



OFFICE OF THE STATE PUBLIC DEFENDER STATE OF MONTANA

Brian Schweitzer
Governor

Chief Appellate Defender
Wade Zolynski

December 7, 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, 8.5 Assistant Appellate Defenders and 2 support staff. We also contract for appellate services with private counsel. The following is my second report to the Commission:

The State of the Appellate Defender Office.

1. Caseloads (see attached case count spreadsheet for first quarter of FY 2013).

The office experienced a 17% increase in direct appeals for FY 2012. Cases have continued to increase into fiscal year 2013. During the first quarter of FY 2013 (July 1, 2012 through September 31, 2012) we received 63 new cases. During this same period fiscal year 2012 we opened 55 new cases. That is a 14.5% increase. First quarter of fiscal year 2013 appointments breakdown as follows:

July	14 cases (7 criminal, 5 DN and 2 DI)
August	31 cases (21 criminal, 5 DN, 2 DI, 1 DJ and 2 PCR).
September	18 cases (12 criminal, 2 DJ, 1 DN, 1 DI and 2 PCR).

**DN = dependent and neglect
**DI = involuntary commitment
**DJ = juvenile
**PCR = postconviction

DN assignments were 17% of the total cases opened this first quarter. Our case management system is currently not configured to run reports that will categorize appeals by case type (as I did above). Therefore, categorizing appeals by case type is a time consuming process that involves a case-by-case analysis.

Direct Supreme Court Appointments. The Montana Supreme Court has authority to appoint the appellate office. For instance, a defendant who hired

private counsel for trial but cannot afford to hire private counsel for appeal may receive an appellate defender by petitioning the Montana Supreme Court for appointment. The Montana Supreme Court may also appoint the appellate office by granting a defendant's out-of-time appeal. An out-of-time appeal permits the defendant to file an appeal although the date by which his or her notice of appeal was due has already passed. Sometimes these defendants had been represented by private counsel at the trial level, and sometimes they had been represented by OPD at the trial level.

These direct appointments have increased significantly for the first half of FY 2013. July 1 through November 20 of FY 2013, the Montana Supreme Court has directly appointed the appellate office 13 times. By comparison, the Montana Supreme Court directly appointed the appellate office only 18 times over the entire 2012 FY.

2. Case Weighting System. In September I began researching the creation of an appellate case weighting system. I studied National Legal Aid and Defender Standards, ABA Standards and case weighting systems in Washington, Tennessee, Texas and Nebraska. From these models, I have created a case weighting system which will provide data concerning individual attorney as well as office-wide workload. The system's purpose is to assist the Chief Appellate Defender and the Public Defender Commission in determining whether the appellate office has appropriate resources to competently and effectively represent clients on appeal. I discussed the system with assistant appellate defenders and support staff. I am currently implementing the system.

3. Turnover and Appellate Office Pay

Turnover. In the first quarter of FY 2013 the office lost three employees – one paralegal and two attorneys. As a result, FY 2013's first quarter turnover rate was 28.5%. This rate is unacceptably high. As discussed in the paragraphs below, most turnover in the appellate office could be remedied by making staff pay competitive with other State agencies.

In August, our paralegal and office manager resigned to accept a position with the Department of Labor and Industry. She received higher pay at her new position while being classified a paralegal but not an office manager.

In September, a half-time assistant appellate defender resigned for personal reasons.

Also in September, a full time assistant appellate defender resigned to accept employment with the Department of Commerce. The attorney received an \$18,000 per year pay increase.

Pay. Every resigning employee except one (the half-time assistant appellate defender who left for personal reasons) cited a lack of pay and/or workload as a consideration in their resignation. The appellate office's FY 2012 turnover rate was 44%. In researching this issue I used the DOA's pay tool and learned the following:

OPD Legal Secretary Pay Compared to Other State Agencies

Office of Public Defender \$9.89/hr to \$11.40/hr

OPD legal secretaries earn significantly less than legal secretaries for other State agencies. In fact, the highest paid legal secretary at OPD earns 59 cents less than the lowest paid legal secretary in any other State agency. OPD legal secretary starting pay is \$2.10 per hour less than the starting pay at the next lowest paid State agency and \$6.51 per hour lower than the highest paid State agency. OPD's highest legal secretary pay is \$5.00 per hour less than that of the State's highest paid agency.

OPD Attorney Pay Compared to the AG's Appellate Bureau Attorney Pay

Appellate defenders earn significantly less than appellate attorneys at the AG's office. Half of the attorneys at the AG's Appellate Bureau are classified band 8. OPD's highest band is 7. The lowest paid attorney in the AG's Appellate Bureau earns \$21,961 more than the lowest paid appellate defender. Half of the attorneys at the A.G.'s appellate bureau earn more than the Chief Appellate Defender.

Therefore, significant pay discrepancies exist between OPD and other State agencies, including our direct counterparts at the AG's office. Our excessive turnover is largely attributable to these pay discrepancies. As the Public Defender Commission knows and appreciates, the issue of disparate pay is complex and largely tied to agency funding. We are working with CMS on these issues. I am encouraged that we were able to work with the current governor's staff and obtain a proposed budget that would increase OPD funding. However, the agency must be prepared to communicate clearly on the topic of disparate pay and the resulting turnover within our agency.

- 4. New Hires.** As discussed in section 2 above, two assistant appellate defenders and our office manager resigned during this first quarter of FY 2013. One of the attorney positions had been half-time, but after receiving internal approval, I made that position full-time. The other position was already full-time. I hired two experienced attorneys and an experienced legal secretary to fill the positions.

Elizabeth Hines. Liz joined the office as a legal secretary on August 22, 2012. Liz assumed Angela Stagg's position when Angela was promoted into the Legal Secretary Office Manager position. Liz came to us with experience from a law firm in Queens New York.

Jonathan King. Jon started as an assistant appellate defender on November 5, 2012. Jon received his J.D. and M.B.A. from New York University in 2008. He worked for Gibson Dunn in New York City and then for a public defender office in Malden, MA before joining us.

Deborah Smith. Debbie also started as an assistant appellate defender on November 5, 2012. Debbie graduated from the University of Michigan Law School in 1989. She was a partner with Reynolds, Motl and Sherwood (now Morrison Motl) from 1994-2009 and was most recently in private practice. Debbie has also been an Adjunct Professor of immigration law at UM Law.

- 5. Proposed Statutory Amendment Pertinent to the Appellate Defender Office.** The Office of the Appellate Defender (along with the Public Defender Commission) has proposed a change to Mont. Code Ann. § 47-1-118. The amendment obtained initial approval from the Law and Justice Interim Committee. The change would permit OPD's conflict coordinator to hire and supervise a staff attorney to handle postconviction cases.

Important Pending Cases and Outcomes.

- 1. Pending Cases.**

State v. Dugan (DA 11-0494). Kristen Larson orally argued this matter before the Montana Supreme Court on November 13, 2012. Kristen argued Montana's privacy in communications statute (45-8-213) is unconstitutionally overbroad and vague. She also argued the statute, as applied to Dugan, infringed on his free speech rights. The Associated Press, the Helena *Independent Record*, the *Missoulian* and the *Billings Gazette* picked up the story:

http://helenair.com/news/local/what-s-ok-to-say-man-challenges-law-banning-offensive/article_beaaae02-2e1a-11e2-a78c-001a4bcf887a.html

http://billingsgazette.com/news/state-and-regional/montana/man-challenges-montana-law-banning-offensive-speech/article_17366041-1e2c-5acd-8383-23141e6d3480.html

State v. Yarlott (DA 12-0014). I discussed this matter in my last field report. Eileen Larkin is counsel of record on this case that involves hearings on ability to

pay fees and costs and the constitutionality of Montana's recoupment statutes. We are awaiting the State's response.

2. Outcomes.

State v. Jentile, 2012 MT 185 (Decided by Court opinion). August 29, 2012. Assistant appellate defender Chase Rosario obtained a restitution reversal where the district court failed to apply a comparative negligence analysis in ordering the defendant's restitution payment.

State v. Wing, 2012 MT 176. (Decided by Court opinion). August 14, 2012. Appellate contractor Johnna Baffa obtained a reversal for Wing because the district court wrongly excluded a statement against interest offered by the defendant. The statement implicated a party other than Wing.

State v. Sanborn. (Decided by Attorney General concession). The Attorney General's Office conceded assistant appellate defender Lisa Korchinski's argument contending the district court erred by not holding a hearing on defendant's ability to pay costs.

State v. Labrie. (Decided by Attorney General concession). The Attorney General's Office conceded assistant appellate defender Jacob Johnson's argument that the district court should have granted Labrie credit for time served in the Elkhorn treatment program.

State v. White. (Decided by Attorney General concession). The Attorney General's Office conceded assistant appellate defender Koan Mercer's and UM Law clinical student Valerie Ritz's argument that two of White's previous DUI convictions should have been expunged, and therefore, could not be used as predicate offenses for a DUI 4th.

State v. Hasson. (Decided by Attorney General concession). The Attorney General's Office conceded assistant appellate defender Jacob Johnson's argument that Hasson's misdemeanor case should have been dismissed for a violation of his speedy trial rights.

Highlighted Chief Appellate Defender Activities

- 1. Annual Conference.** I attended, along with my attorney staff, OPD's annual conference in October in Billings. Koan Mercer provided all OPD attorneys with case summaries from the past year. I, along with Dave Stenerson, Mori Woods and Chief Public Defender Bill Hooks, presented on ethical considerations in case investigation. I also presented the appellate advocacy award to Garrett Norcott.

Garrett has since left the Office of the Appellate Defender to work for another State agency.

2. **Case Weighting.** As discussed above, I researched and created a case weighting system which I am currently implementing.
3. **Boot Camp.** I presented at the OPD Boot Camp in November on preserving the record for appeal and I coached a team of attorneys through mock exercises.
4. **Juvenile Justice.** I presented at a forum at OPD – Missoula on juvenile justice topics.
5. **Standards, Policy and Procedure.** I am currently researching standards, policy and procedures for appellate offices in other states. Next, I will draft standards, policy and procedures for this office.

