



Brian Schweitzer
Governor

OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

Chief Appellate Defender
Joslyn Hunt

August 25, 2010

To: Montana Public Defender Commission
From: Joslyn Hunt, Chief Appellate Defender
RE: Report to the Commission for the Period June 1 to August 1, 2010

UPDATES:

Caseloads: As the attached Exhibit 1 shows, in closing out the fiscal year, we took in 9 cases in June. Hence, over the course of the entire fiscal year, our case base grew. Entering into a new fiscal year in July, we took in 7 cases. It is in that month, for the first time ever, we saw our case base drop by 2 cases. We are now fully staffed. I anticipate our reliance on contract attorneys will decrease. However, it is always difficult to gauge how many cases we may take in for any given month.

Conflict Issue: On July 28, 2010, Colin Stephens argued the *St. Dennis* case before the Montana Supreme Court. He alleged the regional offices are not distinct law firms. Instead, they all operate as one large law firm. As evidence of that, in part, he relied on a letter Regional Deputy Ed Sheehy wrote to Assistant Public Defender Carolyn Gill. The letter as focused on by the ACLU and Mr. Stephens indicated that Mr. Sheehy did not believe it "would look for you, as an OPD attorney, even from a different Region, raising an objection to chain of custody." The response from Ms. Gill indicated that she would do what she needed to in order to represent her client. She stated, in particular, "[I]f I believe that it is in my client's best interest to object to some action taken by a co-defendant, which could potentially negatively impact my case, I will not hesitate, either in this case or in any future case, to object to that action."

It was Ms. Gill's response that Assistant Attorney General Sheri Sprigg from the Attorney General's Office used to indicate how each region is its own separate law firm. And, whether one attorney's actions were improper, in looking at each case on a case-by-case basis, no conflict exists. To that end, Ms. Sprigg also indicated that unless Mr. Stephens could prove how *St. Dennis* was prejudiced by having representation from Region 2, while his co-defendant was represented from Region 1, no per se conflict exists by operation of law.

The case is still pending. We are awaiting the Court's decision in it and *Sellers*.

Training:

On July 6-8, OAD had its first-ever appellate specific training at Lubrecht. It was a great success. Idaho State Appellate Public Defender Molly J. Huskey and Chief of the Appellate Unit, Sara B. Thomas spent two and a half days providing the appellate public defenders, appellate contract attorneys, and a few public defenders tips on how to improve their appellate advocacy skills.

We worked on long term and short term memory; chaining of ideas; answering questions from Justices; psychology of communication; body language; eye contact; nonverbal communication; controlling interactions; changing on stage, platforms; themes; and telling a story. Justice Nelson spoke about the Dos and Don'ts of Oral Advocacy, emphasizing in large part that the trial attorneys must object because the appellate "cannot make a silk purse out of a sow's ear." He commended the appellate attorneys for trying, but the Court is not willing to address most issues on plain error.

The final day we presented oral argument. We were videotaped in doing so and were provided phenomenal feedback on how to improve our storytelling, presentation, such as voice inflection and posture, as well as structural ways in structuring the argument. After getting the feedback, we were given a second opportunity to present the argument. Again, we were videotaped and it was truly amazing to see everyone's improvement.

We thoroughly enjoyed the training. We got the utmost out of it, including tips on brainstorming that we have implemented in weekly sessions for our brief writing.

Commission Requests:

**Court Reporters:*

Sarah Braden has a wonderful working relationship with the court reporters across the State. Even though she was on vacation, she took time away from her vacation to meet with several court reporters regarding their concerns about the use of recordings in lieu of a court reporter's presence. Some of the court reporters have great concern about the preservation of the records in districts where there are standing masters.

In particular, the recordings are oftentimes poor quality, which becomes problematic for the appellate attorneys since those recordings are "the record." The accuracy and quality of the recording is of utmost importance. Questions have arisen regarding policies and procedures about storing these recordings, since the audio tapes could easily be destroyed (or taped over). Also, the recordings can be checked out by anyone, and thereby listened to anyone. The latest recording transferred to the Montana Supreme Court had a DI and a DJ case on it that the attorney had to listen through in order to get to the applicable point in the tape for that attorney's case. The breach of confidentiality that exists is alarming.

Moreover, for OAD, it costs more to transcribe these recordings because we must pay a court reporter the rate for pages plus the time it takes to the court reporter to transcribe the recording. The problem does not just exist for OPD/OAD. Even some private attorneys have hired their own court reporters to go into court where these recordings are occurring, so they have an accurate record. They do not trust that the recordings are providing an accurate record currently. One private attorney is willing to speak to the Commission about this.

**Specialty Courts*

Commissioner Taylor requested input on potential conflict of interest problems resulting from how specialty courts function. To date, I have performed research on the issue and have discussed the issue with several others. More time is needed in order to more fully research and report on this request. I anticipate by the next Commission meeting I will have the report completed.

OFFICE OF THE STATE PUBLIC DEFENDER
 APPELLATE DEFENDER PROGRAM CASE COUNTS - FY 2010

	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	June	FY 2010
Writ													
Carryover	-	-	-	3	-	-	-	-	-	1	1	1	-
Opened	-	-	3	-	3	-	1	-	1	-	-	1	9
Closed	-	-	-	3	3	-	1	-	-	-	-	1	8
Ending Bal	-	-	3	-	-	-	-	-	1	1	1	1	1
PCR													
Carryover	15	16	15	15	15	15	15	16	16	17	17	17	15
Opened	2	-	-	-	-	-	1	-	1	-	-	-	4
Closed	1	1	-	-	-	-	-	-	-	-	-	-	2
Ending Bal	16	15	15	15	15	15	16	16	17	17	17	17	17
Appeals													
Carryover	58	71	78	87	90	98	112	120	141	145	150	155	58
Opened	21	13	17	9	14	14	14	21	13	10	15	9	170
Closed	8	6	8	6	6	-	6	-	9	5	10	3	67
Ending Bal	71	78	87	90	98	112	120	141	145	150	155	161	161