

## **Operating Statutes: Office of the Appellate Defender**

The Office of the Appellate Defender (OAD) is one of the three independent branches of Montana's Statewide Public Defender System.<sup>1</sup> The OAD must be located in Helena,<sup>2</sup> and the vast majority of its cases are appeals to the Montana Supreme Court.<sup>3</sup> However, OAD is also assigned petitions for post-conviction relief which are heard in district courts throughout Montana.<sup>4</sup>

### *OAD in Relation to the Public Defender Commission*

The Public Defender Commission ("Commission") supervises and directs the public defender system, including the OAD.<sup>5</sup> The Commission appoints and supervises the Chief Appellate Defender, who serves at the Commission's pleasure.<sup>6</sup> The Chief Appellate Defender manages and supervises the OAD.<sup>7</sup> The Commission sets the Chief Appellate Defender's compensation, which must be commensurate with the position's duties and responsibilities, taking into account the compensation paid to prosecutors with similar responsibilities.<sup>8</sup>

### *The Chief Appellate Defender*

The Chief Appellate Defender must be an attorney licensed to practice in Montana<sup>9</sup> and must maintain a client caseload, as determined by the Commission.<sup>10</sup> Additionally, the Chief Appellate Defender directs, manages, and supervises the OAD, including:

1. Budgeting, reporting, and related functions;<sup>11</sup>
2. Hiring and supervising staff;<sup>12</sup>
3. Contracting for services (i.e., court reporters and contract attorneys);<sup>13</sup>
4. Promptly assigning cases to an appropriately experienced appellate attorney who is immediately available to the defendant or petitioner;<sup>14</sup>
5. Ensuring that appellate defender assignments comply with standards for attorneys in capital cases;<sup>15</sup>
6. Keeping a record of OAD's services and presenting reports to the Commission;<sup>16</sup>
7. Implementing standards and procedures established for the OAD by the Commission;<sup>17</sup>
8. Conferring with the Chief Public Defender on budgetary issues and submitting budgetary requests and reports through the Chief Public Defender;<sup>18</sup> and
9. Performing all other duties assigned by the Commission.<sup>19</sup>

### *The OAD in Relation to the Office of the Public Defender*

Montana law requires the appointment of counsel through direct appeal to the Montana Supreme Court.<sup>20</sup> Accordingly, the OAD receives most of its cases by referral from a trial attorney at the Office of the Public Defender (OPD). The OAD is not supervised by the OPD or its Chief Public Defender.<sup>21</sup>

### *OAD's Cases*

OAD provides appellate services to clients in criminal and civil cases,<sup>22</sup> some of whom are screened for financial eligibility.<sup>23</sup> First, the OAD provides services in direct appeals to indigent clients in criminal cases involving:

1. A felony with the possibility of incarceration;<sup>24</sup>
2. A misdemeanor with the possibility of incarceration;<sup>25</sup> and
3. A witness in a criminal grand jury proceeding (46-4-304).<sup>26</sup>

Next, the OAD provides appellate services to indigent clients in civil cases involving:

1. A question of parentage;<sup>27</sup>
2. A parent, guardian, or other person with physical or legal custody of a child subject to a dependent/neglect proceeding;<sup>28</sup>
3. Sentence review (note, however, no direct appeal from sentence review is possible under present Montana law);<sup>29</sup>
4. Post-conviction relief;<sup>30</sup>
5. Habeas corpus (note, however, there is no direct appeal from habeas corpus, but habeas corpus petitions can be filed directly to the Montana Supreme Court);<sup>31</sup>
6. A parent or guardian of a developmentally disabled person involuntarily committed to a residential facility;<sup>32</sup>
7. An individual involuntarily committed due to a mental disorder;<sup>33</sup> and
8. An individual involuntarily committed due to alcoholism.<sup>34</sup>

The OAD also provides appellate services to clients, regardless of their financial ability to retain private counsel, in civil proceedings involving:

1. Any party involved in an abuse or neglect petition;<sup>35</sup>
2. A juvenile in Youth Court or subject to the Extended Jurisdiction Act;<sup>36</sup>
3. A juvenile entitled to assigned counsel under the Interstate Compact on Juveniles (note, however, there no direct appeal from this type of proceeding is possible under current Montana law);<sup>37</sup>
4. A minor petitioning for waiver of parental consent for abortion;<sup>38</sup>
5. A developmentally disabled individual committed to a residential facility;<sup>39</sup>
6. A minor voluntarily committed to a mental health facility;<sup>40</sup>
7. A person subject to a petition for the appointment of a guardian or conservator;<sup>41</sup> and
8. A ward when the ward's guardian has filed a petition to require medical attention for the ward's mental disorder.<sup>42</sup>

Finally, the OAD engages in litigation based on the Montana Supreme Court's original jurisdiction.<sup>43</sup> The OAD refers to these filings as writs, which occur as a part of litigation in cases to which OPD or OAD was previously appointed.

#### *Initiation of and Resolution of OAD's Cases*

The decision whether to appeal rests solely with the client; not OAD.<sup>44</sup> When OAD files an appeal, the case may then be (1) fully briefed and decided by the Montana Supreme Court; (2) resolved by agreement (AKA a stipulation); (3) dismissed by the client, based on the attorney's recommendation after review of the record; or (4) resolved by an *Anders* brief and a motion for OAD to withdraw.<sup>45</sup> The OAD files an *Anders* brief and a motion to withdraw when the client wishes to continue an appeal, but the OAD attorney believes no valid legal issues exist for the Supreme Court to resolve.

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<sup>1</sup> Mont. Code Ann. § 47-1-104 (establishing a statewide system); Mont. Code Ann. § 47-1-105 (establishing a public defender commission); Mont. Code Ann. § 47-1-201 (establishing the office of the public defender); Mont. Code Ann. § 47-1-205 (establishing the office of the appellate defender); Mont. Code Ann. § 47-1-118 (establishing a conflicts office).

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- <sup>2</sup> Mont. Code Ann. § 47-1-205(1)
- <sup>3</sup> Mont Code Ann. § 3-2-203
- <sup>4</sup> Title 46, chapter 21
- <sup>5</sup> Mont. Code Ann. § 47-1-105
- <sup>6</sup> Mont. Code Ann. § 47-1-205(2)(a)
- <sup>7</sup> Mont. Code Ann § 47-1-205(2)(a)
- <sup>8</sup> Mont. Code Ann. § 47-1-205(2)(a)
- <sup>9</sup> Mont. Code Ann. § 47-1-205(2)(b)
- <sup>10</sup> Mont. Code Ann. § 47-1-205(3)(h)
- <sup>11</sup> Mont. Code Ann § 47-1-205(3)(a)
- <sup>12</sup> Mont. Code Ann § 47-1-205(3)(d)
- <sup>13</sup> Mont. Code Ann. § 47-1-205(3)(e)
- <sup>14</sup> Mont. Code Ann § 47-1-205(3)(b)
- <sup>15</sup> Mont. Code Ann. § 47-1-205(3)(c)
- <sup>16</sup> Mont. Code Ann § 47-1-205(3)(f)
- <sup>17</sup> Mont. Code Ann § 47-1-205(3)(g)
- <sup>18</sup> Mont. Code Ann § 47-1-205(3)(i)
- <sup>19</sup> Mont. Code Ann. § 47-1-205(3)(j)
- <sup>20</sup> Mont. Code Ann. § 46-1-103(1)
- <sup>21</sup> Mont. Code Ann. § 47-1-105; Mont. Code Ann. § 47-1-205(2)(a); *State v. St. Dennis*, 2010 MT 229, 358 Mont. 88, 244 P.3d 292.
- <sup>22</sup> Mont. Code Ann. § 47-1-104(4)(c); Mont. Code. Ann. § 47-1-205(3)(b)
- <sup>23</sup> Mont. Code Ann. § 47-1-111
- <sup>24</sup> Mont. Code Ann. § 47-1-104(a)(i)
- <sup>25</sup> Mont. Code Ann. § 47-1-104(a)(i)
- <sup>26</sup> Mont. Code Ann. § 47-1-104(a)(x)
- <sup>27</sup> Mont. Code Ann. § 47-1-104(4)(a)(ii)
- <sup>28</sup> Mont. Code Ann. § 47-1-104(4)(a)(iii)
- <sup>29</sup> Mont. Code Ann. § 47-1-104(4)(a)(iv)
- <sup>30</sup> Mont. Code Ann. § 47-1-104(4)(a)(v)
- <sup>31</sup> Mont. Code Ann. § 47-1-104(4)(a)(vi)
- <sup>32</sup> Mont. Code Ann. § 47-1-104(4)(a)(vii)
- <sup>33</sup> Mont. Code Ann. § 47-1-104(4)(a)(viii)
- <sup>34</sup> Mont. Code Ann. § 47-1-104(4)(a)(ix)
- <sup>35</sup> Mont. Code Ann. § 47-1-104(4)(b)(i)
- <sup>36</sup> Mont. Code Ann. § 47-1-104(4)(b)(ii)
- <sup>37</sup> Mont. Code Ann. § 47-1-104(4)(b)(iii)
- <sup>38</sup> Mont. Code Ann. § 47-1-104(4)(b)(iv)
- <sup>39</sup> Mont. Code Ann. § 47-1-104(4)(b)(v)
- <sup>40</sup> Mont. Code Ann. § 47-1-104(4)(b)(vi)
- <sup>41</sup> Mont. Code Ann. § 47-1-104(4)(b)(vii)
- <sup>42</sup> Mont. Code Ann. § 47-1-104(4)(b)(viii)
- <sup>43</sup> Mont. Code Ann. § 3-2-202; M. R. App. P. 14
- <sup>44</sup> *Douglas v. People of State of Cal.*, 372 U.S. 353 (1963); *Entsminger v. Iowa*, 386 U.S. 748 (1967); *Evitts v. Lucey*, 469 U.S. 387 (1985).
- <sup>45</sup> Mont. Code Ann. § 46-8-103(2); *Anders v. California*, 386 U.S. 738 (1967)