropriate and consistent with the purposes of OPD.¹⁴

¶12 Complying with *Title 17* in budgeting, expending appropriations, and accounting is encompassed in the fulfilment of all of the primary duties but most significantly the duties of ensuring adequate public funding for the public defender system and providing public defender services in a fiscally responsible manner.

¶13 Significant changes in agency or program scope, objectives, activities, or expenditures must be explained in a submission to the Governor's office, the legislative fiscal analyst for review and comment by the legislative finance committee and the LJIC prior to any implementation of the change.¹⁵

¶14 The PDC must ensure OPD delivers public defender services with the occupations of public employees approved by DOA in the numbers approved by the budget director and the Legislature along with contracted services.¹⁶

¶15 The PDC has established standards¹⁷ for a statewide contracted services program for ensuring that contracting for public defender services is done fairly and consistently statewide and within each public defender region and that contracting for appellate defender services is done fairly and consistently statewide.¹⁸

¶16 The PDC has established and maintains a conflicts office and has appointed a conflicts manager to oversee the office.¹⁹

¶17 Flat fee contracts are prohibited except contracts for legal representation of individuals appearing before enumerated specialty courts that have been approved by the PDC.²⁰

¶18 OPD must assure that individuals with whom it contracts are independent contractors and do not become employees of the State. A two step test is employed. First, the four "control factors" must be considered: (1) direct evidence of the right or the exercise of control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. Second, the individual with whom OPD contracts must be engaged in an independently established, trade, occupation, profession, or business. If the control factors are not avoided or the independently established, trade, occupation, profession, or business test is not satisfied by a convincing accumulation of undisputed evidence, the individual is an employee and not an independent contractor.²¹

¶19 In addition, *M.C.A. §47-1-105* assigns the PDC with duties to:

- ▶ appoint a chief public defender and regularly evaluate performance;
- ▶ appoint a chief appellate defender and regularly evaluate performance;
- ▶ establish statewide standards²² for the qualification and training of attorneys providing public defender services to ensure that services are provided by competent counsel and in a manner that is fair and consistent throughout the state which take into consideration:
 - (a) the level of education and experience that is necessary to competently handle certain cases and case types, such as criminal, juvenile, abuse and neglect, civil commitment, capital, and other case types, including cases on appeal, in order to provide effective assistance of counsel;
 - (b) acceptable caseloads and workload monitoring protocols to ensure that public defender workloads are manageable;
 - (c) access to and use of necessary professional services, such as paralegal, investigator, and other services that may be required to support a public defender in a case;
 - (d) continuing education requirements for public defenders and support staff;
 - (e) practice standards;
 - (f) performance criteria; and
 - (g) performance evaluation protocols
 - ▶ review and approve the strategic plan and budget proposals submitted by the chief public defender, the administrative director, and the chief appellate defender;
 - ▶ review and approve any proposal to create permanent staff positions;
 - ▶ establish and oversee a conflicts office with a conflicts manager responsible for conflicts of interest and for ensuring that cases involving a conflict of interest are handled according to professional ethical standards;
 - ▶ establish policies and procedures for handling excess caseloads;
 - ▶ establish policies and procedures to ensure that detailed expenditure and caseload data is collected, recorded, and reported to support strategic planning efforts for the system;
 - ▶ adopt administrative rules pursuant to the Montana Administrative Procedure Act to implement the provisions of this chapter; and
 - ▶ submit a biennial report to the governor, the supreme court, and the legislature and, each interim, specifically report to the LJIC with regard to the preceding biennium that includes
 - (a) all policies or procedures in effect for the operation and administration of the statewide public defender system;
 - (b) all standards established or being considered by the commission, the chief public defender, or the chief appellate defender;
 - (c) the number of deputy public defenders and the region supervised by each;
 - (d) the number of public defenders employed or contracted with in the system, identified by region;
 - (e) the number of attorney and nonattorney staff supervised by each deputy public defender;
 - (f) the number of new cases in which counsel was assigned to represent a party, identified by region, court, and case type;

- (g) the total number of persons represented by the office and the office of appellate defender, identified by region, court, and case type;
- (h) the annual caseload and workload of each public defender, except for the chief public defender, and of the office of appellate defender, identified by region, court, and case type;
- (i) the training programs conducted by the office and the number of attorney and nonattorney staff who attended each program;
- (j) the continuing education courses on criminal defense or criminal procedure attended by each public defender employed or contracted with in the system; and
- (k) detailed expenditure data by court and case type.

¶20 OPD assigns a qualified public defender when one of the 208 courts orders an appointment.²³ The assigned public defender provides the full benefit of services for the client until the court rescinds the order requiring assignment.²⁴ Full benefit of services includes constitutionally required effective assistance of counsel at all stages the Montana code requires for the particular kind of case, *e.g.*, the abuse and neglect (DN) cases in *Title 41, chapter 3*, and the applicable criminal procedure sections in *Title 46*.

¶21 A court may order OPD to assign a public defender in the cases listed in *M.C.A. §47-1-104(4)*:

- (a) [I]n cases in which a person is entitled to assistance of counsel at public expense because of financial inability to retain private counsel,²⁵ subject to a determination of indigence pursuant to *47-1-111*:
 - (i) for a person charged with a felony or charged with a misdemeanor for which there is a possibility of incarceration, as provided in *46-8-101*;
 - (ii) for a party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in *40-6-119*;
 - (iii) for a parent, guardian, or other person with physical or legal custody of a child or youth in any removal, placement, or termination proceeding pursuant *41-3-422* [DN cases] and as required under the federal Indian Child Welfare Act, as provided in *41-3-425*;
 - (iv) for an applicant for sentence review pursuant to *Title 46, chapter 18*, part 9;
 - (v) for a petitioner in a proceeding for postconviction relief, as provided in *46-21-201*;
 - (vi) a petitioner in a habeas corpus proceeding pursuant to *Title 46, chapter 22*;
 - (vii) for a parent or guardian in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in *53-20-112*;
 - (viii) for a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in *53-21-116*;
 - (ix) for a respondent in a proceeding for the involuntary commitment of a person for alcoholism, as provided in *53-24-302*; and
 - (x) for a witness in a criminal grand jury proceeding, as provided in *46-4-304*.
- (b) [I]n cases in which a person is entitled by law to the assistance of counsel at

public expense regardless of the person's financial ability to retain private counsel, as follows:

- (i) as provided for in 41-3-425 [for a child when a guardian *ad litem* is not appointed but, at the court's discretion, when a guardian *ad litem* is appointed; indigent parents, guardians, or other person having legal custody of a child; and a party entitled to counsel at public expense under the Indian Child Welfare Act];
- (ii) for a youth in a proceeding under the Montana Youth Court Act alleging a youth is delinquent or in need of intervention, as provided in 41-5-1413, and in a prosecution under the Extended Jurisdiction Prosecution Act, as provided in 41-5-1607;
- (iii) for a juvenile entitled to assigned counsel in a proceeding under the Interstate Compact on Juveniles, as provided in 41-6-101;
- (iv) for a minor who petitions for a waiver of parental consent requirements under the Parental Consent for Abortion Act of 2013, as provided in 50-20-509;
- (v) for a respondent in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;
- (vi) for a minor voluntarily committed to a mental health facility, as provided in 53-21-112;
- (vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in *Title 72, chapter 5*;
- (viii) for a ward when the ward's guardian has filed a petition to require medical treatment for a mental disorder of the ward, as provided in 72-5-322; and

(c) [F]or an eligible appellant in an appeal of a proceeding listed in this subsection (4). (*Emphasis supplied.*)

¶22 The agency adheres to *Title 2, chapter 18*, regarding state employees classification, compensation, and benefits. The PDC and OPD have duties to bargain collectively in good faith and to avoid unfair labor practices.²⁶

¶23 *Title 37, chapter 61*, statutes governing the licensing, suspension, and disbarment of attorneys and provisions regulating the practice of law must be kept in mind. The PDC and OPD must also heed *Title 37* statutes governing the licensing and regulation of other professions and occupations assisting in the delivery of public defense services like psychiatrists, psychologists, and investigators.

¶24 OPD maintains its records in accordance with the public records statutes in *Title 2, chapter 6*.

¶25 The PDC and OPD have other administrative duties. *Title 2* requires that an Administrative Rule Officer, a Records Management Coordinator, and a representative to the Risk Management and Tort Defense Committee be appointed. *Title 10* requires a Business Continuity Team, *Title 17* requires an Agency Internal Controls Committee, and *Title 18* requires that both a Purchasing and a Surplus Property Officer be appointed. Other statutory or state-

mandated requirements include a Safety/Facility Management Team, Data and Technical Security IT Specialists, and a Legislative/Fiscal Note Team. The following is a current list of appointments OPD makes for carrying out administrative and managerial duties in the operations of the agency.

<u>Teams/Committees/Groups/Special Assignments</u>	<u>Required by</u>	<u>Authority</u>
<p>Internal Control Team Purpose: To identify risks and set up internal controls to help an organization control or mitigate risk</p>	State	MOM 399 17-1-102
<p>Safety/Facility Management Team Purpose: to promote safety awareness and identify safety issues, and to act as local contact with landlords Individuals represent each region/facility</p>	State	39-71-1505
<p>ARM Purpose: Assist in development/issuance of administrative rules</p>	State	2-4-110 and 2-4-302
<p>Purchasing Officer Purpose: To assure agency compliance with Title 18</p>	State	Title 18
<p>Risk Management and Tort Defense Rep Purpose: to coordinate with and provide info to RMTD, as necessary</p>	State	2-9-201 and RMTD policy 2.01
<p>Data Security Coordinator</p>	State	IT strategic planning requirement (ITSD)
<p>Technical Security Specialist</p>	State	IT strategic planning requirement (ITSD)
<p>State Depository Program Coordinator</p>	State	22-1-213
<p>Records Management Coordinator</p>	State	2-6-201 and 2-6-213 (6)
<p>Inter-entity Loans, Authorized Signer</p>	State	Title 17
<p>Inter-entity Loans, Authorized Approver Purpose: to access general fund loans when available and allowed by law</p>	State	Title 17
<p>STIP Investment Authorization Purpose: to invest state special revenue funds awaiting use in operations</p>	State	Title 17
<p>Surplus Property Purpose: to dispose of agency property when necessary (vehicles, PCs, etc.)</p>	State	18-4-226

Business Continuity Team

State 10-3-105

Purpose: to identify key tasks/systems/people to be alerted to a disaster or disruption in business and to be able to restart business if necessary - anywhere in the system

Legislation/Fiscal Note Review Team

State Budget Office requirement

Purpose: receive bills from Gov.'s Staff, review them and determine if they present an operational/financial effect

Eligibility Specialists

Agency Policy 105

Purpose: to process application forms and lead the eligibility determination process

Fleet Managers

Agency Policy 220

Purpose: to handle all aspects of agency vehicles assigned to the region or office, including reporting mileage, getting maintenance, arrange for fixing vehicles, issuing fuel cards, reporting accidents, keeping keys in a secure place, etc.

1. *White, et al. v. Martz, et al.*, Montana 1st Jud. Dist. Ct., Cause No. CDV 2002-133. The lawsuit alleged that the state and counties failed to provide constitutionally and statutorily adequate legal representation to indigent persons with criminal cases. The Law and Justice Interim Committee initiated a study of public defense issues and policy options in 2003. In 2004, the state Attorney General and the ACLU entered into a stipulation which stayed the litigation pending legislative action.

2. For the Defense: Enacting a Statewide Public Defender System in Montana, a Report to the 59th Legislature. This report noted that persons were entitled in certain cases to legal counsel at public expense. This right to counsel most often was limited to those cases in which the person was indigent and unable to hire an attorney. There was a limited number of cases in which a person was entitled to appointment of an attorney regardless of income level. The method of delivery of public defense services was a local decision. Some cities and counties established a public defender office. In other municipalities and counties, private attorneys had contracts with the city or county. In still others, a judge directly appointed an attorney on a case-by-case basis. *Report*, 13-14.

The LJIC considered three options for public defender services:

Option A: retain the existing system and await resolution of the ACLU lawsuit.

Option B: develop a hybrid system where the state would set policy and standards and manage a state contracted services program, so that judges would no longer appoint public defenders on a case-by-case basis, and county public defender offices would be locally controlled. Oversight of public defenders would essentially remain under the auspices of the judicial branch.

Option C: develop a statewide public defender system managed and supervised by a state public defender office.

It was clear to the Committee, after receiving “input and testimony from numerous stakeholders,” that

“there was overwhelming support for and compelling issues weighing in favor of Option C.” The Committee voted unanimously to pursue development of a statewide public defender system. *Report*, 30.

3. *M.C.A. §2-15-1028.*
4. *M.C.A. §2-2-102(7); §§2-2-103, et seq.*
5. For the Defense: Enacting a Statewide Public Defender System in Montana, a Report to the 59th Legislature, p. 8.
6. *M.C.A. §47-1-102(2).*
7. *M.C.A. §2-15-1028(7).*
8. *M.C.A. §2-15-1028(6)(a)(ii).*
9. *M.C.A. §47-1-102(5).*
10. *M.C.A. §47-1-102(1) and (3).*
11. *M.C.A. §47-1-104(1); §47-1-105(1).*
12. *M.C.A. §47-1-102.*
13. <http://publicdefender.mt.gov/publications.asp>.
14. *M.C.A. §47-1-104(2).*
15. *M.C.A. §17-7-138(1)(a).*
16. *M.C.A. §2-18-204; §47-1-102(4); §47-1-216.*
17. <http://publicdefender.mt.gov/contracts.asp>.
18. *M.C.A. §47-1-216(1).*
19. *M.C.A. §47-1-118.*
20. *M.C.A. §47-1-216(4).*
21. A two-step process is used in determining whether an individual qualifies for independent contractor status. First, it must be determined whether the “control factors” are met. A four-part control test has been developed: (1) direct evidence of the right or the exercise of control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. Second, it must be determined whether the individual is engaged in an independently established, trade, occupation, profession, or business. Unless both parts of the test are satisfied by a convincing accumulation of undisputed evidence, the person is an employee and not an independent contractor. *Mathews v. BJS Construction, Inc.*, 2003 MT 116, ¶¶27-28, 315 Mont. 441, 68 P.3d 865; *Spain v. Montana Department of Revenue*, 2002 MT 146, ¶¶22-23, 310 Mont. 282, 49 P.3d 615.
22. <http://publicdefender.mt.gov/Standards/StandardsTOC.asp>.

23. *M.C.A. §47-1-104(3).*

24. *M.C.A. §47-1-111(1)(c).*

25. *M.C.A. §47-1-111(3)* provides: An applicant is indigent if:

(a) the applicant's gross household income, as defined in 15-30-2337, is at or less than 133% of the poverty level set according to the most current federal poverty guidelines updated periodically in the Federal Register by the United States department of health and human services under the authority of 42 U.S.C. 9902(2); or

(b) the disposable income and assets of the applicant and the members of the applicant's household are insufficient to retain competent private counsel without substantial hardship to the applicant or the members of the applicant's household.

26. *M.C.A. §39-31-305; §§39-31-401, et seq.*