

LEGISLATIVE AUDIT DIVISION

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



Deputy Legislative Auditors:
Cindy Jorgenson
Angus Maciver

MEMORANDUM

TO: Legislative Audit Committee Members
FROM: Megan Coy, Senior Performance Auditor
CC: Fritz Gillespie, Chair, Public Defender Commission
William Hooks, Chief Public Defender, Office of the State Public Defender
Harry Freebourn, Administrative Director, Office of the State Public Defender
DATE: November 2013
RE: Performance Audit Follow-Up (13SP-15): Improving Statewide Consistency of Key Processes for the Office of the State Public Defender (orig. 11P-03)
ATTACHMENTS: Original Performance Audit Summary

Introduction

Our performance audit report *Improving Statewide Consistency of Key Processes for the Office of the State Public Defender* (11P-03) was issued to the Committee in May, 2012. The audit included nine recommendations to the Public Defender Commission (PDC) and the Office of the State Public Defender (OPD). In July 2013, we conducted follow-up work to assess implementation of the report recommendations. This memorandum summarizes the results of our follow-up work.

Overview

The primary mission of the statewide public defender system is to provide effective assistance of counsel to indigent persons accused of a crime or involved in civil cases who may be entitled to legal counsel at public expense. Our original audit found that improvements should be made to activities associated with contracting for attorney services and determination of client eligibility. Of the nine recommendations we made to the PDC and OPD, seven have been or are being implemented and two have not been implemented.

Background

The Montana Legislature enacted Title 47 of the Montana Code Annotated, also known as the "Montana Public Defender Act," in 2005. The Act created a statewide system, directed and overseen by the PDC, to provide public defender services for eligible clients. Public defender services are provided by OPD through 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 (RDPD). In addition to staff attorneys, OPD uses contracted attorneys to provide public defender services. The agency has Memorandums of Understanding (MOUs) with approximately 200 contract attorneys who 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.

Per statute, OPD is responsible for determining client eligibility for services based on household income and the determination process must be fair and consistent statewide. The determination process is handled on a regional basis and begins with court appointment of OPD to provide counsel to an indigent individual involved in a criminal or specific type of civil case. The client is assigned an OPD attorney and required by statute to complete an application for services, provide a financial statement and any requested supporting documents, and sign an affidavit in which they attest to the accuracy of the information provided. The information is then reviewed by the region's Indigency Determination Specialist (IDS), who determines if the client qualifies for services. If the client qualifies for services, OPD's representation of the client continues. If the client does not qualify, written notice of their ineligibility is sent to the client and the court. 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, the judge may require OPD to continue providing services to the client.

Audit Follow-Up Results

Beginning in June 2013, we gathered information from OPD on its progress toward implementing our audit recommendations. The following summarizes the implementation status of each recommendation.

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.

Implementation Status – Implemented

Statute prohibits OPD from awarding contracts which provide compensation based on a fixed fee paid irrespective of the number of cases assigned. During our audit, we identified four attorneys with whom OPD had entered into flat-fee contracts. In response to our audit, the agency cancelled all flat-fee contracts. During the 2013 Legislative Session, the PDC requested legislation to authorize flat-fee contracts in treatment courts and certain types of cases (HB93), but it did not pass.

RECOMMENDATION #2

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

Implementation Status – Being Implemented

The Montana Public Defender Act requires OPD to procure contracted attorney services using a competitive process which involves a number of considerations which include attorney qualifications, continuing legal education, access to support services, caseload, and caseload monitoring processes. As a result of our audit, we found that while the PDC and OPD had established standards and policies designed to address these considerations, OPD did not have controls in place to assure they were consistently followed. The agency is in the process of implementing this recommendation. In order to ensure that contracting for attorney services is done competitively, OPD implemented contractor file checklists and a file audit process. These tools are used by agency staff to ensure the statutory considerations are appropriately monitored. During our follow-up work, we reviewed a sample of contractor files and found completed file checklists and documentation of the internal audit process. The agency continues to work on implementing processes for monitoring contractor caseloads and has created a caseload report which is under development but upon finalization will aid OPD management during case assignment.

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.

Implementation Status – Implemented

As a result of our original audit, we noted instances where OPD did not ensure both the agency and its contract attorneys complied with the provisions of the MOU. Based on follow-up work, we found the agency implemented a quarterly contractor file audit process in which accounting staff select a random sample of contractor files for review. The files are checked against an internal audit checklist which requires staff to determine if MOUs are signed, if all documents requested from the contractor have been provided, and if performance evaluations have been completed. The checklist contains a section for response by agency contracting staff regarding deficiencies noted and how those deficiencies were remedied. As part of our follow-up work, we reviewed a sample of contractor files and found documentation of internal audit and staff responses in place for those files which had undergone review.

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.**

Implementation Status – Not Implemented

During our audit, we found, since its inception in 2006, OPD had not consistently evaluated the performance of its contract attorneys, as required by statute. Statute requires biennial performance evaluation of contract attorneys. At the time of the audit, we found OPD had completed full performance evaluations for only 22 percent of contractors in our sample and partial evaluations for an additional 25 percent. As part of our follow-up work, we reviewed agency documentation of evaluations for 146 contractors who had both a current and previous MOU with OPD. We found OPD had completed full performance evaluations of 20 percent of the contractors reviewed within the statutory two-year required timeframe; the agency had conducted partial evaluations of an additional 25 percent of the contract attorneys reviewed. This represents continued noncompliance with statutory requirements over contractor performance evaluations. OPD management reported using new methods to conduct evaluations, such as via web conferencing and requiring contractors to complete an online standard test. These are meant to streamline the evaluation process, but management cites a lack of staff resources as the main factor contributing to the agency's continuing noncompliance with statute.

As part of our original review of the agency's evaluation of contract attorney performance, we also looked how OPD follows up on evaluations. We identified policy weaknesses related to remedial action taken against contract attorneys and the process for terminating MOU agreements. Based on our follow-up work, we found that, while OPD management reports they intend to document these actions more formally, no action has been taken to date.

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.

Implementation Status – Not Implemented

The agency has not implemented this recommendation. Although statute prohibits individual public defenders from performing eligibility screening, OPD policy continues to require RDPDs to make the final ruling in instances where a client's eligibility is questionable. In its response to our original audit, OPD management only partially concurred with this recommendation and continue to believe that since the determination of eligibility is a legal decision, the involvement of an RDPD in the process is appropriate.

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.

Implementation Status – Being Implemented

OPD is in the process of revising its indigency determination process. As part of their efforts, staff from OPD's central office conducted onsite reviews of regional activities associated with the process. They noted inconsistencies in how client indigency was determined and worked with regional staff to identify the causes of these inconsistencies. Based on this work, agency staff developed a new indigency questionnaire which was approved by the PDC during its July 2013 meeting, but is not yet in use by the regional offices. OPD management reports they are developing policy and staff training on how the new form should be used to determine client indigency. They will use a pilot project to test the effectiveness of the new process. OPD management reports two regions have been selected and will begin using the new indigency determination process by December 1, 2013. OPD intends to develop a method for monitoring compliance with the new policy, but has not yet done so.

Finally, OPD, through the State Procurement Bureau, issued a Request for Proposal (RFP) for a contractor to provide financial eligibility determination services on October 21, 2013. The RFP response period closes in early December 2013. OPD is asking offerors to provide a detailed description of how they intend to conduct eligibility determinations, including the process for obtaining the indigency questionnaires from applicants, anticipated criteria for determining client eligibility, length of time for determination, and method of notification to applicants of the final determination.

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.

Implementation Status – Being Implemented

Statute requires the PDC ensure the process for determining client eligibility for public defender services is fair and consistent statewide. During our initial audit, we reviewed OPD's process for indigency determination and noted several inconsistencies related to what client-reported financial information was required by staff and how the information was verified. In addition, we found regional offices using a variety of methods for handling indigency determinations for “repeat” clients, or those who had been served previously by OPD. As noted, OPD is currently revising its process for determining client eligibility for public defender services. As part of this, OPD management reported reviewing best practices in other states and in regional offices related to verification of client income, handling “repeat” clients, and determination of client hardship. These best practices will be included as part of the agency's new policy for determining client eligibility.

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.**

Implementation Status – Being Implemented

As part of its efforts to formalize the indigency determination process, OPD plans to develop internal audit procedures through which Central Office staff will review determinations made at the regional level to verify compliance with agency policy and consistency across the state. OPD will begin a pilot project in two regions to test the new indigency determination process by December 1, 2013, but has not yet developed the compliance monitoring piece of the process. In terms of training staff responsible for making indigency determinations, OPD reports they have begun this task by providing training on the process at the annual support staff conference. In addition, Central Office staff visited all regional offices and, using the newly-developed indigency questionnaire as a guide, demonstrated how determinations should be made. Finally, as part of the controls being developed to ensure consistency of the process, the agency recently issued an RFP seeking a contractor to provide eligibility determination services.

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.**

Implementation Status – Being Implemented

During our initial audit, we found the regional offices of OPD enjoyed a high level of autonomy, which was a hold-over from when public defender services were provided by individual counties. OPD management acknowledged some of the inconsistencies we found between regions were because of a lack of direction from OPD early on in the agency's existence. OPD was reluctant to mandate changes to the regional offices which existed prior to the statewide system and already had their own policies and procedures in place. In some instances, regional offices were resistant to directives from OPD.

During our follow-up, OPD management reported they believe the agency has a new perspective and culture in place which is more amenable to change and direction. Overall, there has been significant turnover in the agency, both at the management and staff levels. While there are substantial disadvantages to this, agency management believe it has contributed to the cultural shift which has taken place.

Specific to this recommendation, in August 2012, the PDC adopted an agency goal to ensure uniformity and consistency in the administration of the statewide public defender system and the case management program and intends to develop measurable objectives for the agency, but has not yet done so. As discussed previously in this document, the agency is in the process of developing meaningful methods for monitoring contractor caseloads and performance. Finally, OPD management reports they are establishing a more formal process for determining client eligibility which will include a mechanism for monitoring regional compliance and ensuring statewide consistency.