

BEFORE THE OFFICE OF THE STATE PUBLIC DEFENDER  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM ) NOTICE OF PUBLIC HEARING ON  
2.69.201, 2.69.203, and 2.69.301, and ) PROPOSED AMENDMENT AND  
the repeal of ARM 2.69.202 and ) REPEAL  
2.69.601 pertaining to model rules, )  
definitions, determination of indigency, )  
and reasonable compensation )

TO: All Concerned Persons

1. On March 16, 2018, at 1:00 p.m., the Office of the State Public Defender will hold a public hearing at 44 W. Park St., Butte, Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The Office of the State Public Defender will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Office of the State Public Defender no later than 5:00 p.m. on March 9, 2018, to advise us of the nature of the accommodation that you need. Please contact Cathy Doyle, Office of the State Public Defender, 44 West Park Street, Butte, MT 59701; telephone (406) 496-6080; facsimile (406) 496-6098; Montana Relay Service 711; or e-mail to cmdoyle@mt.gov.

3. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

2.69.201 MODEL PROCEDURAL RULES PROCEDURES FOR ADOPTING, AMENDING, AND REPEALING AGENCY RULES (1) The Office of the State Public Defender (OPD) Commission, for purposes of establishing agency rulemaking procedures, adopts and incorporates by reference the following model rules, which may be found at <http://sos.mt.gov/>:

(a) the Attorney General's Model Procedural Rules 1 found in ARM 1.3.102 and 2 through 7 found in ARM 1.3.205 through 1.3.210. A copy of the Attorney General's Model Rules may be obtained by contacting the Attorney General's Office, Justice Building, 215 N. Sanders, P.O. Box 201401, Helena, MT 59620-1401, telephone (406) 444-2026 ARM 1.3.201, 1.3.202, 1.3.211 through 1.3.224, and 1.3.226 through 1.3.233, including the appendix of sample forms in effect February 13, 2018. These rules provide model rules of practice for contested case hearings and declaratory rulings; and

(b) the Secretary of State's model rules ARM 1.3.101, 1.3.102, 1.3.301, 1.3.302, 1.3.304, 1.3.305, 1.3.307 through 1.3.309, and 1.3.311 through 1.3.313 in effect February 13, 2018. These rules define model requirements for rulemaking under the Montana Administrative Procedure Act.

AUTH: 2-4-201, MCA

IMP: 2-4-201, MCA

STATEMENT OF REASONABLE NECESSITY: The agency proposes to amend this rule to ensure its compliance with current Attorney General's and Secretary of State's Model Rules and to update where rules may be accessed. In addition, this amendment consolidates model rules for declaratory rulings currently found in ARM 2.69.202 into this rule to make the information available in a single rule. The agency believes these model rules fit its operations well and therefore sees no need to draft its own procedural and rulemaking rules.

2.69.203 DEFINITIONS (1) remains the same.

(2) "Income" includes, but is not limited to, all household wages; business or self-employment income; unemployment, social security or workers' compensation benefits; Supplemental Nutrition Assistance Program (SNAP) benefits; government assistance payments; dividends; pension, retirement, or interest income; and rental income. Child support, the percentage of veteran's benefits related to disability, and student financial aid are excluded from income. Applicant's income is subject to periodic review.

(2) remains the same but is renumbered (3).

(4) "Substantial hardship" means that an evaluation of multiple criteria has determined that retaining competent private counsel would incur substantial hardship to the applicant or the members of the applicant's household. The criteria to be considered include, but are not limited to:

(a) gross household income less reasonable and necessary expenses;

(b) extent and liquidity of assets;

(c) severity of crime(s) charged;

(d) estimated cost of retaining private counsel; and

(e) incarceration status.

AUTH: 47-1-105, MCA

IMP: 47-1-105, 47-1-111, ~~47-1-216~~, 47-1-121, MCA

STATEMENT OF REASONABLE NECESSITY: The agency proposes to add definitions to this rule to improve the eligibility determination process by providing standard criteria for use by eligibility specialists statewide. The sources proposed to be included or excluded in the definition of "income" are based on existing national standards and practices currently in use across the country. The agency therefore does not see a need to craft its own standards and practices. Applicants who do not qualify under the gross income poverty guidelines are evaluated more extensively to determine whether substantial hardship may exist in the retention of private counsel.

A hardship determination necessarily requires the consideration of multiple factors beyond just income. Accordingly, to provide guidance and achieve consistent application of this process, the agency, also using current national standards and practices, determined that listing the most common factors considered in making hardship determinations in the definition of "substantial hardship" is appropriate.

Because 47-1-216, MCA, was renumbered in Chapter 358, Laws of 2017, the reference to that statute must be changed to reflect the new section number, 47-1-121, MCA.

2.69.301 DETERMINATION OF INDIGENCY (1) The Central Services Division office shall prepare forms to capture financial information from an applicant for public defender services, including an affidavit as required in 47-1-111(2), MCA. The forms must be reviewed biennially.

(2) Local OPD The offices shall distribute the forms to courthouses, jails, and other venues determined appropriate by the offices.

(3) The applicant will shall complete the forms ~~in accordance with following~~ instructions provided on the forms and forward them to the appropriate regional office indicated on the forms.

(4) The staff of the ~~regional~~ local office shall review an applicant's forms and determine whether, ~~based on the provisions of 47-1-111, MCA,~~ an applicant is indigent and qualifies for public defender services based on the income guidelines in 47-1-111(3)(a), MCA. ~~The applicant will be notified of this determination, regardless of outcome.~~

(5) The local office shall forward application forms for those who do not qualify based on income to the Central Services Division for an eligibility determination under the substantial hardship qualification in 47-1-111(3)(b), MCA, using criteria in ARM 2.69.203.

(6) The local office shall notify the applicant if the applicant does not qualify for public defender services, and shall file a motion to rescind with the court.

~~(5)(7)~~ All information collected on the forms ~~shall~~ must be treated as confidential except:

(a) and (b) remain the same.

AUTH: 47-1-105, 47-1-111, MCA

IMP: 47-1-105, 47-1-111, MCA

STATEMENT OF REASONABLE NECESSITY: The agency proposes to amend this rule to reflect changes to the eligibility determination process made in Chapter 358, Laws of 2017. Section 47-1-111, MCA, now requires that the Central Services Division verify information for all determinations made under the substantial hardship qualification, including an affidavit. These proposed amendments are necessary to clarify the verification and notification process. The Central Services Division provides only the hardship determination. The remainder of the process, notifying the client and filing the motion to rescind, is up to the local office. Additional amendments are to improve the grammar and clarity of the rule.

4. The agency proposes to repeal the following rules:

2.69.202 PROCEDURES FOR THE ISSUANCE OF DECLARATORY RULINGS found at page 2-7109 of the Administrative Rules of Montana.

AUTH: 2-4-201, MCA

IMP: 2-4-201, MCA

STATEMENT OF REASONABLE NECESSITY: The agency proposes repeal of this rule because declaratory ruling procedures are proposed for inclusion in the revisions to ARM 2.69.201, making this rule unnecessary.

2.69.601 REASONABLE COMPENSATION found at page 2-7161 of the Administrative Rules of Montana.

AUTH: 47-1-105, 47-1-216, MCA

IMP: 47-1-105, 47-1-216, MCA

STATEMENT OF REASONABLE NECESSITY: The agency proposes to repeal this rule to reflect changes made in Chapter 358, Laws of 2017. Section 47-1-216, MCA, was amended to remove the requirement that reasonable compensation for contract attorneys and other related services be established in rule, so this rule is no longer necessary.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Cathy Doyle, Office of the State Public Defender, 44 West Park Street, Butte, MT 59701; telephone (406) 496-6080; facsimile (406) 496-6098; or e-mail to [cmdoyle@mt.gov](mailto:cmdoyle@mt.gov), and must be received no later than 5:00 p.m., March 23, 2018.

6. Carleen Green, Office of the State Public Defender, has been designated to preside over and conduct this hearing.

7. The agency maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the mailing list shall make a written request which includes the name and mailing address or e-mail address of the person to receive notices and specifies that the person wishes to receive notices regarding Office of the State Public Defender rulemaking actions. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the agency.

8. An electronic copy of this proposal notice is available through the agency's web site at <http://opd.mt.gov>. The agency strives to make its online version of the notice conform to the official published version, but advises all concerned persons that if a discrepancy exists between the official version and the agency's online version, only the official text will be considered. In addition, although the agency works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor, Representative Randy Brodehl, was contacted on October 31, 2017, by mail and email.

10. The agency has determined that under 2-4-111, MCA, the proposed amendment and repeal will not significantly and directly affect small businesses.

By: /s/ Harry Freebourn  
Harry Freebourn, Interim Director  
Office of the State Public Defender

By: /s/ Michael P. Manion  
Michael P. Manion, Rule Reviewer  
Department of Administration

Certified to the Secretary of State February 13, 2018.