



Steve Bullock  
Governor

# MONTANA PUBLIC DEFENDER COMMISSION STATE OF MONTANA

Richard E. "Fritz" Gillespie  
Chair

## MEMORANDUM

TO: Dave Bohyer, Director of Research and Policy Analysis

FROM: Richard E. "Fritz" Gillespie, Chair

DATE: January 26, 2016

RE: Agency Proposals to the Task Force on Public Defender Operations

This memorandum contains draft proposals prepared by the agency that if implemented would affect OPD's operation. We look forward to discussing each of them in more detail with you and the Task Force members.

1. Transfer representation of all parties in DN cases to another entity.
2. Transfer all DG cases and obligations to another entity.
3. Transfer all Treatment Court cases and obligations to another entity.
4. Transfer eligibility determination to another entity.
5. Convert selected non-violent crimes into civil sanctions, without jail time.
6. Remove jail time from certain offenses such as Driving While Suspended/No Insurance.
7. Amend § 41-3-425, MCA to provide that a parent who cannot be located or whose identity is unknown is not entitled to be represented by an attorney.
8. Amend Title 42 to permit "open adoptions" in dependent/neglect cases. Parental rights could be terminated, but the biological parent would still have some opportunity to remain a part of the child's life, based on agreement with the adoptive parents. Disputes subsequent to the termination would not constitute grounds for the parent to seek to undo the termination of parental rights and adoption.

9. Amend the sentencing statutes to make court-ordered payment of public defender fees a civil judgment or a lien, rather than a part of the criminal sentence.
10. Move client payment priority from (e) to (c) in 46-18-252 (2), MCA.
11. Replace the current assessment of costs of assigned counsel as a condition of sentence with an application fee, subject to ability to pay, to be collected by the court or another non-OPD entity.
12. Alternatively, to collect client fees, give OPD an exception to Title 17 compliance and either use established Title 46 procedures or create a separate non-OPD entity for collection.
13. Develop a pilot project in selected courts or judicial districts, which would shift from the current resource-based bail system to a risk assessment tool for persons in custody. The tool would be empirically-based and locally validated to be predictive of failure to appear in court and re-arrest while on pretrial status.
14. Allow OPD to conduct proficiency determinations only on those contractors that handle a defined number of cases.
15. Adjust the balance of FTE positions to provide the necessary level of services in a cost-effective manner. Staff attorneys cannot focus their efforts on the highest levels of practice if they also have to spend time on non-legal, social work or investigative aspects of criminal defense. Costs are reduced when we are able to provide appropriate representation for clients using non-attorney resources.
16. Create a waiting list for clients in courts of limited jurisdiction, providing service when a public defender is available.
17. Limit the inflow of cases to a level commensurate with the appropriated budget to control costs and create cost certainty for future biennia. OPD is responsible to the taxpayers to spend our resources wisely and prudently, and efficiently address the cases in which courts order our involvement. We do not have any statutory authority to restrict or turn off the volume of cases. We can't stop the inflow of cases, and we can only do so much to control costs and still have fidelity to the core requirement of effective representation.

OPD could identify resources and budget ceilings based on data such as historical trends, case filings, and criminal activity reports. For example, we could identify a budget ceiling for contract costs that we would be able to expend on dependent/neglect cases in a given region. Or, we would use the same approach to identify the maximum amount we can spend

on conflict criminal cases in a region. When we approach a certain level we've pre-identified, we notify the courts, and work with the judges, probation officers, prosecutors and other stakeholders to seek solutions. If there are none, or they are inadequate, we decline further cases or declare ourselves unavailable for a defined period of time. We periodically review our status and our resources and notify the courts.

This type of approach would work best in those areas of the state in which there is an adequate pool of private attorneys to call on. Judges would be able to rely on their inherent authority to appoint private attorneys to those cases which OPD was unable to handle due to these budgetary reasons. Thus, the right to counsel would not be infringed.

cc: Bill Hooks  
Chad Wright  
Kristina Neal  
Harry Freebourn