



A REPORT  
TO THE  
MONTANA  
LEGISLATURE

PERFORMANCE AUDIT

*Improving Statewide  
Consistency of Key  
Processes for the Office of  
the State Public Defender*

*Public Defender Commission  
Office of the State Public Defender*

MAY 2012

LEGISLATIVE AUDIT  
DIVISION

11P-03

**LEGISLATIVE AUDIT  
COMMITTEE**

**REPRESENTATIVES**

RANDY BRODEHL  
[brodehl@centurytel.net](mailto:brodehl@centurytel.net)

TOM BURNETT  
[Tburnetthd63@hotmail.com](mailto:Tburnetthd63@hotmail.com)

VIRGINIA COURT  
[virginiacourt@yahoo.com](mailto:virginiacourt@yahoo.com)

MARY McNALLY  
[mcnallyhd49@gmail.com](mailto:mcnallyhd49@gmail.com)

TRUDI SCHMIDT  
[trudischmidt@q.com](mailto:trudischmidt@q.com)

WAYNE STAHL, VICE CHAIR  
[wstahl@nemontel.net](mailto:wstahl@nemontel.net)

**SENATORS**

DEBBY BARRETT  
[grt3177@smtel.com](mailto:grt3177@smtel.com)

GARY BRANAE  
[garybranae@gmail.com](mailto:garybranae@gmail.com)

TAYLOR BROWN  
[taylor@northernbroadcasting.com](mailto:taylor@northernbroadcasting.com)

CLIFF LARSEN  
[cliff@larsenusa.com](mailto:cliff@larsenusa.com)

FREDRICK (ERIC) MOORE  
[mail@SenatorEricMoore.com](mailto:mail@SenatorEricMoore.com)

MITCH TROPILA, CHAIR  
[tropila@mt.net](mailto:tropila@mt.net)

MEMBERS SERVE UNTIL A  
MEMBER'S LEGISLATIVE TERM  
OF OFFICE ENDS OR UNTIL A  
SUCCESSOR IS APPOINTED,  
WHICHEVER OCCURS FIRST.

§5-13-202(2), MCA

FRAUD HOTLINE  
(STATEWIDE)  
1-800-222-4446  
(IN HELENA)  
444-4446

**PERFORMANCE AUDITS**

Performance audits conducted by the Legislative Audit Division are designed to assess state government operations. From the audit work, a determination is made as to whether agencies and programs are accomplishing their purposes, and whether they can do so with greater efficiency and economy.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Members of the performance audit staff hold degrees in disciplines appropriate to the audit process.

Performance audits are performed at the request of the Legislative Audit Committee which is a bicameral and bipartisan standing committee of the Montana Legislature. The committee consists of six members of the Senate and six members of the House of Representatives.

---

**AUDIT STAFF**

---

MEGAN C. COY  
WILLIAM SOLLER

LAURA SANKEY

---

Reports can be found in electronic format at:  
<http://leg.mt.gov/audit>

# LEGISLATIVE AUDIT DIVISION

Tori Hunthausen, Legislative Auditor  
Deborah F. Butler, Legal Counsel



Deputy Legislative Auditors  
Cindy Jorgenson  
Angie Grove

May 2012

The Legislative Audit Committee  
of the Montana State Legislature:

This is our performance audit of the Office of the State Public Defender. This report presents audit findings and includes recommendations for complying with state laws, improving indigency determinations and contracts for attorney services, and improving management controls over program activities. A written response from the Public Defender Commission and the Office of the State Public Defender is included at the end of the report.

We wish to express our appreciation to the Public Defender Commission and Office of the State Public Defender officials and staff for their cooperation and assistance throughout the audit.

Respectfully submitted,

*/s/ Tori Hunthausen*

Tori Hunthausen, CPA  
Legislative Auditor



## TABLE OF CONTENTS

|  |           |
|--|-----------|
| Figures and Tables.....  | ii        |
| Appointed and Administrative Officials .....   | iii       |
| Report Summary .....   | S-1       |
| <b>CHAPTER I—INTRODUCTION.....</b>   | <b>1</b>  |
| Introduction.....  | 1         |
| Background.....  | 1         |
| Agency Structure .....   | 1         |
| Use of Contract Attorneys.....   | 2         |
| Indigency Determination.....   | 3         |
| Audit Objectives.....  | 3         |
| Audit Scope and Methodologies .....  | 3         |
| Report Contents.....   | 4         |
| <b>CHAPTER II – STRENGTHENING CONTRACT MANAGEMENT.....</b>                             | <b>5</b>  |
| Introduction.....  | 5         |
| The Contracting Process.....   | 5         |
| Existence of Flat-Fee Contracts Does Not Comply With Statute .....                     | 7         |
| Contracting for Attorney Services Should Be Competitive.....                           | 8         |
| Documented Compliance With the Memorandum of Understanding Should Be Improved ...      | 9         |
| Noncompliance With the MOU Results in Risk to OPD .....                                | 10        |
| Regular Evaluation of Contract Attorneys Is Required.....                              | 11        |
| Process for Taking Remedial Action Is Not Defined .....                                | 12        |
| Other States Have Formalized Procedures for Handling Poor Performance.....             | 12        |
| Summary .....  | 13        |
| <b>CHAPTER III—IMPROVING COMPLIANCE OF INDIGENCY DETERMINATIONS.....</b>               | <b>15</b> |
| Introduction.....  | 15        |
| The Indigency Determination Process.....   | 15        |
| Regional Deputy Public Defenders Are Involved in Determination of Indigence.....       | 16        |
| The Indigency Determination Process Must Be Fair and Consistent .....                  | 17        |
| Level of Client-Reported Information Varies .....                                      | 17        |
| Verification of Client-Reported Financial Information Is Undefined and Limited.....    | 19        |
| Other States Verify Client Financial Information .....                                 | 19        |
| Coordination With Other Agencies for Verification Purposes.....                        | 20        |
| Automatic Qualification: An Option?.....   | 20        |
| Handling of “Repeat” Clients Is Inconsistent.....                                      | 21        |
| Central Oversight and Training Needed to Improve Indigency Determination Process ..... | 21        |
| <b>CHAPTER IV—ASSURING STATEWIDE CONSISTENCY.....</b>                                  | <b>23</b> |
| Introduction.....  | 23        |
| Defined Expectations and Oversight Could Strengthen Consistency.....                   | 23        |
| Management Information Vital for Monitoring Agency Activities .....                    | 24        |
| Currently, Management Information Is Limited .....                                     | 24        |
| Management Information Is Important for Demonstrating Compliance .....                 | 24        |
| <b>OFFICE RESPONSE</b>   |           |
| Public Defender Commission .....   | A-1       |
| Office of the State Public Defender .....  | A-2       |

# FIGURES AND TABLES

## Figures

Figure 1 Office of the State Public Defender Regional Overview ..... 2

Figure 2 Availability of Contract Attorneys by Region..... 6

Figure 3 Contractor Performance Evaluation Documentation..... 11

Figure 4 Limitations Noted in Indigency Determination Documentation Within our Sample..... 18

## Tables

Table 1 OPD Staff and Case Numbers, by Region..... 1

Table 2 Statutory Requirements for Contracted Attorney Services..... 8

## APPOINTED AND ADMINISTRATIVE OFFICIALS

|  |   |
|--|---|
| <b>Public Defender Commission</b>          | Richard “Fritz” Gillespie, Chair  |
|  | Kenneth R. Olson, Vice-Chair  |
|  | Alfred F. Avignone  |
|  | Christopher Daem  |
|  | Caroline Fleming  |
|  | Margaret Novak  |
|  | Charles Petaja  |
|  | Majel Russell   |
|  | Ann Sherwood  |
|  | William F. Snell Jr.  |
|  | Vacant  |
|  |   |
| <b>Office of the State Public Defender</b> | Randi Hood, Chief Public Defender (through October, 2011)                               |
|  | Dave Stenerson, Interim Chief Public Defender<br>(October, 2011 through February, 2012) |
|  | William F. Hooks, Chief Public Defender (effective March, 2012)                         |
|  | Harry Freebourn, Administrative Director  |
|  | Larry Murphy, Contract Manager  |






 MONTANA LEGISLATIVE AUDIT DIVISION

## PERFORMANCE AUDIT

# Improving Statewide Consistency of Key Processes for the Office of the State Public Defender

MAY 2012

11P-03

REPORT SUMMARY

The Office of the State Public Defender should strengthen both its attorney contracting and indigency determination processes to improve the consistency of its activities and ensure compliance with statutory requirements.

## Context

The Sixth Amendment to the United States Constitution and Article II, §24 of the Montana Constitution provide that a person accused of a crime has the right to assistance of counsel for his defense. The right extends to those individuals who cannot afford to provide their own counsel and so may be entitled to an attorney provided at the public's expense. The 2005 Legislature enacted Title 47 of the Montana Code Annotated, also known as the "Montana Public Defender Act," to create a statewide system to provide public defender services for eligible clients, beginning July 1, 2006.

The Public Defender Commission, composed of eleven members appointed by the governor, directs and oversees the statewide public defender system, which includes the Office of the State Public Defender (OPD). OPD, which is administratively attached to the Department of Administration, was appropriated approximately \$42 million for the 2013 biennium. In total, the agency has 199.5 FTE for fiscal year 2012. The agency's staff, along with contracted attorneys, is responsible for handling the more than 27,500 new cases to which the agency is appointed each year.

Our audit focused on two main topics: contracting for attorney services and determination of client eligibility.

In addition to staff, OPD uses contracted attorneys to provide public defender services. The agency has approximately 200 attorneys in its contract attorney pool. The number of available contractors varies by region and in two regions, contract attorneys handle nearly all cases that come to OPD. In some instances, contractors take cases in multiple counties. In fiscal year 2011, the agency assigned approximately 26 percent of its new cases to contract attorneys and paid contractors over \$5 million.

Per §§46-8-101 and 47-1-111, MCA, OPD is responsible for determining client eligibility for services upon appointment to a case by the court. OPD uses two methods, which are defined in statute, to determine if an individual is indigent, thus meeting the criteria to receive public defender services. The first method is an income test; the second method is a hardship test. Statute requires the process for determining client eligibility be fair and consistent statewide.

Our audit sought to determine if there are controls in place within the agency over contracting and determination of client indigence.

*(continued on back)*

## Results

As a result of this audit, we determined the agency's management has not clearly defined agency-wide expectations for many of its activities related to contract management and determination of client indigency. For those expectations which have been formalized, the agency does not monitor regional compliance. This has led to inconsistencies within the public defender system.

During our review, we noted inconsistencies related to:

- ◆ Monitoring of contractor caseloads.
- ◆ Tracking of contractor compliance with continuing legal education requirements.
- ◆ Evaluation of contractor performance.
- ◆ Frequency and methods for verifying client-reported financial information.
- ◆ Determination of indigence of "repeat" clients.
- ◆ Agency oversight of the indigency determination process.

To address these concerns and others, we make nine recommendations to the agency to improve operations related to contract management and the determination of client eligibility for services.

| Recommendation Concurrence                                     |   |
|--|---|
| Concur   | 7 |
| Partially Concur   | 2 |
| Do Not Concur  | 0 |
| <b>Source: Agency audit response included in final report.</b> |   |

For a complete copy of the report (11P-03) or for further information, contact the Legislative Audit Division at 406-444-3122; e-mail to [lad@mt.gov](mailto:lad@mt.gov); or check the web site at <http://leg.mt.gov/audit>  
Report Fraud, Waste, and Abuse to the Legislative Auditor's FRAUD HOTLINE  
Call toll-free 1-800-222-4446, or e-mail [lad@mt.gov](mailto:lad@mt.gov).

# Chapter I—Introduction

## Introduction

The Sixth Amendment to the United States Constitution provides that a person accused of a crime has the right to assistance of counsel for his defense. The right extends to those individuals who cannot afford to provide their own counsel and so may be entitled to an attorney provided at the public's expense. The 2005 Legislature enacted Title 47 of the Montana Code Annotated, also known as the "Montana Public Defender Act" to create a statewide system to provide public defender services for eligible clients, beginning July 1, 2006. The Legislative Audit Committee identified a performance audit of the public defender system as a priority.

## Background

The primary mission of the statewide public defender system is to provide effective assistance of counsel to indigent persons, or those with limited income, accused of a crime or involved in civil cases who may be entitled to legal counsel at public expense. The Public Defender Commission (PDC) directs and oversees the statewide public defender system, which includes the Office of the State Public Defender (OPD) and the Office of the Appellate Defender. As required by §47-1-105(2), MCA, the PDC has developed statewide standards which detail the qualification and training of attorneys

who provide public defender services for the purpose of ensuring services are provided by competent counsel in a manner which is fair and consistent statewide. The PDC consists of eleven members, appointed by the governor, who serve staggered three-year terms. In turn, the PDC appoints a Chief Public Defender to manage the day-to-day operations of OPD.

## **Agency Structure**

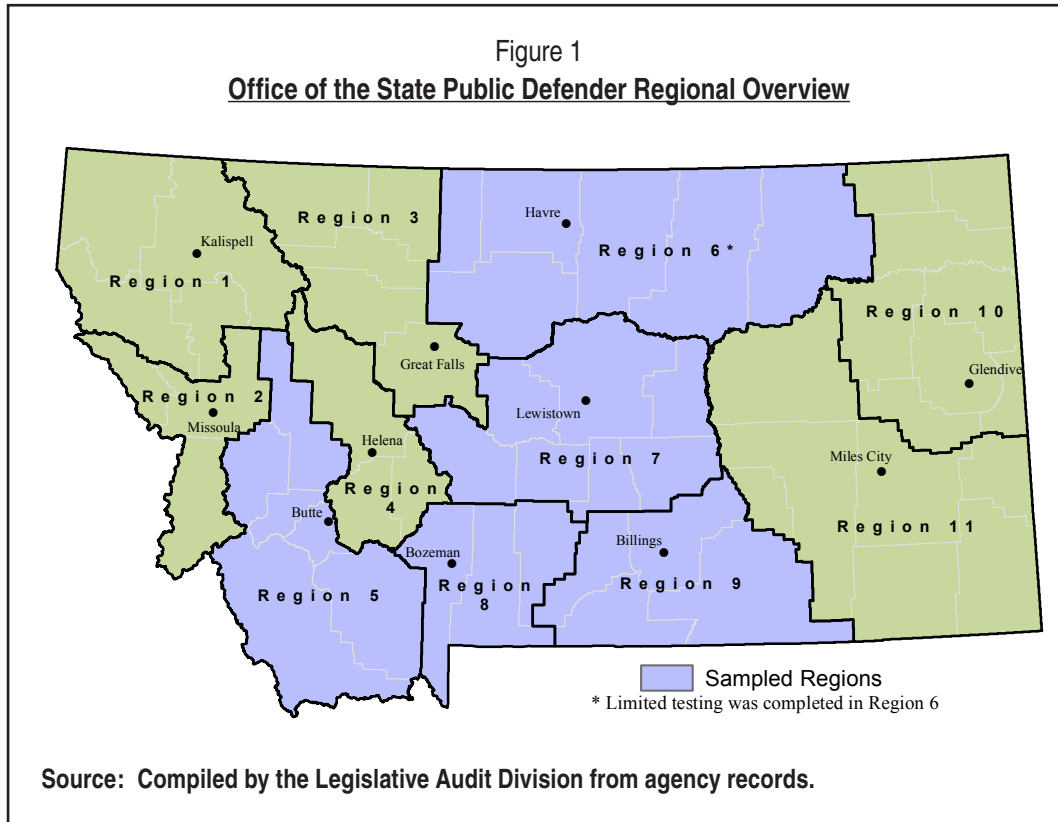
For the 2013 biennium, the Legislature appropriated approximately \$21 million for each year to OPD. The agency is administratively attached to the Department of Administration and has 199.5 FTE for fiscal year 2012. The agency's staff, along with contractors, is responsible for handling the more than 27,500 new cases each year. Staff are divided between a central office and eleven regional offices, all directed by the Chief Public Defender. Each regional office is supervised by a Regional Deputy Public Defender.

Table 1  
**OPD Staff and Case Numbers, by Region**

| Region | FTE   | New Cases Opened (FY11) |
|--------|-------|-------------------------|
| 1      | 27.5  | 4,361                   |
| 2      | 35.5  | 4,831                   |
| 3      | 21    | 3,116                   |
| 4      | 16    | 2,644                   |
| 5      | 14.5  | 1,573                   |
| 6      | 4     | 774                     |
| 7      | 3.5   | 520                     |
| 8      | 18    | 2,251                   |
| 9      | 32.75 | 6,568                   |
| 10     | 5     | 517                     |
| 11     | 4     | 509                     |

Source: Compiled by the Legislative Audit Division from agency records.

The table on the previous page shows the regional distribution of staff and the number of new cases opened in fiscal year 2011. In addition, the following figure illustrates the agency's geographic regions and shows the regions reviewed during the course of this audit.



## Use of Contract Attorneys

In addition to staff, OPD uses contracted attorneys to provide public defender services. The agency has approximately 200 attorneys in its contract attorney pool, who are available to take public defender cases as needed. The number of available contract attorneys varies by region and in two regions, contract attorneys handle nearly all cases that come to OPD. In some instances, contractors handle cases in multiple counties. These attorneys are assigned cases when there are limited staff resources available to handle a case or when doing so would present a conflict of interest to the agency. In fiscal year 2011, the agency assigned approximately 26 percent of its new cases to contract attorneys and paid contract attorneys over \$5 million. Further information regarding the agency's contracting process is provided in Chapter II of this report.

## **Indigency Determination**

Per §§46-8-101 and 47-1-111, MCA, OPD is responsible for determining client eligibility for services upon appointment to a case by the court. OPD uses two methods, which are defined in statute, to determine if an individual is indigent, thus meeting the criteria to receive public defender services. The first method is an income test, which requires the individual's gross household income to be at or below 133 percent of the federal poverty level. The second method is a hardship test. The hardship test requires the disposable income and assets of the individual and the members of their household to be insufficient to retain competent private counsel without substantial hardship to the individual or their household. Statute requires the process for determining client eligibility be fair and consistent statewide. Details regarding the process for determining indigence are provided in Chapter III.

We note that throughout this report, we use the terms "eligibility determination" and "indigency determination" interchangeably.

## **Audit Objectives**

The objectives of this audit were to:

- ◆ Determine if the public defender system has a contract management control structure which ensures compliance with existing laws and policies.
- ◆ Assess whether client eligibility for services is determined fairly and consistently throughout the state as required by state law.

## **Audit Scope and Methodologies**

Audit scope focused on the agency's management of contracts for attorney services and the process for determining client indigence. We examined the activities of OPD and the PDC related to these two topics. Generally, we reviewed only those activities occurring during fiscal year 2011.

To address our audit objectives, we completed the following methodologies:

- ◆ Reviewed applicable laws and administrative rules regarding indigency determinations and contract attorney services.
- ◆ Reviewed OPD and PDC standards, policies, procedures, and forms.
- ◆ Identified criteria from other Montana agencies regarding policies and procedures for contracting for attorney services and determining income-based eligibility for services.
- ◆ Reviewed agency files for a sample of contract attorney files and eligibility determinations located in the central office and in four regional offices.

- ◆ Interviewed central and regional OPD staff and reviewed the agency's procedures and tools for managing indigency determinations and contracting for attorney services.
- ◆ Interviewed agency stakeholders regarding the agency's indigency determinations and use of contract attorneys.
- ◆ Obtained and reviewed information for similar programs in other states and the federal government.
- ◆ Obtained and reviewed literature and other guidance from professional defender organizations regarding best practices for contract management and indigency determinations.

## **Report Contents**

The remainder of this report includes three chapters detailing our findings, conclusions, and recommendations in the following areas:

- ◆ Chapter II addresses the agency's management of attorney contracts
- ◆ Chapter III discusses the agency's indigency determination process
- ◆ Chapter IV presents information regarding how the agency can strengthen oversight of program activities

## Chapter II – Strengthening Contract Management

### **Introduction**

During fiscal year 2011, the Office of the State Public Defender (OPD) assigned 7,276 cases, or 26 percent of its total cases, to contract attorneys. For the same year, the agency paid nearly \$5.3 million to contract attorneys. As part of our audit of OPD, one of our objectives was to determine if there is a contract management structure in place which ensures compliance with existing laws and policies. Based on audit work, we identified areas where OPD can enhance its management of contracts for attorney services. Audit findings and recommendations related to the following areas are discussed in this chapter:

- ◆ Flat-fee contracts
- ◆ The competitive contracting process
- ◆ The Memorandum of Understanding between OPD and contractors
- ◆ Performance evaluation of contract attorneys

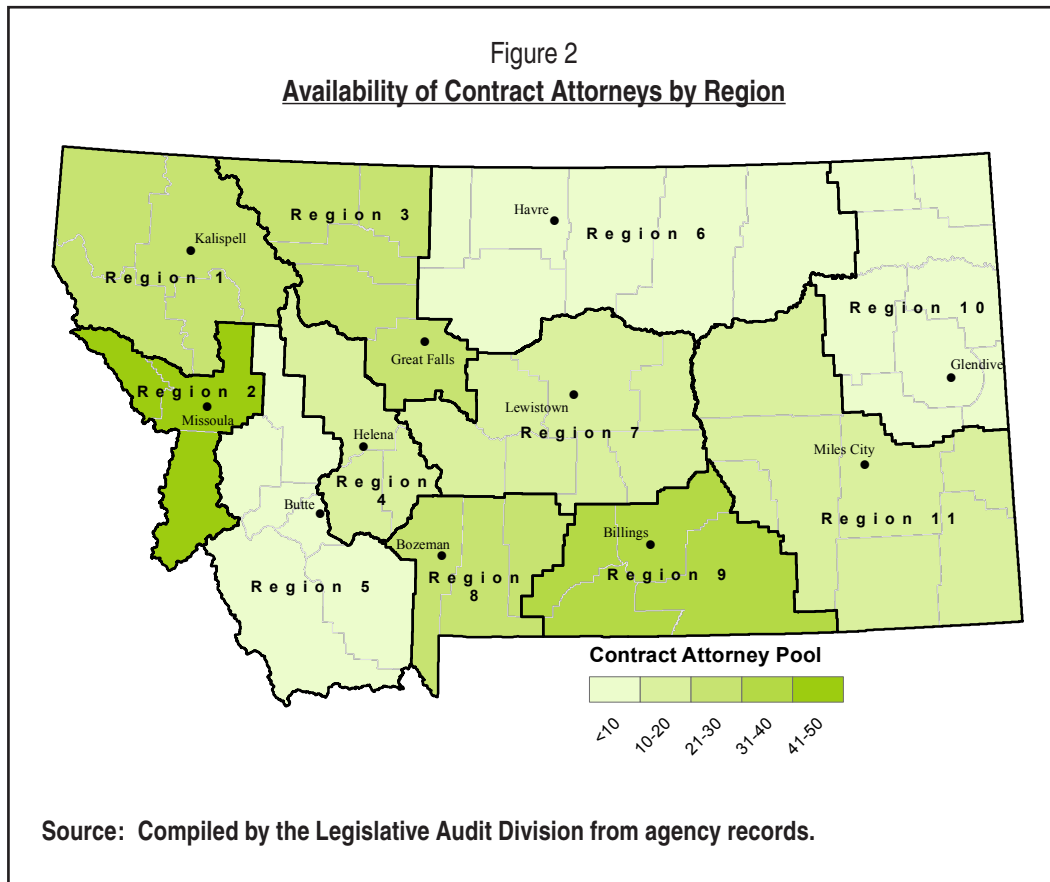
### **The Contracting Process**

The concept of contract management in the public defender system encompasses a wide variety of activities which can be categorized into two component parts—procurement and contract monitoring. Procurement involves activities associated with identifying the need for a contract, securing appropriate contractors, and entering into formal contract agreements. Contract monitoring is the process by which the agency ensures the parties meet the requirements of the contract in a satisfactory manner. Key contract monitoring activities include assignment of cases; evaluation of contractor performance to determine if continued contracting is appropriate and assess experience and skill level for the purpose of assigning more complex cases and processing of contract-related invoices and payments. Contracting in the public defender system is exempt from the Montana Procurement Act, as provided in §47-1-216, MCA. However, §47-1-216, MCA, requires that contracting for public defender services be done through a competitive process.

The agency's contract document is a Memorandum of Understanding (MOU), which outlines the contract conditions and oversight of contractors by OPD according to standards and policies. The agency instituted the current MOU on July 1, 2010. The MOU is effective for a term of two years. In order to secure an MOU with the agency, an attorney must first submit a Summary of Experience and Education form (Summary). This document is available on the agency's website and requests information about

the attorney's legal education, bar admission, legal experience, areas of expertise, and references. In addition, the attorney must certify the types of cases for which they are qualified.

The Summary is reviewed by OPD's Contract Manager. Based on this review, an MOU may be sent to the attorney. The attorney must fill out the MOU, sign it, and return it to OPD. By signing the document, the attorney states they agree to the terms of the agreement and will abide by OPD's billing requirements. The MOU also states that OPD has no obligation to assign cases to the contractor and the contractor is under no obligation to accept the cases offered. However, should the contractor accept a case from OPD, they are required to provide counsel to the client that complies with Public Defender Commission (PDC) standards and OPD policies. As part of the MOU, the contractor indicates the counties in which they are willing to take cases. The following figure shows the distribution of contract attorneys throughout the state.



Once the MOU is formalized, the Contract Manager provides information about the contractor to the Regional Deputy Public Defenders (RDPDs), who are responsible for case assignment.



## **Existence of Flat-Fee Contracts Does Not Comply With Statute**

According to §47-1-216(4), MCA, OPD may not award contracts which “provide compensation to contractors based solely on a fixed fee paid irrespective of the number of cases assigned.” During our review of OPD contracts, we identified four attorneys with whom OPD has entered into flat-fee contracts. In general, these contracts are for work performed in specialty courts, such as drug or family courts, or for the representation of guardians ad item by contract attorneys and OPD pays the attorneys regardless of the number of cases or clients assigned or the hours worked. The value of these contracts varies:

- ◆ Two attorneys are paid \$350 per day for two days per month.
- ◆ One attorney is paid \$2,000 per month.
- ◆ One attorney is paid \$1,250 per month, with the caveat that no more than \$60 per hour is paid.

Not only do these contracts represent noncompliance with state law, the agreements also create inequalities in the pay structure for contract attorneys. On one hand, the agency may be paying these contractors a rate which is higher than the \$60 per hour paid to those contractors working on an hourly basis. As a result, an attorney with a flat-fee contract may have an incentive to spend less time on the representation of clients because they are guaranteed a certain amount by the contract. On the other hand, we found instances where contractors had worked so many hours on cases that their effective hourly rate is less than the \$60 per hour earned by other contractors. For example, for the attorneys paid \$350 per day, if they spend a full day working on cases associated with a specialty court, their hourly rate is \$43.75.

According to OPD staff, some of their flat-fee contracts existed prior to the establishment of the statewide public defender system. OPD assumed some of the existing agreements when the local agencies merged into the state system, even though these contracts violate statute, because of local judicial preferences. Other agreements were reached as a means for lowering costs. In one instance, a contract attorney who was being compensated on an hourly rate switched to a flat-fee contract in order to save OPD \$4,000 per year. Statute clearly prohibits the agency from entering into flat-fee contracts; OPD’s practice of entering into these contracts represents noncompliance with state law.

**RECOMMENDATION #1**

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute by compensating all contract attorneys on an hourly basis.*

## **Contracting for Attorney Services Should Be Competitive**

According to the laws governing the public defender system, OPD must procure contracted attorney services using a competitive process which involves a number of considerations. These are described in the table below.

| Table 2<br><b><u>Statutory Requirements for Contracted Attorney Services</u></b>   |  |
|--|--|
|  |  |
| Attorney qualifications necessary to provide effective assistance of counsel that meets the standards established by the Commission.   |  |
| Attorney qualifications necessary to provide effective assistance of counsel that meets the Montana Supreme Court's standards for counsel for indigent persons in capital cases. |  |
| Attorney access to support services, such as paralegal and investigator services.  |  |
| Attorney caseload, including the amount of private practice engaged in outside the contract.   |  |
| Reporting protocols and caseload monitoring processes.   |  |
| Process for the supervision and evaluation of performance.   |  |
| Process for conflict resolution.   |  |
| Continuing education requirements in accordance with standards set by the Commission.  |  |
| <b>Source: Compiled by the Legislative Audit Division from §47-1-216(5), MCA.</b>  |  |

Both the PDC and OPD have established standards and policies designed to address some of the statutorily required considerations. The PDC's standards describe the qualifications necessary for a contract attorney to provide effective assistance of counsel, while OPD has developed policies which address the assessment of contractor proficiency, responsibilities for consideration of attorney caseload, and the process for entering into a contract. While these standards are defined to ensure the contracting process for attorney services is competitive, OPD does not have controls in place to assure they are consistently followed.

During the course of this audit, we looked at OPD's contracts with 32 attorneys for the provision of public defender services and identified inconsistencies. Specifically, we found:

- ◆ OPD caseloads of contractors are tracked to different extents in each region—some regions use the agency's internal case-weighting procedure to determine the case weight for contractor workloads while others do not appear to track caseloads at all.
- ◆ Thirty-four percent of contractors in our sample had either not provided information about their conflict-checking system or had no system.
- ◆ Thirty-four percent of contractors in our sample had not submitted affidavits regarding their continuing legal education; of those that had, none met all of the requirements set forth in the PDC standards.

Because OPD is not ensuring it complies with standards and policies in these key areas, it is not ensuring the process for contracting with attorneys is competitive, as required by statute. Without the competitive process, OPD cannot demonstrate its contract attorneys are qualified, competent, and are able to provide effective assistance of counsel. OPD staff report that limitations on the number of attorneys willing to contract with the agency, especially in rural areas, inhibit their ability to enforce a competitive process. However, because statute requires the process of contracting for attorney services be competitive, OPD should take steps to comply with law.

---

**RECOMMENDATION #2**

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute related to the competitive process.*

---

**Documented Compliance With the Memorandum of Understanding Should Be Improved**

In order to finalize the agreement between OPD and a contract attorney regarding the provision of public defender services, an MOU is issued for a specific timeframe. The current MOU took effect on July 1, 2010, and remains in force for a period of two years. The terms of the MOU cover such topics as the types of cases for which the attorney is qualified; the courts in which the attorney will work; the compensation schedule; contact with the agency; and Workers' Compensation and professional liability insurance requirements. During our audit, we found OPD does not ensure both they and the contractors comply with conditions of the MOU. Specific examples from our sample include:

- ◆ For three percent of MOUs the attorney had not initialed the policy acknowledgement/agreement section.
- ◆ For 78 percent of MOUs OPD had not completed the “OPD Use” section signifying receipt of all required documents and notification of regional staff.
- ◆ Forty-five percent of attorney Summaries had no indication that OPD staff reviewed the contractors’ qualifications.
- ◆ None of the files reviewed contained documentation that OPD verified the contractor possessed either Worker’s Compensation or professional liability insurance.

Additionally, while the MOU defines the effective timeframe of the agreement, OPD enforces the term in a manner inconsistent with the MOU language. According to staff, the MOU preceding the current agreement terminated on June 30, 2010. However, we found instances in which attorneys, who had agreements under the previous MOU but not the current MOU, were paid for work completed during the current MOU period. OPD staff reported this happens when an attorney is assigned to represent a child in an abuse or neglect case. If the case begins when the client is an infant and continues until the child reaches eighteen years of age, then the attorney could serve as counsel in the case for eighteen years. Further, the attorney could continue to submit invoices to OPD for work on the case even if the MOU under which the case was assigned has expired and there is no new agreement.

### **Noncompliance With the MOU Results in Risk to OPD**

As discussed previously, OPD staff state they have struggled with signing up and retaining contract attorneys due to limitations on the availability of attorneys willing to take public defender cases. It was reported that contract attorneys have resisted providing information or documentation to the agency and OPD does not believe it can make additional demands on contractors without jeopardizing the MOUs currently in place. However, these requirements are not above and beyond required professional standards for attorneys. The MOU provides a level of control over the attorney contracting process and provides protection to the agency. Failure to enforce the MOU weakens those controls.

---

#### **RECOMMENDATION #3**

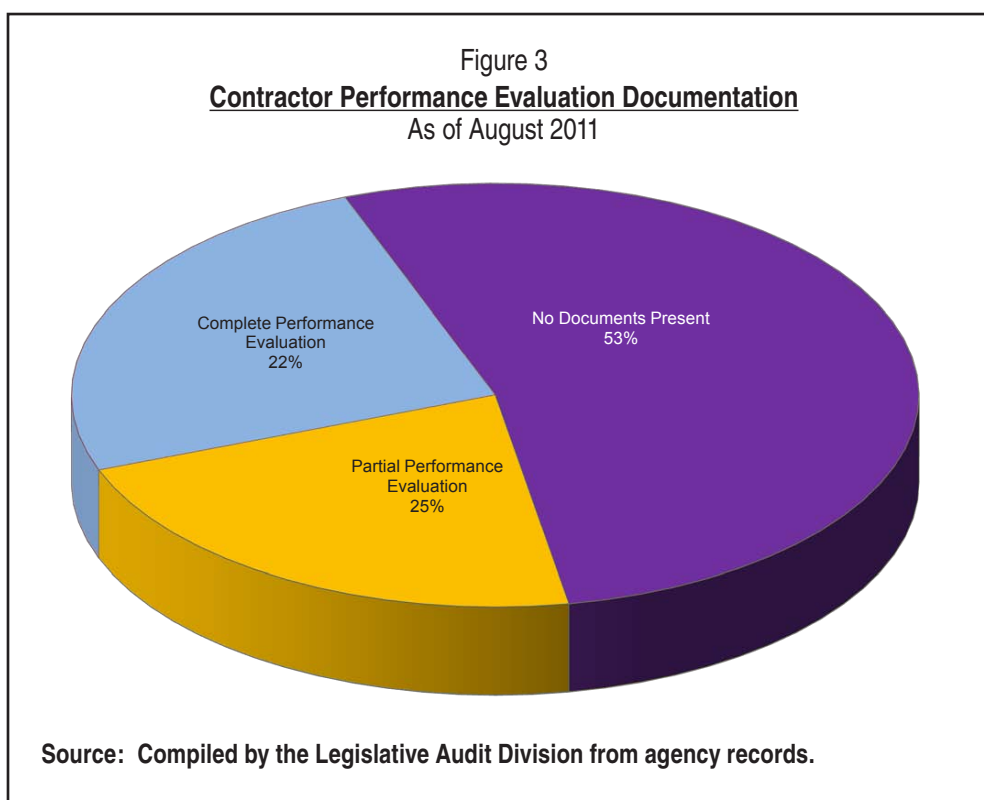
*We recommend the Public Defender Commission and the Office of the State Public Defender ensure both the agency and contractors comply with the provisions of the Memorandum of Understanding.*

---

## Regular Evaluation of Contract Attorneys Is Required

The Montana Public Defender Act requires public defender services be provided by qualified and competent counsel. The Act further requires regular performance evaluations of contract attorneys. OPD's internal policy specifies the agency should perform annual proficiency determinations for each contract attorney. Additionally, OPD staff review specific cases handled by contractors to measure compliance with the PDC standards. According to agency staff, a performance evaluation is considered complete if both the proficiency determination and standards compliance review have been done.

During the course of this audit, we reviewed the evaluation documentation for the 32 contract attorneys in our sample. We found that since its inception in 2006, OPD has not consistently evaluated the performance of its contract attorneys as required by statute, PDC standards, and internal policy. The figure below illustrates the number of complete evaluations we found during our review.



Responsibility for the performance evaluation process is spread throughout the agency. RDPDs are required to complete a portion of the proficiency determination for the contract attorneys working in their region, while the agency's Contract Manager completes the remainder of the determination and the standards compliance review. During our review, we found the central office (OPD Central) faces resistance in

enforcing agency-wide expectations. OPD Central directed regional staff to complete the initial portion of the proficiency determination for each contract attorney in fall, 2010. As of fall, 2011, OPD Central had received less than half of the determinations from the regions.

## **Process for Taking Remedial Action Is Not Defined**

As part of our review of the agency's evaluation of contract attorney performance, we also looked at OPD's follow-up on the evaluations. During the audit, we found completed standards compliance reviews for eleven contractors. Of these, five contained recommendations for improvement or training suggestions. We found no documentation the contract attorney completed the suggested training or that OPD staff followed up with the recommendations.

Additionally, we noted limited guidance available to staff regarding remedial action taken against contract attorneys based on their performance. Current OPD policy does not address:

- ◆ The types of performance issues which warrant remedial action.
- ◆ The process for investigating allegations of behavior warranting remedial action.
- ◆ Appropriate types of remedial action.
- ◆ How poor performance, agency investigation, remedial action taken, and staff follow-up should be documented.
- ◆ When and how MOU agreements should be terminated.

## **Other States Have Formalized Procedures for Handling Poor Performance**

Other states who also have statewide public defender systems have formal guidance in place which addresses the handling of poor performance by contract attorneys. In Wisconsin, administrative rule defines the circumstances under which a contractor may be suspended or terminated from working as a public defender. Additionally, the factors which may be considered by the state public defender in determining if suspension of a contractor is appropriate are outlined and include:

- ◆ Whether the attorney has met the agency's education and performance standards,
- ◆ If inaccurate billing invoices are submitted, and
- ◆ If complaints about the attorney's performance were received from private law offices or other government agencies.

Per rule, the term of the suspension may not exceed 120 days, unless an extension is necessary for the public defender agency to complete its investigation of the contractor's actions. Upon a finding of cause, the state public defender may terminate the contractor's work as a public defender.

In New Mexico, the process for termination of an attorney contract is laid out in the Public Defender Department's Request for Proposal (RFP), used to solicit attorney services. The RFP also outlines the agency's performance standards. In the event the contractor fails to obtain the results required by the agency, they may be provided written notice of the default which specifies a period of time in which the contractor shall advise the agency of specific steps to be taken to achieve these results in the future and the timetable for implementation. Further, the agency may require the contractor to:

- ◆ Attend specific training seminars,
- ◆ Establish and maintain a mentor relationship,
- ◆ Submit certain files for case review or audit,
- ◆ Respond to client complaints filed with the agency,
- ◆ Submit detailed time records and case activity on all cases for review, or
- ◆ Complete any other practices or activities that the agency deems necessary and appropriate to insure quality representation.

Refusal to comply with the agency's requirements or to cooperate and respond in a timely manner to the agency's efforts to enforce the contract mandates may result in a removal from the case rotation or termination of the contract.

## **Summary**

The absence of formalized policies and procedures can have substantial effects on an organization. During the course of this audit, we found the agency cannot demonstrate remedial action taken against contract attorneys is consistent across the regions. In some instances, contracts are formally terminated based on attorney performance; in others, RDPDs simply stop offering cases to the contractor in question. OPD has provided no formal guidance regarding remedial action or contract termination. Because of this, each RDPD is left to develop their own strategies, leading to inconsistent practices.

---

**RECOMMENDATION #4**

*We recommend the Public Defender Commission and the Office of the State Public Defender:*

- A. *Comply with statute, standards, and policies regarding performance evaluation of contract attorneys.*
  - B. *Implement policy and procedures defining the process for taking remedial action and contract termination.*
-



# Chapter III—Improving Compliance of Indigency Determinations

## **Introduction**

As discussed previously, statute defines the criteria by which individuals seeking public defender services are eligible and states a client is indigent if they meet one of two tests. Using the income test, a client is indigent if their gross household income, as defined in §15-30-2337, MCA, is at or less than 133 percent of the most current federal poverty guidelines. Under the hardship test, a client is indigent if the disposable income and assets of the applicant and their household are insufficient to retain competent private counsel without substantial hardship to the applicant or their household. Responsibility for determining indigence, and thus eligibility for services, falls to the Office of the State Public Defender (OPD). Our second objective in auditing OPD focused on examining the agency's methods for determining client eligibility for services. Based on our audit work, we identified areas where the agency can improve the indigency determination process to improve consistency and comply with state law. Audit findings and recommendations relate to the following areas:

- ◆ Involvement of the Regional Deputy Public Defenders (RDPDs) in the process
- ◆ Overall fairness and consistency of the process

## **The Indigency Determination Process**

OPD completed approximately 23,000 indigency determinations in fiscal year 2011. During the course of this audit, we reviewed the documentation associated with indigency determinations made in four regions—Region 5 (Butte), Region 7 (Lewistown), Region 8 (Bozeman), and Region 9 (Billings). We selected a random sample of indigency determinations made in each region, reviewed all documentation associated with each determination, and interviewed region staff. In total, we reviewed 262 indigency determinations.

The indigency determination process is handled on a regional basis and generally begins with court appointment of OPD to provide counsel to an indigent individual involved in a criminal or specific type of civil case. Notice of the appointment is provided by the court to OPD's regional offices. Per statute, once OPD receives notice of its appointment in a case, an attorney is assigned to the client prior to a determination of eligibility for services. The client is then required by statute to complete an application for services, provide a financial statement, and sign an affidavit in which they attest to the accuracy of the information provided. The application and financial statement request information about the client's income sources and level, monthly expenses, and

assets. In addition, the application notifies the client that OPD may request supporting documents such as pay stubs, tax returns, and retirement statements for verification purposes.

The information provided by the client is reviewed by the region's designated Indigency Determination Specialist (IDS). The IDS determines if the client meets the requirement of indigency using the two tests described previously. If the client qualifies for services, OPD's representation of the client continues. If the client does not qualify for public defender services, written notice of their ineligibility is sent to them. Additionally, the court is notified and a motion to rescind OPD's appointment in the case is submitted. If the court agrees with OPD's determination, the appointment is rescinded and the client must secure private counsel. In the event the court does not agree with OPD's determination, the judge may require OPD to continue providing services to the client. OPD reported in ten of the eleven regions that there were 1,144 denials. In these regions, the court overruled 56 denials and OPD provided public defender services to these clients at a total cost of \$22,399.

## **Regional Deputy Public Defenders Are Involved in Determination of Indigence**

While agency policy designates responsibility for making determinations of eligibility to IDSs, it also requires RDPDs to make the final ruling in instances where a client's eligibility is questionable. This policy directly conflicts with statute. Section 47-1-111(6)(e), MCA, requires the PDC to establish procedures and rules which "prohibit individual public defenders from performing eligibility screening pursuant to this section." Section 47-1-103(5), MCA, defines a "public defender" as an attorney employed by or under contract with OPD and assigned to provide legal counsel to a person under the provisions of the Montana Public Defender Act. Because RDPDs maintain caseloads, they meet the definition of individual public defenders.

In all of the regions we reviewed, the RDPD was involved in the indigency determination process in some manner. In most regions, the RDPD served as a resource for the IDSs if they had questions. In one region, if the IDSs thought the client was ineligible, the RDPD reviewed the application and issued the final decision. The reason given by staff for this was that the decision to deny an individual public defender services is an important one which must be defended in court by the RDPD. In our review of indigency determinations in that region, we identified nine cases in our sample in which the final determination was made by the RDPD.

While RDPD involvement in the indigency determination process aligns with OPD policy, it is a violation of statute. Because OPD provides no central oversight of the

indigency determination process, the agency did not recognize it was not complying with law. In addition to noncompliance, RDPD involvement in determining client eligibility poses other risks to the agency. For example, there is increased risk of a conflict of interest or the appearance of a conflict of interest because decisions about client eligibility affect attorney caseloads. This not only has the potential to hinder their ability to provide effective assistance of counsel, but also may impact public perceptions about the agency.

---

**RECOMMENDATION #5**

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute and ensure individual public defenders are not involved in the determination of client indigence.*

---

## **The Indigency Determination Process Must Be Fair and Consistent**

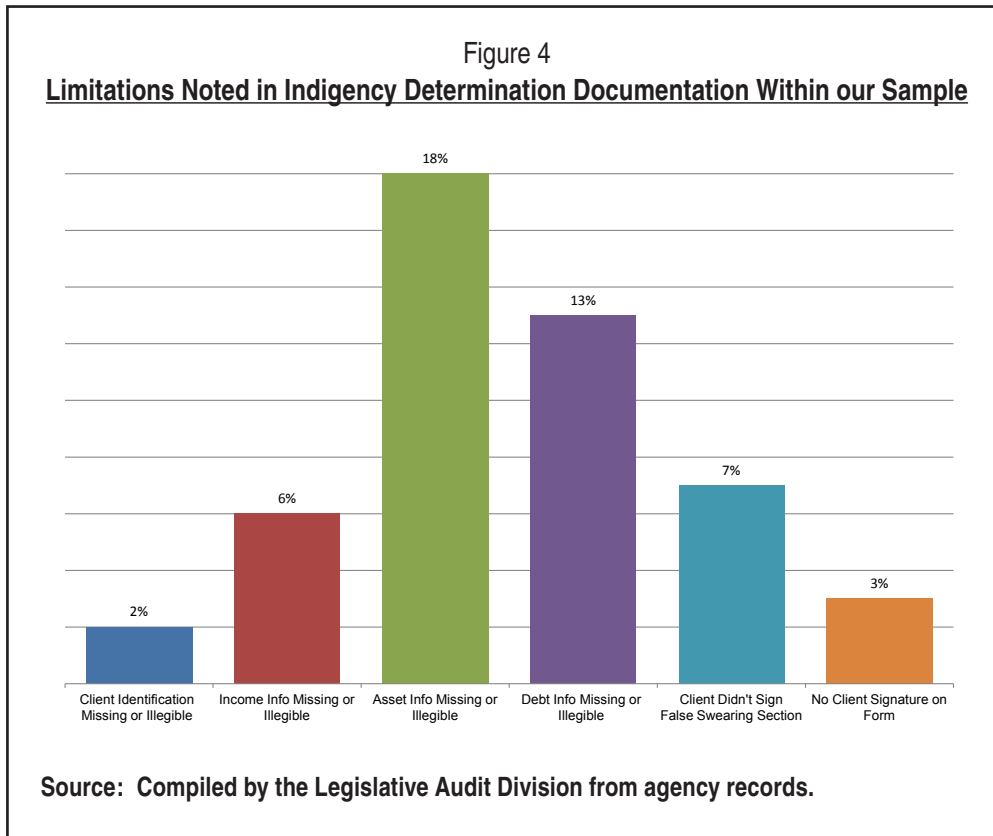
As the entity responsible for oversight of OPD, the Public Defender Commission (PDC) maintains authority over the indigency determination process. Section 47-1-111(6), MCA, directs the PDC to establish procedures and adopt rules regarding the process which, in part, must ensure the eligibility determination process is fair and consistent statewide. During our audit of OPD, we noted several aspects of the indigency determination process which were inconsistent not only between regions, but also within the same region. These are:

- ◆ Level of client-reported information
- ◆ Verification of client-reported financial information
- ◆ Handling of “repeat” clients

## **Level of Client-Reported Information Varies**

Section 47-1-111(2), MCA, requires applicants for public defender services to complete an application, financial statement, and affidavit attesting to the accuracy of information provided. OPD has developed an indigency questionnaire (IQ) for this purpose. According to OPD policy, the IQ must be returned by the client to the appropriate regional office within ten days of OPD’s appointment to the case by the court. If the IQ is not received by OPD, policy directs staff to submit a motion to rescind OPD’s appointment in the case to the presiding court.

In our review of the indigency determination documentation associated with the cases in our sample, we found that for 93 cases, or nearly 36 percent, there was no IQ present. Regionally, the percentages varied from 0 percent with no IQ present to 48 percent. We also noted that in only one of the 93 cases in which there was no IQ the client was denied services because they failed to provide the form. For those cases in which the client did provide the IQ form, we found the completeness of the information provided was inconsistent, as shown by the figure below.



Not requiring clients to provide complete information about their financial circumstances represents noncompliance with statute by OPD. In addition, there is increased risk to the agency in a number of areas. First, the purpose of the IQ form is to aid staff in determining if a client is eligible for services. Without complete financial information, OPD cannot ensure it is providing services only to those clients who are financially eligible for a public defender. Additionally, staff reported instances in which members of the public or other interested parties have questioned a specific client's eligibility for a public defender. By not complying with statute and policy regarding the requirement of the IQ, the agency does not have the records to justify its defense of these clients to stakeholders in the public defender system.

---

**RECOMMENDATION #6**

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute by requiring all clients to submit a complete indigency questionnaire.*

---

## **Verification of Client-Reported Financial Information Is Undefined and Limited**

The verification of client-reported financial information serves as a control over the indigency determination process by ensuring only eligible clients receive public defender services. OPD policy requires IDS staff to verify income and assets for every tenth applicant seeking qualification for services under the income test and for all applicants seeking qualification under the hardship test. The policy does not, however, address how the verification is to be completed or documented. While OPD staff identified a number of methods by which financial verification might be conducted, we found limited documentation that verification actually occurred. Based on OPD's policy regarding verification, we expected to find evidence of verification in more than 10 percent of the cases in our sample. However, we found, of those cases for which an IQ was present:

- ◆ Seven percent had documentation of verification of reported income information
- ◆ One percent had documentation of verification of reported monthly debt information
- ◆ One percent had documentation of verification of reported asset information

In total, only eleven of the 262 cases we reviewed showed documentation of verification of client-reported financial information; eight of these cases occurred within one region.

## **Other States Verify Client Financial Information**

As part of our audit work, we considered financial verification processes in other states. At Colorado's public defender agency, staff reported verification is required for all applicants except those who are incarcerated. Staff review documents such as pay stubs and tax records and, if the client does not have these, will review letters from family members. In New Mexico, proof of income, expenses, and assets must be attached to the application for services. We also found Wisconsin's public defender agency provides comprehensive guidance to its staff on the topic. The agency's manual defines when

verification is appropriate; how it should be done; the types of verification information which staff may rely on; and how the process should be documented.

## **Coordination With Other Agencies for Verification Purposes**

We also reviewed whether OPD coordinates with other state or federal agencies to verify financial information. Staff reported this does not occur and they were unsure about the potential of it due to confidentiality issues. We sought to identify if there were other Montana agencies which coordinated with each other to verify client-reported financial information. We looked at the processes used by the Department of Public Health and Human Service's Human and Community Services Division to assess client eligibility for income-based benefit programs such as the Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), and Medicaid. We found that agency incorporates into its determination process a step to compare client-reported information with that held in the Montana Department of Labor and Industry's unemployment database. This allows for the verification of whether clients are unemployed and the level of unemployment benefits being received. It may be beneficial for OPD to coordinate with other Montana agencies such as the Departments of Revenue and Labor and Industry to share financial information through information sharing agreements.

## **Automatic Qualification: An Option?**

Multiple staff within OPD reported verification of client-reported financial information is a low priority because their workload does not allow for a detailed review. One method used by staff to minimize the need for verification has been to automatically approve some clients based on specific circumstances, for example incarceration or enrollment in a needs-based benefits program. This practice is not formalized in OPD policy. We found it varies from region to region and staff using the practice reported they did not require any supporting documentation from clients.

The idea of auto-qualification for services based on particular conditions is formalized in other states. For example, in Colorado, if a client is in custody, they are automatically approved. And in Wisconsin, some applicants qualify automatically if their sole family income is received from certain needs-based programs. New Mexico also presumes a client is eligible if they receive state or federal public assistance. In both Wisconsin and New Mexico, the client must provide documentation of their enrollment in specific programs. In all three states, these automatic qualifications are outlined in policy.

Overall, OPD's process for verifying client-reported financial information could be strengthened. The agency has not defined how the process should be conducted and

does not comply with its own policy regarding the frequency of verification. This increases the risk OPD is providing services to ineligible clients.

## **Handling of “Repeat” Clients Is Inconsistent**

During the course of the audit, staff noted numerous times that the agency frequently provides counsel to clients they have previously served (“repeat” clients). In all regions reviewed, we found the process for handling the determination of eligibility for “repeat” clients to be relatively subjective. In some regions, staff reported that whether or not they required an IQ or verified income information depends on the timeframe between the client’s multiple cases and the client’s history with OPD. In some instances, staff stated because of the size of the population in the area, they know the clients and their families and have a good idea of their financial circumstances. Other regions have developed unwritten policies that indigency determinations are effective for a certain amount of time—three months in one region, six in another. OPD policy does not address how indigency determination for these clients should be addressed. However, other states have more formalized methods for determining indigency of “repeat” clients. In New Mexico, an eligibility determination is effective for six months, while in Wisconsin the effective period is 90-days.

---

### **RECOMMENDATION #7**

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute regarding the indigency determination process by implementing formal procedures which define the income verification process, handling of “repeat” clients, and the hardship test.*

---

## **Central Oversight and Training Needed to Improve Indigency Determination Process**

Currently, there is no central oversight of the indigency determination process. The IDS staff are responsible for making the determinations, but there is no quality control factor in place. As discussed previously, the RDPDs are involved to some extent, but neither they nor Central Office staff review final individual determinations made by staff to assure compliance with statute and policy. Within the agency, there are examples where oversight of a key administrative process has been centralized. Specifically, as noted previously, there is a Contract Manager whose role is to oversee agency contracting. OPD could take steps to mirror this by centralizing supervision of

indigency determination to allow better monitoring of the process on a statewide level and assurance of compliance with statute.

In addition to centralized oversight of the indigency determination process, formal staff training on the topic would improve the overall consistency of the process. During the course of this audit, we found the agency had provided training on the indigency determination process at the management level. Training for the staff responsible for making indigency determinations is now necessary to ensure the process is fair and consistent, as required by statute.

---

***RECOMMENDATION #8***

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute regarding the indigency determination process by:*

- A. *Assigning oversight responsibility within the agency to ensure accountability and consistency.*
  - B. *Establishing a training program for staff responsible for making determinations of indigence.*
-



## Chapter IV—Assuring Statewide Consistency

### **Introduction**

Historically, the provision of public defender attorneys was handled on a county-by-county basis. Between 1985 and 2003, the state reimbursed counties for the cost of providing public defender services to adults involved in cases before district courts. In February 2004, the American Civil Liberties Union filed a class action lawsuit alleging that Montana had failed to provide constitutionally and statutorily adequate legal representation to indigent adults. Later that year the lawsuit was put on hold in anticipation of legislative action to create a statewide public defender system. Title 47 of the Montana Code Annotated, otherwise known as the “Montana Public Defender Act” (Act), was enacted by the 2005 Legislature.

When the Public Defender Commission (PDC) and the Office of the State Public Defender (OPD) were created in 2005, agency management had to start from scratch. New policies and procedures had to be created, office space had to be secured, and staff had to be hired within a limited timeframe because the system was required to begin taking clients on July 1, 2006. As noted in this report, we identified a variety of inconsistencies in agency activities related to contracting and indigency determination. During audit work, OPD management acknowledged some of the inconsistencies between regions may be due to a lack of direction from the OPD central office (OPD Central) initially. OPD was reluctant to mandate changes to the regional offices which already existed and had their own policies and procedures in place. While the agency is still dealing with some of these issues, active management of program activities is needed, not only to ensure compliance with statute, but also to assure the system is administered efficiently and effectively.

### **Defined Expectations and Oversight Could Strengthen Consistency**

Currently, each region within the public defender system enjoys a high level of autonomy. A management control structure which provides operational direction to and ensures compliance by the regional offices must be developed to increase consistency throughout the system. Assuring this consistency was one of the main purposes in creating the statewide system.

The first step in developing this structure would be for management at the PDC and OPD to define comprehensive, agency-wide expectations for regional activities. To assure compliance with the requirements of the Act, management should, for example, provide guidance about the types of remedial action appropriate for addressing poor

performance by contract attorneys or the process for verifying client-reported financial information during the indigency determination process.

### **Management Information Vital for Monitoring Agency Activities**

After expectations are defined, management will need to assure regional compliance through ongoing monitoring and analysis of management information regarding agency activities. Program information is a vital tool to be utilized by agency management for making key decisions regarding budgeting, staffing, and program direction. Information and records should be consistently managed and maintained, and should be readily available for examination.

### **Currently, Management Information Is Limited**

During our review, we found the department has limited management information regarding its activities. Overall, we found information about the agency's contracting activities to be documented inconsistently or not at all. Specifically, we noted:

- ◆ There is no uniform method for recording information about contractor performance, client complaints, or the attorney pool.
- ◆ There were no "complete" set of contract attorney files at any location.
- ◆ OPD caseloads of contractors are tracked to different extents in each region—some regions use the agency's internal case-weighting procedure to determine the case weight for contractor workloads while others do not appear to track caseloads at all.
- ◆ The agency does not accurately track the regions in which contractors are working or if payments are made without a current Memorandum of Understanding in place.

We also found incomplete and inconsistent management information related to its indigency determination process. OPD currently has no method for calculating the total number of determinations made each year. Further, information regarding the number of income/asset verifications completed and determinations of ineligibility is not readily available.

### **Management Information Is Important for Demonstrating Compliance**

Without periodic management oversight, operational inconsistencies will continue. During this audit, we noted instances where OPD Central directed regional staff to complete specific tasks or provide information, yet the regions did not satisfy the requests. In instances where several requests were made by OPD Central, there were

no consequences when regional staff did not provide the requested information. For example, management cannot rely on reports extracted from its information system to contain accurate agency-wide data. Currently, when a report is run, OPD Central must request that the regional offices fill in any “gaps” in the information and correct any discrepancies.

Without management information, OPD cannot demonstrate its use of contract attorneys or process for determining client indigence is fair and consistent, as required by statute. OPD also cannot show it has the information necessary to ensure contract attorneys are qualified, competent, and providing effective assistance of counsel to OPD’s clients. It is vital that OPD Central take a leadership role and provide direction to the agency’s regional offices in order to reduce the inconsistencies we identified.

---

***RECOMMENDATION #9***

*We recommend the Public Defender Commission and the Office of the State Public Defender assure compliance with statute regarding contracting and indigency determination activities by:*

- A. *Establishing defined, agency-wide expectations.*
  - B. *Identifying and collecting key management information regarding those expectations.*
  - C. *Monitoring statewide consistency through analysis of management information.*
-



PUBLIC DEFENDER  
COMMISSION

OFFICE OF THE STATE  
PUBLIC DEFENDER

OFFICE RESPONSE





Brian Schweitzer  
Governor

MONTANA PUBLIC DEFENDER COMMISSION A-1  
STATE OF MONTANA

Richard E. "Fritz" Gillespie  
Chair

RECEIVED

MAY 24 2012

LEGISLATIVE AUDIT DIV.

May 22, 2012

Tori Hunthausen, CPA  
Legislative Auditor  
Legislative Audit Division  
P.O. Box 201705  
Helena, MT 59620-1705

Re: Response to Legislative Audit Recommendations

Dear Ms. Hunthausen:

I appreciate the opportunity to respond to the performance audit report for the Office of the State Public Defender. I have reviewed the recommendations and I want you to know that the Commission views them very seriously. We look forward to working with Chief Hooks and his staff to assure that all of the recommendations are implemented as indicated in his response.

Sincerely,

Richard E. "Fritz" Gillespie, Chair

cc: Angie Grove, Deputy Legislative Auditor  
Megan Coy, Legislative Auditor  
William Soller, Legislative Auditor  
Laura Sankey, Legislative Auditor  
William F. Hooks, Chief Public Defender

## OFFICE OF THE STATE PUBLIC DEFENDER



BRIAN SCHWEITZER  
GOVERNOR

WILLIAM F. HOOKS  
CHIEF PUBLIC DEFENDER

---

STATE OF MONTANA

---

Phone: (406) 496-6080  
Fax: (406) 496-6098  
www.publicdefender.mt.gov

44 WEST PARK STREET  
BUTTE, MONTANA 59701

RECEIVED

MAY 24 2012

LEGISLATIVE AUDIT DIV.

May 22, 2012

Tori Hunthausen, CPA  
Legislative Auditor  
Legislative Audit Division  
P.O. Box 201705  
Helena, MT 59620-1705

Re: Response to Legislative Audit Recommendations

Dear Ms. Hunthausen:

Thank you for the opportunity to respond to the performance audit report for the Office of the State Public Defender. We have reviewed the recommendations in the report and our responses are as follows:

**Recommendation #1:**

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute by compensating all contract attorneys on an hourly basis.*

**Response:** We concur. The agency inherited some of the fixed fee contracts and the personnel involved. Some were put into place to save money for the agency. The agency intends to cancel all fixed fee contracts to comply with the strict interpretation of the statute. However, the agency has drafted legislation that would allow for some fixed fee contracts. These contracts would be used in instances whereby the agency could save money without hampering the legal representation provided to our clients.

**Recommendation #2:**

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute related to the competitive process.*

**Response:** We concur. The underlying issue that we took from this recommendation is that some parts of our contracting documents were blank and some had limited responses. The agency has reviewed all contracting documents that were in effect during the audit period and identified items that were either blank or had a limited response. The agency also conducted an internal review of the language in its contracting documents and found that some areas were confusing to the reader. The agency will issue new contracting documents that will be effective July 1, 2012. These documents will contain language that is expected to be more understandable by the reader. After the documents are received by the agency, agency personnel will follow up with responses that are unclear or blank. The contracts will not be signed by the agency and thus not effective until all blanks are filled in and other areas are complete and understandable.

Regarding the agency's monitoring of caseloads, the agency will work with its internal control committee to establish controls that assure consistent monitoring of contractor caseloads are in place and followed. The agency will design and produce a report by contractor that shows all contract and conflict cases by case type.



This information, along with the percentage of time that a contract attorney works for the agency as supplied by the contractor, will help agency personnel determine if the contractor can handle new cases.

**Recommendation #3:**

*We recommend the Public Defender Commission and the Office of the State Public Defender ensure both the agency and contractors comply with the provisions of the Memorandum of Understanding.*

**Response:** We partially concur. The agency has reviewed the contracting files in effect during the audit period and found that the agency had not signed certain MOUs. They are now signed. Contractors have been sent a notice to initial the policy acknowledgement and agreement section. The agency is completing the "OPD Use" section. The agency has reviewed contractor qualifications but has no obligation to initial that they have done so. The agency does make notes in this area from time to time. The agency practice is to receive worker's compensation notices from contractors upon request and it is not a requirement to have this in all cases. The agency will continue with this practice.

The agency will issue new MOUs in June of 2012 that will be effective July 1, 2012. The agency will institute an internal review process to assure that all items of the MOU will be complete and all backup information is received before approving the MOU.

The agency will issue MOUs to all contractors, including those that are not assigned current contract period cases but are working on cases issued under older contract periods.

**Recommendation #4:**

*We recommend the Public Defender Commission and the Office of the State Public Defender:*

- A. Comply with statute, standards, and policies regarding performance evaluation of contract attorneys.*
- B. Implement policy and procedures defining the process for taking remedial action and contract termination.*

**Response:** Part A: We concur. However, the agency has been struggling in this area due to current staff levels. To help with compliance, the agency's policy and standards have recently been updated (after the audit period) to allow for a two-year period to do proficiency determinations and standards compliance review. The contract manager position is currently three-quarter time which has inhibited his ability to complete reviews of all 200 contractors during a one-year period. Another hurdle relates to the fact that regional deputy public defenders' current caseloads hinder their ability to support this review. The agency has submitted a budget item for the 2015 biennium to address this workload situation.

Part B: We concur. The agency will implement policy and procedure regarding taking remedial action that is consistent across the regions.

**Recommendation #5:**

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute and ensure individual public defenders are not involved in the determination of client indigence.*

**Response:** We partially concur. We believe the Public Defender Commission and the Office of the State Public Defender comply with statute and ensure individual public defenders are not involved in the determination of client indigence. We respectfully submit that current OPD practices and procedures are in substantial compliance with applicable statutes, and disagree with a contrary conclusion.

Section 47-1-111(6)(e), Montana Code Annotated, requires the Public Defender Commission to establish procedures to implement the determination of client indigence. The procedures must “prohibit individual public defenders from performing eligibility screening[.]” Agency policy assigns the task of eligibility screening to a non-attorney staff person. This staff person, trained as an “indigency determination specialist” (IDS), is tasked with determining eligibility for services. Agency policy specifically prohibits the Regional Deputy Public Defender from acting as the IDS. If the IDS has a question regarding the applicant’s eligibility for public defender services, agency policy provides that the Regional Deputy Public Defender will make a ruling. The Regional Deputy Public Defender must notify the court if an applicant does not qualify for public defender services. A judge may overrule a determination that an applicant does not qualify. If overruled, the agency will provide public defender services. In sum, the agency respectfully submits that individual public defenders do not perform the initial eligibility screening of applicants for public defender services.

However, in the smaller regions, where we have limited staff, we may not be in strict compliance with the statute. The agency will explore options to address this situation.

**Recommendation #6:**

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute by requiring all clients to submit a complete indigency questionnaire.*

**Response:** We concur. The agency will take measures to improve its processes and procedures to assure that applications for services are complete. The agency will also take measures to improve its operations manual and its ongoing training for this area to assure consistent application of the process throughout the regions.

**Recommendation #7:**

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute regarding the indigency determination process by implementing formal procedures which define the income verification process, handling of “repeat” clients, and the hardship test.*

**Response:** We concur. Agency policy 105 requires that all hardship cases and 10% of income-qualified cases provide financial proof of income. The agency has instructed staff to request the most recent tax return or a recent work pay stub as stated in policy. This is also part of the training for the IDS. It appears from the audit that we are only getting 7% rather than 10% of income verifications and only 1% on assets and debt. We will work to close that gap.

The agency will adjust its policy and procedure to address repeat clients to assure that IQs are updated if necessary.

**Recommendation #8:**

*We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute regarding the indigency determination process by:*

- A. Assigning oversight responsibility within the agency to ensure accountability and consistency.*
- B. Establishing a training program for staff responsible for making determinations of indigence.*

**Response:** A and B: We concur. The agency can do a better job creating more detailed processes and training on the qualification-determination process. The agency has recently developed a new training program based on one region’s “better practice.” As of the date of this response, more than half of the 11 regions have been trained on this better practice. We will make this training required of all new indigency determination

specialists and will do periodic updates for all that work in this area. The agency also expects to develop an internal audit process to periodically verify the results of the training effort.

**Recommendation #9:**


*We recommend the Public Defender Commission and the Office of the State Public Defender assure compliance with statute regarding contracting and indigency determination activities by:*

- A. Establishing defined, agency-wide expectations.*
- B. Identifying and collecting key management information regarding those expectations.*
- C. Monitoring statewide consistency through analysis of management information.*

**Response:** We concur. The Chairman of the Montana Public Defender Commission will assign this recommendation and its development, implementation, and oversight to the Commission's Strategic Planning Committee. This committee can use the conclusions of the ACLU/AU reports to support this effort.

We appreciate the legislative staff time devoted to this audit, and we look forward to working with your office in the future.

Sincerely,



William F. Hooks  
Chief Public Defender

cc: Angie Grove, Deputy Legislative Auditor  
Megan Coy, Legislative Auditor  
William Soller, Legislative Auditor  
Laura Sankey, Legislative Auditor  
Richard "Fritz" Gillespie, Chair, Montana Public Defender Commission