



Brian Schweitzer
Governor

OFFICE OF THE STATE PUBLIC DEFENDER STATE OF MONTANA

Wade Zolynski
Chief Appellate Defender

August 27, 2012

To: Montana Public Defender Commission
From: Wade Zolynski, Chief Appellate Defender
RE: Report to the Commission

The Commission appointed me Chief Appellate Defender May 16, 2012. The Appellate Defender Office consists of a Chief Appellate Defender, 8 full-time Assistant Appellate Defender positions and two support staff members. Additionally, we had two interns this summer, and we currently have two temporary assistants as we are short staffed. As of August 1, 2012, we are recruiting a permanent full-time legal secretary. The following is my first report to the Commission:

The State of the Appellate Defender Office.

1. **Caseloads (see attached case count spreadsheet for FY 2012).** The office experienced a 17% increase in direct appeals for FY 2012 (218 in FY 2012 compared to 186 in FY 2011). We opened a total of 225 cases (direct appeals + PCR + writs) in FY 2012.
2. **Increase in Appellate Office Pay.** In June, qualified attorneys and support staff at the Appellate Defender Office received a pay increase. The increase was paid retroactively to October 1, 2011. The increase was in concert with those provided to public defender employees who are part of bargaining units represented by AFSCME. Some staff did not qualify for an increase due to their years of experience or because of the pay band in which they are currently classified. I met with each staff member individually, and those receiving an increase expressed gratitude and appreciation for the increase.
3. **Proposed Legislation Pertinent to the Appellate Defender Office.** The Appellate Office has proposed two changes to Montana statutes:
 - a. **47-1-118. Conflicts of Interest.** We proposed to amend this statute requiring the conflict coordinator for OPD to hire an attorney to handle post-conviction cases. The reason for the proposed change is that post-conviction cases are conflicts for the Appellate Office. The Governor's Office supported our proposed change. I recommend the Public Defender Commission continue moving forward on this proposed amendment.
 - b. **47-1-111. Eligibility – determination of indigence – rules.** We proposed to amend this statute to preclude defendants previously represented by private counsel from being classified as indigent for purposes of being appointed counsel

on appeal. The amendment would remedy situations where private counsel exhausts a defendant's monetary funds and then withdraws prior to completion of the case or appeal. The governor's office did not support this amendment.

I do not recommend the commission move forward on this amendment. Doing so may deprive indigent individuals representation. I agree cases are being dumped on our office following private counsel's exhaustion of client funds; however, we must address the problem a different way.

- 4. Succession Plans to Retain Institutional Knowledge.** The office lost institutional knowledge when Sarah Braden and Joslyn Hunt departed. A loss of institutional knowledge impacts efficiency and client representation. Angela Stagg and I are currently creating written procedures describing daily office functions (detailed instruction on how cases are opened in JustWare, how cases are calendared, when notices of appeal are filed, when transcripts are ordered, how briefs are formatted, and etc.) As such, some institutional knowledge will be preserved should key members of the team resign in the future.
- 5. Recruiting Contractors.** The majority of our contractors have indicated they cannot currently accept new cases. Therefore, I have been actively recruiting additional contractors. In doing so I have spoken to four attorneys. Three indicated they will not work for \$60 per hour as their lowest normal billing rate is just over \$200 per hour. They would perform contract public defender work for \$80-\$85 per hour. One attorney indicated he would begin Memorandum of Understanding paperwork.
- 6. Death Penalty Training.** Eileen Larkin and I attended the most recent installment of the Northern Rockies Death Penalty Training – July 30 through August 1, 2012. We received valuable insight into death penalty related legal issues at the trial level.
- 7. CMS.** I had, in the past month, a conference call with CMS as they begin their process of studying internal job descriptions and classifications. Having a neutral outside source compiling information and making recommendations will be beneficial to the agency.
- 8. We Need an Additional Attorney and an Additional Support Staff Member.** As mentioned above, many of our contract attorneys have been refusing new assignments due to their work load. Therefore, to ensure competent client representation, and in order to absorb increased case loads, this office should hire an additional Assistant Appellate Defender. Further, it is more cost effective to hire full-time staff and easier to monitor their work product.

We also need an additional support staff member. We currently employ two support staff members. Including me, the office has 9 FTE attorney positions. We currently have 10 contract attorneys assigned to active cases. Therefore, the current attorney to support staff ratio is approximately 9.5 to 1. When one support staff member is ill, on vacation or attending a family emergency (as we recently experienced) the remaining support staff member assumes the entire support staff function. If that support staff member is out, we

have zero support staff. For example, Sarah Braden recently resigned, and Angela Stagg is on leave. We have zero permanent support staff members working. A lack of support staff interferes with operations, and at some point, competent client representation. An additional support staff position would give us enough depth to ensure the office can cover its current work-load.

- 9. Internal Attorney Recruitment.** I hired Nick Domitrovich to fill the full-time assistant appellate defender position in Helena that I vacated when I accepted Chief position. We welcome Nick and look forward to witnessing his progression into a seasoned and skilled appellate defender.

There were a number of very qualified applicants for the position. We received applications from an assistant appellate defender from Anchorage, Alaska and a trial level public defender from Massachusetts. During the interview process we learned the appellate defender from Alaska earns a salary of \$78,000 per year with four years of experience. Alaska has adopted a statute requiring parity in pay among public defenders and prosecutors.

- 10. Turn-over.** The Appellate Office has a 44% turn-over rate, including the Chief Appellate Defender. Most of those leaving did so due to low pay juxtaposed with high work load and high stress. Sarah Braden, our paralegal and office manager since creation of the agency, resigned her position to work for the Department of Labor and Industry. Internal morale suffers significantly due to excessive turnover, and eventually the quality of client representation is diminished.

- 11. Pay and Retention.** To help combat the revolving door syndrome, the agency should make pay levels match those offered by other state agencies. The Department of Commerce recently posted an attorney position paying \$65,000 per year for four years of experience. This office pays \$54,844 per year for four years of experience. The Attorney General's Office recently posted an attorney position paying \$57,075 - \$65,083 per year with two years of experience. This agency pays \$47,010 per year for two years of experience. With such a disparity in pay other agencies can and will recruit our talent.

- 12. Angela Stagg's Promotion.** Angela Stagg, a legal secretary who has been with the office since 2010, assumed the office manager position. Congratulations to Angela on her promotion.

- 13. Legal Secretary Recruitment.** We are currently recruiting for the open legal secretary position. To ensure clients continue receiving proper representation, I hired Brady Smith, a recent UM Law graduate, as a temporary legal secretary.

Staff Update.

- 1. Sarah Braden.** Sarah recently resigned her paralegal and office manager position to join the Department of Labor. Her last day was August 1, 2012. She is missed.

2. **Angela Stagg.** Angela is now the office's legal secretary and office manager. Angela supports me, our team of eight assistant appellate defenders and the 10 active contract attorneys.
3. **Brandy Fetters.** Brandy joined our office on a temporary part-time basis in July. She assists support staff with copying, filing and other tasks.
4. **Brady Smith.** Brady started with our office August 13, 2012 as a temporary support staff member. She recently graduated from UM Law and sat for the July Montana Bar Examination. Brady will assist while we recruit a full-time permanent legal secretary.
5. **Inga Nelson.** Inga worked in the office this summer as a legal intern. She was a student from the University of Minnesota School of Law where she received the Justice John Paul Stevens Fellowship.
6. **Valerie Ritz.** Valerie acted as the office's summer clinical intern through the Appellate Defender Clinic at the UM Law. Valerie completed an initial brief to the Montana Supreme Court in *State v. White*.
7. **Nick Domitrovich.** Nick joined the office July 16, 2012. He graduated from the University of Montana School of Law in 2011. Following graduation he clerked for Chief Justice Mike McGrath at the Montana Supreme Court. I assigned Nick two cases immediately upon his arrival, and then assigned him two others shortly thereafter. We welcome Nick to our team.
8. **Eileen Larkin.** Eileen is an assistant appellate defender. She recently filed an opening brief in *State v. Yarlott*. Eileen argued, among other things, that (1) Montana's statutes requiring a defendant to pay for court appointed counsel are unconstitutional and (2) the trial court failed to meaningfully investigate Yarlott's ability to pay. The ACLU filed an *amicus* brief supporting Yarlott. As part of her argument, Eileen cited *State v. Moore*, 2012 MT 95 (a win by Jennifer Hurley of the Appellate Defender Office). In addition to her client representation, Eileen spends significant time mentoring young attorneys and is the office's new liaison to the Commission.
9. **Garrett Norcott.** Garrett is an assistant appellate defender. He recently obtained a reversal (with an order to dismiss with prejudice) in *State v. Davis*, 2012 MT 129. Garrett argued the State had presented insufficient evidence at trial. The Montana Supreme Court agreed. Following the Court's decision Garrett filed motions to obtain Davis' immediate release. Excellent work Garrett.
10. **Jacob Johnson.** Jacob is an assistant appellate defender. He has been with the office nearly a year. Previous to joining our office as an attorney, he worked as a summer intern. Recently Jacob filed an opening brief in *State v. Gruendemann-Labrie*. Jacob argued a defendant must be given credit for time served in a lock-down treatment center. We await the Attorney General's response.

- 11. Jennifer Hurley.** Jen is a half-time assistant appellate defender. She splits a full-time position with Chase Rosario. Jen recently prevailed in *State v. Moore*, 2012 MT 95. There, the district court ordered Moore to pay the costs of court appointed counsel, the costs of prosecution and the costs associated with his jury trial. Jen argued, and the Montana Supreme Court agreed, finding the trial court failed “to demonstrate a serious inquiry or separate determination” into Moore’s ability to pay. The Court also reasoned that assessing jury trial costs has the potential to chill a defendant’s inviolate right to a jury trial.
- 12. Kristen Larson.** Kristen Larson is an assistant appellate defender. She is a former clerk to the Montana Supreme Court. She started at the Appellate Defender Office early December 2011. Kristen recently completed the briefing process in *State v. Dugan* (DA 11-0494). Dugan was convicted of Privacy in Communications for calling victim services and cursing as he hung up the phone after being refused assistance. Kristen challenged the constitutionality of the Privacy in Communications statute contending it violates free speech rights. We await the Court’s opinion.
- 13. Chase Rosario.** Chase is one of two half-time assistant appellate defenders. She splits a full-time position with Jennifer Hurley. Chase is currently working on a speedy trial issue in *State v. Stops*.
- 14. Koan Mercer.** Koan is an assistant appellate defender based in our Missoula office. Most recently Koan handled a dependent and neglect (DN) matter for the office. In DN cases, the Court encourages parties to complete initial briefs within 30 days without requesting extensions. I assigned Koan this DN matter when a quarter of the initial 30 days had already elapsed. Koan filed his opening brief within the first 30 days. In addition to directly representing clients, Koan assists in supervising one student per session for the Appellate Defender Clinic at UM Law.
- 15. Lisa Korchinski.** Lisa is a full-time assistant appellate defender. She recently filed her final brief in *State v. Yeoman*. The State charged Yeoman with Felony DUI. Lisa argued the officer lacked particularized suspicion to stop Yeoman’s vehicle. We await the Supreme Court’s decision. Until recently Lisa acted as the office’s liaison to the Public Defender Commission.

