DEALING WITH INEFFECTIVE ASSISTANCE CLAIMS

Kristina Neal
Attorney at Law
Regional Deputy Public Defender for Region 3 (Great Falls)
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Attended via video telecom by OPD staff and private attorneys from the following locations: Libby, Polson, Kalispell, Missoula, Hamilton, Great Falls, Helena, Butte, Anaconda, Bozeman, and Billings

PART I

Summary of the Ineffective Assistance of Counsel cases which have been argued successfully to the Montana Supreme Court over the past 10-15 years.

For discussion purposes, the cases generally can be grouped into one of three categories:

(1) Cases where Δ alleged IAC for failure to file appeal;
(2) Cases where Δ alleged IAC after postconviction proceedings; and
(3) Cases where Δ alleged IAC for trial errors raised directly on appeal.

At the outset, make note of the following significant cases which provide overall insight into how the Montana Supreme Court analyzes the dynamics of attorney-client relationships and the bases of ineffective assistance of counsel claims:

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2063 (1984)

Hans v. State, 283 Mont. 379; 942 P.2d 674; 54 Mont. St. Rep. 654, (1997)

State v. Wilson, 296 Mont. 465, 989 P. 2d 813 (1999)

State v. Finley, 276 Mont. 126, 915 P. 2d 208 (1996)

Note: In deciding a pretrial request for new counsel, the court must determine whether "a breakdown in communication" or "irreconcilable differences" has occurred between the client and the attorney which prevents an adequate defense[1]. To establish an irreconcilable conflict, the defendant must show a complete collapse of the attorney-client relationship. *State v. Wilson*, 1999 MT 271, ¶ 19, 296 Mont. 465, 989 P. 2d 813, 817. When considering a motion for substitution of counsel, the trial court must inquire adequately into the complaint of the defendant and must discover whether the conflict was so great that it resulted in a total lack of

[1] Courts use "breakdown in communication" and "irreconcilable differences" interchangeably.

communication. *State v. Martz*, 233 Mont. 136, 760 P. 2d 65 (1988). If the trial court determines that the defendant and his counsel have a conflict so great that it results in a total lack of communication, new counsel should be appointed. *Wilson*, ¶19. However, the Montana Supreme Court in *State v. Gallagher (II*), 2001 MT 39, ¶21, 304 Mont. 215, ¶21, 19 P. 3d 817, ¶21 clarified that it has not adopted the rule that a defendant has a right to "meaningful client-attorney relationship.

1. IAC for a failure to file Notice of Appeal after request from counsel to do so.

   State v. Adams, 2002 MT 202, 311 Mont. 200, 54 P.3d 50

   State v. Tweed, 2002 MT 286, 312 Mont. 209, 59 P.3d 1105

   State v. Patton (unpublished) 2003 MT 375N, 319 Mont. 425, 82 P.3d 37

   State v. Rogers, 2001 MT 165, 306 Mont. 130, 32 P. 3d 724

   Woeppel v. City of Billings, 2006 MT 283

   See further**:**

Roe v. Lucio Flores-Ortega, 528 US 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000);

U.S. v. Sandoval-Lopez, 409 F. 3d 1193 (9th Cir. 2005)

2. IAC after postconviction proceedings.

   State v. Rogers, 2001 MT 165, 306 Mont. 130, 32 P.3d 724
   Rogers's attorney was aware of instruction which allowed jurors to consider lesser included offense if disagreement about greater charge, but failed to object to judge giving an acquittal first instruction.

   Hope v. State, 2003 MT 191, 316 Mont. 497, 74 P.3d 1039
   Hope's attorney did not move to suppress incriminating statements Hope made while incarcerated during the unreasonable delay before being brought before a neutral magistrate.

   State v. Henderson, 2004 Mont. 173, 322 Mont. 69, 93 P. 3d 1231
   Henderson's attorney was ineffective for pleading his client to maximum sentence after two meetings with client, almost no investigation and failure to pursue viable suppression motion.

3. IAC for trial errors and raised on direct appeal

State v. Chastain, 285 Mont. 61, 947 P.2d 57 (1997) **OVERRULED**

Chastain's attorney failed to ask follow up questions to jurors who had serious reservations about serving in this rape case. The Court has now ruled that this type of claim should only be raised in postconviction to defer to counsel's potential tactics during voir dire (See, *State v. Herrman*, 2003 MT 149, 316 Mont. 198, 70 P. 3d 738).

State v. Rose, 1998 MT 342, 306 Mont. 130, 972 P.2d 321

Rose's attorney found ineffective for failing to offer instruction requiring jury to view co-defendant's testimony with distrust, when co-defendant had plead guilty to the crimes and was an accomplice as a matter of law.

State v. Jefferson, 2003 MT 90, 315 Mont. 146, 69 P.3d 641

Jefferson withdrew plea for aggravated assault for opportunity to obtain acquittal at trial on attempted deliberate homicide and aggravated assault charge. His attorney admitted guilt on aggravated assault, rendering his withdrawal of the guilty plea meaningless.

State v. Becker, 2005 MT 75, 326 Mont. 364, 110 P. 3d 1

Becker convicted of criminal possession of dangerous drugs, possession of precursors, and criminal production or manufacture of dangerous drugs by accountability. The Montana Supreme Court held that defense counsel provided ineffective assistance of counsel because his double jeopardy motion did not include the possession charge. The Court additionally found counsel ineffective because, in his double jeopardy motion to dismiss, he failed to rely upon the protections provided by the Montana Constitution and Montana statute.

State v. Newman, 2005 MT 348, 330 Mont. 160, 127 P. 3d 374

Newman's attorney found to be ineffective when he failed to request an accomplice jury instruction pursuant to §26-1-303(4), MCA.

State v. Lamere, 2005 MT 118, 327 Mont. 115, 112 P. 3d 1005

Lamere's attorney admitted that during voir dire he did not notice the answers on a juror's questionnaire form that stated that one of the jurors had a relative that had retired from the police department and was the mother of a paralegal employed at the county attorney's office, who sat at

> counsel table during voir dire, assisting the prosecuting attorney. The Montana Supreme Court held that Lamere received ineffective assistance of counsel because of his counsel's failure to question the juror regarding her potential biases and counsel's subsequent failure to remove this juror from the final jury panel.

In the Matter of the Mental Health of K.G.F., 2001 MT 140, 306 Mont. 1, 29 P. 3d 485 (2001)

> The Montana Supreme Court determined that an involuntarily committed mental patient received ineffective assistance of counsel when counsel acquiesced to an involuntary commitment.

As you can see the number of cases is relatively small considering *Strickland* was issued in 1984.

PART II
Horizontal continuity of representation:

OPD Practice Standard III (C): "Once a case is assigned to an attorney, continuous, uninterrupted representation by the same attorney is the most effective method of representation."

Ownership of the file (and file contents): *Montana Rules of Professional Conduct, Rule 1.16 (c)*: ""Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. A lawyer is entitled to retain and is not obliged to deliver to a client or former client papers or materials personal to the lawyer or created or intended for internal use by the lawyer except as required by the limitations on the retaining lien in Rule 1.8(i). Except for those client papers which a lawyer may properly retain under the preceding sentence, a lawyer shall deliver either the originals or copies of papers or materials requested or required by a client or former client and bear the copying costs involved."

Practice tip: Notwithstanding the language of *M.R.P.C. 1.16(d)* (above) ("papers or materials "personal to the lawyer or created or intended for internal use by the lawyer") the best practice when faced with a potential claim of IAC., is to turn over to successor counsel all writings contained within the client's file. *See*,

> *Matter of Kaleidoscope, Inc.*, 15 B.R. 232, 244 (N.D. Ga. 1981)("...an attorney is in a fiduciary relationship to his client, owing the highest duty of good faith and diligence, and has no right or ability to unilaterally cull or strip from his files created or amassed during his representation of that client documents which he determines the client is not entitled to see.")(*In the Matter of Palmer,* 956 P. 2d 1333 (Kan. 1998)(Kansas Supreme Court sanctioned

an attorney with a public censure for failing to turn over a former client's complete file to the client's new attorney). The work product exception does not apply to the situation in which a client seeks access to documents or other tangible things created or amassed by his attorney during the course of the representation. *Clark v. Milam*, 847 F. Supp. 424, 426 (S.D. W. V. 1994); *Maleski v. Corporate Life Insurance Company*, 641 A. 2d 1, 5 (Pa. 1994); *Ashcraft & Gerel v. Shaw*, 728 A. 2d 798, 815 (Md. 1998); *Spivey v. Zant*, 683 F. 2d 881, 886 (5th Cir. 1982)(Habeas proceeding in which the Court found the attorney's contention that the requested materials were protected work product without merit because the work product doctrine only pertains to material prepared by an attorney in preparation for litigation when the materials are sought by an adversary of the attorney's client).

PART III
SPECIFIC ISSUES WITHIN CATEGORIES

A. Cases dealing with jury selection

Here are two scenarios which deal with claims of ineffective assistance of counsel in the jury selection process.

Scenario 1: After the jury has been selected – but before the trial in chief has begun – defense counsel discovers that a member of the jury is directly related to a member of the prosecution team. This is information which the "trial team" neglected to identify during the pretrial preparation process.

Has counsel been ineffective in allowing this to occur?

If so, can counsel do anything at this point to rectify the problem?

See*: State v. Lamere, supra.*

What does this case teach us about ineffective assistance of counsel?

(1) Almost all errors at the jury selection stage will be regarded as "structural" in nature, thus creating almost automatic prejudice.

(2) The buck stops with trial counsel. No one is likely to "forgive" an ineffective practice just because it was not the lawyer who made the mistake.

(3) That said, be constantly on alert for ways to eliminate damage to your client. (Remember the first prong of the Duty of Loyalty: "Do no harm to your client!")

Scenario 2: During the jury selection phase, counsel learns that a member of the jury was once victimized by the same type of behavior which has been alleged to the defendant. The final jury has not yet been selected.

What can counsel do at this point to rectify the problem?

Suppose counsel moves for – and is granted – individual voir dire in chambers and is told by the juror that as a result of the prior experience the juror "is probably not going to be favorably inclined toward the defendant."

Where is the trip wire for ineffective assistance of counsel?

> *Ans*: Failure to file a challenge on the record !

See*, State v. Chastain, supra:*

What does this case teach us about ineffective assistance of counsel?

> (1) If you identify a problem with a juror, you will probably be ineffective if you do not challenge the juror on the record.
>
> (2) Do not assume that the court is going to dismiss a juror just because you identify a problem but do not move to challenge. Again, the buck stops with trial counsel. No appeal court is likely to "forgive" an ineffective practice just because it was the trial judge allowed it to take place.

B. Cases dealing with Jury Instructions

Another area which is ripe with ineffective claims is the field of jury instructions.

Here is a common fact situation:

Scenario 3:

The charges are:

> (a) felony criminal possession of dangerous drugs; and
> (b) felony possession with intent to distribute -- or
> (c) pick your favorite felony drug charge

The police find drugs and marijuana in the defendant's house. A co-defendant, arrested in the same raid, admits that all the drugs are his. Prior to the defendant's trial, however, the co-defendant, recognizing how much time he is looking at, makes a deal and rolls over on the defendant, now claiming that, in fact, she was the person in possession of the marijuana which was found.

The defendant's case goes to trial and the defendant's counsel fails to request a "view the accomplice testimony as inherently suspicious" jury instruction.

Is this ineffective assistance of counsel?

See*, State v. Newman, supra*

In light of the failure to request the instruction, what, if anything, could the defendant's counsel do to avoid an ineffective claim?

Compare this case to: *State v. Johnson, State v. Kougl*, *supra*, and *State v. Rose*, *supra*, among others.

C. Cases involving guilty pleas

Another fertile area of I.A.C. litigation involves cases where the defendant signs a plea agreement, appears in court, and has the plea accepted by the court.

Scenario 4:

The charge is CPODD. Although he originally tells his attorney he is innocent of the charge, eventually the defendant signs a plea agreement, pleading "Guilty". He appears in court and expresses some reluctance to advance the plea agreement – but ultimately (after some out of court discussion with counsel) he agrees to enter a guilty plea on an *Alford* basis.

Thereafter he files a motion to withdraw his plea alleging that his plea was "coerced." He tells the court that the only reason he took the plea was because his counsel informed him that if he did not sign the agreement the prosecutor was going to "go to trial in two days," "convict him," and then make sure he was sentenced as a persistent felony offender.

Counsel's records reflect that he spent a total of four hours on the case, consulting with his client on two occasions (the second of which is when he and the client discuss the case after communication breaks down at the change of plea.)

At what point is an attorney providing "ineffective assistance" by advancing a plea agreement?

See*, State v. Henderson, supra* –

What does this case teach us we can do in a plea agreement situation to avoid being found ineffective?

(1) Make sure you spend ample time on the case to understand what the prosecution is and is not going to be able to prove at trial.

(2) Do not be unduly intimidated by prosecutor threats of trial and

sentencing. Understand the law and make sure you explain all the nuances of the law to your client.

(3) A defendant establishes "prejudice" in the context of a guilty plea by showing there is a reasonable probability that, but for his counsel's errors in advising him, would he would not have plead guilty and would have insisted on going to trial.

D. Cases involving failure to file a timely appeal

Failing to follow a client's instructions to file an appeal is creates automatic error and provides an automatic basis for an IAC claim.

Scenario 5 –

In December the defendant signs a P/A and changes his plea in court.

At sentencing on January 1 the judge rejects the sentencing terms and increases the sentence.

On January 20 the defendant files a motion to withdraw his plea, claiming IAC by his attorney in that the attorney allegedly assured him prior to the change of plea that the court would honor the sentencing recommendations of the P/A.

On February 10, the court issues an order denying the motion to withdraw the plea.

On March 1, the court grants the defendant's counsel's motion to withdraw from the case and assigns an appellate defender to the case.

On March 10, the defendant advises the court, prior counsel, and appellate counsel, that he wishes to appeal.

On August 1, the appellate defender files a motion requesting an out of time appeal.

Was original counsel ineffective for failing to file an appeal at any point in time?

Was appellate counsel ineffective for failing to file a timely appeal?

See, *State v. Tweed, supra* –

What does this case teach us?

(1) Trial (or plea) counsel must maintain effective communication with the defendant following sentencing or entry of some other dispositive order (such as a motion to withdraw plea).

(2) Failure to preserve a defendant's right to appeal constitutes ineffective assistance of counsel – even if the failure is unintentional.

PART IV
Some “do’s” and “don’ts” where IAC is involved

DO: Review the procedures which govern appeals within the OPD

DO: Review the underpinnings of the relationship between yourself (as trial counsel) and counsel representing your client in a post conviction matter based on a claim of ineffective assistance of counsel.

DO: Review the principles relating to the relationship between yourself (as trial counsel), counsel representing your client in a post conviction matter based on a claim of ineffective assistance of counsel, and the prosecutor.

DO: Honor the duty of loyalty. The case is about your client, not about you. You have an on-going duty to provide effective representation to your client until such time as you are permitted to withdraw from the case by a court of appropriate jurisdiction. This means that you must continue to advance the client’s interests despite the fact that the client has come to question your actions or even become adverse to your representation.

DO: Be sure to have another attorney, paralegal, or trained support staff sit at counsel table with you during voir dire to take notes and consult regarding any developments which occur during the jury selection process.

DO: Remember that there are rights and procedures which are governed or controlled by the Montana State Constitution which may clearly affect your client’s rights and/or the structure of the proceeding.

DO: Maintain a workable case tracking and calendaring system in order to ensure compliance with deadlines, including notice of appeal and briefing deadlines.

DO: Stay current in training, especially with regard to standards and recent developments in the law.

DON’T: Practice law with the principal focus of preventing IAC. Rather, practice law with the principle focus fighting for your client.

DON’T: Write it down if you don’t want it released to the client or the client’s subsequent attorney . . .

(That having been said . . .):

DO: Thoroughly document every substantive communication you have with your client.

DO: Make sure your client is present at every critical stage of criminal proceedings –

err on the side of caution.

FINALLY:
Some comments on plea agreements and I.A.C.

Be sure to distinguish a “binding” agreement (§211(1)(b)) from a “nonbinding” agreement (§211(1)(c).) Absent a basis upon which to file motion to withdraw plea, the client’s only option once he has been settled per plea agreement is to file petition for sentence review. (Remember: the client “voluntarily” waived right to file appeal per language of plea agreement.)

With a nonbinding plea agreement, sentence review is likely only going to produce result where the judge has issued an “illegal” sentence; i.e., a sentence which exceeded the judge’s sentencing authority for the crime in question.

With a binding plea agreement, the client retains the ability to withdraw from the plea agreement if the judge exceeds his/her legal sentencing authority.

The issue of “voluntariness” of the plea is one for resolution by the sentencing court, not the appeals or reviewing court.