



Montana Legislative Services Division
Office of Research and Policy Analysis
David D. Bohyer, Director

May 14, 2016

TO: Members of the Task Force on State Public Defender Operations
FROM: Dave Bohyer, LSD Research Director
RE: Options to improve/reduce OPD caseloads

The Task Force on State Public Defender Operations has asked staff to identify options to improve/reduce caseloads assigned to the Office of Public Defender (OPD).¹ Please accept this memo as my response.

Background

At the outset, the OPD has virtually no control over the number of cases for which it is ordered by a judge to provide a public defender. A person accused of a crime for which jail time is possible, who requests legal counsel, and who claims indigence has a constitutional right to legal services.² The OPD does not seek cases or clients to defend, but is ordered by judges or required by statute or case law to provide legal counsel.

In criminal cases in which jail time is a possibility, once the judge has ordered the OPD to provide a public defender, the OPD has the responsibility to determine the eligibility of the individual being defended, (hereafter, "client"). A client is determined to be eligible if the client meets certain "income guidelines". Pursuant to section 47-1-111, MCA,

- (3) 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.
- (4) A determination of indigence may not be denied based solely on an applicant's ability to post bail or solely because the applicant is employed.
- (5) A determination may be modified by the office or the court if additional information becomes available or if the applicant's financial circumstances change.

¹ As used here, Office of Public Defender and OPD include the Office of Appellate Defender and the Office of Conflict Coordinator. In some instances, the term also includes the Public Defender Commission.

² *Gideon v. Wainwright* 372 U.S. 335 (1963),

Even if the OPD determines that a client is not indigent, a judge can nevertheless order the OPD to provide legal services to the client.

The OPD is required constitutionally, statutorily, or by case law to also provide legal counsel in certain cases involving indigent individuals involved in "dependent neglect" cases, "involuntary commitment" cases, and cases involving juveniles. Again, the OPD does not pursue these types of cases or clients, but instead has a legal obligation to provide legal counsel.

Finally, an OPD client who is convicted or pleads guilty has a right to appeal if a person similarly convicted or pleading guilty but represented by private counsel has a right to appeal and the OPD is legally obligated to either follow through and appeal the case if there is merit to an appeal or must file an "Anders Brief" if the OPD believes and asserts that there are no non-frivolous issues to appeal. In writing an Anders Brief, the OPD must essentially argue to the court all of the reasons that the court should not entertain the appeal. Consequently, whether the OPD litigates the appeal or files an Anders Brief, the assigned OPD attorney must do a substantial amount of work.

Options to Reduce OPD Caseloads

- Reducing the number of crimes committed by indigent individuals would reduce the number of cases assigned to OPD and the caseloads of individual OPD attorneys. It is not the Task Force's commission, under House Bill No. 627, to explore ways to reduce the number of crimes committed by indigent individuals. However, if the Task Force believes that reducing the number of crimes committed by indigent individuals is something that should be explored by policymakers, the Task Force could recommend to the 65th Montana Legislature that the underlying causes of why indigent individuals commit crimes be explored by a standing committee, an interim committee, or a select committee.
- The Task Force could recommend to the Legislature that certain criminal infractions be completely repealed or be changed to civil infractions and remove jail time as a possible penalty or sentence. OPD would not have to provide legal services to many of its clients that it must defend today if there is no crime to be committed or if the statutes were changed to ensure that jail time is not a possibility if the client pleads guilty or is found guilty of committing the underlying offense. This option would likely reduce the overall number of cases assigned to OPD, thereby reducing the caseload assigned to each OPD attorney, all else being equal.

Absent reducing the number of crimes committed by indigent individuals, repealing statutes that define certain acts or omissions as crimes, or revising statutes by eliminating the possibility of jail time as a possible penalty or sentence for certain infractions, options for reducing the overall number of criminal cases and perhaps dependent neglect and other civil cases assigned to OPD are severely limited.

- The Task Force could recommend to the Legislature that the income threshold prescribed in section 47-1-111, MCA, be reduced from "...133% of the poverty level set according to the most current federal poverty guidelines...." By reducing the income threshold, fewer individuals would be eligible for OPD assistance.
- The Task Force could recommend to the Legislature that the "hardship" threshold prescribed in section 47-1-111, MCA, be changed from "substantial hardship" to something more dire, for example, "personal bankruptcy". By revising the hardship

- threshold, fewer individuals might be eligible for OPD assistance.
- The Task Force could recommend that the Legislature create an entity separate from the OPD that would provide legal counsel to eligible individuals involved in various civil cases, including dependent neglect cases and involuntary commitment cases. While those cases would still require appointment of a public defender and not reduce the overall number of cases requiring a public defender, redirecting those types of civil cases away from OPD and to an as-yet-undefined "office of civil defender", by whatever name, would relieve the number of cases assigned to OPD and the caseloads of individual OPD attorneys, all else being equal.

The options described in any of the following five bullets could reduce the caseloads of individual attorneys, but would probably not reduce the overall number of cases or clients assigned to OPD.

- Whenever the caseloads of OPD-employed attorneys exceed reasonable levels, the Task Force could recommend to the Legislature that OPD executives or managers be allowed to request additional resources, either in the form of more FTE attorneys or access to more contract attorneys.
- The Task Force could recommend that OPD executives or managers be allowed to more effectively appeal to the court for relief, such as postponing the appointment of OPD counsel until workloads abate.
- The Task Force could recommend that the Legislature attempt to provide the OPD with the authority, whenever caseloads become sufficiently excessive, to deny the judicial appointment of OPD defense counsel until additional resources become available. Not improbably, there could be constitutional issues with this remedy option.
- The Task Force could recommend that the Legislature establish "hard caps" on OPD attorney caseloads and, based on the caps, provide OPD with sufficient funding to hire an adequate number of attorneys and support staff to professionally and ethically carry out diligent if not zealous defense of OPD clients up to the "hard caps".
- The Task Force could recommend that the Legislature appropriate sufficient funding to either (1) allow OPD to hire a sufficient number of attorneys and support staff to reduce existing and anticipated caseloads or (2) allow OPD to establish contracts with private attorneys who would absorb excess caseloads from OPD attorneys, which would likely require establishing a higher-than-current rate of hourly pay for contract attorneys.

And if all else fails:

- The Task Force could recommend that Montana attempt to secede from the Union, where, if the attempt is successful, the 6th and 14th Amendments to the U.S. Constitution would not apply in Montana.

Respectfully submitted.

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