

MONTANA PUBLIC DEFENDER COMMISSION 28

Date 4-8-13

Bill No. RICHARD E. FRITZ" GILLESPIE CHAIR

STEVE BULLOCK
GOVERNOR

STATE OF MONTANA

PROGRAM 2 (Appellate Defender Program)

CONSTITUTIONAL OBLIGATION

1. Indigent clients are guaranteed the right to the assistance of an attorney for the appellate process by the 6th and 14th Amendments to the US Constitution, the Montana constitution, and Montana statute.
2. Each Legislator, the Governor, and every Judge takes an oath to uphold the Constitution of the United States and the Constitution of Montana.
3. Every one of them taking that oath promises to fulfill the constitutional duty of the State of Montana to provide effective assistance of counsel in the appellate process for indigent persons and other persons in "civil" cases who are entitled by law to the assistance of counsel at public expense.
4. The Office of Appellate Defender [OAD] was created in 2005 when the Legislature and the Governor created the statewide Office of the Public Defender [OPD] to carry out the State's constitutional duty of providing effective assistance of counsel for those who qualify.
5. It now seems universally recognized that OPD, including the OAD, has never been adequately funded to perform that constitutional duty of the State.

WHAT DOES THE OFFICE OF APPELLATE DEFENDER DO?

1. A case is a two part marathon:
 - a. Trial is the first part;
 - b. Appeal is the second.
2. If the client loses at trial, whether to appeal is reserved for the client to decide.
3. An appeal asks that mistakes made at trial that might have impacted the outcome of the case be corrected.
4. The Office of the Appellate Defender conducts the appeal if the client elects to appeal.

EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

1. Similar to the duties of the trial counsel, if a client elects to appeal, effective representation by an appellate defender ethically, fundamentally, and minimally requires:
 - a. Communicating with the client;
 - b. Gathering, examining, and studying the appropriate portions of the record on appeal;
 - c. Analyzing the merits of the issues the client wants presented based upon legal research applied to the facts of the case; and
 - d. Thereafter, informing the client of the lawyer's opinion about the merit and the potential for success on each issue.
 - e. Writing an appellate brief and a reply brief with citation to the facts in the record on appeal and the law applicable to the issues in the case.

- f. Of course, the lawyer must vigorously advocate for the client on any issue believed by the attorney to have merit in law and fact. However, if the appellant does not agree there are frivolous issues, the attorney must move to withdraw if his or her professional judgment is that issues the appellant insists on raising lack merit, but not without filing an Anders brief referring to anything in the record that might arguably support the appeal.

RECOMMENDED MAXIMUM ANNUAL CASELOAD LEVEL

1. Appeals are often large:
 - a. Involving several thousand pages of legal documents, exhibits, and transcripts of court proceedings, sometimes thousands of pages;
 - b. OAD pays for its copy of the transcript, the court's copy and the attorney general's copy at the *M.C.A. §3-5-604(2)(a)(i)* statutory rate of "... \$2 per page for the original furnished to a state or local government agency, \$2.50 per page for the original furnished to any other party, 50 cents per page for the first copy to each party, and 25 cents per page for each additional copy to the same party."
 - c. One appeal generally takes the equivalent time of many trial cases.
2. The nationally recommended maximum annual caseload level for appellate attorneys is to not exceed 25 non-capital appeals per attorney per year. *See* National Advisory Commission on Criminal Justice Standards and Goals, Courts, 13.12 (1973) and American Council of Chief Defenders Statement on Caseloads and Workloads (2007). The National Legal Aid and Defender Association advocates for a similar standard.
3. Virtually, all appellate defenders exceed the caseload standard.

OAD AUTHORIZED STAFFING (PERMANENT AND MODIFIED)

1. The Office of the Appellate Defender staff currently consists of:
 - a. Chief Appellate Defender – Wade Zolynski;
 - b. 10 Assistant Appellate Defenders (1 modified and 9 FTE);
 - c. A pool of approximately 10 contract attorneys; and
 - d. 2 support staff (a paralegal and a legal secretary) who aid the FTE and contract lawyers in the formatting, assembly, and filing of the briefs.

CHALLENGES

1. Excessive workload:
 - a. 218 direct appeals opened in FY 2012, a 17% increase over FY 2011; and
 - b. 18% increase in first half of FY 2013.
2. Low Pay:
 - a. Lowest paid attorneys and support staff in the State;
 - b. Attorney career ladder increase approved by the House;
 - c. No similar career ladder increase for support staff.
3. Excessive workload and low pay have combined to cause a plague of turnover:
 - a. 44 % turnover in attorney staff in FY 2012;
 - b. 100% turnover in support staff in first half of FY 2013.
 - c. Human resource experts agree that the cost of turnover can be expensive.

4. Every employee, except one, resigned because of excessive workload and low pay; and
5. Every employee, except one, went to work for another state agency, *e.g.*, Department of Labor, Department of Commerce, and Montana Supreme Court.

SOLUTION

1. Pass the remaining decision packages for the Office of the Appellate Defender:
 - a. 1.0 FTE legal secretary (Cost is below):
 - (i) \$41,985 FY 2014; and
 - (ii) \$38,262 FY 2015.
 - b. .50 FTE attorney (Cost is below):
 - (i) \$56,005 FY 2014; and
 - (ii) \$52,197 FY 2015.
2. House appropriated:
 - a. Modified attorney made permanent;
 - b. 1.0 FTE attorney (funded out of the *M.C.A. §47-1-110* OPD special revenue account earmarked in *M.C.A. §2-15-1028(6)(b)* for funding commission support staff);
 - c. Career pay ladder increase for attorneys but not for support staff; and
 - d. 2% increase for contract attorneys.