

OFFICE OF THE STATE PUBLIC DEFENDER



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September 30, 2012 Performance Audit Update

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.

Update as of 9/30/12: The agency has cancelled the above mentioned fixed fee contracts and established an internal control that requires the agency's Purchasing Officer to review all future contracts to assure the Chief Public Defender and Chief Appellate Defender that the contract provisions do not contain fixed fees. The agency has drafted legislation for the 2013 session that will allow for the use of fixed fee contracts, where appropriate.

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.

Update as of 9/30/12: The agency issued a new MOU effective for FY 2012 and 2013. The MOU contains revised language that the agency believes is more understandable to the reader.

The agency's internal control committee reviewed and approved for deployment a checklist to ensure that statutory and MOU requirements are being met by the contractor. The agency follows up with the contractor to assure that all information requested is received. The Chief Public Defender and Chief Appellate Defender both receive a copy of the checklist on a periodic basis for review and comment.

The agency also developed a report that shows all contractor and conflict cases by case type. This report is used to determine if a contractor can be issued new cases based upon current caseload supplied by either OPD or other sources. The agency is working on reporting to alert the Chiefs when there are contractor caseload issues.

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.

Update as of 9/30/12: Please see the response to Recommendation #2. The above mentioned checklist covers the deficiencies noted in Recommendation # 3. The agency intends to continue its practice on workers compensation notices; i.e., received when requested. Effective for FY 2013 and beyond, the agency issued MOUs to all contractors that had cases.

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.

Update as of 9/30/12: The agency continues to find it challenging to come into full compliance with this recommendation due to a lack of resources. The agency submitted a budget request for additional staffing in the contracting area and in the regions. Additional staff would allow the Contract Manager and the Regional Deputies to focus more of their efforts on performance evaluations. This budget item is pending approval. If the request clears the budget office, it will still need to be approved by the legislature.

Recommendation #5:

We recommend the Public Defender Commission and the Office of the State Public Defender complies with statute and ensures 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 “indigence 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.

Update as of 9/30/12: The agency is developing a policy that will direct that an attorney may not participate in the eligibility determination for any client they represent. This will include any cases that the regional deputy takes. However, as part of their managerial duty, the regional deputy may address indigence/eligibility questions or issues for any case where they are not personally representing the client.

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 indigence 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.

Update as of 9/30/12: The agency’s internal control committee reviewed this recommendation and will: (1) implement controls to assure that only one IQ form is used throughout the system; and (2) install controls to ensure that IQs are complete, which will include training, a centralized IQ function, and an internal audit function to verify compliance.

However, the agency recognizes that to come into full compliance with this recommendation will be challenging due to a lack of resources. Therefore, the agency has submitted a budget request for additional regional staffing that will allow for more focus and effort on the IQ process. This budget item is pending approval. If the request clears the budget office, it will still need to be approved by the legislature.

Recommendation #7:

We recommend the Public Defender Commission and the Office of the State Public Defender comply with statute regarding the indigence 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.

Update as of 9/30/12: The agency's internal control committee recommended that the agency review its best practice for this process. The Chief Public Defender has established a project team that includes personnel from central services and the region with the best practice. The team will draft new or revised policy and procedure, develop an initial and ongoing training program, and define ongoing monitoring for this function.

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.

Update as of 9/30/12: Please refer to the update in Recommendation # 7 above.

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:

- C. *Establishing defined, agency-wide expectations.*
- D. *Identifying and collecting key management information regarding those expectations.*
- E. *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.

Update as of 9/30/12: The Commission's Strategic Planning Committee met with the Performance Audit Team on August 8, 2012 to gain a full understanding about this recommendation. The Committee voted to adopt a goal for the agency as follows: "Ensure uniformity and consistency in the administration of the statewide public defender system and the case management program." The goal was approved by the full Commission at the August 27, 2012 meeting. The Committee will now develop measurable objectives for the agency so that it can monitor compliance.