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**Office of Research and Policy Analysis**

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**Montana's Public Defender System:  
Issues & Options #1**

A REPORT TO THE LAW AND JUSTICE INTERIM COMMITTEE

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## TABLE OF CONTENTS

<b>INTRODUCTION</b> .....	<b>2</b>
Purpose .....	2
Preview of the options .....	2
Organization of paper .....	3
<b>PART I: CURRENT STRUCTURE</b> .....	<b>4</b>
Defining the scope .....	4
Types of cases where counsel may be assigned .....	5
How many cases actually involve court-appointed counsel? .....	6
How are public defender services delivered? .....	7
Caseload management and standards .....	8
Caseload compared to public defender positions .....	9
Current statewide administration .....	13
<b>PART II: FUNDING RESPONSIBILITIES</b> .....	<b>16</b>
Historical perspective .....	16
State assumption .....	16
Statutory language on funding obligations .....	16
Allowable expenses for court-appointed counsel .....	20
Challenges with carving out current actual costs .....	21
Recent progress in getting better data .....	21
Cost drivers and cost controls .....	22
<b>PART III: POLICY CONSIDERATIONS</b> .....	<b>24</b>
Overview .....	24
Questions to ask .....	24
<b>SUMMARY AND CONCLUSION</b> .....	<b>27</b>
<b>Appendix A: Noncriminal Code Public Defender Statutes</b>	
<b>Appendix B: ABA 10 Principles of a Public Defense Delivery System</b>	

# **Montana's Public Defender System: Issues and Options #1**

prepared by  
Sheri S. Heffelfinger, Legislative Services Division  
for the  
***Law and Justice Interim Committee***

March 2004

## **INTRODUCTION**

### **Purpose**

The Law and Justice Interim Committee (LJIC) is at the first crossroads in its study of public defender services in Montana. There are essentially three different roads (though other roads may yet be identified) that the Committee could travel down as it further considers what recommendations to make to the full Legislature regarding Montana's public defender services. There are pros and cons to each road. These roads, or options, and some of the pros and cons are outlined in an accompanying paper entitled "Options Chart: Montana Public Defender Study".

The purpose of this paper is to provide background information and analysis as a foundation for the Committee's deliberations and decisions concerning the issues and options.

### **Preview of the options**

The three basic roads or options that could be taken by the Committee at this juncture are as follows:

- A. Get more information first. Further examine and discuss what steps

need to be taken to clarify certain governing statutes that are overlapping and confusing with respect to District Court funding, the provision of public defender services, and statewide policies, and thereby set the stage for the development of better data and information.

- B. Take a hybrid approach. Further examine and discuss how to establish statewide standards and procedures to address issues such as compensation, caseloads, training, etc., while also allowing for local flexibility and county-level administration. Centralize contracting at the state level.
- C. New state agency. Further discuss how to establish a new state agency that would be a state public defender office. The state agency would manage state funding and administer a statewide public defender system and county public defender offices would become state offices.

Other options may be identified by Committee members or stakeholders and could be added to this menu.

Any option chosen will require further decisions down the road and would be outlined and deliberated at subsequent meetings. This paper is intended to lay the foundation for this and future discussions.

### **Organization of paper**

This paper is organized as follows:

- Part I: Current Structure
- Part II: Funding Responsibilities
- Part III: Policy Considerations
- Summary and Conclusion

## PART I: CURRENT STRUCTURE

### Defining the scope

Before going any further, it is important to note that the terms “public defender” and “indigent defense” do not encompass all of what should be included in the Committee’s discussion. The scope of what the Committee is deliberating is more accurately described in terms of “court- appointed counsel” for a defendant or respondent. Court-appointed counsel usually means a public defender appointed for an indigent defendant, but certain statutes also authorize the court to appoint legal counsel in some cases irrespective of a formal determination of indigence.

Thus, when used in this paper, the terms “public defender” or “indigent defense” should be taken to include all court-appointed counsel. However, the terminology excludes guardians ad litem (GALs) or court-appointed special advocates (CASAs). Although appointed by the court, the GALs and CASAs are appointed to look out for a child's or youth's best interest, not necessarily the child's legal interests.

The Montana statute summarizing a defendant's right to counsel in criminal cases is section 46-8-101, MCA, which reads as follows:

**46-8-101. Right to counsel.** (1) During the initial appearance before the court, every defendant must be informed of the right to have counsel, and must be asked if the aid of counsel is desired.

(2) If the defendant desires counsel, is unable to employ counsel, and is entitled to have counsel assigned, the court shall assign counsel to the defendant without unnecessary delay.

(3) The defendant, if unable to employ counsel, is entitled to have counsel assigned if:

- (a) the offense charged is a felony;
- (b) the offense charged is a misdemeanor and the court desires to retain imprisonment as a sentencing option; or
- (c) the interests of justice would be served by assignment.

From the outset of this study, the Committee decided by consensus to not include lower court cases in the public defender discussion, thus limiting the scope of the discussion to District Court and Youth Court cases.

Other statutes outline the right to counsel for juveniles in Youth Court proceedings, parents in abuse and neglect proceedings, and mentally ill persons in involuntary commitment proceedings. These statutes are provided at Appendix A.

### **Types of cases where counsel may be assigned**

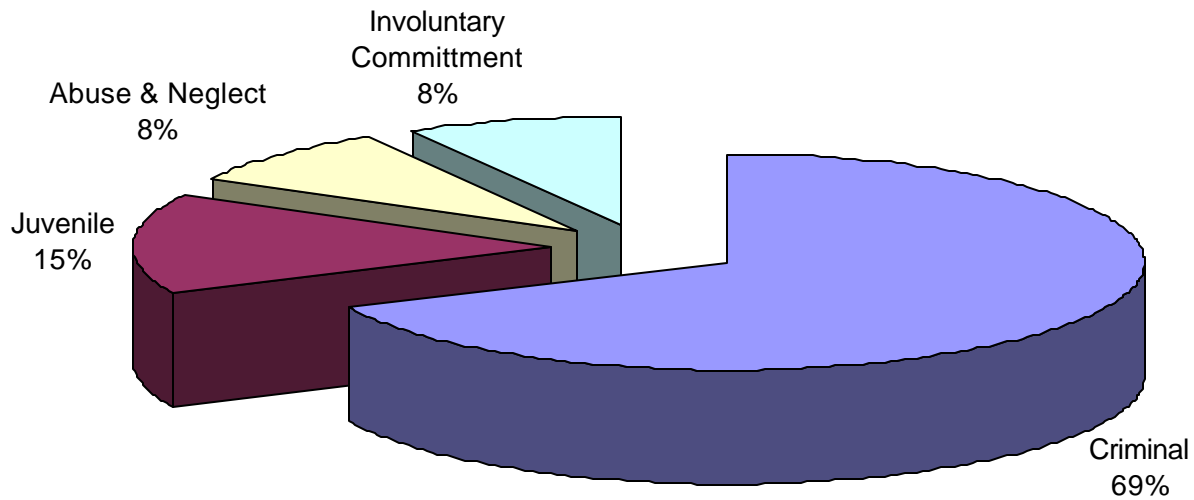
Under current Montana law, the District/Youth Court cases in which counsel may be assigned fall into four case-type categories:

- ▼ criminal (DC);
- ▼ abuse and neglect (DN, also called youth-in-need-of-care, or YINC cases);
- ▼ juvenile proceedings in Youth Court (DJ); and
- ▼ involuntary civil commitment (DI);

In calendar year 2003, these four case types accounted for 11,655 cases, which is about 31% of the total District Court/Youth Court caseload of 37,092 cases (all types). Figure 1 illustrates how the 11,655 DC, DN, DI, and DJ cases types break out in terms of percentages.

**Figure 1: 2003 Caseload Percentages by Type**

**District Court/Youth Court Caseload in 2003  
Involving Cases Where Counsel May Be Appointed**



**How many cases actually involve court-appointed counsel?**

According to the U.S. Bureau of Justice Statistics, 82% of the felony defendants prosecuted in the nation's largest state courts have court-appointed counsel. The State Public Defender in Wyoming, Mr. Kenneth Koski, estimates that between 90% and 95% of all cases in Wyoming (upper and lower courts) involve indigent defendants. Test data requested on behalf of this Committee and captured for Missoula County for FY 2003 cases (and which will be run for all counties in time for a subsequent Committee meeting) showed that 75% of the cases involved court-appointed counsel.



When considering this data, it is important to note that how indigence is defined and determined by each court affects how often and under what circumstances counsel is actually assigned. This issue is discussed later in this paper.

If one assumes that 80% of all District Court and Youth Court cases in the four stated case-type categories (DC, DN, DJ, and DI) involved court-appointed counsel, then the public defender caseload in 2003 was 9,324 cases.

Comparing costs to caseload indicates that cases involving appointed counsel represents about 25% of the total District/Youth Court caseload and 82% of the Judicial Branch District Court Program's variable costs.

### **How are public defender services delivered?**

Montana's public defender services are state-funded but county-administered. This means that the decision about how public defender services are delivered is determined by the county in which the case is filed. Public defender services may be provided by one of the following methods:

- ▼ by county public defender offices, if the county chooses to establish an office;
- ▼ by contracted services, if the county chooses to contract; or
- ▼ absent county action, by direct appointment of a private attorney by a district judge.

Missoula, Yellowstone, Cascade, Lewis & Clark, Anaconda-Deer Lodge, and Gallatin Counties each have public defender offices, about 16 counties rely primarily on contracts for public defender services (this number has not been verified), and the remaining counties rely primarily on judges to appoint counsel on a case-by-case basis. Records in the Office of Court Administrator indicate that since July 1, 2003, about 180 different private

vendors (court-appointed or county-contracted private attorneys and law firms) have received payments from the Office of Court Administrator for providing public defender services.

Section 46-8-202, MCA, which authorizes county public defender offices, reads as follows:

**46-8-202. Public defender's office.** Any county through its board of county commissioners may provide for the creation of a public defender's office and the appointment of a salaried public defender and any assistant public defenders that may be necessary to satisfy the legal requirements in providing counsel for defendants unable to employ counsel. The costs of the office must be paid in accordance with 3-5-901.

Current statutes are, for the most part, silent on the topic of contracted services for court-appointed counsel, and counsel directly appointed by the judge on a case-by-case basis is the assumed method of service delivery in much of the statutory provisions.

### **Caseload management and standards**

In 1998, the American Bar Association passed a resolution adopting the following standards (see Figure 2) originally developed by the National Advisory Committee on Criminal Justice Standards and Goals in 1973. These standards specify that to keep workload manageable the maximum number of new cases a public defender should be assigned in a year are as follows (these are stand-alone maximums and therefore should be read as "150 felony cases or 400 misdemeanors or 200 juvenile cases", etc.).

**Figure 2: ABA-Adopted Caseload Standards**

Felonies	150
Misdemeanors (excluding traffic)	400
Juvenile	200
Mental Health Act	200

Appeals	25
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### **Caseload compared to public defender positions**

Figure 3 provides a summary table of 2003 District/Youth Court cases (new filings) in the criminal, involuntary commitment, juvenile, and abuse and neglect categories, i.e, cases in which a public defender may be appointed. A count of the actual cases in which a public defender was appointed is not available at this time. Thus, the table also shows what the public defender caseload statewide would have been in each county and judicial district assuming that 80% of those cases actually involved indigent defendants (or respondents) eligible for court-appointed counsel. Also shown is the number of full-time public defenders required to effectively handle the caseload if the caseload standard for felony cases (150 per public defender) is applied across the board to the total assumed public defender caseload. Lastly, the table shows how many full-time county public defenders are employed in each of the six counties with county public defender offices. However, it is important to note that county public defender offices handle all indigent defense cases in the Justice's Court as well as in the District/Youth Court. Thus, each position (FTE) listed in the table needs to be reduced accordingly. To accomplish this split of FTE between District/Youth Court and Justice's Court cases, further research is needed so the column has been left blank for now.

A review of the data presented in Figure 3 shows that if Montana wanted to handle all of these cases with state employee public defenders, it would have needed about 62 full-time public defenders to effectively manage the caseload (applying the caseload standard for felonies to the total of all case types).

**Figure 3:  
District Court Caseload and FTE Comparison  
Based on Case Filings in 2003**

Judicial District	County	Crimina I	Mentally III / Dev.		Abuse and Neglect		TOTAL CASES	Total PD cases assuming 80% are indigent	Required PD FTE	County Office PD FTE	Available County PD FTE
			Disabled	Juvenile	(Applying Felony Caseload Standard)	est. split Upper/Lower Court					
1	BROADWATER	18	0	2	10	30	24	0.2			
	LEWIS AND CLARK	<u>678</u>	<u>72</u>	<u>171</u>	<u>56</u>	<u>977</u>	<u>782</u>	<u>5.2</u>	3.0	?	
	<b>Subtotal</b>	<b>696</b>	<b>72</b>	<b>173</b>	<b>66</b>	<b>1007</b>	<b>806</b>	<b>5.4</b>			
2	SILVER BOW	<u>327</u>	<u>88</u>	<u>212</u>	<u>195</u>	<u>822</u>	<u>658</u>	<u>4.4</u>			
	<b>Subtotal</b>	<b>327</b>	<b>88</b>	<b>212</b>	<b>195</b>	<b>822</b>	<b>658</b>	<b>4.4</b>			
3	DEER LODGE	94	201	15	10	320	256	1.7			
	GRANITE	15	1	0	0	16	13	0.1			
	POWELL	<u>20</u>	<u>2</u>	<u>4</u>	<u>2</u>	<u>28</u>	<u>22</u>	<u>0.1</u>			
	<b>Subtotal</b>	<b>129</b>	<b>204</b>	<b>19</b>	<b>12</b>	<b>364</b>	<b>291</b>	<b>1.9</b>	2.0	?	
4	MINERAL	42	1	10	0	53	42	0.3			
	MISSOULA	<u>685</u>	<u>110</u>	<u>113</u>	<u>54</u>	<u>962</u>	<u>770</u>	<u>5.1</u>	9.0	?	
	<b>Subtotal</b>	<b>727</b>	<b>111</b>	<b>123</b>	<b>54</b>	<b>1015</b>	<b>812</b>	<b>5.4</b>			
5	BEAVERHEAD	51	9	39	3	102	82	0.5			
	JEFFERSON	87	19	22	17	145	116	0.8			
	MADISON	<u>50</u>	<u>2</u>	<u>10</u>	<u>1</u>	<u>63</u>	<u>50</u>	<u>0.3</u>			
	<b>Subtotal</b>	<b>188</b>	<b>30</b>	<b>71</b>	<b>21</b>	<b>310</b>	<b>248</b>	<b>1.7</b>			
6	PARK	141	20	6	14	181	145	1.0			
	SWEET GRASS	<u>26</u>	<u>2</u>	<u>2</u>	<u>2</u>	<u>32</u>	<u>26</u>	<u>0.2</u>			
	<b>Subtotal</b>	<b>167</b>	<b>22</b>	<b>8</b>	<b>16</b>	<b>213</b>	<b>170</b>	<b>1.1</b>			
7	DAWSON	82	7	19	8	116	93	0.6			
	MCCONE	6	0	1	0	7	6	0.0			
	PRAIRIE	2	0	0	0	2	2	0.0			
	RICHLAND	36	4	6	6	52	42	0.3			
	WIBAUX	<u>1</u>	<u>0</u>	<u>0</u>	<u>1</u>	<u>2</u>	<u>2</u>	<u>0.0</u>			
<b>Subtotal</b>	<b>127</b>	<b>11</b>	<b>26</b>	<b>15</b>	<b>179</b>	<b>143</b>	<b>1.0</b>				
8	CASCADE	<u>1032</u>	<u>10</u>	<u>168</u>	<u>89</u>	<u>1299</u>	<u>1039</u>	<u>6.9</u>			
	<b>Subtotal</b>	<b>1032</b>	<b>10</b>	<b>168</b>	<b>89</b>	<b>1299</b>	<b>1039</b>	<b>6.9</b>	8.3	?	

Judicial District	County	Crimina I	Mentally III / Dev. Disabled	Juvenile	Abuse and Neglect	TOTAL CASES	Total PD cases assuming 80% are indigent	Required PD FTE (Applying Felony Caseload Standard)	County Office PD FTE	Available County PD FTE applying est. split Upper/Lower Court
							80% are indigent	County Office PD FTE	est. split Upper/Lower Court	
9	GLACIER	112	5	18	5	140	112	0.7		
	PONDERA	37	0	7	5	49	39	0.3		
	TETON	32	1	2	4	39	31	0.2		
	TOOLE	<u>36</u>	<u>0</u>	<u>6</u>	<u>3</u>	<u>45</u>	<u>36</u>	<u>0.2</u>		
	<b>Subtotal</b>	<b>217</b>	<b>6</b>	<b>33</b>	<b>17</b>	<b>273</b>	<b>218</b>	<b>1.5</b>		
10	FERGUS	120	95	26	26	267	214	1.4		
	JUDITH BASIN	13	1	1	2	17	14	0.1		
	PETROLEUM	<u>20</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>20</u>	<u>16</u>	<u>0.1</u>		
	<b>Subtotal</b>	<b>153</b>	<b>96</b>	<b>27</b>	<b>28</b>	<b>304</b>	<b>243</b>	<b>1.6</b>		
11	FLATHEAD	<u>721</u>	<u>46</u>	<u>85</u>	<u>77</u>	<u>929</u>	<u>743</u>	<u>5.0</u>		
	<b>Subtotal</b>	<b>721</b>	<b>46</b>	<b>85</b>	<b>77</b>	<b>929</b>	<b>743</b>	<b>5.0</b>		
12	CHOUTEAU	18	6	4	4	32	26	0.2		
	HILL	186	14	44	28	272	218	1.5		
	LIBERTY	<u>2</u>	<u>0</u>	<u>1</u>	<u>0</u>	<u>3</u>	<u>2</u>	<u>0.0</u>		
	<b>Subtotal</b>	<b>206</b>	<b>20</b>	<b>49</b>	<b>32</b>	<b>307</b>	<b>246</b>	<b>1.6</b>		
13	YELLOWSTONE	<u>1360</u>	<u>151</u>	<u>333</u>	<u>131</u>	<u>1975</u>	<u>1580</u>	<u>10.5</u>		
	<b>Subtotal</b>	<b>1360</b>	<b>151</b>	<b>333</b>	<b>131</b>	<b>1975</b>	<b>1580</b>	<b>10.5</b>	8.0	?
14	GOLDEN VALLEY	9	0	0	0	9	7	0.0		
	MEAGHER	12	1	6	1	20	16	0.1		
	MUSSELSHELL	28	3	11	7	49	39	0.3		
	WHEATLAND	<u>17</u>	<u>1</u>	<u>10</u>	<u>6</u>	<u>34</u>	<u>27</u>	<u>0.2</u>		
	<b>Subtotal</b>	<b>66</b>	<b>5</b>	<b>27</b>	<b>14</b>	<b>112</b>	<b>90</b>	<b>0.6</b>		
15	DANIELS	5	0	6	0	11	9	0.1		
	ROOSEVELT	37	4	21	4	66	53	0.4		
	SHERIDAN	<u>11</u>	<u>3</u>	<u>22</u>	<u>2</u>	<u>38</u>	<u>30</u>	<u>0.2</u>		
	<b>Subtotal</b>	<b>53</b>	<b>7</b>	<b>49</b>	<b>6</b>	<b>115</b>	<b>92</b>	<b>0.6</b>		
16	CARTER	0	0	0	0	0	0	0.0		
	CUSTER	82	12	14	49	157	126	0.8		
	FALLON	10	0	1	5	16	13	0.1		
	GARFIELD	2	0	1	1	4	3	0.0		
	POWDER RIVER	3	0	0	0	3	2	0.0		
	ROSEBUD	70	0	10	24	104	83	0.6		
	TREASURE	<u>4</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>4</u>	<u>3</u>	<u>0.0</u>		
	<b>Subtotal</b>	<b>171</b>	<b>12</b>	<b>26</b>	<b>79</b>	<b>288</b>	<b>230</b>	<b>1.5</b>		

Judicial District	County	Crimina I	Mentally III / Dev. Disabled	Juvenile	Abuse and Neglect	TOTAL CASES	Total PD cases assuming 80% are indigent	Required PD FTE (Applying Felony Caseload Standard)	County Office PD FTE	Available County PD FTE applying est. split Upper/Lower Court
17	BLAINE	30	1	29	1	61	49	0.3		
	PHILLIPS	20	0	9	0	29	23	0.2		
	VALLEY	<u>31</u>	<u>3</u>	<u>5</u>	<u>3</u>	<u>42</u>	<u>34</u>	<u>0.2</u>		
	<b>Subtotal</b>	<b>81</b>	<b>4</b>	<b>43</b>	<b>4</b>	<b>132</b>	<b>106</b>	<b>0.7</b>		
18	GALLATIN	<u>516</u>	<u>41</u>	<u>51</u>	<u>23</u>	<u>631</u>	<u>505</u>	<u>3.4</u>		
	<b>Subtotal</b>	<b>516</b>	<b>41</b>	<b>51</b>	<b>23</b>	<b>631</b>	<b>505</b>	<b>3.4</b>	5.0	?

Judicial District	County	Crimina I	Mentally III / Dev. Disabled	Juvenile	Abuse and Neglect	TOTAL CASES	Total PD cases assuming 80% are indigent	Required PD FTE (Applying Felony Caseload Standard)	County Office PD FTE	Available County PD FTE applying est. split Upper/Lower Court
19	LINCOLN	<u>230</u>	<u>9</u>	<u>66</u>	<u>37</u>	<u>342</u>	<u>274</u>	<u>1.8</u>		
	<b>Subtotal</b>	<b>230</b>	<b>9</b>	<b>66</b>	<b>37</b>	<b>342</b>	<b>274</b>	<b>1.8</b>		
20	LAKE	256	11	27	13	307	246	1.6		
	SANDERS	<u>55</u>	<u>1</u>	<u>9</u>	<u>9</u>	<u>74</u>	<u>59</u>	<u>0.4</u>		
	<b>Subtotal</b>	<b>311</b>	<b>12</b>	<b>36</b>	<b>22</b>	<b>381</b>	<b>305</b>	<b>2.0</b>		
21	RAVALLI	<u>264</u>	<u>18</u>	<u>79</u>	<u>12</u>	<u>373</u>	<u>298</u>	<u>2.0</u>		
	<b>Subtotal</b>	<b>264</b>	<b>18</b>	<b>79</b>	<b>12</b>	<b>373</b>	<b>298</b>	<b>2.0</b>		
22	BIG HORN	108	7	30	31	176	141	0.9		
	CARBON	43	5	5	5	58	46	0.3		
	STILLWATER	<u>34</u>	<u>0</u>	<u>12</u>	<u>4</u>	<u>50</u>	<u>40</u>	<u>0.3</u>		
	<b>Subtotal</b>	<b>185</b>	<b>12</b>	<b>47</b>	<b>40</b>	<b>284</b>	<b>227</b>	<b>1.5</b>		
<b>STATEWIDE</b>										
	<b>TOTAL</b>	<b>7927</b>	<b>987</b>	<b>1751</b>	<b>990</b>	<b>11655</b>	<b>9324</b>	<b>62.2</b>	<b>35.3</b>	<b>?</b>

Compiled by Sheri Heffelfinger, LSD Sources: Office of Court Administrator, MACo, and individual phone calls

## **Current statewide administration**

As previously mentioned, in 2001, as part of "state assumption", the Legislature established the District Court Council, which is responsible for adopting policies and procedures for the state-funded District Court program (subject to the review of the Supreme Court). The statutes providing for the District Court Council are as follows:

**3-1-1601. District court council -- administration of state funding of district courts.** (1) The district court council ***shall adopt policies and procedures*** to administer the state-funded district court program as established in 3-5-901.

(2) The court administrator appointed under 3-1-701 shall administer the policies and procedures adopted under this section.

(3) Money appropriated for the district court program may not be used for any other purpose. *[emphasis added]*

**3-1-1602. District court council -- appointment -- composition -- duties -- staggered terms -- staff.** (1) There is a district court council. The council must be composed of nine members as follows:

(a) the chief justice of the supreme court or a designee of the chief justice;

(b) four district court judges elected by district court judges, one of whom must be from a judicial district that does not contain a first-class city as provided in 7-1-4111; and

(c) the following ex officio, nonvoting members appointed by the supreme court:

(i) one chief juvenile probation officer nominated by the Montana juvenile probation officers association;

(ii) one clerk of the district court nominated by the Montana association of clerks of district courts;

(iii) one county commissioner nominated by the Montana association of counties;

and

(iv) one court reporter nominated by the Montana court reporters association.

(2) The chief justice or the chief justice's designee shall serve as the presiding officer of the council and shall appoint a vice presiding officer to act in the absence of the presiding officer.

(3) The district court council ***shall develop and adopt policies and procedures***, subject to review by the supreme court, to administer the state funding of district courts. The policies and procedures must address but not be limited to the following issues related to district courts:

(a) workload;

(b) resource allocation among the district courts;



- (c) hiring policies;
- (d) court procedures;
- (e) information technology;
- (f) for court reporters, work schedules, transcript fees, and equipment; and
- (g) other issues regarding the state funding of district courts.

(4) Each district court judge shall retain the inherent power to select and appoint the judge's own necessary assistants and employees and to direct the performance of their duties.

(5) The chief justice of the supreme court shall serve on the council during the term of election or appointment. Other members shall serve staggered 3-year terms.

(6) The court administrator shall provide sufficient support to the council to allow it to carry out its statutory duties.

(7) The council shall provide reports to the legislature and supreme court upon request. *[emphasis added]*

In addition to the statutory obligations of the District Court Council, the Appellate Defender Commission, established by the Legislature in 1991, is statutorily responsible for recommending to the Supreme Court statewide professional standards for public defenders and for developing and disseminating a roster of attorneys eligible for appointment as public defenders. Section 2-15-1020, MCA, specifies the duties of the Appellate Defender Commission and reads as follows:

**2-15-1020. Appellate defender commission -- duties -- rules.** (1) There is an appellate defender commission.

(2) The commission consists of five members appointed by the governor as follows:

(a) one district judge nominated by the district judges under a nominating procedure initiated and conducted by the supreme court and certified by the chief justice of the supreme court;

(b) three attorneys. In selecting the attorney appointees, the governor shall consider recommendations submitted by the president of the state bar of Montana, as follows:

(i) at least two attorneys who are experienced in the defense of felonies, at least one of whom has served a minimum of 1 year as a full-time public defender for a governmental agency or a public corporation; and

(ii) at least one attorney who has been licensed to practice law in this state for a minimum of 10 years.

(c) one member of the general public who is not an attorney or a judge, active or retired.

(3) The members shall serve staggered 3-year terms.

(4) The commission is allocated to the department of administration for administrative purposes only pursuant to 2-15-121.

(5) A member of the commission may not while serving a term on the commission serve as a county attorney or a deputy county attorney, the attorney general or an assistant attorney general, the United States district attorney or an assistant United States district attorney, or a law enforcement official.

(6) Members of the commission may not receive a salary for service on the commission but must be reimbursed for expenses, as provided in 2-18-501 through 2-18-503, while actually engaged in the discharge of official duties.

(7) The commission shall make rules for the conduct of its affairs.

(8) The commission shall develop a system of indigent appellate defense services.

**(9) The commission shall propose to the supreme court minimum standards to which all trial and appellate public defenders, including locally appointed private counsel, shall conform.**

**(10) 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.**

(11) The commission shall establish qualifications, duties, and priorities for the appellate defender, provided for in 46-8-211, not inconsistent with those established in 46-8-212. *[emphasis added]*

Thus, under current law, the District Court Council and Appellate Defender Commission each have a responsibility related to the current public defender system.

## PART II: FUNDING RESPONSIBILITIES

### Historical perspective

Historically, state funding for indigent defense costs was provided as part of the District Court Criminal Reimbursement Program, which was devised to help defray county expenses in District Court criminal cases. That program was originally funded with special revenue collected from a portion of the light vehicle tax. If state funding was insufficient to defray all of the county's costs, the counties paid the balance.

### State assumption

Under what has been termed "state assumption" of District Court costs, which was completed effective July 1, 2003, the state became 100% responsible for all District Court costs (except for office space and the costs associated with the county Clerk of the District Court). These costs are now state, not county, obligations.

As mentioned previously, the Legislature in 2001 established the District Court Council and directed it to adopt policies and procedures, subject to review by the Supreme Court, to administer this state-funded District Court program. The Office of Court Administrator, supervised by the Supreme Court, provides staff support to the District Court Council and manages the budget for the District Court program.

A fiscal briefing prepared by Legislative Fiscal Division staff provides the Committee with detailed information and the current funding situation.

### Statutory language on funding obligations

The primary statute governing state funding for the District Court program is section 3-5-901, MCA, which reads as follows, with emphasis added in certain places:

**3-5-901. State assumption of district court expenses.** (1) There is a state-funded district court program. Under this program, ***the state shall fund all district***

***court costs, except as provided in subsection (4). These costs include but are not limited to:***

(a) salaries and benefits for:

(i) district court judges;

(ii) law clerks;

(iii) court reporters, as provided in 3-5-601;

(iv) juvenile probation officers, youth division offices staff, and assessment officers of the youth court; and

(v) other employees of the district court;

***(b) in criminal cases, fees for transcripts of proceedings, as provided in 3-5-604, expenses for indigent defense that are paid under contract or at an hourly rate, and expenses for psychiatric examinations;***

(c) the district court expenses in all postconviction proceedings held pursuant to Title 46, chapter 21, and in all habeas corpus proceedings held pursuant to Title 46, chapter 22, and appeals from those proceedings;

(d) the following expenses incurred by the state in federal habeas corpus cases that challenge the validity of a conviction or of a sentence:

(i) transcript fees;

(ii) witness fees; and

(iii) expenses for psychiatric examinations;

(e) the following expenses incurred by the state in a proceeding held pursuant to Title 41, chapter 3, part 4 or 6, that seeks temporary investigative authority of a youth, temporary legal custody of a youth, or termination of the parent-child legal relationship and permanent custody:

(i) transcript fees;

(ii) witness fees;

(iii) expenses for medical and psychological evaluation of a youth or the youth's parent, guardian, or other person having physical or legal custody of the youth except for expenses for services that a person is eligible to receive under a public program that provides medical or psychological evaluation;

(iv) expenses associated with appointment of a guardian ad litem or child advocate for the youth; and

(v) expenses associated with court-ordered alternative dispute resolution;

***(f) in involuntary commitment cases pursuant to 53-21-121, reasonable compensation for services and related expenses for counsel appointed by the court;***

(g) costs of the court-sanctioned educational program concerning the effects of dissolution of marriage on children, as required in 40-4-226, and expenses of education when ordered for the investigation and preparation of a report concerning parenting arrangements, as provided in 40-4-215(2)(a);

(h) all district court expenses associated with civil jury trials if similar expenses were paid out of the district court fund or the county general fund in any previous year;

**(i) all other costs associated with the operation and maintenance of the district court**, including contract costs for court reporters who are independent contractors, **but excluding the cost of providing district court office, courtroom, and other space as provided in 3-1-125**; and

(j) **costs of the youth court and youth court division operations** pursuant to 41-5-111 and subsection (1)(a) of this section, except for those costs paid by other entities identified in Title 41, chapter 5, and the costs of providing youth court office, courtroom, and other space as provided in 3-1-125.

(2) In addition to the costs assumed under the state-funded district court program, as provided in subsection (1), the state shall fund and directly pay the expenses of the appellate defender program. These costs must be allocated to and paid by the appellate defender program.

(3) In addition to the costs assumed under the state-funded district court program, as provided in subsection (1), **the state shall reimburse counties, within 30 days of receipt of a claim, for the following:**

(a) **in district court criminal cases:**

**(i) expenses for indigent defense that are not paid under subsection (1)(b);**

(ii) juror fees and necessary expenses; and

(iii) witness fees and necessary expenses as provided in 46-15-116;

(b) in proceedings under subsection (1)(e):

**(i) expenses for appointed counsel for the youth; and**

**(ii) expenses for appointed counsel for the parent, guardian, or other person having physical or legal custody of the youth; and**

(c) costs of juror and witness fees and witness expenses before a grand jury.

(4) For the purposes of subsection (1), district court costs do not include:

(a) one-half of the salaries of county attorneys;

(b) salaries of deputy county attorneys;

(c) salaries of employees and expenses of the offices of county attorneys;

(d) costs for clerks of district court and employees and expenses of the offices of the clerks of district court;

(e) costs of providing and maintaining district court office space; or

(f) charges incurred against a county by virtue of any provision of Title 7 or 46.

*[emphasis added]*

Section 46-8-201, MCA, addresses payment for court-appointed counsel and reads as follows:

**46-8-201. Remuneration of appointed counsel.** (1) Whenever in a criminal proceeding an attorney represents or defends any person by order of the court on the ground that the person is financially unable to employ counsel, the attorney must be paid for the services a sum as a judge or justice of the state supreme court certifies to be a reasonable compensation and be reimbursed for reasonable costs incurred in the criminal proceeding.

(2) The expense of implementing subsection (1) must be paid by the state as provided in 3-5-901, ***except that***

(a) in proceedings solely involving the violation of a city ordinance or state statute prosecuted in a municipal or city court, the expense is chargeable to the city or town in which the proceeding arose; or

(b) when there has been an arrest by agents of the department of fish, wildlife, and parks or agents of the department of justice and the charge is prosecuted by personnel of the state agency that made the charge, the expense must be borne by the prosecuting state agency. *[emphasis added]*

Finally, there is a statute that allows a court to require that a convicted defendant pay all or part of the costs for the defendant's appointed counsel. Section 46-8-113, MCA, reads as follows:

**46-8-113. Payment for court-appointed counsel by defendant.** (1) The court may require a convicted defendant to pay the costs of court-appointed counsel as a part of or a condition under the sentence imposed as provided in Title 46.

(2) Costs must be limited to reasonable compensation and costs incurred by the court-appointed counsel in the criminal proceeding.

(3) The court may not sentence a defendant to pay the costs of court-appointed counsel unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been sentenced to pay costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

Amounts paid under this statute, if any, are collected by the Clerk of Court and forwarded to the Department of Revenue for deposit in the state general fund. Currently, any amounts collected are pooled and reported with all District Court

finances and forfeitures. Thus, a dollar amount attributable to this provision could not be determined.

### **Allowable expenses for court-appointed counsel**

In July 2003, the Court Administrator's Office adopted a policy manual entitled *Handbook on the Payment of State Costs for Montana's District Courts*, which establishes what expenses are state-paid, including the compensation paid to public defenders and the allowable costs for services or operational expenses associated with the defense, such as medical evaluations, transcripts, investigators, expert witnesses, etc.

The handbook sets the compensation rate for court-appointed and contracted public defenders at a maximum of \$60 per hour. These payments are made directly to the vendor, not to the county. Costs incurred by county public defender offices are paid as reimbursements to the county. Reimbursement for county public defender offices is paid at 100% of the county's costs for providing those services (as long as the expenses were incurred in a District/Youth Court case and as long as the expense is classified as "allowable" in the handbook).

Again, it is important to note that county public defender offices also provide services in Justice's Court cases. It is also important to note that the compensation paid to a county public defender is not based on the maximum \$60-per-hour rate set for court-appointed or contracted public defenders but on the salary set and paid by the county. Each county submits a monthly voucher to the Office of Court Administrator indicating total hours worked by case number and case type. A calculation is made determining what percentage of the attorney's salary was attributable to the time spent on the District/Youth Court cases and that percentage is then used to determine how much of the salary and what percentage of the office's operating costs will be reimbursed by the state in that particular month.

While the Office of Court Administrator keeps expense data by case type and service provided, it has no automated process for capturing hours worked and expenses paid on each case. Thus, a comparison of expenses to caseloads

could not be done for this paper. Furthermore, a detailed survey of each county public defender office will be required to determine what portion of the actual total budget of each county public defender office is actually reimbursed by the state and what portion remains county-funded either as a nonallowable District/Youth Court cost or as a Justice's Court cost.

With respect to the rate paid to court-appointed and contracted public defenders, only the \$60-per-hour maximum rate is paid. There is no separate payment of office expenses or operating costs.

### **Challenges with carving out current actual costs**

Carving out the state's current costs for public defender services from the Judicial Branch District Court Program budget is a challenge. The historical evolution of section 3-5-901, MCA, which governs the state-funded District Court program, caused the establishment of expense categories that overlapped between public defender and non-public defender cases. Furthermore, as previously noted, the Office of Court Administrator does not have an automated system for capturing the hours worked by a public defender or for tracking expenses paid on each case. Finally, without a systematic way of analyzing the county expenditure data and comparing each county's actual expenses with what was considered "allowable" or "nonallowable" for state reimbursement purposes, there is no way to determine what "hidden" costs, if any, may become a new state expense if the county public defender offices are made state offices. A survey of each county public defender office budget and expense data will be required.

### **Recent progress in getting better data**

With state assumption, the Office of Court Administrator revamped its accounting codes so indigent defense costs can now be separated from non-indigent defense expenses. However, costs for transcripts, medical evaluations, and witnesses are still tracked in expense categories where non-public defender and public defender cases are involved. Thus, to split out these costs, assumptions must be applied. Also, as helpful as this new accounting system is, it has only been in place since July 1, 2003. Thus, short of directly surveying each county to get their actual expenditures, analysis of caseloads and costs must rely only on



data collected by the Office of Court Administrator since July 1, 2003, and on the assumptions applied to this data. All of this is further discussed in the fiscal briefing prepared by the Legislative Fiscal Division.

### **Cost drivers and cost controls**

Indigent defense costs account for the largest portion of the District Court program's variable budget and is also the most volatile expense, spiking or declining with caseload. Capital cases and complex felony cases can drive costs up and cause significant fluctuations in many expense categories. In such an unstable environment, budgeting becomes problematic.

However, there are various ways to help stabilize costs and make them more predictable. One way is to establish staffed offices and pay an annual salary rather than an hourly rate for contracted or court-appointed attorneys. The risk is building in fixed costs higher than caseload demands. The other risk is understaffing the office and needing to rely too heavily on contract counsel, which leads back to fluctuating costs. Other ways to stabilize costs and make them more predictable may be to use contract language to specify what amounts will be paid per hour for certain types of cases or for work performed out of court verses in court. Various approaches have been taken by other states to control and predict costs by compensating attorneys according to a "weight" or "score" assigned to a case based on the case type and complexity and projecting costs by doing detailed caseload analysis and trending. Cost control and predictability is most problematic when judges must make direct appointments of counsel on a case-by-case basis and compensation rates and approved expenses are set by court order.

Another factor that drives costs is how the court defines and determines indigence and when in the process the court ultimately chooses to ensure counsel is assigned. But a balance must be struck. Appointing counsel earlier in the process will increase costs, while delays in appointments may infringe on the defendant/respondent's constitutional rights.

In deciding which option to further consider with respect to Montana's public defender services, it may be argued that with a state-funded but locally administered public defender system, the state has little control over its fiscal

destiny because it has limited ability to engage cost controls. However, it may also be argued that the District Court Council (or another oversight body, such as the Appellate Defender Commission) can set certain control costs, such as has been done by the District Court Council in some areas by defining allowable and nonallowable expenses and a maximum hourly compensation rate.

In considering the options, there are also factors to consider with respect to establishing appropriate buffers between fiscal pressures for efficiency and the need to ensure adequate funding for quality services.

The policy issues and how cost controls must be balanced against the obligation to provide for effective counsel is further discussed in Part III.

## **PART III: POLICY CONSIDERATIONS**

### **Overview**

The 2002 class action lawsuit filed by the ACLU against the state and several counties (with Missoula County the only remaining county defendant) alleges that indigent defendants were and are being denied their constitutional rights. The merits of these claims have not been decided and when decided, may not prove that any certain type of delivery model, state- or county-level, is the core problem or will be the only solution.

To assess the policy issues and options, the LJIC has requested a systematic study. Thus, the discussion in this section does not reflect any effort to examine the issues raised in the ACLU lawsuit or to weigh the merits of any argument being made by either side in the lawsuit.

Current policy is to allow the counties to decide whether to contract or establish a state public defender system and, in the absence of county action, to provide direct appointment of a public defender by court order. The state pays directly for contracted services (even though the contract is with the county) and for court-appointed services. The state reimburses the counties for the portion of District Court costs incurred by the county public defender offices. Thus, the system is state-funded, but driven by local decisionmaking.

The overarching policy question for the LJIC is whether to continue this basic policy (perhaps with some updates and clarifications to current law), take a hybrid approach that provides more centralized administration but stops short of creating a new state entity, or recommend a full-fledged state-driven and state-administered public defender system. There are various pros and cons for each course of action, which, as previously noted, are outlined and discussed in a separate paper entitled "Options Chart".

### **Questions to ask**

When considering each option and its potential advantages and disadvantages, the LJIC should keep in mind the standards provided at Appendix B, the ABA's 10 Principles, and ask the following questions:

- ▼ How is compensation determined under each option? Will there be appropriate checks and balances between paying enough to get quality services and paying too much?
- ▼ How will caseloads be managed under each option? Are standards beyond the professional ethics of individual attorneys needed, and if so, who will set them? If standards are set, who will monitor and enforce compliance? How will fiscal pressures for efficiency (or handling more cases than standards allow) be balanced against incentives to ensure maximum caseloads are not exceeded?
- ▼ How will training and education be handled under each option? Is it the responsibility of the attorneys or of the state? If standards are set, who will monitor compliance? Should training be handled "in-house" or simply be a reimbursable expense?
- ▼ How will attorney compliance with professional standards and job performance be handled?
- ▼ How can the concept of "parity" and a level playing field with county and state prosecutors be factored into the structure and funding of public defender services?
- ▼ What structure will best provide appropriate checks and balances between the best interests of justice and responsible fiscal management, between executive and judicial functions and responsibilities, between state and local government, and between the public and private sectors.

In addition to the above policy considerations, the Committee may also want to keep in mind the following factors and perhaps address some of them legislatively:

- ▼ How indigence is defined and determined will affect access to counsel as well as the cost to the state. Currently, statutes allow each court to make that determination itself based on a fiscal statement from the defendant or respondent.

- ▼ When in the process counsel is appointed will also affect access to counsel and costs to the state. This is an issue relevant to the Youth Court cases and abuse and neglect cases where there are concerns emerging that counsel is not being appointed early enough in the process. The Committee may want to coordinate with the Children, Families, Health, and Human Services Interim Committee on these issues.
- ▼ Current statute does not clearly address the right to counsel of developmentally disabled respondents in involuntary commitment proceedings. Whether and how the costs for court-appointed counsel in these cases are being incurred and paid should be examined.
- ▼ A District Court or Youth Court may appoint for a minor child a guardian ad litem (GAL) or court-appointed special advocate (CASA) to represent the best interests of that child (not the legal interests). Sometimes the GAL or CASA is also the attorney appointed for the child's legal interest. Whether or how this program should fit into a new public defender program should be discussed and further considered.
- ▼ The Appellate Defender Commission also has statutory responsibilities with respect to public defender performance standards at the trial level, and it is in the process of developing those standards. The roles of the Commission and the District Court Council with respect to public defender services may need to be discussed and clarified by statute. Also, this study so far has not addressed the Appellate Defender Office budget and caseload issues. However, the Appellate Defender Office is a significant piece of the entire public defender program and should be part of the discussion as the Committee travels down the road, irrespective of which option is selected.

## SUMMARY AND CONCLUSION

This paper has reviewed the current structure of public defender services in Montana, reviewed key statutory provisions, discussed the state's funding responsibilities, and examined policy considerations.

Montana's public defender services are state-funded and locally administered. The District Court Council and Appellate Defender Commission each have a role in the current system.

By statute, public defender services encompass court-appointed attorneys for defendants or respondents who may not necessarily be indigent and involve criminal, abuse and neglect, juvenile, and involuntary commitment cases. While these cases account for 25% of the total District/Youth Court caseload statewide, they account for 82% of the costs in the Judiciary's District Court Program variable cost budget. Carving out public defender costs from the rest of the budget is a challenge staff has tried to meet by relying on less than 6 months of data and applying certain assumptions to the analysis.

The fiscal picture coming into focus is that there are significant overruns in the current budget from which public defender costs are being paid and that the Judicial Branch is concerned it does not have the means to control these costs. Any option considered by the Committee will have to consider not only current costs and shortfalls but any new costs for enhancements to the current system. How to balance the legal obligation to provide effective counsel with the fiscal realities and the state's obligation to be fiscally responsible and to ensure that appropriate cost controls are in place are critical to the discussion and to the ability of the Committee legislation to move forward during the legislative session.

The Office of Court Administrator currently has a little to no ability to connect expense data to caseload data. Thus, there is no way to calculate how many hours are being worked by public defenders statewide. We know that more than 180 different appointed or contract attorneys or firms have been paid for public defender work since July 1, 2003. We know that if you apply basic assumptions to total caseload and then apply recognized caseload standards for felony cases to the total estimated public defender caseloads for 2003, about 62 full-time attorneys would have been needed to handle that caseload. The six county public defender offices in Montana employ about 35 attorneys, who also handle Justice's Court cases. These offices are reimbursed 100% of *allowable* expenses for

District/Youth Court cases. Some counties still contract for services, but most counties rely on District Court judges to make appointments on a case-by-case basis. Court-appointed and contracted services are paid by the hour at a maximum rate of \$60 per hour (judges may exceed this maximum if there are extenuating circumstances, such as a complex felony or death penalty case).

Caseload and hours worked are the key factors affecting costs, which makes state expenses for public defender services volatile and unpredictable. There are various ways to stabilize costs and try to manage volatility; most involve stabilizing compensation rates by hiring salaried attorneys and carefully tracking and trending caseloads by type and complexity, applying maximum caseload standards, and projecting needs.

The basic options before the Committee at this juncture are whether to allow more time for study and experience so that better data can be made available (if possible), whether to pursue a hybrid, middle-of-the-road service delivery model combining centralized state contracting while retaining county-administered public defender offices, or whether to move toward establishing a new state agency to centrally administer public defender services and assume direct responsibility for the current county public defender offices.

Judges, attorneys, state government, local government, clients, and taxpayers each have a stake in the outcome of the Committee's decision. Each option should be carefully weighed in context with the policy issues and the Committee's objectives.

# **Appendix A:**

## **Right to Counsel Statutes Outside Criminal Codes**

### **Right to Counsel in Abuse and Neglect Cases**

**41-3-422. Abuse and neglect petitions -- burden of proof.** (1) (a) Proceedings under this chapter must be initiated by the filing of a petition. A petition may request the following relief:

- (i) immediate protection and emergency protective services, as provided in 41-3-427;
- (ii) temporary investigative authority, as provided in 41-3-433;
- (iii) temporary legal custody, as provided in 41-3-442;
- (iv) long-term custody, as provided in 41-3-445;
- (v) termination of the parent-child legal relationship, as provided in 41-3-607;
- (vi) appointment of a guardian pursuant to 41-3-444;
- (vii) a determination that preservation or reunification services need not be provided;

or

(viii) any combination of the provisions of subsections (1)(a)(i) through (1)(a)(vii) or any other relief that may be required for the best interests of the child.

(b) The petition may be modified for different relief at any time within the discretion of the court.

(c) A petition for temporary legal custody may be the initial petition filed in a case.

(d) A petition for the termination of the parent-child legal relationship may be the initial petition filed in a case if a request for a determination that preservation or reunification services need not be provided is made in the petition.

(2) The county attorney, attorney general, or an attorney hired by the county shall file all petitions under this chapter. A petition filed by the county attorney, attorney general, or an attorney hired by the county must be accompanied by:

- (a) an affidavit by the department alleging that the child appears to have been abused or neglected and stating the basis for the petition; and
- (b) a separate notice to the court stating any statutory time deadline for a hearing.

(3) Abuse and neglect petitions must be given highest preference by the court in setting hearing dates.

(4) An abuse and neglect petition is a civil action brought in the name of the state of Montana. The Montana Rules of Civil Procedure and the Montana Rules of Evidence apply except as modified in this chapter. Proceedings under a petition are not a bar to criminal prosecution.



(5) (a) Except as provided in subsection (5)(b), the person filing the abuse and neglect petition has the burden of presenting evidence required to justify the relief requested and establishing:

(i) probable cause for the issuance of an order for immediate protection and emergency protective services or an order for temporary investigative authority;

(ii) a preponderance of the evidence for an order of adjudication or temporary legal custody;

(iii) a preponderance of the evidence for an order of long-term custody; or

(iv) clear and convincing evidence for an order terminating the parent-child legal relationship.

(b) If a proceeding under this chapter involves an Indian child, as defined in the federal Indian Child Welfare Act, 25 U.S.C. 1901, et seq., the standards of proof required for legal relief under the federal Indian Child Welfare Act apply.

(6) (a) Except as provided in the federal Indian Child Welfare Act, if applicable, the parents or parent, guardian, or other person or agency having legal custody of the child named in the petition, if residing in the state, must be served personally with a copy of the initial petition and a petition to terminate the parent-child legal relationship at least 5 days before the date set for hearing. If the person or agency cannot be served personally, the person or agency may be served by publication as provided in 41-3-428 and 41-3-429.

(b) Copies of all other petitions must be served by certified mail. If service is by certified mail, the department must receive a return receipt signed by the person to whom the notice was mailed for the service to be effective. Service of the notice is considered to be effective if, in the absence of a return receipt, the person to whom the notice was mailed appears at the hearing.

***(7) If personal service cannot be made upon the parents or parent, guardian, or other person or agency having legal custody, the court shall appoint an attorney to represent the unavailable party when, in the opinion of the court, the interests of justice require.***

(8) If a parent of the child is a minor, notice must be given to the minor parent's parents or guardian, and if there is no guardian, the court shall appoint one.

(9) (a) Any person interested in any cause under this chapter has the right to appear. Any foster parent, preadoptive parent, or relative caring for the child must be given legal notice by the attorney filing the petition of all judicial hearings for the child and must be given an opportunity to be heard. The right to appear or to be heard does not make that person a party to the action. Any foster parent, preadoptive parent, or relative caring for the child must be given notice of all reviews by the reviewing body.

(b) A foster parent, preadoptive parent, or relative of the child who is caring for or a relative of the child who has cared for a child who is the subject of the petition who appears at a hearing set pursuant to this section may be allowed by the court to intervene in the action if the court, after a hearing in which evidence is presented on those subjects provided for in 41-3-437(4), determines that the intervention of the person is in the best interests of the child. A person granted intervention pursuant to this subsection is entitled

to participate in the adjudicatory hearing held pursuant to 41-3-437 and to notice and participation in subsequent proceedings held pursuant to this chapter involving the custody of the child.

(10) An abuse and neglect petition must:

(a) state the nature of the alleged abuse or neglect and of the relief requested;

(b) state the full name, age, and address of the child and the name and address of the child's parents or guardian or person having legal custody of the child;

(c) state the names, addresses, and relationship to the child of all persons who are necessary parties to the action.

**(11) The court may at any time on its own motion or the motion of any party appoint counsel for any indigent party. If an indigent parent is not already represented by counsel, counsel must be appointed for an indigent parent at the time that a request is made for a determination that preservation or reunification services need not be provided.**

(12) At any stage of the proceedings considered appropriate by the court, the court may order an alternative dispute resolution proceeding or the parties may voluntarily participate in an alternative dispute resolution proceeding. An alternative dispute resolution proceeding under this chapter may include a family group decisionmaking meeting, mediation, or a settlement conference. If a court orders an alternative dispute resolution proceeding, a party who does not wish to participate may file a motion objecting to the order. If the department is a party to the original proceeding, a representative of the department who has complete authority to settle the issue or issues in the original proceeding must be present at any alternative dispute resolution proceeding.

(13) Service of a petition under this section must be accompanied by a written notice advising the child's parent, guardian, or other person having physical or legal custody of the child of the:

**(a) right to request the appointment of counsel if the person is indigent or if appointment of counsel is required under the federal Indian Child Welfare Act, if applicable;**

(b) right to contest the allegations in the petition; and

(c) timelines for hearings and determinations required under this chapter.

(14) If appropriate, orders issued under this chapter must contain a notice provision advising a child's parent, guardian, or other person having physical or legal custody of the child that:

(a) the court is required by federal and state laws to hold a permanency hearing to determine the permanent placement of a child no later than 12 months after a judge determines that the child has been abused or neglected or 12 months after the first 60 days that the child has been removed from the child's home;

(b) if a child has been in foster care for 15 of the last 22 months, state law presumes that termination of parental rights is in the best interests of the child and the state is required to file a petition to terminate parental rights; and

(c) completion of a treatment plan does not guarantee the return of a child.

(15) A court may appoint a standing master to conduct hearings and propose decisions and orders to the court for court consideration and action. A standing master may not conduct a proceeding to terminate parental rights. A standing master must be a member of the state bar of Montana and must be knowledgeable in the area of child abuse and neglect laws. *[emphasis added]*

**41-3-607. Petition for termination -- separate hearing -- right to counsel -- no jury trial.** (1) The termination of a parent-child legal relationship may be considered only after the filing of a petition pursuant to 41-3-422 alleging the factual grounds for termination pursuant to 41-3-609.

(2) If termination of a parent-child legal relationship is ordered, the court may:

(a) transfer permanent legal custody of the child, with the right to consent to the child's adoption, to:

(i) the department;

(ii) a licensed child-placing agency; or

(iii) another individual who has been approved by the department and has received consent for the transfer of custody from the department or agency that has custody of the child; or

(b) transfer permanent legal custody of the child to the department with the right to petition for appointment of a guardian pursuant to 41-3-444.

(3) If the court does not order termination of the parent-child legal relationship, the child's prior legal status remains in effect until further order of the court.

***(4) At the time that a petition for termination of a parent-child relationship is filed, parents must be advised of the right to counsel, and counsel must be appointed for an indigent party.***

(5) A guardian ad litem must be appointed to represent the child's best interests in any hearing determining the involuntary termination of the parent-child legal relationship. The guardian ad litem shall continue to represent the child until the child is returned home or placed in an appropriate permanent placement. If a respondent parent is a minor, a guardian ad litem must be appointed to serve the minor parent in addition to any counsel requested by the parent.

(6) There is no right to a jury trial at proceedings held to consider the termination of a parent-child legal relationship. *[emphasis added]*

**41-3-432. Show cause hearing -- order.** (1) (a) Except as provided in the federal Indian Child Welfare Act, a show cause hearing must be conducted within 20 days of the filing of an initial child abuse and neglect petition unless otherwise stipulated by the parties pursuant to 41-3-434 or unless an extension of time is granted by the court. A separate notice to the court stating the statutory time deadline for a hearing must accompany any petition to which the time deadline applies.

(b) The court may grant an extension of time for a show cause hearing only upon a showing of substantial injustice and shall order an appropriate remedy that considers the

best interests of the child.

(2) The person filing the petition has the burden of presenting evidence establishing probable cause for the issuance of an order for temporary investigative authority after the show cause hearing, except as provided by the federal Indian Child Welfare Act, if applicable.

(3) At the show cause hearing, the court may consider all evidence and shall provide an opportunity for a parent, guardian, or other person having physical or legal custody of the child to provide testimony. Hearsay evidence of statements made by the affected child is admissible at the hearing. The parent, guardian, or other person may be represented by legal counsel. The court may permit testimony by telephone, audiovisual means, or other electronic means.

**(4) At the show cause hearing, the court shall explain the procedures to be followed in the case and explain the parties' rights, including the right to request appointment of counsel if indigent or if appointment of counsel is required under the federal Indian Child Welfare Act, if applicable, and the right to challenge the allegations contained in the petition. The parent, guardian, or other person having physical or legal custody of the child must be given the opportunity to admit or deny the allegations contained in the petition at the show cause hearing. Inquiry must be made to determine whether the notice requirements of the federal Indian Child Welfare Act, if applicable, have been met.**

(5) The court shall make written findings on issues including but not limited to the following:

(a) whether the child should be returned home immediately if there has been an emergency removal or remain in temporary out-of-home care or be removed from the home;

(b) if removal is ordered or continuation of removal is ordered, why continuation of the child in the home would be contrary to the child's best interests and welfare;

(c) whether the department has made reasonable efforts to avoid protective placement of the child or to make it possible to safely return the child to the child's home;

(d) financial support of the child, including inquiry into the financial ability of the parents, guardian, or other person having physical or legal custody of the child to contribute to the costs for the care, custody, and treatment of the child and requirements of a contribution for those costs pursuant to 41-3-446; and

(e) whether another hearing is needed and, if so, the date and time of the next hearing.

(6) The court may consider:

(a) terms and conditions for parental visitation; and

(b) whether orders for examinations, evaluations, counseling, immediate services, or protection are needed.

(7) Following the show cause hearing, the court may enter an order for the relief requested or amend a previous order for immediate protection of the child if one has been entered. The order must be in writing.

(8) If a child who has been removed from the child's home is not returned home

after the show cause hearing or if removal is ordered, the parents or parent, guardian, or other person or agency having physical or legal custody of the child named in the petition may request that a citizen review board, if available pursuant to part 10 of this chapter, review the case within 30 days of the show cause hearing and make a recommendation to the district court, as provided in 41-3-1010.

(9) Adjudication of a child as a youth in need of care may be made at the show cause hearing if the requirements of 41-3-437(2) are met. If not made at the show cause hearing, adjudication under 41-3-437 must be made within the time limits required by 41-3-437 unless adjudication occurs earlier by stipulation of the parties pursuant to 41-3-434 and order of the court. *[emphasis added]*

## **Right to Counsel in Youth Court Cases**

**41-5-1413. Right to counsel.** In all proceedings following the filing of a petition alleging that a youth is a delinquent youth or youth in need of intervention, the youth and the parents or guardian of the youth must be advised by the court or, in the absence of the court, by its representative that the youth may be represented by counsel at all stages of the proceedings. If counsel is not retained or if it appears that counsel will not be retained, counsel must be appointed for the youth if the parents or guardian and the youth are unable to provide counsel unless the right to appointed counsel is waived by the youth and the parents or guardian. Neither the youth nor the youth's parents or guardian may waive counsel after a petition has been filed if commitment to the department for a period of more than 6 months may result from adjudication.

## **Right to Counsel in Involuntary Commitment Cases**

**53-21-121. Petition for commitment -- contents of -- notice of.** (1) The county attorney, upon the written request of any person having direct knowledge of the facts, may file a petition with the court alleging that there is a person within the county who is suffering from a mental disorder and who requires commitment pursuant to this chapter.

(2) The petition must contain:

(a) the name and address of the person requesting the petition and the person's interest in the case;

(b) the name of the respondent and, if known, the address, age, sex, marital status, and occupation of the respondent;

(c) the purported facts supporting the allegation of mental disorder, including a report by a mental health professional if any, a statement of the disposition sought

pursuant to 53-21-127, and the need for commitment;

(d) the name and address of every person known or believed to be legally responsible for the care, support, and maintenance of the respondent for whom evaluation is sought;

(e) the name and address of the respondent's next of kin to the extent known to the county attorney and the person requesting the petition;

(f) the name and address of any person whom the county attorney believes might be willing and able to be appointed as friend of respondent;

(g) the name, address, and telephone number of the attorney, if any, who has most recently represented the respondent for whom evaluation is sought; ***if there is no attorney, there must be a statement as to whether to the best knowledge of the person requesting the petition the respondent for whom evaluation is sought is indigent and unable to afford the services of an attorney;***

(h) a statement of the rights of the respondent, which must be in conspicuous print and identified by a suitable heading; and

(i) the name and address of the mental health facility to which it is proposed that the respondent may be committed, if known.

(3) Notice of the petition must be hand-delivered to the respondent and to the respondent's counsel on or before the initial appearance of the respondent before the judge or justice of the peace. The respondent's counsel shall meet with the respondent, explain the substance of the petition, and explain the probable course of the proceedings. Notice of the petition and the order setting the date and time of the hearing and the names of the respondent's counsel, professional person, and friend of respondent must be hand-delivered, mailed, or sent by a facsimile transmission to the person or persons legally responsible for care, support, and maintenance of the respondent, the next of kin identified in the petition, any other person identified by the county attorney as a possible friend of respondent other than the one named as the friend of respondent, the director of the department or the director's designee, and the mental health facility to which the respondent may be committed, if known. The notice may provide, other than as to the respondent and the respondent's counsel, that no further notice will be given unless written request is filed with the clerk of court.

**53-21-122. Petition for commitment -- filing of -- initial hearing on.** (1) The petition must be filed with the clerk of court who shall immediately notify the judge.

(2) If a judge is available, the judge shall consider the petition, and if the judge finds no probable cause, it must be dismissed. ***If the judge finds probable cause, counsel must be immediately appointed for the respondent, and the respondent must be brought before the court with the respondent's counsel.*** The respondent must be advised of the respondent's constitutional rights, the respondent's rights under this part, and the substantive effect of the petition. The respondent may at this appearance object to the finding of probable cause for filing the petition. The judge shall appoint a professional person and a friend of respondent and set a date and time for the hearing on the petition

that may not be on the same day as the initial appearance and that may not exceed 5 days, including weekends and holidays, unless the fifth day falls upon a weekend or holiday and unless additional time is requested on behalf of the respondent. The desires of the respondent must be taken into consideration in the appointment of the friend of respondent and in the confirmation of the appointment of the attorney.

(3) If a judge is not available in the county, the clerk shall notify a resident judge by telephone and shall read the petition to the judge. If the judge finds no probable cause, the petition must be dismissed. If the judge finds probable cause, the judge shall cause the clerk to issue an order appointing counsel and a professional person and setting a date and time for the hearing on the petition that may not be on the same day as the initial appearance and that may not exceed 5 days, including weekends and holidays, unless the fifth day falls upon a weekend or holiday and unless additional time is requested on behalf of the respondent. The order must also direct that the respondent be brought before a justice of the peace with the respondent's counsel to be advised of the respondent's constitutional rights, the respondent's rights under this part, and the contents of the clerk's order, as well as to furnish the respondent with a copy. The justice of the peace shall ascertain the desires of the respondent with respect to the appointment of counsel, and this information must be immediately communicated to the resident judge. The resident judge may appoint other counsel, may confer with respondent's counsel and the county attorney in order to appoint a friend of respondent, and may do all things necessary through the clerk of court by telephone as if the resident judge were personally present.

*[emphasis added]*

## **Appendix B:**

### **ABA's 10 Principles of a Public Defender Delivery System**