



THE STATE
of **ALASKA**
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Department of Administration

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March 24, 2021

The Honorable Adam Wool
House Finance Administration Subcommittee Chair
Alaska State Capital
Juneau, Alaska 99801

Subject: March 9, 2021 Hearing - Office of Public Advocacy (OPA)

Dear Representative Wool:

Thank you for allowing Office of Public Advocacy (OPA) to present to your committee on March 9, 2021. I was able to pull some data regarding OPA's costs to respond to Representative Story's inquiry. I apologize for the length, but I felt it would be helpful to provide a bit of background knowledge on Appeals and PCRs and how they are different. I am still trying to drill down into some of the data that was pulled, but feel comfortable providing the following:

OPA Appeals and Post-Conviction Relief cases (PCRs).

Purpose

The purpose of this analysis is to answer the subcommittee's questions and concerns regarding the cost and quality issues OPA is experiencing with appeals and PCRs. There are key differences between Appeals and PCRs that most people are not aware of. These differences impact any cost or caseload analysis.

Standing Order 12

Standing Order 12 (attached) was issued by the Court of Appeals (COA) during a time when OPA was taking over 500 days to file an opening brief in certain cases. In the order, 2013 is referenced as the point when felony appeals were taking in excess of two years for the opening brief to be filed. The old maximum deadline to file was set at 530 days. During this time, the PDA was also having the same issues regarding the amount of time it was taking to file opening briefs. Despite these time issues, the court lowered the allowable delay to 390 days over time. This can be seen on page 4 of the COA-order 12.

The COA letter (attached) highlights the most current problem the court is having with the agencies and references Standing Order 12. The PDA requested Standing Order 12 be adjusted upward (see PD's letter), because they were routinely exceeding the 390-day maximum however, the COA did not grant the PDA's request.

Critical feedback is provided to both OPA and the PDA in the COA's letter to agencies for different reasons. As stated in my testimony on 3/9/21, the COA (on page 5) states that OPA is generally timely but has issues with the quality of some of the contractors' work whereas the PDA has issues with timeliness but generally has good quality work submitted. This criticism of OPA's contractors raises the question as to whether the agency's resources are appropriately allocated and whether OPA's clients would be better served if OPA could be more selective in determining which cases are handled by high-quality in-house attorneys and which cases are assigned to contract appellate attorneys over whom OPA has much less quality control.

Appeals and PCRs explained (in a nutshell)

1) After a conviction in a criminal case the client has a Constitutional right to appeal their conviction and/or sentence to the Court of Appeals. This is called a direct appeal of right and raises arguments about mistakes the trial court (judge) made and it is limited specifically to what is in the official court record. The court system generates a new case number, e.g. A-00000.

2) Whichever party loses at the Court of Appeals can file a petition for hearing to the Alaska Supreme Court, asserting that the Court of Appeals decision is in error. The court system generates a new case number, e.g. S-00000 for these appeals.

3) The client can also file a post-conviction relief (PCR) application. PCRs raise arguments about the lawyer's mistakes and/or actual innocence claims, or new evidence claims that consider information outside of the official court record. This is typically pursued after the direct appeal process is complete, however it can be filed as soon as a conviction is entered. The most common claim raised in a PCR is the ineffective assistance of prior counsel. Other claims can also be raised, including new evidence claims. PCRs are also the method to challenge Dept. of Corrections' time accounting issues or parole board decisions. The court system generates a new case number, e.g., 3AN-00-00000 CI, for PCR cases and they are filed in the trial court.

4) Whichever party loses the PCR in the trial court can appeal the decision to the Court of Appeals. The court system generates a new case number, e.g., A-00000 for the PCR Appeal.

5) Whichever party loses the PCR appeal in the Court of Appeals can file a petition for hearing to the Alaska Supreme Court. The court system generates a new case number, e.g., S-00000 for this appeal.

6) If the client believes that their PCR attorney (or their attorney in their PCR appeal or PCR petition for hearing) was ineffective, they can file a subsequent PCR. This is known as a Grinols PCR.

7) Whichever party loses the Grinols PCR can file an appeal to the Court of Appeals.

8) Whichever party loses the Grinols appeal can file a petition for hearing to the Alaska Supreme Court.

Each of these cases, even if they all stem from the same underlying case, are separate and distinct both in the Court System and in OPA's database system. Therefore, when these cases are handled by contractors, a new billing number is assigned for each separate case in OPA's system. As described above, direct appeals and PCRs raise entirely different sets of issues.

An appeal and the ensuing petition for hearing are often handled by the same attorney because the issues overlap even though the focus is different. However, the attorney who handled a direct appeal

and petition for hearing (or any piece of the criminal trial case) cannot handle the PCR because under the ethics rules a conflict of interest exists with that type of representation.

How much can PCRs cost?

It is difficult to determine the average cost of a PCR because the complexity of PCRs vary wildly since they specifically encompass issues and evidence outside of the official court record that need to be uncovered and proven. The “Fairbanks Four” case is a good example of a highly complex PCR case. OPA handled one client in that matter, although it is not unusual for OPA to handle more than one defendant in a multi-defendant case. For that one client, our contractor billing exceeded \$150,000 in outside agency costs. This billing amount only includes the funds expended prior to moving the matter in-house. It does not include the attorney and staff costs during the highly publicized litigation of the matter. Hundreds of hours of in-house staff time were expended on this particular case over the course of multiple years.

The high cost of contracting out PCRs of this type is in part due to the significant amount of investigation that is required by the attorney to uncover evidence and issues existing outside of the official court record. This cost is in addition to and entirely separate from what it can cost to litigate the case at the underlying trial phase and the appellate phase. There are two additional issues associated with these types of highly complicated PCRs. The first is the inability to predict how many there will be and when they will come to OPA. The second is that for these highly complex and complicated PCR cases, a contractor simply will not take these cases under any hourly billing limitations (such as case caps or flat fees) because they can consume a contractor’s entire practice. Therefore, the market demands drive up the cost of these cases for OPA.

On the other end of the spectrum are straightforward ‘ineffective assistance of counsel’ PCRs in cases where a client accepted a guilty plea. These are cases where much less investigation and evidence are required to resolve the matter. These cases are more easily contracted out under case caps and flat fee arrangements. However, significant in-house attorney time is needed to assess that the case is of this nature before it can be contracted out.

Any PCR related to an A or Unclassified felony that went to trial is very resource intensive. A dedicated PCR attorney could probably handle six of those types of PCRs at most, as well as some of the more basic types of PCRs. Having an in-house investigator to work these types of PCRs is imperative – otherwise the costs just for investigation will be significant. Given that the true cost of having a contractor agree to take an A or Unclassified PCR for a case that went to trial, and appeal is between \$50,000 to \$150,000 per case, the equivalent of 6 of these in house would cost \$300,000-\$900,000. Thus, it is not sensible to apply the \$7,500 cap when assessing the cost of these types of PCRs as they far exceed this amount to contract out and can take years to resolve.

How much can appeals cost?

OPA is in the regulatory process of increasing case caps for appeals from \$5,000 to \$7,500. Overall, the \$7,500 case cap for appeals is a more reasonable cost estimation when compared to PCRs. The current \$5,000 cap routinely results in case cap increase requests. In the last two years, numerous contract appeals cases exceeded the \$5,000 cap after a justified case cap increase request was submitted. Most of those case cap increases have not exceeded \$7,500.

The subcommittee should also be aware that OPA and the PDA compete for the same small contractor pool regarding appeals and PCRs. This contractor pool is further restricted by any legal conflicts that

exist between the clients of the agencies. After OPA updates its rates, both agencies will finally pay the same rate.

The other solution OPA has contemplated is to review the existing sole appellate/PCR attorney's cases to try to contract out the possibly less complex appeals and PCRs that the attorney is carrying in order to take in a more complex case that comes to the Agency. This option was deemed impractical, as it may be detrimental to the existing clients that OPA has an equal obligation to represent, would increase the additional time needed to file an opening brief when employed, and reach limitations quickly. The lone appellate attorney only has so much bandwidth before there are no cases that remain to contract out under this design. Additionally, it leaves no staff attorney available for handling time sensitive issues that arise and conflict with existing deadlines or cannot be sent to contractors. Moreover, it can be very difficult to accurately assess whether an appeal will be complex. An in-depth pre-assignment review of each new appeal is inefficient and, with a single appellate attorney, impractical.

Having additional appellate attorneys would be a solution to handling more complicated appeals cases though it is difficult to predict what the approximate dollar amount (in terms of savings) would turn out to be for those types of cases.

Previously OPA had a dedicated appellate section

Between 2007-2011 OPA had four attorneys who did nothing but handle appeals and PCRs. They worked directly with two trial attorneys who primarily handled A and Unclassified felonies. The section had a law office assistant and a paralegal as support staff. I am in the process of trying to pull data regarding the number of cases the attorneys in that section handled at the time. That data is from an older, now-defunct case management system.

It is interesting to note that the complaints from the COA (Standing Order 12) about delays and quality began shortly after the appellate section was dissolved to transfer PCNs to handle growing caseloads in other areas.

Cost of contracting out cases

As stated during the 3/9/21 hearing, OPA is in the process of increasing the basic case caps for its appeals and PCRs to \$7,500. It was asked whether the hourly rates of compensation should be increased. However, without increasing the case caps first that would result in a contractor simply hitting the case cap faster. Thus, it is important to increase the case caps.

Below is the data I was able to pull:

(a) Contracted out appeals

OPA pulled data for total billings submitted on all types of appeals cases in FY19 & FY20. The total billings that were submitted are approximately \$707,721.¹

(b) Contracted out PCRs

OPA pulled data for total billings submitted on all types of PCR cases in FY19 & FY20. The total billings that were submitted are approximately \$252,909.²

¹ This is the total for both fiscal years combined.

² This is the total for both fiscal years combined.

(c) How many cases are contracted out?

OPA is contracting out approximately 85% or more of its criminal appeals and PCRs on a yearly basis.³

Total cost comparisons

It should be noted that extraordinary expenses (investigation, expert witnesses, travel, transcription costs, etc.) are not part of the case cap for any type of OPA case. Those type of expenses are requested via a pre-authorization request to the Director or Deputy Director and the agency will approve and pay for them separately. As previously stated, case cap increases can be requested. Thus, \$7,500 should not be considered the maximum cost of a PCR or appeal if sent to a contractor.

How many cases can an appeals/PCR attorney handle?

A dedicated appellate attorney can handle an estimated 20 cases in a timely manner depending on how complicated they are; 20 cases x \$7,500 = \$150,000. The average cost of an in-house attorney is approximately \$136,420. A newer attorney II would cost less but be less capable of handling complicated cases. A more senior attorney IV would cost more but would be expected to handle a larger and/or more complex caseload.

Thus, adding appellate attorneys would potentially be more cost effective when compared with contractor costs. However, it is difficult to predict. Not every appellate attorney would be able to handle 20 separate cases in a year. It may be the case that 15, or even 12 is a more reasonable number depending on how complicated an appeal is and how experienced the attorney is.

On the other hand, keeping the complex and expensive cases in-house would almost certainly save money. It would also largely solve the quality issue as OPA would have more control of the work product of its own attorneys in addition to having the ability to be more selective with who it uses as a contractor for appeals.

These benefits are magnified if these attorneys also handle PCRs. As explained above, PCRs can be exceedingly time consuming and expensive. If each attorney took even one or two serious PCR cases the positions would likely be more cost effective. In-house attorneys, in conjunction with increased case caps, would likely resolve the issues OPA is experiencing. For example, 10 substantive appeals x \$7,500 = \$75,000. 2 substantive PCRs x \$50,000 (at least) = \$100,000. Thus, an appellate/PCR attorney could easily carry 12 cases that meet or exceed \$175,000. If they were in a section with an in-house investigator, the value would be magnified for the PCRs.

Other considerations

An important consideration is that OPA has no contingency in place if its lone highly experienced appellate attorney leaves. This leaves the agency in a vulnerable position where it would potentially have to contract out *all* its appeals and PCRs. Additionally, OPA would lose all its institutional knowledge regarding appeals and PCRs. Currently, OPA has no additional appellate attorneys and thus no ability to have succession planning.

Bringing more PCRs/Appeals in house allows for more in-depth training, supervision, accountability, and quality control. Replacing contractors with in-house attorneys makes it less likely a complicated case

³ The raw number that is contracted out varies year to year. In the last few years, it has been approximately 100-120 cases.

will be mishandled. Mistakes cost the state money because OPA or the PDA may have to provide counsel if there were errors made by a contract attorney.

Respectfully,

A handwritten signature in black ink, appearing to read "James Stinson", with a stylized flourish at the end.

James Stinson
Director
Office of Public Advocacy

Attachments:

coa-order12

COA Letter to Agencies 6.8.2020

PD's Standing Order 12 request