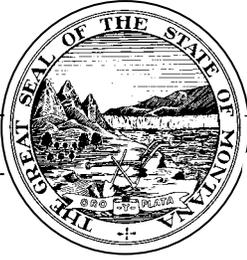


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To: Fritz Gillespie, Chair, Public Defender Commission  
Public Defender Commission Members

From: Lisa S. Korchinski, Liaison, Office of Appellate Defender

Date: August 29, 2011

RE: Commission Liaison Comment Period

In preparation for this meeting I contacted all team members of the OAD and asked if anyone had input, comments, questions, or concerns for the Commission. I received one comment/concern, based upon the "closing form" which was mentioned in Chief Hood's report to the Commission, under the Travel and Meetings section. This comment was forwarded to the OAD team for further input. Due to time limitations and availability not all team members may have been able to respond.

*Therefore, the following comment was made by a member of the OAD team:*

There is a growing concern that private counsel passes off clients to the OPD and OAD after the client has been stripped clean and is now considered indigent.

So it is suggested that any "closing form" developed should include issues trial attorneys need to discuss after sentencing with their clients and this should be addressed in a comprehensive training. Possibly a video (available for downloading) could be created and viewed by all new hires (as well as current employees). This could be made part of the checklist of policies (such as travel, phone, and computer use) that new hires must complete before hitting the files.

The training should be quite clear about the difference between sentence review (SR), petitions for post-conviction relief (PPCR), and appealable issues. It's a tremendous waste of agency resources for the OAD to be writing fully preventable Anders briefs, and/or letters explaining the client is barking up the wrong tree, or has nothing to bark about at all. This waste of resources comes

*after* the waste of resources of initiating the appeal process, both human and financial. Transcript costs are high and the Commission should be aware that trial attorneys have the power to save this agency a significant amount by simply talking with their clients.

It may be appropriate that the closing form, Anders briefs, and withdrawn appeals (based on no appealable issue/more appropriate for SR or PPCR) could become a tracked and weighted system and possibly reflected in the trial attorney's personnel file and possibly used as a basis for salary increases.

If trial attorneys always used a closing form, had clients initial all procedural issues discussed, and had room to fill in particular information given to the client regarding specific questions the client had regarding appealing their case, it is believed this agency could save tens of thousands in transcripts, let alone human resources.

Again, concern has arisen regarding private counsel dumping their appeals on the OAD. In the past, clients have paid for 20-30k for a mess, and then dumped. The Commission is in the position to make this situation known to the legislature, the Commission on Practice, the State Bar at large, the law school, and finally to the Montana Supreme Court.

While arguably 47-1-111 provides the authority for the Montana Supreme Court to appoint, it is unlikely anyone foresaw the private bar creating the indigency and dumping the case on appeal. 47-1-105(9)(a) and (b) should provide the Commission with the vehicle to propose policies, procedures and standards now that bring attention to the issue and begin the discourse among the relevant bodies to stop the problem. One immediate action that could be taken is to reference attorneys by name in our opening brief in the case facts. Another is to have a concerted effort to inform these bodies of the issue, and make a clear stand that the private bar needs to have better business acumen; they need to plan on taking the case to appeal and charge accordingly.

*Further input from OAD team based on above comment:*

- Agreed that trial attorneys should advise clients on the merits of an appeal, and it is thought most probably do. Concern arises that if an attorney was ineffective below (e.g. where the Court reverses because of IAC for failure to object to an erroneous jury instruction), he's going to be

ineffective again in telling a client there are no appealable issues (given that he missed the issue in the first place).

- There is some discomfort in the creation of a financial incentive for attorneys to convince clients not to appeal.