

# Alaska Court of Appeals

303 K Street, Fourth Floor  
Anchorage, Alaska 99501

Marjorie K. Allard, *Chief Judge*  
Tracey Wollenberg, *Judge*  
Bethany S. Harbison, *Judge*

June 8, 2020

Samantha Cherot  
Renee McFarland  
Alaska Public Defender Agency  
900 W. Fifth Ave., Suite 200  
Anchorage, AK 99501

John Skidmore  
Tamara DeLucia  
Department of Law  
1031 W. Fourth Ave., Suite 200  
Anchorage, AK 99501

Beth Russo  
Brooke Berens  
Office of Public Advocacy  
900 W. Fifth Ave., Suite 525  
Anchorage, AK 99501

Dear Ms. Cherot, Ms. McFarland, Ms. Russo, Ms. Berens, Mr. Skidmore, and Ms. DeLucia:

For many years, this Court has expressed concern about appellate delay. In 2014, the Court issued Standing Order No. 12, which instituted a schedule of gradually decreasing briefing extension limits. The premise of the order was that a single, large extension request within the maximum permissible limit for a given time period would be expeditiously granted — and thus allow attorneys additional time to write briefs without the need to write lengthy extension requests. Extension requests beyond the time periods enumerated in Standing Order No. 12 would require an affidavit and would only be granted if extraordinary and unforeseeable circumstances justified the extension.

Initially, Standing Order No. 12 allowed an Appellant to request a composite extension of up to 530 days to file the opening brief, and the

Appellee a composite extension of up to 250 days to file a responsive brief. As these limits ratcheted down, the extension requests largely followed suit: by September 2016 (2.5 years after issuance of Standing Order No. 12), the maximum composite extension for an opening brief was 390 days, and the maximum composite extension for the Appellee's brief was 200 days. Since then, Standing Order No. 12 has remained in place, but the Court has not further reduced the extension limits.

Until recently, the agencies have largely been complying with these deadlines, and progress toward reducing briefing delay was occurring. For example, the Public Defender Agency reported that the number of cases on its list of unassigned appeals fell from 129 cases in 2014 to 17 cases in 2017. During that time, the Agency increased its use of appellate contract lawyers to help reduce the backlog. But since 2017, the Public Defender Agency has experienced a serious increase in its backlog and a concerning decrease in its ability to meet the mandates of Standing Order No. 12. In 2018, the backlog increased to 36 cases, and in 2019, the backlog increased to 50 cases. In the last year, the Public Defender Agency's backlog more than doubled, reaching as many as 120 cases in recent months — approximately the same level that existed prior to the implementation of Standing Order No. 12.<sup>1</sup>

Also in the last year, this Court has received an increasing number of requests by the Public Defender Agency seeking lengthy extensions of time to file opening briefs outside the limit set out in Standing Order No. 12. These extension requests were generally filed by individual appellate attorneys who were unable to complete their assigned opening briefs because of significant competing work obligations. In contrast, the Office of Public Advocacy and the Office of Criminal Appeals have generally filed their briefs within the extension limits.

In late March, the newly-appointed supervisor of the Agency's appellate section, Deputy Public Defender Renee McFarland, sent a letter to this Court seeking a global resolution on behalf of the section. Ms. McFarland asked this Court to amend Standing Order No. 12 to increase the maximum composite extension for filing an opening brief from 390 days to 540 days. In the letter, Ms. McFarland explained that over the past several years, the Agency's appellate section had decreased in size from twelve attorneys to eight attorneys

---

<sup>1</sup> As of the last update, the Agency had a total of 111 criminal cases awaiting assignment to an appellate lawyer.

and that the Agency was unable to meet the current time frames given their workload.

On May 8, 2020, we met as a group by videoconference to discuss the current status of appellate briefing delay and the Public Defender Agency's request. We appreciate your participation in that meeting, particularly given the additional stress that the current pandemic has placed on personal and professional obligations. We also appreciate Ms. McFarland's May 21, 2020 letter responding to some of the questions we asked at that meeting.

The primary driver of the Public Defender Agency's backslide has been the removal of permanent positions from the appellate section. Although the Agency reports that it intends to have nine lawyers working in its appellate section by the end of this summer and that it plans to add a tenth lawyer to the section in early 2021, there is no indication that the Agency has a coherent plan for returning to the existing Standing Order No. 12 limits.

We are alarmed that the Public Defender Agency's appellate section will be staffed with only nine attorneys for the first half of this year and that the Agency apparently has no intention to return its appellate section to full staffing. It is clear to us that, in order to meet the existing Standing Order No. 12 time limits, the Agency must either return to full appellate staffing or greatly increase its use of contract appellate lawyers. We wish to be clear that sustained understaffing of the appellate section is not an extraordinary circumstance. Accordingly, if nothing is done to address the backlog, this Court will be unable to find that extraordinary circumstances exist to grant the vast majority of the Agency's over-limit extension requests.

As we said in our original letter accompanying Standing Order No. 12, and as we reiterated at the meeting, we do not doubt the professionalism and dedication of the staff attorneys at your agencies. The appellate staff attorneys at your agencies produce briefs of extremely high quality that greatly assist the Court in its decision-making.

But enlarging the time limits under Standing Order No. 12 will not advance our common goal of reducing appellate delay. In fact, an enlargement of the time limits will undermine the strides that the agencies made in the years following that order. While we appreciate the budget and staffing shortfalls that state agencies are experiencing, we have determined that we will not enlarge the time limits under Standing Order No. 12.

We have also determined that, beginning on June 15, 2020, additional information will be required when an over-limit extension request is made by the Public Defender Agency, particularly when the request is made for an unassigned case.

Currently, Standing Order No. 12 requires the following information to be included in all over-limit extension requests:

- the original due date for the brief
- the proposed new due date
- any exempted periods of time that do not count against the extension limit
- what the total briefing extension will be if the motion is granted, and how much the requested extension exceeds the applicable extension limit
- the other party's position on the requested extension
- the extraordinary and unforeseeable circumstances that justify extending the briefing deadline beyond the Court's limits

Beginning on June 15, when Ms. McFarland files an over-limit extension request for an unassigned case, she should include the information required by Standing Order No. 12 and also the following information:

- the current length of the unassigned list
- the position of the case on the unassigned list
- the anticipated time frame in which the case will be assigned
- the number of permanent appellate attorneys in the agency
- whether the appellate attorneys have obligations other than their appellate cases

Additionally, beginning on June 15, 2020, whenever a staff attorney from the Public Defender Agency files an over-limit extension request in an assigned case, the request shall include the requirements under Standing Order No. 12 and should also state the number of appellate briefs and petitions that the attorney has completed since being assigned that case.

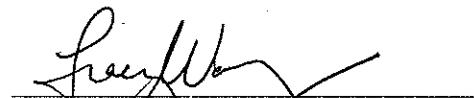
We wish to reiterate that it is not our intent to increase the workload of individual attorneys by requiring them to file lengthy extension requests. It is

our hope that attorneys will only be assigned cases once it is expected that they can meet the briefing deadline, and we were glad to see Ms. McFarland move to a system of centralized extension requests.

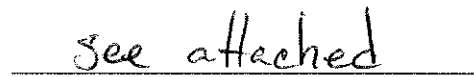
One additional note: At our meeting, we indicated that, while the Office of Public Advocacy was generally meeting its briefing deadlines, the quality of the briefing by many of its contract attorneys was extremely poor. We reiterate our willingness to participate in a CLE training on appellate practice and brief writing and restate our suggestion that the agencies consider making participation in the CLE a condition of their appellate contracts.



---

Chief Judge Marjorie K. Allard

---

Judge Tracey Wollenberg

---

Judge Bethany S. Harbison

our hope that attorneys will only be assigned cases once it is expected that they can meet the briefing deadline, and we were glad to see Ms. McFarland move to a system of centralized extension requests.

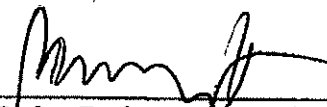
One additional note: At our meeting, we indicated that, while the Office of Public Advocacy was generally meeting its briefing deadlines, the quality of the briefing by many of its contract attorneys was extremely poor. We reiterate our willingness to participate in a CLE training on appellate practice and brief writing and restate our suggestion that the agencies consider making participation in the CLE a condition of their appellate contracts.

---

Chief Judge Marjorie K. Allard

---

Judge Tracey Wollenberg



---

Judge Bethany S. Harbison