

Setting the Stage for Appeal --  
i.e., How Can We Help Each  
Other?

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# APPEALS

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The following applies to:

OPD Attorneys

Contract Attorneys

Conflict Attorneys

# Procedure for OPD Cases

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The following steps assist us greatly with our intake. We appreciate your cooperation.

ADO has the right to assume all appeals, including contract and conflict cases.

# Procedure for OPD Cases Cont'd

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## **STEP 1**

Email Sarah Braden at [sbraden@mt.gov](mailto:sbraden@mt.gov) to inform her that the appeal is coming.

# Procedure for OPD Cases Cont'd

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## **STEP 2:**

Complete Appellate Referral Form (ARF) online and submit it electronically to ADO.

Criminal Appeals: Complete ARF within **20 days** of final judgment.

Dependent/Neglect Appeals: Complete ARF within **7 days** of final judgment.

Commitment Appeals: Complete ARF within **20 days** of commitment order.

# ARF

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Make them as complete and as detailed as possible.

**Mandatory Fields:**

Summarize any colorable claims of error.

# Procedure for OPD Cases Cont'd

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## **STEP 3:**

**File Notice of Substitution of Counsel**

# Procedure for OPD Cases Cont'd

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## **STEP 4:**

Submit electronic copy of all of the district court documents ever filed in the case.

Submit this electronic copy by scanning documents and placing them on a CD or placing them on the "O" drive.

Dependent/Neglect Cases, Commitment Cases, and Juvenile Cases: Send the physical attorney case file in addition to submitting the electronic copy.

# Procedure for OPD Cases Cont'd

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## **STEP 5:**

After you complete Steps 1 through 4, ADO will file the notice of appeal and request for transcripts.

# Procedure for OPD Cases Cont'd

If OPD Attorney keeps the appeal:

1. Complete ARF

2. File Notice of Appeal with MT Supreme Court

Criminal: 60 days from final judgment

D/N or Guardianship: 30 days from final adjudication

Commitment: 53-21-131, MCA; Notice of appeal may be filed within **90 days** after service of the client's notice of his right to appeal **or** within **90 days** after discharge, whichever is later.

## Procedure for OPD Cases Cont'd

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3. File Request for Production of Transcripts with district court.

\* Notice of Appeal must be filed simultaneously with the Request.

4. Send copies of Notice and Request to ADO.

# Procedure for PCR Cases

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If OPD is appointed by the district court, complete the Post-conviction Referral Form online and submit electronically to ADO.

Send the district court file to ADO.

ADO will appoint contract counsel to handle the PCR case.

# Appeal Checklist

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Conversation with client should cover:

What an appeal is.

What an appeal is not.

What a jury does.

What an error of law is.

Ineffective assistance of counsel.

Sentencing

Guilty pleas.

Remedies.

# Appeal

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It is one of several different options to challenge a conviction or sentence.

# What an appeal is.

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An appeal occurs when the Montana Supreme Court reviews a case to see if there was an error of law.

# What an appeal is not.

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An appeal is not a “do over.”

There is no new trial.

There are no witnesses.

There are no new facts.

# What a jury does.

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A jury decides the facts. Once a jury does this, the facts will not change on appeal.

If the jury did not believe you or your star witness, an appeal will not fix that. Again, that is because a jury already decided they did not believe you.

The “record on appeal” is the papers filed in the district court and the hearings held in the district court.

# What an error of law is.

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Judge made a mistake.

Preservation: Attorney must bring the problem to the judge's attention. This is called preserving the record.

Plain Error: Montana Supreme Court will reverse your case even if the attorney did not bring the problem to the judge's attention.

\*This is rare!!!!

Prejudice: Judge's mistake must not be harmless.

# Ineffective Assistance of Counsel

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Record-based: This means we have to know “why” somewhere in the paperwork the attorney did or did not do something.

If you cannot answer “why” in the paperwork, the problem you are complaining about is appropriate for post-conviction . . . NOT AN APPEAL.

## IAC Cont'd

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An attorney's actions must be unreasonable.

A mistake does not necessarily amount to IAC.

Prejudice must be shown.

You have to be able to show that if the attorney had not done what she did, the result of your trial/hearing/etc. would have been different.

# Sentencing

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Felonies: When you appeal, the Montana Supreme Court will review your conviction for legality only. This means they are only going to look to make sure when you were sentenced, nothing illegal happened.

# Sentencing Cont'd

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If your sentence is unreasonable, unfair, inequitable,

Or

You feel your sentence length is inappropriate . . . .

These are matters for SENTENCE REVIEW . . . NOT AN APPEAL.

Except where sentence review is not available  
(jail time is less than one year, sentenced to  
Montana State Hospital, etc.)

# Sentence Review

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Have them complete the sentence review application.

Explain to them whether they will have counsel.

Advise them of the risks, but reiterate an appeal is not the option to pursue when they have those problems with their sentences.

# Guilty Pleas

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Waiver: We cannot discuss in an appeal any errors that occurred before the change of plea unless you reserve the right to appeal them as part of the plea agreement.

If the client's problem is about his plea, an appeal is not the option. Advise him to file a **MOTION TO WITHDRAW GUILTY PLEA.**

# Motion to Withdraw Guilty Plea

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This must be filed in the district court. ADO cannot file these if the motion occurs after sentencing.

The client has **1 year** after the appeal is complete to file a motion to withdraw his guilty plea. This is available where a client is appealing other issues.

If the plea is the only problem, again, an appeal is not the option the client should choose. Tell the client this.

# Withdraw Guilty Plea Statute

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46-16-105. Plea of guilty –

(2) At any time before judgment or, except when a claim of innocence is supported by evidence of a fundamental miscarriage of justice, within 1 year after judgment becomes final, the court may, for good cause shown, permit the plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted.

## Withdraw Guilty Plea Statute Cont'd

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A judgment becomes final for purposes of this subsection [46-16-105](2):

- (a) when the time for appeal to the Montana supreme court expires;
- (b) if an appeal is taken to the Montana supreme court, when the time for petitioning the United States supreme court for review expires; or
- (c) if review is sought in the United States supreme court, on the date that that court issues its final order in the case.

# Remedies

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An appeal is not a “Get out of jail FREE card.”

If appeal is successful, you will get a new trial OR you will get a new hearing.

It is the RARE case that you actually get set free.

# Other Helpful Tips

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# Appeal Bond

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This is a trial attorney function.

Where applicable, pursue an appeal bond.

Where it is not, explain this to your client.

We are not equipped to handle appeal bonds.

They must occur at district court. Even if we ask the Montana Supreme Court for an appeal bond, the Court will just remand the case to the district court.

# Appeal Bond Statute

46-20-204 Stay of execution and relief pending appeal.

(1) If an appeal is taken, a sentence of death shall be stayed by order of the trial court until final order by the supreme court.

(2) If an appeal is taken and the defendant is admitted to bail, a sentence of imprisonment shall be stayed by the trial court.

(3) If an appeal is taken, a sentence to pay a fine or a fine and costs shall be stayed by the trial court or by the reviewing court.

(4) If an appeal is taken and the accused was admitted to probation, he shall remain on probation or post bail.

# Dependent/Neglect Cases

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Case is not final until the termination order is signed. Appeal time runs from the date of the notice of entry of judgment.

You cannot appeal show cause and adjudication orders.

Where you see a purely legal issue during show cause or adjudication, contact us.

We may take that issue up on a writ of supervisory control, especially ICWA.

# Post-conviction

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ADO does not represent clients for post-conviction except on appeal where OPD was previously appointed under 46-21-201, MCA.

ADO contracts out all PCR cases.

Defendants are not automatically entitled to representation on their PCR petitions.  
*See* 46-21-201, MCA.

# PCR Statute

46-8-104 Assignment of counsel after trial -- definition.

(1) OPD can be appointed to represent a client for his PCR proceeding if:

(a) the district court determines that a hearing on the petition is required pursuant to 46-21-201;

(b) the state public defender's office requests appointment of a public defender and demonstrates good cause for the appointment;

(c) a statute specifically mandates the appointment of counsel;

(d) the petitioner or appellant is clearly entitled to counsel under either the United States or Montana constitution; or

(e) extraordinary circumstances exist that require the appointment of counsel to prevent a miscarriage of justice.

## PCR Statute Cont'd

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(2) An appointment of counsel made in the interests of justice, as provided in 46-21-201(2), may be made only when extraordinary circumstances exist.

(3) As used in this section, "extraordinary circumstances" includes those in which the petitioner or appellant does not have access to legal materials or has a physical or mental condition or limitation that prevents the petitioner or appellant from reading or writing in English.

## PCR Cont'd

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If the judge is not following 46-8-104 and 46-21-201, MCA, call us.

We have successfully challenged appointment in several cases on writs of supervisory control.

Do not just accept appointment where the statute has not been followed.

# Good Issues

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Call us. We want to talk to you about the issues you face in your cases.

# Checklist

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We have it available for your use.

We have dismissed 109 cases.

Voluntary: Some are the result of the clients never having wanted to appeal.

Anders: Avoid frivolous appeals.

- \* We understand it is the client's decision, but they need to know whether they have an issue or not.
- \* Call us to support your advice if need be.
- \* Have the discussion with them
- \* If you don't . . . we will. However, it will cost us.  
Over \$10,000 in one year

# Contacts

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Phone number to follow . . .