



Montana Districting and Apportionment Commission

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TO: Districting and Apportionment Commission

FROM: K. Virginia Aldrich, Staff Attorney

RE: Representation of the Districting and Apportionment Commission

DATE: July 21, 2021

This memorandum was prepared at the direction of the Chair as background information by request of Commissioner Essmann for the Districting and Apportionment Commission (Commission), and it does not represent any opinion or action on the part of the Commission.

I. Legal Representation

By statute, the Legislative Services Division is directed to provide "technical staff and clerical services that the [Districting and Apportionment] commission needs to prepare its districting and apportionment plans." Section 5-1-106, MCA. However, if the Districting and Apportionment Commission (Commission) is named in a lawsuit and if the Legislative Services Division is unable to provide legal support due to a conflict under the Montana Rules of Professional Conduct, the Commission would require outside representation. In addition, there may be other situations in which the Commission requires outside legal representation, such as instances in which the Commission desires extensive litigation expertise in a particular subject-matter area or if the Legislative Services' legal staff has capacity issues.

Historically, the Attorney General has represented the Commission when the Commission has been named in a lawsuit.

<u>Year</u>	<u>Case</u>	<u>Legal Representation</u>	<u>Clients Represented</u>
1982	<i>St. ex rel. Greely v. Mont. Districting & Apportionment Commn.</i> , First Jud. Dist., No. 46873 (Aug. 12, 1981).	Office of the Attorney General James H. Lear, Counsel to the Districting and Apportionment Commission	Montana Districting and Apportionment Commission; the individual members thereof: Eugene Mahoney, James Pasma, Nancy Aagenes, John Kuhr, Louise Rankin Galt; the 47 th Legislative Assembly of the State of Montana
1983	<i>McBride v. Mahoney</i> , 573 F. Supp. 913 (D. Mont. 1983).	Mike Greely, Attorney General Judy Browning, Assistant Attorney General	Eugene Mahoney, Jim Pasma, Joann Woodgerd, Louise Galt, John Kuhr, Individually and in their official capacities as members of the Montana Districting and Apportionment Commission; James Waltermire, Secretary of State of Montana, and the State of Montana
1999-2002	<i>Old Person v. Cooney</i> , 230 F. 3d 1113 (9th Cir. 2000) <i>Old Person v. Brown</i> , 182 F. Supp. 2d 1002 (2002). <i>Old Person v. Brown</i> , 312 F. 3d 1036 (9th Cir. 2002).	Joseph Mazurek / Mike McGrath, Attorney General Sarah Bond, Assistant Attorney General Thomas Bowe, Assistant Attorney General	Secretary of State (Mike Cooney / Bob Brown), Governor (Marc Racicot / Judy Martz)
2003	<i>Brown v. Mont. Districting and Apportionment Commn.</i> , 2003 ML 1896 (Mont. Dist. 2003).	Mike McGrath, Attorney General Brian Morris, Solicitor General	Montana Districting and Apportionment Commission (State of Montana)

2004	<i>Wheat v. Brown</i> , 2004 MT 33.	Robert Cameron of <i>Gough, Shanahan, Johnson & Waterman</i>	Bob Brown, in his official capacity as Secretary of State for the State
2014	<i>Willems v. St.</i> , 2014 MT 82.	Timothy Fox, Attorney General Lawrence VanDyke, Solicitor General Stuart Segrest, Assistant Attorney General	State of Montana Linda McCulloch, in her capacity as Secretary of State

If the Commission is served in a lawsuit or otherwise has an interest in particular litigation, the Commission may desire or require its own independent legal counsel. Because the Commission determines the use of funds that have been appropriated to it by the Legislature, it may use those funds toward litigation costs, if necessary. As a practical matter, if unanticipated litigation costs exceed the Commission's budget, the Commission could request additional funding through Legislative Council or request for additional funding through the next Legislature.

In addition to the Commission's options for private attorneys, the Department of Justice represents the state and state agencies and officers in certain cases through the Civil Services Bureau and the Agency Legal Services Bureau.

If the Commission is named in a lawsuit, the Commission may request legal representation from the Attorney General. Even if the Commission does not request representation from the Attorney General, as the state's legal officer under the Montana Constitution, the Attorney General retains the statutory authority to defend a case on behalf of the state's interests and may intervene in a case in that capacity if the Attorney General deems it appropriate. If the Attorney General participates in litigation on behalf of the state, the Commission would not be precluded from retaining legal counsel on behalf of the Commission's interests (although if the Commission seeks to intervene in litigation, analysis of standing issues according to case-specific facts would be required); however, where the state's interests and the Commission's interests align, the Commission may prefer to request legal representation from the Attorney General.

By law, the Attorney General is required to defend certain cases on behalf of the state:

2-15-501. General duties. It is the duty of the attorney general:

(1) to prosecute or defend all causes in the supreme court in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest;

...

(6) when required by the public service or directed by the governor, to assist the county attorney of any county in the discharge of the county attorney's duties or to prosecute or defend appropriate cases in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest;

...

While the Attorney General is required to defend "all causes" in the Montana Supreme Court in which the state or an officer of the state (in that officer's official capacity) is a party, in other courts, the Attorney General is required to defend "appropriate" cases when required by the public service or as directed by the Governor. Ultimately, as an independent constitutional officer, the Attorney General determines which cases the Department of Justice will defend on behalf of the state. Litigation undertaken by the Department of Justice's Civil Services Bureau is generally funded by general funding for the Department of Justice's Legal Services Division, although the Department of Justice may negotiate the source of funding for litigation with state agencies and officers.

The Montana Department of Justice is also home to the Agency Legal Services Bureau, which provides legal representation including litigation services and legal counsel to state government officials and agencies on a contractual basis. The Agency Legal Services Bureau is a proprietary agency, and if the Commission contracted with the Agency Legal Services Bureau for legal services, the costs of litigation would be paid out of the Commission's budget. According to the Department of Justice's organizational rule, "fees charged to client agencies are substantially less than fees charged by private law firms." [ARM 23.1.101](#).¹

Ultimately, many factors concerning legal representation of the Commission depend on the nature and subject-matter of the specific litigation at issue, the parties named in the litigation, the timing of the litigation, and the Commission's budget. Each instance must be evaluated by the Commission on a case-by-case basis pursuant to the relevant facts of the situation.

¹ See also section [2-15-503](#), MCA.