

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.

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
Source: Agency audit response included in final report.	

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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 Statutory Requirements for Contracted Attorney Services	
	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.

Source: Compiled by the Legislative Audit Division from §47-1-216(5), MCA.

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.