



A REPORT
TO THE
MONTANA
LEGISLATURE

PERFORMANCE AUDIT

*Public Defender
Workforce Management*

Office of State Public Defender

SEPTEMBER 2020

LEGISLATIVE AUDIT
DIVISION

19P-04

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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 conducted 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.

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LEGISLATIVE AUDIT DIVISION

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September 2020

The Legislative Audit Committee
of the Montana State Legislature:

This is our performance audit of Public Defender Workforce Management within the Office of State Public Defender.

This report provides the legislature information about the management of public defender staff and contract attorneys to provide competent and efficient indigent defense legal services. This report includes recommendations for increasing centralized oversight and guidance of workload, attorney performance, contractor billing, time tracking, and data collection and analysis at the Office of State Public Defender. A written response from the Office of State Public Defender is included at the end of the report.

We wish to express our appreciation to the Office of State Public Defender personnel and private Montana State Bar attorneys for their cooperation and assistance during the audit.

Respectfully submitted,

/s/ Angus Maciver

Angus Maciver
Legislative Auditor

TABLE OF CONTENTS

Figures and Tables.....	iii
Appointed and Administrative Officials	iv
Report Summary	S-1
CHAPTER I – INTRODUCTION.....	1
Introduction	1
History and Organizational Structure of the State Public Defender	1
Audit Scope.....	4
Effective Representation.....	4
Cost-Efficient Representation	5
Audit Objective & Methodology	5
Issue for Further Study.....	6
Report Contents.....	7
CHAPTER II – ENSURING EFFECTIVE COUNSEL.....	9
Introduction.....	9
OPD Does Not Routinely Evaluate Attorney Performance	9
Contract Attorneys Are Also Not Evaluated for Performance.....	9
Attorney Evaluations Are Best Practice and Statutorily Required	10
OPD Administration Should Communicate and Enforce Evaluation Policy.....	11
Client Grievance Tracking Should Be Completed and Monitored Consistently.....	11
Client Grievance Tracking Is Not Centrally Monitored or Enforced.....	12
Improvements in Monitoring and Evaluating Attorney Performance Needed.....	12
Excessive Caseloads Are a Nationwide Challenge to Public Defense, Including Montana	13
OPD Uses a Case Weight System to Manage Caseloads.....	13
OPD Staff Are Not Confident in Case Weight System Accuracy.....	14
Despite Perceptions of Inaccuracy, the Case Weight System Generally Reflects Actual Hours Billed to Cases.....	15
Some Attorney Caseloads Are Excessive.....	16
OPD Attorneys Report Unreasonable Caseloads	17
Caseloads for Some Attorneys Exceed Both OPD and National Caseload Guidelines ...	20
High Caseloads Increase Risk of Ineffective Counsel and Conflict of Interest	22
Excessive Caseloads Impact Agency Retention	22
Multiple Forces Contribute to Excessive Caseloads.....	23
Regions Have Few Attorneys Willing to Work in Public Defense	23
In Many Rural Areas There Are Few or No Attorneys Working OPD Cases.....	24
OPD Has Not Prioritized Recruitment.....	25
OPD Attorneys Wages Are Lower Than Other Public Attorneys.....	27
Private Attorney Availability and Willingness-to-Contract Rates Vary Significantly by Region	29
Caseload Is Not Evenly Distributed Between Agency Divisions or Regions	31
CHAPTER III – PROVIDING COST-EFFICIENT COUNSEL.....	33
Introduction	33
OPD Cannot Control Workload	33
OPD Staff Attorneys Cost Less Than Contractors Based on Relative Workload	34
OPD Currently Prioritizes Assigning Cases to Staff Attorneys	35
Case Assignment and Staffing Methods Could Further Decrease Costs	35

OPD Does Not Accurately Track or Report Attorney Time.....36

 Tracking Time Is Best Practice for Public Defense Organizations.....36

 Inaccurate Time-Tracking Data Challenges State Policy Makers37

 OPD Does Not Monitor or Enforce Time-Tracking Policy37

 Current Time-Tracking Mechanism Is Considered Burdensome.....38

Some OPD Contract Attorneys Bill Inconsistently and Inefficiently.....38

 Contractors Do Not Use Assistants to Decrease Administrative Costs..... 41

 Charging More Time Than Expended Is Against Legal Association Ethics Opinion 41

 Inefficient Contractor Billing Diverts OPD Resources42

 OPD Does Not Exercise Ability to Revoke or Limit Contractor’s Ability to Take Cases
 Based on Inefficient or Unethical Billing.....42

 Contract Billing Oversight Is Regionally Dispersed43

 OPD Does Not Specify Time Rounding or Communicate Assistant Option43

CHAPTER IV – PUBLIC DEFENSE DATA TRACKING AND ANALYSIS.....45

Introduction 45

OPD Does Not Accurately Track Key Data Points 45

 Legal Associations and State Policy Emphasize the Importance of Collecting and
 Communicating Accurate Agency Information.....46

 Inaccurate and Incomplete Data Compromises Agency47

 OPD Has Not Integrated Data Management into Daily Operational Processes47

 Montana’s Justice System Data Is Disconnected and Duplicative.....48

OFFICE RESPONSE

Office of State Public Defender A-1

FIGURES AND TABLES

Figures

Figure 1	Public Defender Division Regional Offices.....	3
Figure 2	Conflict Defender Division Regions	4
Figure 3	Regional managers report the case weight system does not or barely reflects actual caseloads for staff attorneys.....	14
Figure 4	Seventy percent of Public Defender Division attorneys disagree their caseloads are reasonable.....	17
Figure 5	Public Defender Division regions 9 and 3 most strongly disagreed their assigned caseloads are reasonable.....	18
Figure 6	Higher percentages of OPD staff attorneys report caseloads as more burdensome than contract attorneys.....	19
Figure 7	Regional managers report that caseloads are often or always excessive.....	20
Figure 8	Twenty-Six Counties Have No Public Defenders Based Within Their Boundaries	24
Figure 9	Distance between assigned attorneys and case court is most extreme in the East and North Central portions of the state.....	25
Figure 10	OPD Attorney Salaries are lower than all executive agencies and elected officials.....	27

Tables

Table 1	Complaint Rate by Attorney Type.....	11
Table 2	Case Weights by Case Type Reflect Average Hours Charged by Contractors	15
Table 3	Regions 3 & 9 Have the Most Attorneys With Excessive Caseloads.....	21
Table 4	Pay Comparison of Public Defenders and County Attorneys	28
Table 5	The point at which over half of respondents would consider working for OPD varied by region.	30
Table 6	Staff Attorneys Cost Less on Average Per Added Case Weight and Added Case.....	34
Table 7	Average Hours Contract Attorneys Billed and Number of Estimated Hours Actually Needed to Work to Support Billing.....	39
Table 8	Contractor Billing as Percent of Assigned Case Weight Hours	40

APPOINTED AND ADMINISTRATIVE OFFICIALS

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Chad Wright, Administrator, Appellate Defender Division

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Carleen Green, Administrator, Central Services Division

Brett Schandelson, Operations Manager

Travis Tilleman, Administrator, Human Resources



MONTANA LEGISLATIVE AUDIT DIVISION

Public Defender Workforce Management
OFFICE OF STATE PUBLIC DEFENDER**BACKGROUND**

The Office of State Public Defender was established in 2006 to provide unified and consistent indigent legal defense across the state. The agency enlists the services of 183 staff attorneys and around 190 contractor attorneys to provide these services on over 35,000 new cases a year. Three divisions provide public defense: one is the initial provider for legal defense, another handles conflict of interest cases, and the final division works on appeals.

Office of State Public
Defender

Director:
Rhonda Lindquist

Agency FTE: 302.44

Agency Fiscal Year 2021

Appropriation:
\$37.5 million

The Office of State Public Defender (OPD) needs to improve evaluation of the quality and efficiency of its provision of indigent defense services. We found OPD does not always track data and outcomes in a meaningful way. We also found staff attorneys to be 22 percent more cost-efficient than contract attorneys. OPD currently prioritizes assigning cases to staff attorneys, but is hampered by workforce shortages, turnover, and conflict of interest considerations. Additionally, 19.7 percent of staff attorneys have caseloads exceeding the expected full-time work hours in a year. OPD needs to mitigate excessive caseloads for attorneys by prioritizing and diversifying recruitment for vacant positions, addressing pay parity for staff and reasonable rates for contract attorneys, and adjusting the way cases are assigned between divisions.

KEY FINDINGS:

OPD does not monitor attorney performance. OPD staff and contract attorneys are not consistently or regularly evaluated, nor are client grievance recording policies enforced. Reviewing and monitoring performance of attorneys is key to ensure attorneys are providing the constitutionally required competent and effective representation to their clients.

OPD staff attorneys experience excessive caseloads. Based on manager and staff attorney survey feedback, manager first-hand accounts, and comparison of FY 2019 case data to both OPD and national caseload standards, we found some attorneys carry excessive caseloads. This is due to recruitment and retention issues, attorney pay and rate disparities, and difficulty moving cases between different jurisdictions.

OPD staff attorneys are the more cost-efficient means of providing indigent defense. In a cost-efficiency analysis based on costs for staff and contractor attorneys in FY 2019 relative to the caseload assigned, we found that contract attorneys were 22 percent less cost-efficient by assigned caseload. OPD does appropriately assign cases to staff attorneys when possible, but faces challenges due to workforce shortages and conflict of interest considerations.

OPD tracking staff attorney time by case, court type, or case type is unreliable. OPD does not monitor or enforce its time-tracking policy for attorneys. The time tracking data used to calculate relative costs by case and case type was unreliable, with some full-time attorneys claiming only one minute of time per pay period and others claiming years of time due to data entry errors.

Some OPD contract attorneys are billing inconsistently and inefficiently. Audit work found some contract attorney billing levels in FY 2019 were unusually high relative to average time required to work per day and their caseload assigned. Eight attorneys billed more hours than would be expected of a full-time attorney with no time off, training time, administrative time, or breaks.

OPD generally does not accurately track key data points. Legal associations and state best practices encourage the use of key data points to track performance and resource needs. OPD does not have access to other criminal justice related systems and has not identified and planned how to track and report on key variables identified as important for evaluating public defense.

RECOMMENDATIONS:

In this report, we issued the following recommendations:

To the department: 8

To the legislature: 0

RECOMMENDATION #1 (PAGE 13):

Performance evaluations and client grievance tracking

Improve centralized oversight to ensure effective counsel is provided by attorneys performing public defense work by requiring consistent evaluations of staff attorneys, evaluating contractors on a biennial basis, and enforcing client grievances policy and procedures.

Department response: **Concur**

RECOMMENDATION #2 (PAGE 26):

Excessive caseloads

Develop a recruitment plan to fill positions in chronically understaffed regional offices.

Department response: **Concur**

RECOMMENDATION #3 (PAGE 29):

Excessive caseloads

Investigate and propose methods to the legislature to address excessive differences in pay between OPD staff attorneys and other public attorneys.

Department response: **Concur**

RECOMMENDATION #4 (PAGE 31):

Excessive caseloads

Assess the need for an increase to the contract professional or travel rate to attract willing and competent attorneys in high demand areas of the state.

Department response: **Concur**

RECOMMENDATION #5 (PAGE 32):

Excessive caseloads

Establish and implement policy for moving cases between divisions for select case overflow relief.

Department response: **Concur**

For the full report or more information, contact the Legislative Audit Division.

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RECOMMENDATION #6 (PAGE 38):

Attorney time-tracking

Improve agency time-tracking completeness and accuracy by centrally monitoring frequency of submissions and quantity of time, enforcing the requirement that managers review and approve time each week, and improving the ease of time-tracking.

Department response: **Concur**

RECOMMENDATION #7 (PAGE 44):

Contractor billing

Increase centralized oversight of contracting billing on an agency level to improve efficiency and consistency in contractor billing by reviewing agency-wide billing patterns and revising and communicating contracting policy.

Department response: **Concur**

RECOMMENDATION #8 (PAGE 49):

Data management

Develop and implement a data management program to identify data needs, develop controls, establish performance targets, develop reports, and improve access to justice data.

Department response: **Concur**

Chapter I – Introduction

Introduction

The Sixth Amendment of the U.S. Constitution guarantees a right to counsel, requiring states ensure the provision of indigent defense. In Montana, that responsibility is carried by the Office of State Public Defender (OPD). OPD’s mission is to provide effective professional legal services with equal access to quality client-centered representation. State law outlines expectations for state public defense, including that public defender services be delivered fairly and consistently throughout the state by qualified and competent attorneys. It also requires that the system be adequately funded and managed in a fiscally responsible manner.

At the request of a group of legislators concerned about managing contracted attorneys, the Legislative Audit Committee prioritized a performance audit of the agency. We conducted a performance audit to assess OPD workforce management processes for both state salaried staff public defenders and private contracted public defenders. We considered the agency’s workforce management practices for ensuring cost-efficient and effective client representation. This chapter outlines the background of OPD and describes the audit work completed to assess the provision of public defense.

History and Organizational Structure of the State Public Defender

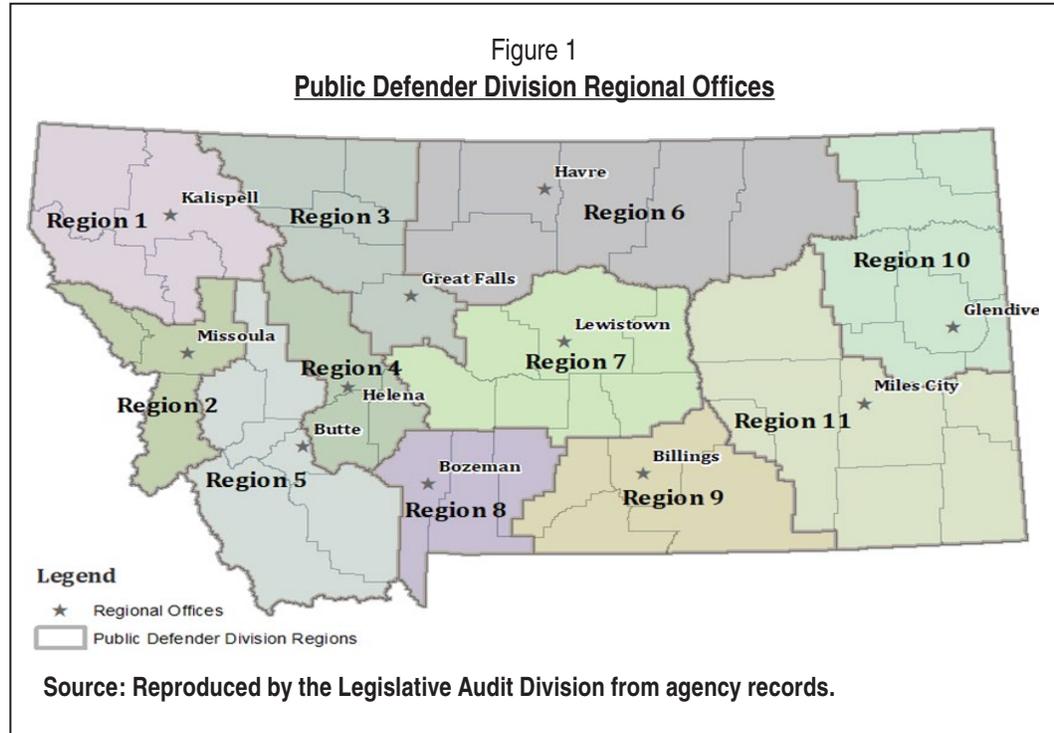
Prior to 2006, indigent defense was funded and organized on a county-by-county basis, leading to inconsistent quality of counsel across the state. In 2002, the American Civil Liberties Union (ACLU) filed a lawsuit against Montana and seven counties due to disparities in the quality of indigent services provided from county to county, inadequate public defense resources, and a lack of necessary oversight, supervision, and data collection. In response, the legislature created OPD and the Public Defender Commission in 2005 to unify the different county offices under a single agency and serve as a mechanism to provide state funding for its provision. Since its inception, the agency has been subject to several major studies assessing its performance, one of which was the product of a legislative task force in 2015 and 2016. This task force was created in response to concerns about OPD’s growing caseload and frequency of expenditures exceeding legislative appropriations. The study led to significant changes to the structure of OPD in the 2017 Legislative Session, including replacing the Public Defender Commission with an executive director.

OPD represents indigent clients on over 35,000 new cases each year. The agency was appropriated almost \$38 million for fiscal year (FY) 2020 from the general fund. As

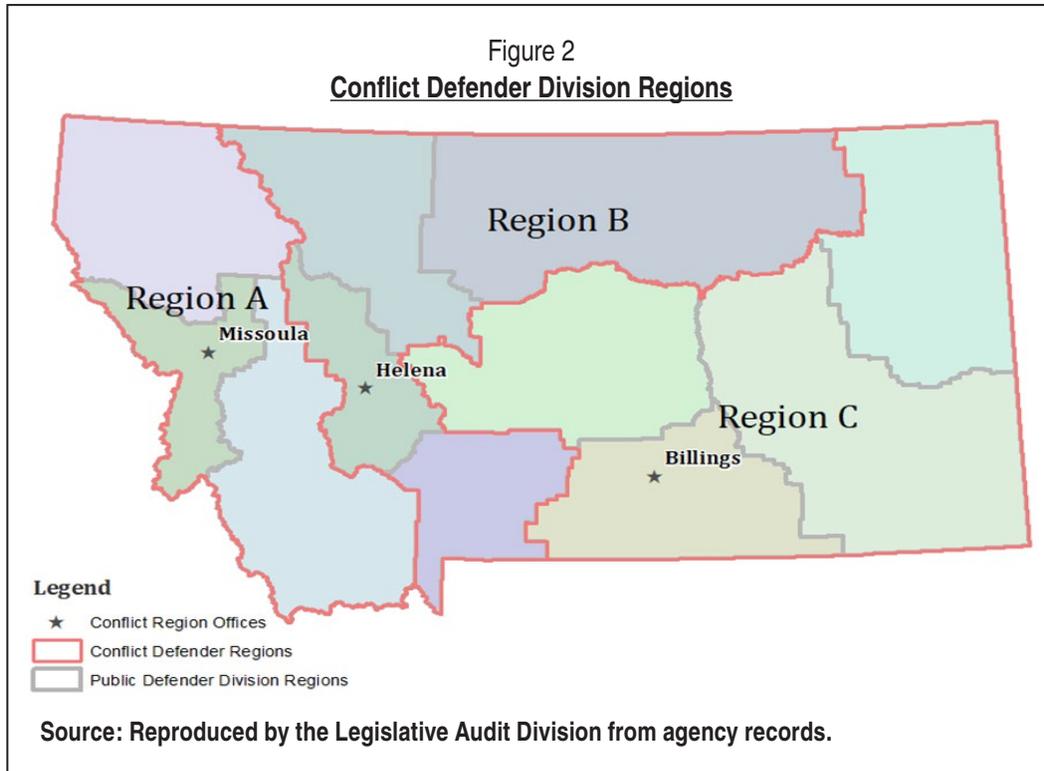
of FY 2020, OPD was allotted 304.28 full-time equivalent (FTE), including 183 staff attorney and manager positions. They also use the services of around 190 contract attorneys each year.

The agency is headquartered in Butte and led by an executive director who supervises the administrators of four divisions. The executive director is ultimately responsible for ensuring the provision of public defender services across the state, including approving strategic plans, establishing regions, and establishing a contracted services program. Each division is managed by an administrator. The agency consists of the following four divisions:

- ◆ **Central Services Division** provides management of nonlegal services for the agency, including client eligibility determination, accounting, budgeting, payroll, IT, and contracting. The division was appropriated 23 FTE and \$3.2 million in FY 2020. Most division staff are in Butte, and the executive director splits time between Butte and Helena.
- ◆ **Appellate Division** handles appeals of lower court decisions for OPD clients in front of the Montana Supreme Court and United States Supreme Court. It is the smallest of the divisions, with 17.5 FTE and a total FY 2020 budget of \$2.6 million. Most Appellate Division staff are based out of the Helena office.
- ◆ **Public Defender Division** is the largest and represents the most clients of all the divisions. If a client qualifies for counsel, their case is first assigned to this division. Most clients are represented by staff attorneys. The division was allocated \$23 million and 230.94 FTE in FY 2020. It includes 11 regions across the state, each with its own manager. The division administrator is based out of the Bozeman office. Figure 1 (see page 3) shows the locations of the Public Defender Division regional headquarters and associated territories. Four regions include an additional small satellite office that reports to the regional manager.



- ◆ **Conflict Division** provides counsel for clients that cannot be represented by the Public Defender Division due to conflicts of interest. For example, if multiple defendants are facing charges relating to the same crime, one could be represented by the Public Defender Division and another could be represented by the Conflict Division. If there are more than two defendants, additional defendants must be represented by contract attorneys or by staff attorneys in different regions within a division. In FY 2020, 31 FTE and over \$9 million were allocated to the division. Services are provided by three regional offices (Missoula, Helena, and Billings), each with its own manager. These regions are separate and independent from the Public Defender Division regions. Most of this division's expenses relate to paying fees to private attorneys for cases contracted out due to conflicts of interest. The division administrator is based out of Butte. Figure 2 (see page 4) shows the locations of the Conflict Division's regional headquarters and associated territories.



Audit Scope

Audit assessment work identified risks in the management of OPD's staff attorneys and contract attorneys that could potentially impact the provision of competent and efficient indigent defense services. These risk areas include attorney workloads, oversight of contractor attorneys, monitoring of attorney performance, strategic assignment of cases for cost efficiency, questionable contract attorney billing practices, and a lack of analysis relating to the relative cost-efficiency and effectiveness of staff attorneys and contract attorneys. We focused our workforce management evaluation on the three agency divisions that provide indigent services at all 14 regional offices. Analysis focused on FY 2019 to capture recent changes relating to the 2017 OPD restructure. This included analysis of over 34,000 newly added cases and over 65,000 open cases assigned to approximately 164 staff and 190 contract attorneys. We identified two areas of interest in workforce management: the provision of effective representation and the cost-efficiency of representation.

Effective Representation

In addition to the Supreme Court requirement to provide counsel for indigent individuals in certain defense proceedings, states are required to provide effective assistance of counsel. Effective assistance of counsel means the defense must not be

restricted by the court from providing representational duties and the defense must provide competent representation to ensure a fair outcome. This requirement has been used to challenge excessive caseloads for staff and contract attorneys in other states, as well as to require additional oversight relating to monitoring and evaluating staff and contract attorneys providing indigent services. We assessed the measures OPD had in place to ensure both staff and contract public defenders were providing effective representation for OPD clients. In addition to feedback from two surveys (described in the Methodology section below) and dozens of interviews, we also used FY 2019 caseload data, FY 2019 District Court case outcome data, and FY 2019 client grievances as a means of assessing competency.

Cost-Efficient Representation

The Montana Public Defender Act stipulates that the public defender system be managed in a fiscally responsible manner. To determine if workforce management by the agency fulfills that requirement, we concentrated our efforts on reviewing the relative cost efficiency of attorneys by type, division, and region in FY 2019. Staff attorney costs were identified using state HR data, including salaries, benefits, and retirement contributions, as well as agency-reported regional office rent costs. Contract attorney costs were identified using actual billing data for professional service hours and travel hours for FY 2019 and contract attorney assistant costs. We also reviewed case assignment practices to identify methods that could influence cost efficiency. Contractor billing practices from survey results and OPD billing data were analyzed to identify potential inefficient or unreasonable billing activity. Finally, we conducted a spatial analysis to determine the efficiency of case assignment by measuring average distances between attorneys and assigned case court locations by county and region.

Audit Objective & Methodology

Based our audit assessment work, we developed a single objective to guide our review of OPD:

- ◆ Determine if the Office of State Public Defender manages its staff and contract attorney workforce to provide cost-efficient and effective indigent legal services.

To meet our objective, we completed the following methodology:

- ◆ Reviewed state and federal legal requirements for public defense.
- ◆ Reviewed agency policies and procedures related to case assignment, contractor billing, attorney evaluation, and contractor monitoring to determine agency expectations and controls relating to efficiency and effectiveness of providing indigent services.

- ◆ Interviewed central administration and staff, including the executive director, four division administrators, the contracts manager, the human resources director, the IT supervisor, a contract attorney, and regional managers to learn about processes, identify challenges, and discuss potential cause of these challenges.
- ◆ Visited six Public Defender Division regions and all three Conflict Division regions to interview regional managers and office staff regarding workforce management in their regions.
- ◆ Reviewed publications from legal professional associations, such as the American Bar Association and the National Legal Aid & Public Defender Association, as well as the American Civil Liberties Union, to identify professional standards and guidelines for providing and contracting for public defense.
- ◆ Interviewed five public defense offices in three states to gain an understanding of best practices in public defense.
- ◆ Reviewed and assessed the current case weight system, including comparing hours spent by contractors relative to average case weights assigned, to determine if the case weight system represents time spent on cases.
- ◆ Surveyed 174 OPD staff attorneys in February 2020 to obtain their perceptions of OPD workforce management, including case assignment and access to resources. Fifty percent of recipients responded to the survey.
- ◆ Surveyed approximately 2,319 Montana Bar private attorneys in April 2020, including those who have never contracted with OPD, currently contract with OPD, and previously contracted with OPD. We received a 22.7 percent response to the survey. Respondents were asked about their perceptions and experiences contracting with OPD, billing practices, and willingness to contract with OPD at different reimbursement rates.
- ◆ Completed a cost-efficiency analysis of OPD staff and contract attorneys and different OPD divisions and regions to identify potential workforce management issues.
- ◆ Reviewed completed contract attorney evaluation surveys, analyzed FY 2019 client complaint data, and analyzed court data of client outcomes to determine relative effectiveness of different attorney types and regions.
- ◆ Completed a spatial analysis of the location of attorneys relative to the location of cases by court to determine attorney resource deficits and surplus, and relative case assignment efficiency by OPD region.
- ◆ Analyzed contractor cost data to assess potential issues relating to the reasonableness of billing and effects of the hourly attorney reimbursement rate decrease in 2018.

Issue for Further Study

Accurate and timely data is vital to carry out agency missions, identify potential issues in a system, and evaluate the success of public policy initiatives. This audit

completed work to assess relative client outcomes based on attorney type. In the process, we identified issues with siloed and conflicting data within the agencies and courts of Montana's justice system, including discrepancies in case close dates and case dispositions between the public defender's office and district court data, and a lack of useful demographic information. OPD staff indicate that they also commit significant administrative time to collecting and entering data that is already collected by other agencies. This includes information directly related to providing services to their clients, such as updated client contact information, client demographics, charges, court hearing dates, final dispositions, and custody status and location, among others. While OPD has made strides internally to increase data sharing within its own systems, data access and accuracy appears to be a statewide issue among the different public participants in the criminal justice system. A performance audit or interim committee study could assess current data collection and needs across the justice system, observe existing efforts to share access to data across organizations, assess data security, and identify additional sharing needs and methods.

Report Contents

The remainder of this report includes additional context regarding the program and details our audit findings, conclusions, and recommendations. There are three subsequent chapters:

- ◆ Chapter II discusses the practices OPD uses to ensure effective services.
- ◆ Chapter III presents the cost efficiency of public defense services.
- ◆ Chapter IV describes the extent to which data is tracked and used to inform management and policy decision making.

Chapter II – Ensuring Effective Counsel

Introduction

Providing effective indigent counsel is the primary purpose of the Office of State Public Defender (OPD). To provide effective counsel, OPD relies on a combination of staff and contract attorneys. Necessary methods to ensure attorneys provide effective counsel include hiring qualified attorneys, providing ongoing training, monitoring attorney performance, managing attorney caseloads, and evaluating client outcomes. We reviewed agency practices to determine if these activities were occurring, particularly regarding monitoring attorney performance and caseloads. We found OPD's evaluation practices do not ensure the agency is aware of whether or not attorneys provide effective counsel. They do not regularly monitor attorney performance and do not assign cases or retain enough attorneys to best mitigate excessive caseloads with current resources. Current caseloads for some attorneys are too heavy according to best practices, increasing the risk they cannot provide effective services to all their clients. This chapter provides recommendations to strengthen attorney performance monitoring and mitigate attorney caseload burdens.

OPD Does Not Routinely Evaluate Attorney Performance

Despite state policy, industry best practices, and its own policy and procedures, OPD does not evaluate the performance of either staff or contract attorneys. Section IV of OPD Practice Standards requires each attorney employed as a public defender “shall have their work performance evaluated on a yearly basis.” During our audit work we learned it is not typical for staff attorneys to receive evaluations. We conducted a survey of all regional staff and managing attorneys regarding their experiences and perceptions of workforce management. We found 36 percent of attorneys had never received a formal evaluation, and 25 percent of responding managers never give formal evaluations. Interviews with regional managers confirmed it was not common for managers to provide regular formal evaluations. One manager described both having never received one and having never provided one to staff their entire career. Managers did report in the survey and in interviews they frequently check in with their staff more informally.

Contract Attorneys Are Also Not Evaluated for Performance

All approximately 190 OPD contract attorneys are required to be formally evaluated on a regular basis in accordance with OPD policy and state law. According to OPD policy and state law, this is the responsibility of the contract manager in the Central Services Division. If the evaluation determines the contract attorney is not providing effective representation to clients, the contract manager is to notify OPD supervising

attorneys to determine if cases should be reassigned. The contract manager can keep the contractor from receiving new cases, terminate the memorandum of understanding (MOU), or require remedial measures. According to interviews with OPD staff, until recently OPD had not completed contractor performance evaluations in several years. The Legislative Audit Division previously identified this as an ongoing issue in a 2012 performance audit and a 2018 financial-compliance audit. Contract attorneys have also not been formally evaluated on a regular basis, despite state requirements that all OPD contract attorneys be evaluated on a biennial basis. Agency staff report they believed the old method of observing contractors in court was a waste of time and not effective. A new tool was developed and implemented in late summer 2019. Contractors are now being evaluated in batches to spread the time requirement on managers out over the biennium. OPD evaluated 71 of over 190 contractors as of February 2020. If the agency continues evaluations on schedule, this will be the first biennium it has fully met this requirement.

We reviewed evaluation results to assess the competency of the evaluated contractors. The evaluation materials consist of survey responses from supervising attorneys, office staff, OPD staff attorneys, judges, and prosecutors. There is also a portion that will eventually include following up with select clients. We examined the feedback to determine if there were any major issues identified with contract attorneys. We found 8 of the 71 reviewed attorneys were identified as underperforming by a reviewer. Half of these attorneys had at least one reviewer recommend not renewing their MOU. By the conclusion of audit work, the newly completed evaluations had not yet been used to determine whether to renew contractor MOUs.

Attorney Evaluations Are Best Practice and Statutorily Required

State law requires the OPD director to establish statewide standards to ensure services are provided by competent counsel, including performance evaluation protocols and establishing and supervising attorney evaluation programs. National legal associations indicate monitoring and evaluating public defenders is a best practice. The American Bar Association indicates that defense counsel (both staff and contract attorneys) should be supervised and systematically reviewed for quality and efficiency. By not completing formal performance evaluations of staff or contract attorneys, OPD is not meeting statutory requirements or best practice. Without comprehensive, formal evaluation of attorneys (contract and staff), OPD risks not contributing to meaningful professional development of attorneys, identifying performance issues that may result in negative client outcomes, or not knowing when attorneys need additional support or are experiencing burnout.

OPD Administration Should Communicate and Enforce Evaluation Policy

Overall, there is a lack of central guidance and oversight relating to completing staff attorney performance evaluations. OPD management activities are dispersed to the regional level, but administration and HR have not communicated expectations and policy regarding evaluations. In interviews with regional managers, many were unsure of the current status of the performance review policy. Some thought they were supposed to follow an annual formal policy but did not because they had never been directed to do so. Others had heard a new policy was in development and were waiting to see what it was before evaluating employees. HR staff indicated they were not enforcing the policy because they felt the traditional annual review was no longer considered best practice. However, even under new continual review methods, it is still advised that managers have structured discussions on a regular basis regarding performance. OPD has not yet developed or communicated the current expectations for performance evaluations to regional managers.

Client Grievance Tracking Should Be Completed and Monitored Consistently

Another method of monitoring competence of public defense is by monitoring client grievances. OPD currently collects written and signed grievances regionally. Regional managers are responsible for responding to grievances, including investigating their validity and determining whether reassignment is necessary. We reviewed the aggregate complaints recorded in OPD's case management system in FY 2019 and compared them to relative workload by attorney type. As presented in Table 1, we found contract attorneys had nearly twice as many complaints as staff attorneys, relative to caseload.

Table 1
Complaint Rate by Attorney Type

	Contract Attorney	Staff Attorney
Number of Complaints	149	367
Case Count	6,587	27,757
Complaints Per 100 Cases	2.3	1.3

Source: Compiled by Legislative Audit Division staff based on client grievance data analysis.

Upon further investigation during regional site visits, we learned complaints were not being entered in accordance with OPD policy. Interviews with regional managers revealed some managers submitted all signed and written complaints into the system,

while others only submitted complaints which they thought merited investigation. These regional managers also did not keep hard copies of the complaints they chose not to submit. As a result, it is unclear if there are concerning patterns in client grievances by attorney type or region. The higher ratio of contractor-related complaints to staff-related complaints could be due to regions not entering all complaints for staff, rather than true relative performance. Without accurate complaint data, OPD cannot determine whether differences in defense practices between attorney types or regions result in differences in client satisfaction. It is also more difficult to identify when individual attorneys are struggling relative to others with managing their cases.

Client Grievance Tracking Is Not Centrally Monitored or Enforced

The current OPD policy for entering complaints is not monitored or enforced. Administration suspected not all complaints were being entered but did not investigate where this was occurring or find a solution. Regional managers also did not like to enter all complaints because they considered some without merit and with no need to be investigated. However, there was not a way in the case management system to indicate when complaints were frivolous or nonsensical. Until recently, regional managers were also unable to see complaints associated with contract attorneys from cases outside of their region. During our audit, OPD made changes to allow managers to view all client complaint records by attorney.

Improvements in Monitoring and Evaluating Attorney Performance Needed

Performance evaluations and tracking client grievances are both methods for public defense agencies to monitor and support attorney performance. Evaluations are an important tool for management to ensure contract staff are providing the expected level of service and have the support they need from the office. OPD needs to improve centralized oversight and enforcement to maintain consistency between regions and divisions. Contract attorney evaluations should be consistently done by the central office, and actively used to inform decisions regarding continuation of MOUs and case assignment. While it is promising that the agency has begun contractor evaluations, these need to continue to occur and be used to inform agency decision-making regarding the contractor workforce. Administrators should include the provision of performance evaluations to staff and consistent input of client grievances as part of their evaluations of regional managers.

RECOMMENDATION #1

We recommend the Office of State Public Defender improve centralized oversight to ensure effective counsel is provided by attorneys performing public defense work by:

- A. *Updating, communicating, and enforcing a policy for performance evaluations to be used consistently across the state for evaluating the performance of staff attorneys.*
 - B. *Continuing to evaluate contract attorneys on a biennial basis and use the results to determine whether MOUs should be renewed or if remedial action is required.*
 - C. *Clarifying, communicating, and enforcing the client grievance tracking policy and procedures.*
-

Excessive Caseloads Are a Nationwide Challenge to Public Defense, Including Montana

Across the country, states have struggled to meet their obligation to provide effective defense due to heavy public defender caseloads. When caseloads are too heavy, attorneys cannot meet their professional obligations to provide effective counsel as they do not have time to conduct interviews, file motions, investigate facts, negotiate with the prosecutor, and prepare for hearings. National caseload problems often result from a combination of poor funding, criminalization of minor offenses, the addition of new criminal law, creation of specialty courts, and other factors. Many contributing factors to caseload burdens are out of the control of public defense organizations. We found that Montana is not an exception to this nationwide tendency to overburden public defenders.

OPD Uses a Case Weight System to Manage Caseloads

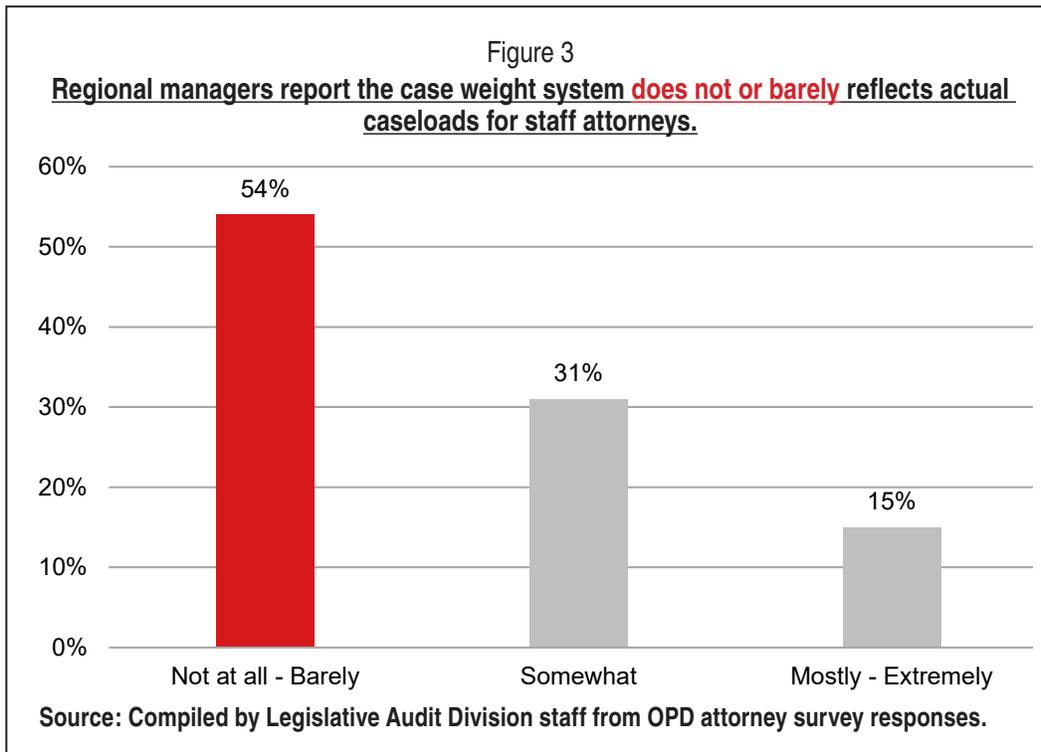
OPD practice standards and national legal organizations discuss the difficulty in setting rigid caseload standards, and the need to allow for additional time for travel in geographically large areas. OPD's goal is that caseloads must not be oppressive, and should match counsel's experience, training, and expertise. Like many other states, OPD uses an internally-developed case weight system to help assign cases to attorneys in an equitable manner. This system has assigned values to different case types and circumstances to serve as an approximation of the expected average amount of work required for a case. For example, a misdemeanor traffic offense would be assigned three case weight hours, while a homicide would be assigned 100 case weight hours. Guidance outlined by OPD determined 125 added case weight hours a month (or 1,500 added

case weight hours a year), to be the threshold at which regional managers must meet with staff attorneys to ensure their caseloads are not excessive. This corresponds with the expected 1,500 hours per year OPD expects staff attorneys to dedicate specifically to case work. Cases can last years, so these added cases are in addition to an attorney’s ongoing caseload.

OPD also uses the case weight point system to identify soft caps for contractor hourly claims. This means while contractors are always required to provide detailed invoices for the work completed on a case, they must provide additional written justification for their time when the number of hours charged surpasses the number of assigned case weight hours. Regional managers can then review this reasoning when they decide whether to approve the claim.

OPD Staff Are Not Confident in Case Weight System Accuracy

To determine whether the current case weight system was an accurate means of estimating workload, we included questions regarding its perceived accuracy to staff and managers in the internal OPD staff attorney and manager survey. We found attorneys generally believe the current case weight system is inaccurate. As shown in Figure 3 below, 54 percent of regional managers who responded to the staff survey believed the current case weight system “barely” or “not at all” accurately represents relative caseloads.



Despite Perceptions of Inaccuracy, the Case Weight System Generally Reflects Actual Hours Billed to Cases

To determine if these OPD perceptions of case weight system inaccuracy found in the survey were reflective of actual hours spent by attorneys on cases, we completed work to determine if attorney time spent on cases reflected assigned case hours. Due to data collection issues with time tracking by staff attorneys, we could only use contract attorney hours to compare case weights with actual time spent on cases. We analyzed time billed by contractors on cases marked as closed in FY 2019 in the OPD case management system. These records were joined with OPD attorney billing records for FY 2018 and FY 2019. Cases closed in FY 2019 had been open for as little as one day to as long as 12.6 years, though 75 percent cases closed within 1.8 years. Because of the length of some cases, some cases had additional hours billed prior to FY 2018. OPD indicated that due to a change in systems, they are unable to pull billing data from FY 2017 or earlier. We calculated the total number of hours charged to each case during FY 2018 and FY 2019 and compared them to the total case weight assigned. We then averaged the total percent of case weight hours billed by contractors by case type.

Despite managers' perceptions of inaccurate case weights, our analysis found case weights appear to be good approximations of relative professional time spent. If anything, they underestimate the number of hours spent on cases due to the longevity of some cases. On average, we found most hours billed in FY 2018 and FY 2019 on these cases resembled their assigned case weight hours by case type. Table 2 shows the percentage of assigned case weight hours billed as professional service hours by contractors for this time frame. An average of 100 percent of case weights billed indicate that overall, as much time was spent on the case as the case weight hours assigned. Percentages higher than 100 indicate on average cases took longer than their assigned weights, while percentages below 100 indicate less time was required on average than the case weights assigned. Overall, the average time spent was similar to the case

Table 2
Case Weights by Case Type Reflect Average Hours Charged by Contractors

Case Type	Average Percent Case Weight Billed
Lower Court Criminal Complaint	100%
District Court	108%
Guardianship	97%
Involuntary Commitment	126%
Youth Court	97%
Dependent Neglect	89%
Writ	94%
Lower Court Ticket	97%

Source: Compiled by Legislative Audit Division staff from case weight analysis.

weights assigned, with some variation by case type. For example, dependent neglect cases appear over weighted, but these cases tend to last longer than others (average 2.1 years), so are likely missing relatively more hours billed prior to FY 2018 than other case types.

Managers' perceptions of case weight inaccuracy do not appear to be reflected in actual time spent on cases as an overall average. Some OPD administrators and managers indicated they do not believe the case weight system has much value because individual cases may vary greatly from their case weights depending on individual circumstances. Some cases take significantly more or less time than assigned case weights depending on factors such as client desire to settle the case or go to trial. Managers use the case weight system to varying extents to assign cases to attorneys, but it is not generally used to monitor patterns of attorney efficiency. Based on our analysis, case weights appear to reflect the overall measure of relative workload on average, though likely underestimate the actual number of hours. This also means while excessive or little time spent on an individual case is not cause for concern with either a staff or contractor attorney, consistent patterns of either situation may be an indication of performance issues. Further analysis by OPD of the relationship of case weight hours to actual time spent on cases could be used to refine the case weight system.

CONCLUSION

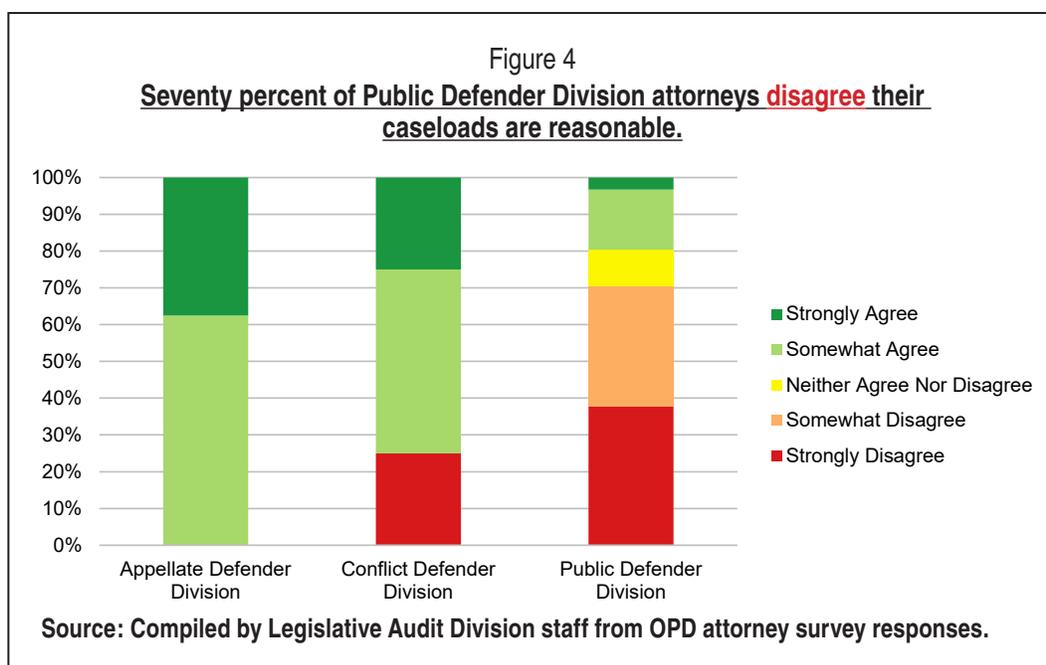
OPD's case weight system serves as an approximate indicator of average time spent on cases, according to recent contractor billing activity. These values serve as a reasonable approximation for relative caseload burdens. Further analysis of billing over longer periods of time and time-tracking by staff attorneys would help further refine the accuracy of case weights. OPD can use significant or consistent deviation from the case weight values as an indicator to review attorney activities.

Some Attorney Caseloads Are Excessive

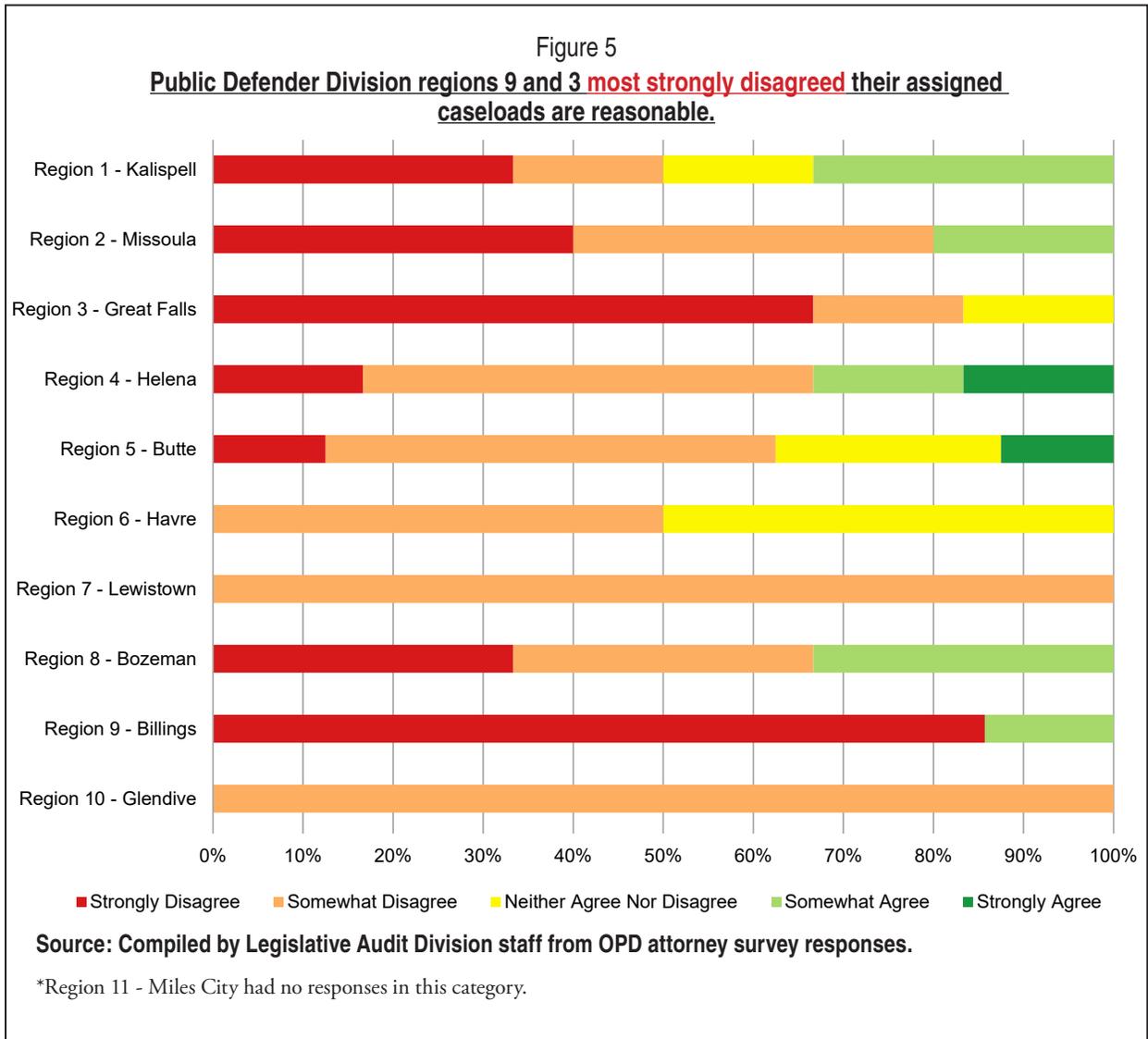
In 2002, the American Civil Liberties Union (ACLU) filed suit against Montana and seven counties based on several shortcomings it identified in the old public defense system, including excessive caseloads. Today, while the problems do not appear as dire, we still identified issues with excessive caseloads carried by some OPD staff attorneys. Not only do some attorneys believe their workload is unreasonable, these beliefs are supported in our work comparing attorney FY 2019 caseloads to OPD case assignment standards and national caseload limit standards.

OPD Attorneys Report Unreasonable Caseloads

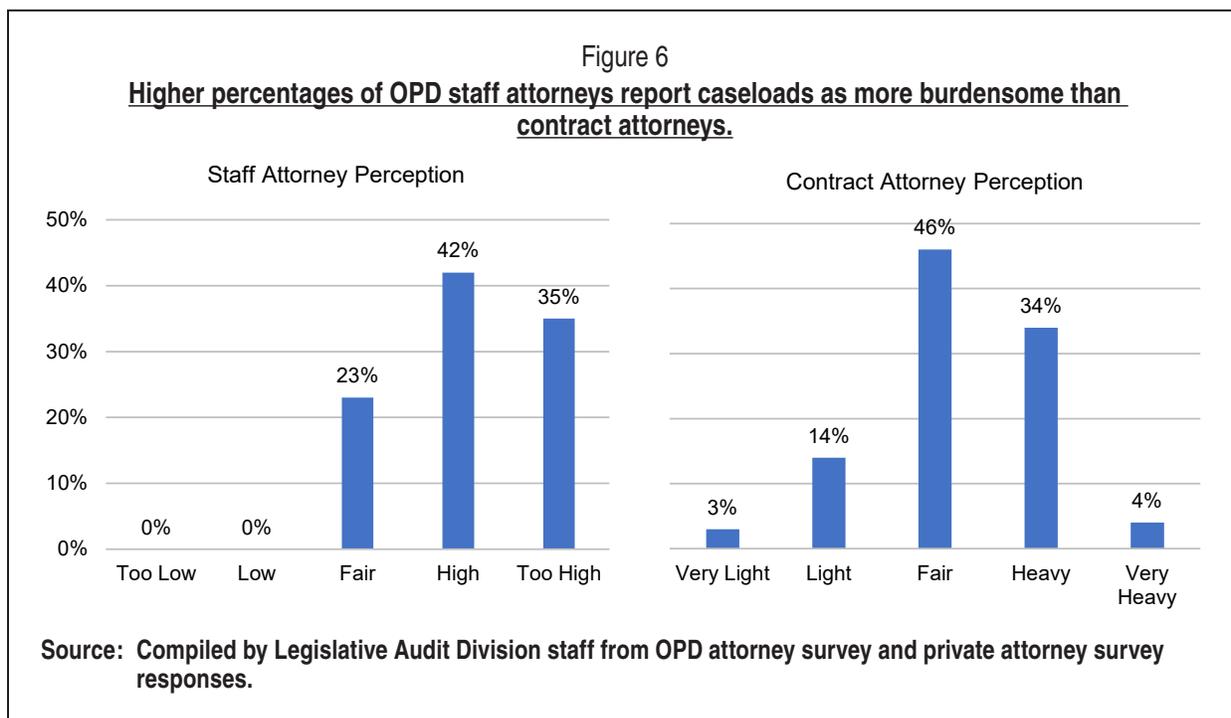
In our survey of OPD staff attorneys and managing attorneys, we found that many did not believe their caseload was reasonable. Figure 4 below illustrates Public Defender Division attorneys especially believe they have unreasonable caseloads, with 70 percent disagreeing their caseloads are reasonable. The Conflicts Division attorneys mostly indicated their caseloads were reasonable, but one quarter strongly disagreed. The Appellate Division, which can control its caseload by only taking on the number of appeals each year as suggested by national standards, was the only division that had all respondents believe their caseload was reasonable. As a result of maintaining a reasonable caseload, however, the Appellate Division has not been able to catch up on an inherited backlog of appeals cases.



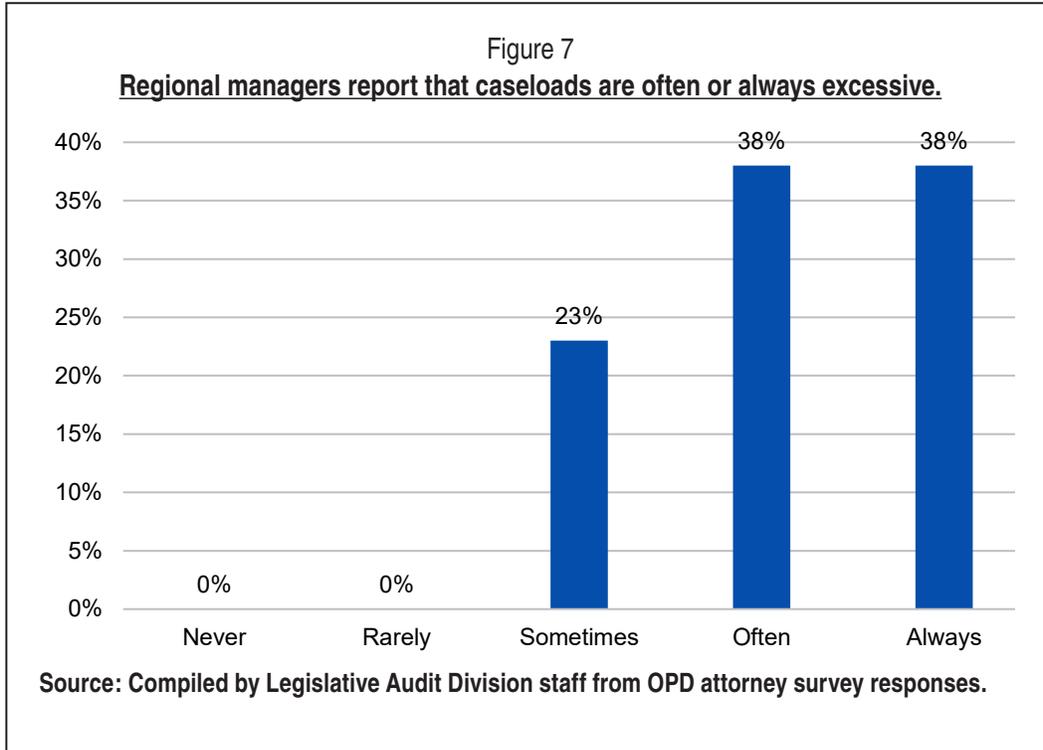
When Public Defender Division respondents were broken out by region, we found some regions felt especially overburdened. Figure 5 shows most attorneys in Region 9 (Billings) and Region 3 (Great Falls) strongly disagreed their caseloads were reasonable.



Staff attorneys also reported feeling more overworked than their contractor counterparts. For example, 77 percent of staff attorneys viewed their caseload as high or too high, while 37.5 percent of current contract attorneys viewed their current caseload as heavy or very heavy (Figure 6). This is not surprising given contract attorneys can control their workload and supplement their income with work paid at different rates.



OPD regional managers also agreed caseloads are often or always excessive. As indicated in their survey responses in Figure 7 below, 76 percent of managers believed caseloads are often or always excessive. Like staff attorney responses, no regional managers reported staff attorney caseload as low or too low.



Caseloads for Some Attorneys Exceed Both OPD and National Caseload Guidelines

To measure the extent of excessive caseloads reported by attorneys, we considered two different measures: OPD case standards and National Advisory Commission on Criminal Justice Standards and Goals (NAC) standards. First is the OPD standard of 125 case weight hours assigned per attorney per month, for an annual total of 1,500 hours. Once an attorney reaches 125 case weight hours, managers are supposed to check in with attorneys to ensure they can handle the caseload. We summarized the total number of cases and case weights added during FY 2019 per attorney using data from OPD's case management system. We found 56.6 percent of attorneys who worked more than half-time in FY 2019 exceeded this threshold. We also found 19.7 percent of these attorneys exceeded 2,080 case weight hours, or more than the total expected work hours in a year. While some of these individuals may well just be more efficient than others, it is concerningly high given our estimates that case weights on average underestimate the amount of time spent on a case, and more attorneys than not are exceeding the threshold. During regional interviews, some managers told us staff case weight hours so frequently exceeded 125 assigned per month they did not bother to meet with their staff to discuss the caseload. Attorneys also remarked in the survey

that there is no point in discussing their caseload burdens with their managers. They feel it is a constant condition and there is no one to take excess cases to provide relief.

Due to agency concerns about its own caseload system being an accurate reflection of average time expected to be spent on cases, we also considered the OPD caseloads relative to the annual maximum standards established by the NAC. This commission was created in 1971 to establish national criminal justice standards and goals. These standards are still widely used across the nation and are generally considered to be an absolute limit rather than an actual reasonable caseload. Overall these limits are criticized for not taking into consideration travel time in more dispersed areas or increases in workload relating to reviewing evidence from technological advances, such as social media pages and increased video footage. We applied the standards based on annual added cases in FY 2019 and found 12.5 percent of staff attorneys exceeded the maximum recommended caseload burden, as detailed in Table 3. Eight out of 14 regions have staff exceeding recommended caseloads. After breaking the total down by region, Region 3 (Great Falls) and Region 9 (Billings) had the most instances of excessive caseloads. This aligns with the reports of case weight excess from the staff attorney survey responses from these regions.

Table 3
Regions 3 & 9 Have the Most Attorneys With Excessive Caseloads

Region	Total FY 2019 Allotted Attorney FTE	Number of Staff Attorneys Exceeding National Caseload Standards	Exceeding Attorneys Average Percent Caseload Over NAC Guidelines
Region 1 - Kalispell	20	2	6.60%
Region 2 - Missoula	25	2	19.70%
Region 3 - Great Falls	13	7	17.30%
Region 4 - Helena	12.5	0	
Region 5 - Butte	9	1	4.80%
Region 6 - Havre	4	1	24.90%
Region 7 - Lewistown	1	0	
Region 8 - Bozeman	11	1	17.70%
Region 9 - Billings	27.5	3	29.50%
Region 10 - Glendive	2	0	
Region 11 - Miles City	2	0	
Region A - Missoula	8.5	0	
Region B - Helena	3	0	
Region C - Billings	4.5	2	30.20%

Source: Compiled by Legislative Audit Division staff from caseload analysis.

High Caseloads Increase Risk of Ineffective Counsel and Conflict of Interest

Legal associations have studied and described the effects of higher caseload on client outcomes. The American Bar Association, National Legal Aid and Defender Association, and others all indicate excessive caseloads threaten the ability for attorneys to provide effective indigent services. It can also lead to a conflict of interest for the attorney as they must choose between their clients on whom to spend time, to the detriment of the remaining clients.

Based on national research, the inability of public defenders to provide effective representation can have many effects on their clients, such as longer sentences and higher likelihood of incarceration. It also can increase the costs to the state by increasing the number of incarcerated individuals or extending the length of incarceration. With high caseloads, all attorneys regardless of their abilities risk not providing effective representation for clients. Ultimately this can potentially impact the overall costs to maintain the incarcerated population. For each additional year a client who is unnecessarily incarcerated due to overworked attorneys or other system inefficiencies, based on past audit work, the state pays on average over \$31,025 just in prison costs. Avoidable incarceration times also inflict severe hardships on clients, their families, and their communities.

Excessive Caseloads Impact Agency Retention

Regional managers and OPD staff report one of the main reasons attorneys leave OPD is due to burnout as a result of the caseload and burden of work. Region 10 (Glendive) and Region 11 (Miles City), for example, each struggle to keep one of their three attorney positions filled. Regional managers report attorneys in these positions regularly leave for higher pay in different organizations or transfer to a more urban OPD office. Region 11 (Miles City), with two attorneys and one manager, had both attorney positions vacant at the end of our audit.

We reviewed state human resource data compiled by the Department of Administration (DOA) to analyze turnover for all agencies in the state. The data, last updated in January 2019, showed annual OPD turnover for attorneys was 23.9 percent, including transfers to other state agencies. This is high compared to the statewide turnover rate of 15.84 percent as indicated in a 2019 statewide employee data report. OPD managers and administrators also explain that word gets out about caseloads in an office, which

negatively affects their ability to recruit new attorneys. Using the same DOA data, we were able to review turnover for attorneys by region. We found turnover in some of the most overburdened areas of OPD was well above the agency average. For example, Region 3 (Great Falls) had a turnover rate of 28.67 percent for attorneys. Turnover for OPD is costly. OPD estimates turnover for each departing employee costs the agency between \$30,000 and \$50,000 for recruitment, training, and additional use of contract attorneys to handle excess caseloads. They arrived at this number using Human Resources (HR) tools from the Society of Human Resource Managers. Based on the lowest of these estimates, turnover at OPD currently costs the agency \$1.3 million annually. Our work identified several factors impacting caseloads, which are discussed in more detail below.

Multiple Forces Contribute to Excessive Caseloads

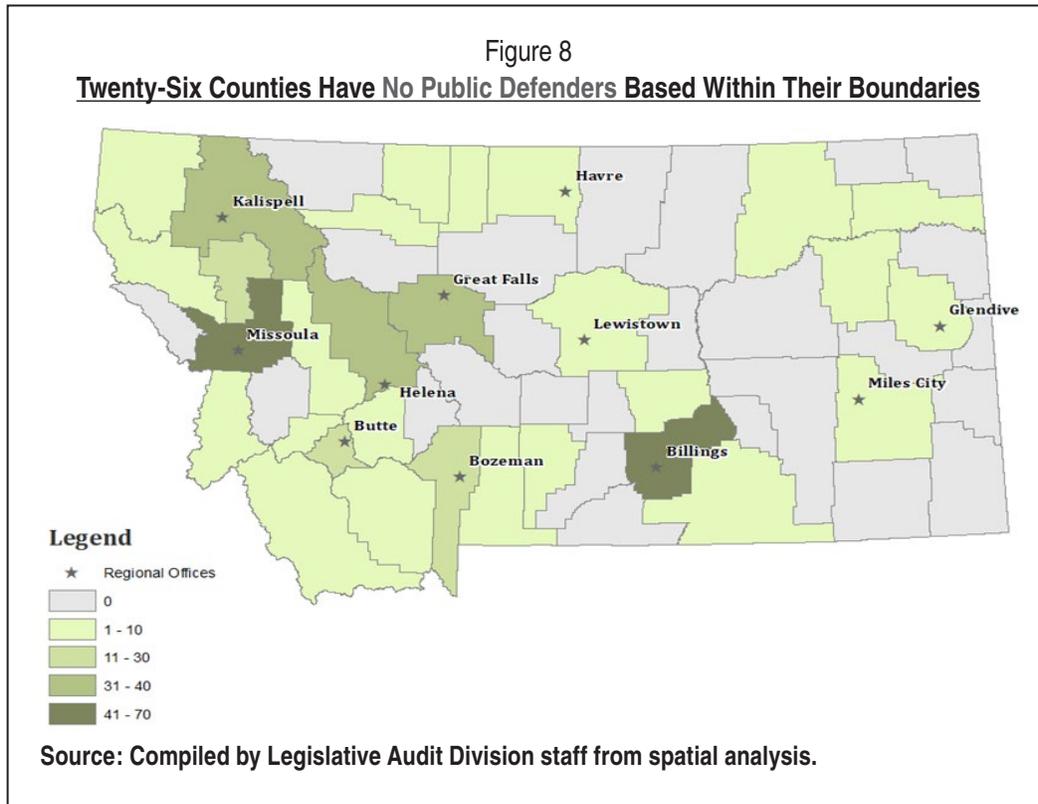
The cause of excessive caseloads in public defense is multi-faceted. Fundamentally, caseload excess is caused when the number of incoming cases and associated time requirements increase without a corresponding increase in public defense resources. OPD has limited ability to control its own caseload, but there are internal management practices that would better distribute caseloads. We found attorney recruitment and retention, competitive attorney pay, adjusting private attorney contract rates, and more equitable distribution of caseload across the agency could improve caseload burdens.

Regions Have Few Attorneys Willing to Work in Public Defense

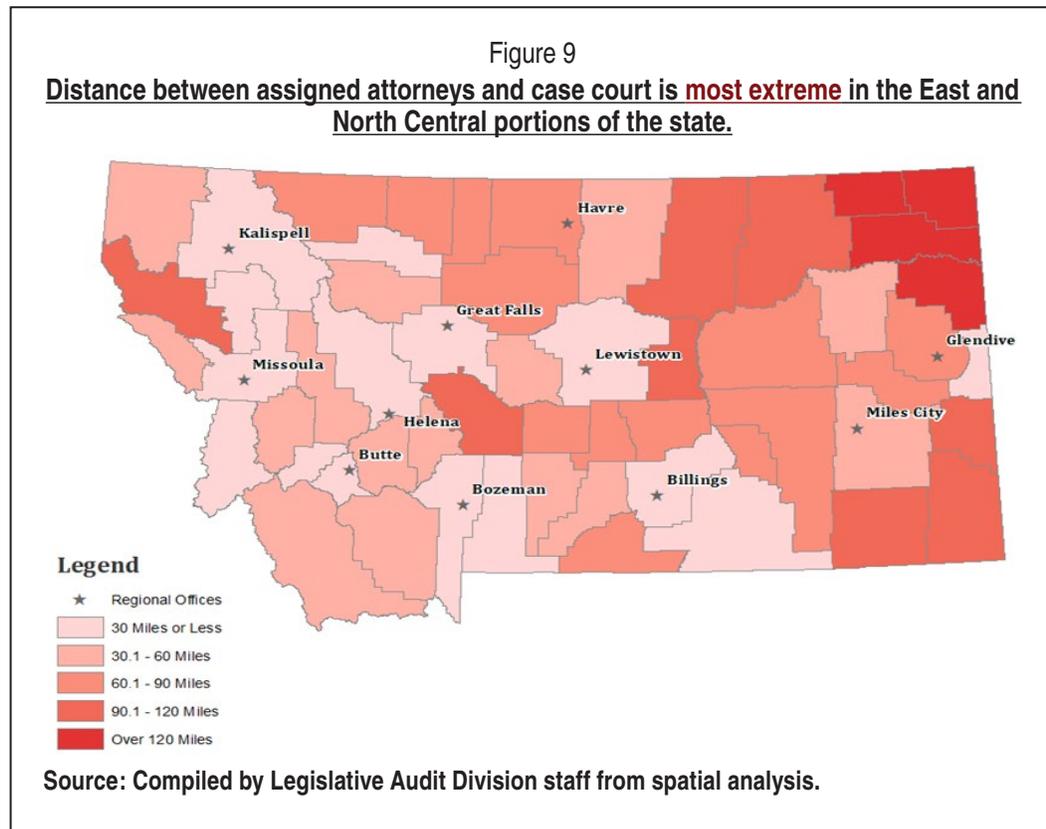
Overall scarcity of attorneys in certain areas of the state is another issue contributing to high caseloads. Many regional managers report being unable to find enough willing and competent attorneys to either work for OPD or take cases as contractors. This increases the time from case receipt to case assignment by OPD, overloads OPD staff attorneys, and causes cases to be assigned to attorneys far from the case court location. Regional managers reported having to “beg” contractors to take cases, often presenting multiple contractors with a case. Often contractors do not respond immediately as to whether they will accept a case, so each contractor who declines increases the time from case receipt to case assignment. Additionally, regional managers describe some of the willing contractors as being inexperienced, and OPD takes on a training role with them through mentoring and serving as co-counsel on cases.

In Many Rural Areas There Are Few or No Attorneys Working OPD Cases

As experienced in many professional sectors, attorneys in rural areas of the state are hard to come by. We determined in FY 2019 there were 26 counties that did not have a single public defender (staff or contract) located in the county. This is illustrated in Figure 8 below.



The lack of attorneys increases the burden on OPD staff public defenders in rural regions and increase the need to pay for extensive travel for distant contract attorneys. Figure 9 shows the relative travel burden on public defenders by showing the average distance each case’s court of jurisdiction is from the primary location of the assigned attorney. We found eight counties where public defenders needed to travel on average between 90 and 120 miles to reach their assigned case court, and another four counties where public defenders traveled on average over 120 miles.



OPD Has Not Prioritized Recruitment

Based on interviews with regional managers, we confirmed some OPD regions struggle with workforce shortages due to recruitment issues. In Billings, for example, over 20.4 percent of approved FTE positions were vacant as of June 2020. OPD staff and regional managers describe chronic understaffing or constant turnover in all the eastern regions and in Region 4 (Helena). Interviews with these regional managers found very few applicants apply, and many who do are underqualified. Region 3 (Great Falls), for example, often has no applicants who have passed the bar. Other regions struggle with both recruitment and retention issues.

OPD has a centralized HR function, but there is not a strategic or targeted approach to recruitment to meet regional needs. Regional workforce availability varies greatly by location, with some regions having a larger supply of competent and willing attorneys while others must “import” their workforce and struggle to retain attorneys in the area. There are currently no specialized incentives to bring attorneys to these higher demand or rural areas of the state or to encourage longer tenure. Any changes to attorney pay or incentives is negotiated between OPD and the union prior to implementation. OPD recruits at the state’s only law school but does not actively recruit out of state to bring in the needed workforce. Internships, which in many fields lead to entry level hires, are currently only offered sporadically on a regional basis. OPD staff also report when they do try to recruit attorneys, they lack tools to encourage potential recruits to travel for the interview or relocate. Until recently they did not offer travel reimbursement for interviewees or relocation reimbursement for new hires. They also have difficulty competing at the Montana Law School job fair because, unlike private firms, OPD cannot extend job offers to candidates on the spot. OPD needs to develop and prioritize a comprehensive strategy to recruit attorneys to under-staffed regions.

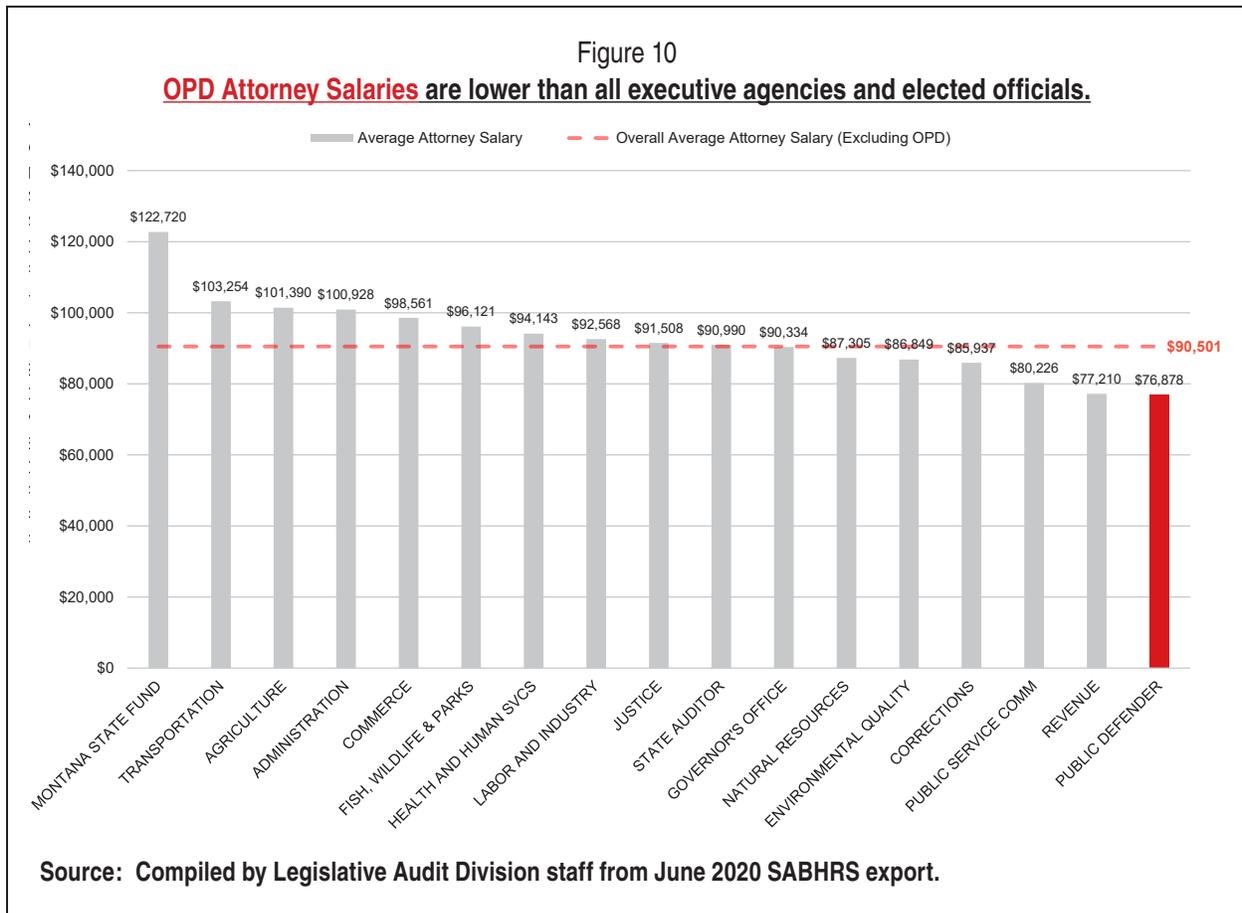
Montana OPD could improve its recruitment efforts by developing a recruitment plan of action, including regional incentives, out-of-state recruitment, or statewide internship or fellowship programs. We found other states use more vigorous recruitment practices to find public defenders. As part of our work, we inquired about recruitment and retention practices in other states, including Alaska, North Dakota, and Delaware. Alaska has a statewide internship program providing 30 percent of its public defender recruits, attends the Equal Justice Works public interest career fair in Washington, D.C., and has also set up a system that has new attorneys start in rural offices for a few years before allowing them to transfer to one of the more urban offices. North Dakota has also set up internships and externships to help with recruitment and outreach.

RECOMMENDATION #2

We recommend the Office of State Public Defender develop a targeted recruitment plan to provide incentives to recruit and retain attorneys, expand recruitment efforts, and restructure the recruitment process to increase ease of participation for applicants and provide more flexible ability to extend job offers.

OPD Attorneys Wages Are Lower Than Other Public Attorneys

One observation we heard from managers and administrators was that they often lose attorneys to either the prosecution or other state attorney positions paying more than OPD attorney positions. Our audit reviewed the average attorney salary for the state and researched current county attorney and prosecutor salaries. Salary information was extracted from state human resources for every Montana state government attorney as of June 2020 and averaged by agency. This included executive branch agencies and elected officials. We found when compared to other state government attorney salaries (unadjusted for tenure), Montana’s public defenders are paid less than all other agency attorneys. While OPD hires entry level attorneys, it also has more senior managing attorneys in all regional offices than other state agencies. As shown in Figure 10, OPD attorney average annual salaries are \$13,622 less than the average salary of all other executive agency attorneys. We found all other agency attorneys have higher average annual salaries than OPD attorneys, despite using the same salary market survey and classification as other attorneys in the state.



OPD managers also indicated that OPD attorneys sometimes leave to make more money by switching to prosecute defendants as county attorneys or deputy county attorneys. One manager believed if they were to walk across the street to the county attorney's office, they would immediately have a lower caseload and a \$20,000 raise. To assess the relative pay between county attorneys and OPD attorneys, we collected current salaries paid to county attorneys from 11 different counties across the state, including: Roosevelt, Beaverhead, Fergus, Cascade, Butte-Silver Bow, Flathead, Lincoln, Dawson, Lewis & Clark, Missoula, and Yellowstone. Table 4 shows the average, minimum, and maximum salaries for both line-attorneys and managing attorneys in public defense and county attorney offices. Public defenders make on average \$6,248 less than the average sample of deputy county attorneys. With OPD's recent pay increase for starting attorneys, starting salaries for public defenders do appear competitive with less experienced deputy county attorneys. There were, however, some deputy county attorneys paid much more than public defenders. OPD regional managers earn \$16,252 less than full-time county attorneys. In some cases, the difference between attorney managers located in the same municipality reached as high as over \$48,000 a year. In some areas even the deputy county attorney salaries were significantly higher than the current OPD regional managers in that area.

Table 4
Pay Comparison of Public Defenders and County Attorneys

	Average Actual Salary	Minimum	Maximum
Public Defender	\$74,925	\$64,064	\$92,851
Deputy County Attorney	\$81,173	\$56,908	\$113,443
OPD Regional Manager	\$93,864	\$83,966	\$99,049
County Attorney	\$110,116	\$87,485	\$135,235

Source: Compiled by Legislative Audit Division staff from SABHRS June 2020 salary data, self-reported deputy county attorney salaries from 11 counties as of August 2020, and a Montana Association of Counties FY 2019 salary survey for County Attorneys.

OPD recently adjusted its pay scale to increase its starting salary from \$56,232 to \$64,064 and collapsed the levels of more experienced attorneys. Based on this salary review, OPD attorney starting salaries are now competitive with starting salaries for many county attorney offices. However, major discrepancies in pay still exist for more experienced public defenders and regional managers relative to their peers. Differential adjustments to pay in certain regions may address some of these differences.

OPD attorneys are underpaid relative to other state attorneys despite being part of the same market analysis and pay band. More experienced attorneys in the public defender's office also appear to make less than similar attorneys in county attorney

offices despite best practice calling for parity between public defenders and those serving a prosecuting position. OPD has recently made changes to begin to address these issues, but many still exist. OPD has not successfully demonstrated to the legislature the extent of the relative pay disparities of OPD attorneys compared to others in public service to ensure appropriate funding is obtained.

RECOMMENDATION #3

We recommend the Office of State Public Defender investigate and propose methods to the legislature to address excessive differences in pay between OPD staff attorneys and other public attorneys.

Private Attorney Availability and Willingness-to-Contract Rates Vary Significantly by Region

To explore why there is a shortage of willing contract attorneys in some regions, we completed a survey of private attorneys to learn of their perceptions of contracting with OPD. Respondents included private attorneys practicing who have never, currently, and previously contracted with OPD. According to respondents, the primary reason attorneys reported stopping or decreasing their contracting with OPD was the low compensation rate. It was also the second most common reason attorneys had never participated in the contracting program. OPD currently pays \$45 an hour for time spent traveling and \$56 an hour for professional time spent. These rates are set by the executive director and were both lowered for budgetary reasons from \$62 in 2018. Though contractors reported in the survey they anticipated the rates to be reinstated after the budgetary crisis, they remain at the lower rate. In the survey, we asked attorneys to respond to a sample of scenarios with different possible rates of compensation for contracting with OPD. We also asked them to indicate how many average hours a week they would be willing to work under the proposed rates and whether they would be willing to travel outside their county. Overall, the rate at which half of respondents indicated they would consider contracting with OPD within their county was \$71 for professional time and \$57 for travel time. This is a \$15 an hour increase from the current hourly rate. The rate at which half of respondents would be willing to travel outside of their county was even higher, at \$76 an hour for the professional rate, and \$61 an hour for the travel rate. Over one-third of respondents would not consider contracting at any of the presented rates. This type of analysis has not yet been completed by OPD to identify regional differences and needs in contractor rates.

Among regions there was a lot of variation in both the number of attorneys indicating willingness to contract with OPD, and the rate they would work for. This indicates that changes to the contractor rate could increase the availability of willing and competent contractors, particularly in some areas with shortages in contractors. As illustrated in Table 5, we found the rate at which half of respondents were willing to contract ranged \$10 an hour between the highest and lowest regions.

Table 5
The point at which over half of respondents would consider working for OPD varied by region.

Proposed Rates (Professional/Travel)	Region 1 Kalispell	Region 2 Missoula	Region 3 Great Falls	Region 4 Helena	Region 5 Butte	Region 6 Havre	Region 7 Lewistown	Region 8 Bozeman	Region 9 Billings	Region 10 Glendive	Region 11 Miles City
\$56/\$56	19%	14%	21%	17%	18%	20%		22%	8%		33%
\$61/\$49	29%	21%	36%	26%	18%	40%		39%	22%		33%
\$61/\$61	38%	31%	43%	26%	27%	40%		43%	35%	50%	33%
\$66/\$53	43%	33%	43%	35%	36%	40%		52%	38%	50%	33%
\$66/\$66	43%	38%	57%	35%	36%	40%		52%	46%	50%	33%
\$71/\$57	48%	52%	57%	48%	45%	40%		57%	49%	50%	33%
\$71/\$71	57%	60%	64%	48%	45%	80%		61%	57%	50%	33%
\$76/\$61	62%	62%	64%	48%	55%	80%		70%	62%	50%	33%
\$76/\$76	67%	64%	71%	52%	55%	80%		78%	62%	50%	67%
Respondents rejecting all proposed rates	33%	36%	29%	48%	45%	20%	100%	22%	38%	50%	33%
Respondents not interested regardless of rate	10	12	11	4	9	1	2	7	10	2	0
Respondents presented scenarios	21	42	14	23	11	5	1	23	37	2	6

Source: Compiled by Legislative Audit Division staff from private attorney survey responses.

Higher demand areas such as Region 11 (Miles City) and Region 4 (Helena) had higher reported rate requirements. Other high-demand regions such as Region 10 (Glendive) had very few respondents and there was no rate at which over half of respondents would contract with OPD. As a result, there may be a need to increase and vary contracting rates to entice contractors in areas with small numbers of attorneys and/or high wage demands to meet regional public defense needs. Ensuring contractor rates are set to attract and retain attorneys where they are needed most can be used together with other workforce management strategies to ensure competent and cost-efficient public defense for Montanans.

RECOMMENDATION #4

We recommend the Office of State Public Defender assess the need for an increase of the contract professional or travel rate to attract willing and competent attorneys in high-demand areas of the state.

Caseload Is Not Evenly Distributed Between Agency Divisions or Regions

In addition to OPD facing scarcity of both staff and contract attorneys due to issues such as recruitment efforts, low staff salaries, and low contracting rates, we also found OPD has uneven assignment of cases among currently employed staff attorneys. In our analysis, we found the average caseload for Conflict Division attorneys is much lower than Public Defender Division attorneys. The average added caseload for an attorney in the Conflict Division was 42 percent lower by case weight in FY 2019 than for attorneys in the Public Defender Division. OPD administration had known there were differences between the two divisions but thought differences in case specifics such as case type might explain the difference. We found that while there were some differences, such as a longer average distance between Conflict Division attorneys from their assigned case courts, we did not feel the differences created an equivalent burden on the Conflict Division as the overall workload difference for the Public Defender Division.

Interviews with regional managers brought up the difficulty in moving cases from the Public Defender Division to the Conflict Division, which is currently only based on whether there is a conflict in the Public Defender Division. The Conflict Division is still a relatively new entity, created in 2018. There is currently no policy allowing Public Defender Division case overflow to be transferred to the Conflict Division for relief. Allowing excess nonconflict cases to be moved to Conflict Division, when capacity allows, could relieve some of the caseload burden off stressed Public Defender Division regions. The number of attorneys in the Conflict Division is considerably lower than the Public Defender Division, however. These attorneys are also, on average, twice as far away from their clients' courts of jurisdiction, meaning they may have a higher travel burden. Any redistribution of cases between the divisions must balance the workload needs of both divisions.

RECOMMENDATION #5

We recommend the Office of State Public Defender establish and implement policy for moving cases between divisions to increase the use of the Conflict Division for select case overflow relief for nonconflict cases.

Chapter III – Providing Cost-Efficient Counsel

Introduction

The Montana Public Defender Act requires the public defense system be managed in fiscally responsible manner. In the past, the Office of State Public Defender (OPD) has overrun its annual budgetary allocation every year since inception. The 2020/2021 biennium may yet be the first budget cycle the agency does not require a budgetary supplement or special funding from the governor's office. The reasons for budget excesses vary but include a combination of unexpected contractor fees relating to a death penalty case and consistent inability to convincingly frame the business needs of the agency to the legislature. There have also been concerns regarding the accuracy and efficiency of contractor billing and work on public defense cases.

To identify overall cost efficiencies of OPD related to frontline attorneys, support staff, and contractors that work on cases, we completed a cost-efficiency analysis to identify whether there were more efficient means of allocating cases between attorney types and divisions. We determined staff attorneys are overall more cost-efficient both by average cost per case assigned and each case weight hour assigned. We also reviewed current staff attorney time-tracking practices to review relative efficiency, only to find OPD attorneys do not consistently track time. We also reviewed the highest billing contractor hours for reasonableness to determine if contractors have patterns of questionable billing. OPD policies and practices relating to oversight of contractors do not direct OPD to monitor or follow up on system-wide contractor billing patterns. In this chapter, we offer recommendations to improve time-tracking and monitoring and increase central oversight of contractor billing.

OPD Cannot Control Workload

A common issue for public defender organizations is providing effective defense for their clients with limited resources. Public defense organizations cannot control the flow of clients they must represent due to their responsibility to uphold their state's constitutional requirement to provide indigent defense. Factors that commonly increase the workload on public defense organizations include the poverty rate, sentencing practices, number of law enforcement officials, and local prosecutor charging practices. In interviews with OPD managers across the state, we determined several localized issues leading to increased workloads. These include:

- ◆ Municipal incarceration practices,
- ◆ Local pre-trial requirements,
- ◆ Individual prosecutor practices and campaign behavior,
- ◆ Special courts, such as treatment courts,

- ◆ Frequency of judge-required in-person appearances,
- ◆ Sentencing practices and requirements, and
- ◆ Number of arrests by local law enforcement.

OPD has some ability to refuse cases if it determines the client is not financially eligible for its services. However, even if OPD finds a client is not eligible for its services, judges still have the final decision if OPD will continue to represent the client. OPD staff report there are cases in which they found clients were not eligible, but judges required OPD to continue to represent the client because judges prefer not to work with self-represented defendants.

OPD Staff Attorneys Cost Less Than Contractors Based on Relative Workload

To determine if OPD efficiently allocates cases between staff and contract attorneys, we completed a cost-benefit analysis of cost per case and case weight based on attorney type (staff or contract attorney). For the purposes of this review, we excluded appellate case costs due to the significant difference in the casework and assignment relative to the other divisions. Central Services costs were also not included in the analysis due to the use of these services to provide administrative support regardless of the make-up of attorney type used. To identify costs for cases represented by OPD, we included the gross salary, benefit share, and retirement share for OPD attorneys and legal assistants in OPD regional offices. We obtained this information from state human resource data for FY 2019. OPD manager costs were discounted 50 percent, as managers are also responsible for contractor oversight. We included the FY 2019 regional rent for offices in the costs. For contractor costs, we took actual time charged by attorneys for professional and travel time in FY 2019 from OPD’s billing system. We did not include office supply costs and utility costs for either OPD offices or contractor office stipends. We also did not include costs of specialists, such as investigators, expert witnesses, or caseworkers, as these services are required regardless of attorney type. To identify the average cost per case and case weight, we summarized the total number of cases and case weights assigned in FY 2019 to each type of attorney. Some attorneys switched status mid-year, in which case the cases were allocated to their records based on the proportion of hours the attorney charged as staff to SABHRS or billed as a contractor to the OPD billing system. As shown in Table 6, cases represented by contract attorneys cost 22 percent

Table 6		
<u>Staff Attorneys Cost Less on Average Per Added Case Weight and Added Case</u>		
	Average Cost Per Added Case Weight	Average Cost Per Added Case
Percent Difference Contractor to Staff Attorney	+22%	+64%
Source: Compiled by Legislative Audit Staff from cost-efficiency analysis.		

more in FY 2019 by case weight and 64 percent more by case count than cases represented by staff attorneys.

While there will always be situations in which contract attorneys are the most beneficial representation, increasing the use of staff attorneys could decrease associated costs in some cases. Contract attorney professional and travel related reimbursements totaled over \$6.3 million in FY 2019. If all these cases were able to be absorbed by staff attorneys in the future by increasing in-house resources, savings of over \$1.3 million could be achieved based on the relative case weight efficiency differences.

OPD Currently Prioritizes Assigning Cases to Staff Attorneys

OPD has not completed a comprehensive evaluation of the relative cost-efficiency of contractors and staff attorneys. However, the office explored it in the past based on a comparison of two similar cases and determined staff attorneys were more affordable. As a result, regional managers indicated they try to contract out as little as possible. The Public Defender Division especially keeps contracting down, and only contracts when its caseloads are unsustainable, often due to specialized case needs or staffing shortages. The Conflict Division contracts out more frequently due to many of its cases including multiple defendants that must be contracted out due to conflict of interest issues. Given the potential for cost efficiencies in using staff attorneys for cases, OPD should leverage its allotted FTE by prioritizing being fully staffed.

Case Assignment and Staffing Methods Could Further Decrease Costs

OPD contracting is currently less efficient than keeping cases with internal staff attorneys. OPD contracts cases with private attorneys for several reasons. Examples include conflict of interest within a region or division, case overflow in areas where there are not enough staff attorneys to keep up with the workload, geographic isolation of cases from OPD offices, and necessity for specialty case expertise. There is potential for increased cost-efficiency by using staff attorneys more frequently in some of these circumstances. While regional offices cannot work on cases with conflicts of interest, staff attorneys in nearby regions could potentially take some of these cases. This is currently a limited practice due to capacity issues handling nonconflict cases within a region. In cases of work overflow, adding more staff attorneys to take cases and allowing the Conflict Division to take nonconflict cases could decrease reliance on contract attorneys. Overflow cases could also be increasingly kept within OPD if the office was able to improve its recruitment and retention issues to make sure positions are filled, and experienced attorneys retained.

CONCLUSION

The most cost-efficient means of providing indigent legal services is by assigning cases to OPD staff attorneys. OPD's current practice emphasizes keeping cases with staff attorneys when possible, but staff shortages and conflicts of interest require contracting out. OPD may be able to increase its capacity to keep cases in-house by increasing the number of staff attorney positions and conflicting cases out between different regions. This could potentially decrease overall per case cost of providing indigent defense.

OPD Does Not Accurately Track or Report Attorney Time

While OPD cannot decrease its caseload and does generally emphasize assignment of cases to staff attorneys, there are some means by which OPD could better track cost efficiency in the office. One challenge to providing cost efficient services is knowing what resources are needed to complete the work and which aspects of the workforce are more efficient. OPD policy directs attorneys to keep track of daily time in one-tenth hour increments by case type and court on a weekly basis. Supervising attorneys are responsible for reviewing their direct reports to ensure time is being tracked in a uniform matter. As part of our work, we reviewed a data export of time tracked by attorneys by case type and court for FY 2019. We found recorded time tracked in OPD's case management system to identify staff time spent directly on casework was inaccurate and incomplete. Many full-time attorneys rarely entered time. There were also attorneys with full caseloads recording low numbers of hours as casework over the year. For example, some had regular entries of only one minute in a pay period. Others had high values entered, including one entry for 2,922 continuous 24-hour days which agency staff suspected an increment labeling error (i.e. entry of "m" for minutes instead of months).

Tracking Time Is Best Practice for Public Defense Organizations

In addition to OPD policies, the American Bar Association has suggested tracking public defender time in order to:

- ◆ Justify compensation to governments,
- ◆ Explain the type of work performed,
- ◆ Demonstrate how hard attorneys are working,
- ◆ Identify more time-consuming courts,
- ◆ Show the time waiting in court,

- ◆ Reflect which public defender activities increase positive outcomes, and
- ◆ Assess the extent of efforts of lawyers for clients in both time and activities.

OPD's current time tracking efforts are not complete or accurate enough to meet these suggestions.

Inaccurate Time-Tracking Data Challenges State Policy Makers

Tracking time to case type and court by each attorney is necessary to provide accurate data to meet state statute requirements for detailed OPD expenditure data. Without accurate time tracking, OPD is unable to show how much or little time defenders devote to core tasks, how much time is spent on specific cases, and whether there are patterns for attorneys or divisions. This information can help OPD managers advise attorneys, redistribute caseloads, and leverage for appropriate funding of the agency. Additionally, state law contains a provision that requires OPD to submit a biennial report to the governor, the Supreme Court, and the legislature, including detailed expenditure data by court and case type. Due to staff attorneys inconsistently recording their time, costs reported by OPD in the past have not been an accurate portrayal of the relative cost per case type or court. As a result, the legislature cannot determine the relative costs to OPD from actions it takes in other parts of the justice system and does not have the information it needs to ensure appropriations are what the agency needs to fund its activities. It also hinders OPD's ability to implement changes and communicate to the legislature funding requirements to provide indigent defense services across the state.

OPD Does Not Monitor or Enforce Time-Tracking Policy

We found there is not centralized oversight and enforcement of agency policy due to undefined roles of administrators and central office staff in monitoring compliance and performance. In this case, OPD administration was unaware of the extent to which staff attorneys were not tracking time because they did not review or audit attorney compliance. Therefore, they did not know managing attorneys were not requiring attorneys to complete time-tracking information. Data is supposed to be audited and certified according to policy, but there is not a specific description of an audit process relating to time-tracking.

During our work, OPD management indicated they recognize the value of accurate time reporting and are developing a dashboard to show which attorneys have entered time, how many hours they entered, and the type of hours reported to assist managers approving time. This will include monitoring if attorneys and regions submit an expected number of case hours to identify a threshold for potential individual and

regional compliance issues. Continuing to monitor this information and refining the controls will help identify time-tracking issues in the regions and provide more assurance of the quality of the tracked time.

Current Time-Tracking Mechanism Is Considered Burdensome

OPD attorneys indicated tracking time is arduous and time consuming in the current case management system, particularly since they must also separately enter aggregate time worked for their state time sheets. Because of this, OPD managers are reluctant to require staff attorneys to track time due to concern about attorney retention. Nonetheless, reporting time is important from the perspective of both staff accountability and communicating agency needs to the legislature. Time tracking is considered best practice for public defense organizations and is a common practice in other types of law. Improving the ease of time-tracking and automatically requiring tracking be completed in the case system as part of daily work processes will improve management enforcement, ease recruitment or retention issues relating to time tracking, and improve attorney perceptions and compliance with time tracking. OPD is currently planning to replace its case management system and plan to integrate time tracking into the daily work processes.

RECOMMENDATION #6

We recommend the Office of State Public Defender improve agency time tracking completeness and accuracy by:

- A. Increasing centralized oversight of the completeness and accuracy of time-tracking by monitoring frequency of submissions and quantity of time.*
 - B. Enforcing the requirement that managers review and approve time each week.*
 - C. Improving the ease of time-tracking by exploring easier methods of electronically entering and tracking time and incorporating tracking into daily workflow processes.*
-

Some OPD Contract Attorneys Bill Inconsistently and Inefficiently

We found some contract attorneys are charging in excess of what is reasonably expected for their workload or for the time frame in which they are billing. We also found others underutilizing assistants or charging assistant time under their own MOU at the same rate. Contract attorneys may use legal assistants under their guidance to help

with routine casework that does not require a law degree. These assistants currently must set up a separate MOU with OPD and bill their time separately at \$18 an hour.

We reviewed contract attorney FY 2019 billing data extracted from OPD’s billing system to identify anomalies that may indicate billing inefficiencies, policy issues, and other potentially concerning patterns of behavior. Unlike salaried employees, contract attorneys are only paid for their time spent directly on casework. It is unlikely that every hour worked by a contract attorney is billable. It is against best practices and policy to bill for things such as completing mandatory professional training hours, administrative time, breaks, or time spent on private practice. Yale Law School estimates 75.7 percent of time worked by attorneys is billable, while OPD estimates 72.1 percent of attorney time is directly case related. With that in mind, contractors billing over 40 hours a week on average likely spend significantly more time working in a day than a salaried employee. To determine if there were contract attorneys appearing to bill more hours than would be expected in a given time frame, we pulled contractors who billed more than 2,080 hours (the equivalent of a full-time work year without any leave). Using this data, we calculated the average number of hours billed per weekday and workday (week days minus official holidays). Eight contract attorneys billed more than 2,080 hours in a year, or 40 hours a week. One billed an average of 14 hours per weekday for the year. Using the higher rate of 75.7 percent, we estimate contract attorneys are likely working even more unreasonable hours based on these billing rates. Based on this rate, these contractors were working between 10 and 17.5 hours per weekday on average throughout the year, as described in Table 7.

Table 7
Average Hours Contract Attorneys Billed and Number of Estimated Hours Actually Needed to Work to Support Billing
 (Based on Yale Billable Hours Estimate)

Contract Attorney	Total Hours Billed	Total Estimated Hours Actually Worked (75.7% efficiency)	Estimated Average Hours Worked Per Weekday	Estimated Average Hours Worked Non-Holiday Weekday
A	3,652.6	4,540.2	17.5	18.3
B	3,383.1	4,205.2	16.2	17
C	2,691.7	3,345.8	12.9	13.5
D	2,585.2	3,213.4	12.4	13
E	2,340.3	2,909.0	11.2	11.7
F	2,256.1	2,804.3	10.8	11.3
G	2,131.7	2,649.7	10.2	10.7
H	2,085.1	2,591.8	10	10.5

Source: Compiled by Legislative Audit Division staff from contractor billing analysis.

While these billing patterns seem concerning, it is possible attorneys simply carry heavy caseloads. To determine if these attorneys managed to carry caseloads that reflected a similar relative number of hours, we compared the total professional hours billed by these attorneys to the number of case weight hours assigned to them in the OPD case management system in FY 2019. Some, but not all, appear to carry large caseloads. Higher caseloads are expected to lead to increased efficiencies. Only one attorney, however, was more efficient with their hours than the case weights assigned to them. Four of the eight attorneys billed nearly twice as many hours as would be expected given their assigned case weights. Professional hours billed relative to hours assigned are described in Table 8 below. For each attorney, the professional time billed by that attorney (excluding travel time) is shown in column two. Column three shows the total case weight assigned that year to each attorney. Column four calculates the number of hours charged over the number of hours assigned and column five calculates what percentage the hours billed exceed case weight hours. The final column calculates what these excess hours cost based on the professional attorney billing rate.

Table 8
Contractor Billing as Percent of Assigned Case Weight Hours

Contract Attorney	Total Professional Hours Billed	Total Added Case Weight	Total Potential Excess Hours	Percent Excess Professional Hours Billed	Cost of Hours Excess Case Weight Assigned
A	3,471	2,598	873	34%	\$48,877
B	3,073	1,826	1,247	68%	\$69,804
C	2,224	3,743	NONE	NONE	NONE
D	2,565	1,331	1,234	93%	\$69,126
E	2,264	918	1,346	147%	\$75,354
F	2,076	1,047	1,029	98%	\$57,624
G	2,006	1,774	232	13%	\$12,975
H	2,085	920	1,165	127%	\$65,246
		Total	7,126		\$399,006

Source: Compiled by Legislative Audit Division staff from contractor billing analysis.

We identified these contractors from OPD records based on unexpected billing patterns that may be a result of reasonable case specific circumstances, lack of clear billing increment policy, misuse of contractor staff billing under attorney MOUs, or even fraudulent representation of work. OPD staff describe one related issue they observed with contractor billing that they referred to as “micro-billing.” Staff describe this practice as excessively rounding microtasks, such as sending an e-mail or text, to a .1 hour minimum. Staff indicated at one time they checked the extent of these micro-billings and found approximately 20 percent of contractors excessively and noticeably

separately rounded small tasks to the .1 hour increment for billing, resulting in major inflation to their overall bills. This was supported by our survey results, in which 80 percent of contract attorneys indicated that they billed to the nearest one-tenth hour by task. We found 20 percent billed to the nearest one-tenth by client per day, and none billed to the nearest one-tenth hour for total work done for OPD clients in a day.

Contractors Do Not Use Assistants to Decrease Administrative Costs

Another example of inefficient contractor billing we identified was limited use of less expensive legal assistants for certain tasks relating to OPD cases. OPD offers \$18 an hour for contractors' legal assistants to work on OPD cases. These assistants must have their own MOUs and charge time separately from the assigned contract attorneys. Based on survey results:

- ◆ 41 percent of survey respondents indicated they had an assistant but did not use them to complete any OPD work. This indicates they are doing work that could be completed by an assistant at a lower professional rate.
- ◆ Some respondents (8 percent) did use assistants to work on OPD cases but charged the time under the attorney's MOU at the higher attorney professional rate.

Using assistants to complete work at a lower billing rate could help decrease costs associated with certain case activities. In the survey, two-thirds of respondents indicated they would consider diverting work to their assistants if there was an increase in the billable rate for assistant work. At an increase to \$25 an hour for assistants, 76 percent indicated they would divert work to legal assistants, though 44.5 percent would only do so if they could bill the time under their MOU. This rate is less than half the current contracting professional rate, so could lead to cost savings for the office. Only 24 percent of respondents thought the increased rate would cover their overhead costs for an assistant to complete the work.

Charging More Time Than Expended Is Against Legal Association Ethics Opinion

The American Bar Association clearly stated in a formal ethics opinion that attorneys do not fulfill their ethical obligation if they charge a client for more hours than expended, except for rounding to the minimum time period. To abide by ethics requirements for their profession, attorneys should practice this regardless of OPD's restrictions laid out in policy. OPD as an agency aims for attorneys to spend about 1,500 hours a year on direct casework hours, or about 72.1 percent of their time. An estimate of billable time from Yale estimated about 75.7 percent of time was billable for attorneys.

If contractors were working at an efficiency of 75.7 percent of billable time, those same eight attorneys would be billing a range of an average of 10 to 17.5 hours per weekday for the year. This indicates some of these attorneys (and likely others with lower caseloads) charge more time than spent on clients or charge time worked by their assistant under their MOU.

Inefficient Contractor Billing Diverts OPD Resources

For the eight highest billing attorneys, billing for professional service hours charged in excess of the case weights was 7,125 hours. The total cost of these hours is over \$399,000. Only one of the eight highest billing attorneys appear to have billed on average fewer hours than the case weight hours assigned to them in that year. Despite charging time well above the hours of a full-time equivalent staff attorney, half of these contract attorneys did not even have a full-time equivalent caseload (1,500 case weight hours) based assigned to them in that year.

As a result of potentially excessive billing, resources that could be directed to improving public defense services are being diverted to work that is not completed. For example, the funds could be used to provide additional staff attorneys or support staff to relieve caseload burdens for staff attorneys, or even paying higher rates to improve access to additional contract attorneys.

OPD Does Not Exercise Ability to Revoke or Limit Contractor's Ability to Take Cases Based on Inefficient or Unethical Billing

Per OPD policy, OPD's contract manager is responsible for deciding when to renew or revoke MOUs based on evaluations of contractors and other factors. If the evaluation shows the contract attorney is not performing in a satisfactory manner, the contract manager must notify the supervising attorney, who determines if case-related action is required. Regardless of the supervising attorney's actions, the contract manager can suspend or limit the contractor's ability to receive new assignments, require remedial measures, or may terminate the counsel's MOU with OPD. This policy shows there is an expectation that the contract manager plays a role in assuring contract attorneys are fulfilling their obligations, including efficient and ethical billing of time.

OPD's policy regarding contractor billing does not specify how contractors are to appropriately round their time for OPD clients for billing purposes and does not include any central level oversight regarding contractor billing. While there is centralized contract oversight, this function does not regularly review contractor billing data, such as hours billed relative to overall caseload or total time billed within a time period, to

identify unusual billing patterns. The contract manager also does not review overall billing practices as part of the biennial contractor evaluation process.

Contract Billing Oversight Is Regionally Dispersed

There is regional oversight and responsibility for reviewing contractor billing, but the review is case specific and concentrates on identifying unnecessary or irrelevant work and denying payment for the associated charges. There is not any guidance from the central office or administration regarding statewide expectations for what work is unnecessary or irrelevant under different circumstances. An unintended consequence of this approach is inconsistent practices. OPD contractors who work in multiple regions and divisions have noticed these inconsistencies and reported them in survey responses. Some report having to adjust their bills and their work according to each manager's billing preferences.

Some regional managers report when they notice contractor bills appear to be excessive on a case-by-case basis, they are not always comfortable denying payment. They indicate they wish central management would help them handle these types of disciplinary issues with contractors, particularly with repeat offenders. They also express concerns that often they have no choice but to continue to use a contractor, because there are no other contractors willing or able to take on the work. The contract manager indicated it was important to keep the responsibility for case-by-case payment decisions at the regional level. This is because these locally connected, experienced attorneys would be most likely to know if work was reasonable.

OPD Does Not Specify Time Rounding or Communicate Assistant Option

OPD policy regarding contractor billing requires claims be submitted on a monthly basis separated into provider hours and travel hours rounded into one-tenth of an hour increments, including a detailed invoice for each case. This policy does not specify if the increment should be applied by task, by client daily total, or by OPD daily total. Because of this, micro-billing by contractors cannot be denied based on policy. Other states, such as Massachusetts, have billing standards that clearly indicate time must be aggregated for all public defense clients and rounded to the nearest tenth of an hour. They are not allowed to round each separate task up to the next tenth-hour, or round time for each client to each tenth of an hour. If OPD's policy included similar guidance regarding incremental billing, they would be better equipped to stop paying contractors for more time than worked on OPD clients.

In addition, OPD does not communicate to contractors the ability to use assistants for certain types of OPD client related tasks or encourage contractors to consider

using more affordable assistants. In the private attorney survey, 64 percent of current contractors indicated they were not aware they could use an assistant and bill for their time on OPD cases. OPD staff indicate they do not encourage the use of assistants among contractors as they are unsure whether it would result in a net cost savings or loss to the agency. Some contractors may currently use assistants but donate their time. However, considering the wide difference between the assistant rate of \$18 an hour and the attorney rate of \$56 an hour, and because some contractors are currently charging assistant time under the attorney rate, there are efficiencies that could result from increasing awareness of the ability to use assistants. OPD could consider increasing the appeal of using assistants for certain tasks by allowing attorneys to bill assistant time under their own MOU and considering increasing the rate.

RECOMMENDATION #7

We recommend the Office of State Public Defender increase centralized oversight of contracting billing on an agency level to improve efficiency and consistency in contractor billing by:

- A. *Reviewing aggregate agency-wide billing data relative to assigned cases, case weight hours, and expected work hours for a given time period during the biennial contractor evaluation process to determine whether to renew each MOU,*
 - B. *Providing guidance for regional managers regarding appropriate and inappropriate contractor billing circumstances to increase consistency between regions,*
 - C. *Revising the contracting policy to specify aggregating time billed for each OPD client to the nearest one-tenth hour by contractors, and*
 - D. *Communicating the option to use assistants for certain tasks, revising policy to allow work to be completed under the attorney's supervision and MOU at the assistant rate, and considering an increase in the assistant rate.*
-

Chapter IV – Public Defense Data Tracking and Analysis

Introduction

Data tracking and analysis is key for all agencies to achieve objectives, identify challenges, and respond to risks. Data can help public defense organizations improve program efficiency and effectiveness in providing client services by monitoring case activity and client outcomes, identifying and justifying budget and resource needs, and advocating for broader changes to the criminal justice system. National legal associations have identified the need to track and assess common data points over time, including:

- ◆ Case data,
- ◆ Defendant characteristics,
- ◆ Case events and management,
- ◆ Case disposition and sentence, and
- ◆ Representing attorney information.

These data are valuable for identifying agency needs when they are complete, accurate, and consistently collected over time. Prior to using data collected by the Office of State Public Defender (OPD), we assessed and analyzed key data points collected to determine if data was complete and accurate. We also reviewed the agency's use of this data for informing management decisions. We found that while OPD has a case management system and billing system to handle electronic processes and collect data, the information held is inconsistently collected and sometimes inaccurate, and key components are not analyzed to improve agency operations. In this chapter, we discuss identified shortcomings and proposed ways to improve the use of information for providing effective and efficient services at OPD.

OPD Does Not Accurately Track Key Data Points

Legal associations have identified key data points essential for public defense organizations to track to monitor performance and identify resource needs. OPD collects data using its case management system and billing system, but it does not track all essential data points, and some data has been entered incorrectly. For example, agency staff report that they are not aware of when contractors close their cases. Many contractors do not complete the required paperwork to notify OPD staff to manually close the cases in OPD's case management system. As a result, they are unable to compare case duration between contract and staff cases and have had issues with the office closing the case prematurely, at which point the contractor must get the case

reopened in order to bill time. They also do not have disposition information regarding case outcomes for OPD clients represented by contractors, pre-trial incarceration time frames, case events such as trial status, fines paid, and other vital performance related data. Other data is not effectively analyzed or distributed. For example, until recently client complaint data was not accessible to managers for contractors between regions and divisions. Regional managers could see complaints for contractors on cases in their region, but not for the same contractor for cases they took in other regions. Managers indicated in the staff survey that cross-regional complaints data would be the most useful to them. During our work, OPD adjusted manager access to complaint data to allow managers to view complaints from other regions.

We also found OPD does not consistently use information available to analyze its operations. For example, while there are accounting related checks on the payment of contractor claims to ensure the amount claimed is the amount paid, OPD does not regularly analyze the reasonableness of contractor bills. The volume of hours billed is not compared to contractors' caseloads or case weights, the relative amount of time contractors spent on cases is not compared to other contractors, and invoices for these contractors are not scrutinized for reasonableness.

Legal Associations and State Policy Emphasize the Importance of Collecting and Communicating Accurate Agency Information

The National Legal Aid & Defender Association (NLADA) describes data collection and utilization as key to data-informed decision-making for smart defender management. Data can help defender managers “carry out their core managerial functions more effectively, assess progress in meeting organizational goals and objectives and, in turn, help improve their programs effectiveness.” The NLADA National Research and Data Analysis Advisory Committee developed a list of key indicators that every defender should track and analyze, including:

- ◆ Process of case management/events (motions filed, bail, detainment status, number of client visits and time spent, phone and e-mail).
- ◆ Case disposition and sentence information.
- ◆ Defendant characteristics such as sex, race, and age.
- ◆ Attorney characteristics, including years of experience.

State policy also describes the importance of agencies developing control structures to “provide for the identification, capture, and exchange of information both within the agency and with external parties.” Management is expected to design information systems with control activities to achieve objectives and respond to risks. Specific to OPD’s inaccurate or incomplete data entry, state policy describes the importance of

automated application controls in an IT environment. These controls help ensure the completeness, accuracy, and validity of all information processed.

Inaccurate and Incomplete Data Compromises Agency

Without complete information and efforts to analyze data, OPD cannot readily or meaningfully describe successes, challenges, and struggles it faces in providing effective indigent legal services. Therefore, its ability to manage effectively is compromised in areas including unifying agency operations, allocating resources, improving client outcomes and representation, and monitoring attorney performance. By not collecting essential data to supervise the provision of public defense, OPD risks additional civil suits due to not providing effective indigent services. One of the primary complaints of the 2002 American Civil Liberties Union (ACLU) lawsuit was the failure to collect and track caseload data. In a 2011 follow up report, the ACLU noted that attorneys, directors, and managing attorneys “did not appear to have access to trial rates, dispositive motion rates, or cases overturned on appeal,” and that “no one appears to track any of this information whatsoever for contract attorneys.”

Without collecting, monitoring, and analyzing data, the information provided to the legislature by OPD is not accurate, which threatens to lead to policy-making that is not based on evidence. For example, audit work found the time-tracking data used to report OPD relative costs by case type and court to the legislature, governor, and the Supreme Court was incomplete and inaccurate due to noncompliance with time-tracking policy. Issues included full-time attorneys entering case hours of 0 or 1 hour per pay period, and others entering extremely high figures. Agency staff seemed unaware the data was incomplete as they had not analyzed it to see if attorneys were regularly entering data or if data entered was reasonable. Regional managers did not appear to be reviewing attorney time submissions weekly as required by OPD policy to ensure attorneys were submitting time.

OPD Has Not Integrated Data Management into Daily Operational Processes

OPD has historically not prioritized the collection, assurance, analysis, and communication of operations- and performance-related data. According to legal associations, “data-informed decision-making is a fundamental component of smart defender management.” Causes for OPD’s challenges with data-informed decision-making is concentrated in the following areas:

- ◆ **Identification, collection, and access to essential data points to assess performance over time.** Currently OPD does not have easy access to many of the data points every defender should track, such as complete case disposition and sentencing data, bail and fine amounts, pre-trial detention time frames, etc. OPD has not identified what data points it should be

collecting or determined how these data points will be used to help OPD operations.

- ◆ **Defined roles in data collection, policy enforcement, and analysis.** Recently OPD management has recognized the need to use data more actively to manage their activities. They have created a new position within the agency, the operations support manager, to prioritize the use of data to improve operational performance. However, the division of responsibility between the central office and the regional managers is not yet clear.
- ◆ **Development of controls and automation to increase collection and accuracy of needed data.** Current methods of entering data are described as arduous by staff and contractors, and lack built-in controls to ensure accuracy. Their current case management system is also nearing its end of life.
- ◆ **Establishment, identification and pursuit of performance targets.** What data is collected by OPD is not currently analyzed to identify performance or compliance thresholds at which intervention should be pursued. For example, the time tracking data was not assessed for completion or accuracy, and regional compliance was not monitored in order to identify issues with data entry.
- ◆ **Development of reporting and communication of performance indicators to division administrators and regional managers.** Progress has been made in building dashboards to identify patterns in operational data, but many of these efforts are still relatively new or still in development.
- ◆ **Disconnect from data collected and maintained by other justice-related state entities.** OPD's data is not integrated or shared with any other justice entities, such as law enforcement or the court system, despite the need for similar information. Data integration will be discussed further below.

Collectively, these issues stem from a lack of a comprehensive data management program for the agency. The agency is now actively working on developing an agency management program, which will formally:

- ◆ Identify OPD data collection needs,
- ◆ Establish standards and procedures for data entry, validation, and auditing,
- ◆ Address issues of data accuracy,
- ◆ Establish standards for data requests,
- ◆ Develop on-demand data process, and
- ◆ Use data to inform effective operational decision making.

Montana's Justice System Data Is Disconnected and Duplicative

The state of Montana also does not have an integrated database or other means of easily sharing data between agencies and courts involved in the criminal justice system, though there has been progress in sharing data within functions. For example,

Montana's Department of Justice manages an information sharing system that shares information primarily among different law enforcement entities. The court system has also been implementing an enterprise case management system over several years to eventually share court information and data between different courts and agencies within the justice system. Currently OPD's case management system does not communicate with these systems, nor is there a central repository of data (commonly referred to as a data warehouse) from the different systems. Since the late 1990s justice entities have urged the development of technology to integrate data of agencies within the criminal justice system to improve access to needed information. Entities such as the U.S. Department of Justice describe the benefits, including increasing case processing efficiency, decreasing the needed support staff-to-attorney ratio, and improving the quality of representation. As part of our work, we interviewed officials in three states, Alaska, North Dakota, and Delaware, to learn more about their systems. These three systems have similar expected burdens on public defenders due to their poverty and crime rates, use a combination of staff and contract attorneys, and two also have separate conflict offices.

We also reviewed publications about other state public defense systems. We found that many states have completed or begun the process to integrate justice related agencies data. Delaware has an integrated database with the state law enforcement database, which allows access to information such as warrants, charges, and court dates directly without entering data manually. Alaska has a system similar to law enforcement, which allows for easy sharing of evidence for discovery requests. Alaska also has access to a public court database which can be used to look up and verify information, including for verifying contractor activities.

RECOMMENDATION #8

We recommend the Office of State Public Defender develop and implement a data management program and policy to:

- A. Identify data needs for measuring agency performance,*
 - B. Specify staff responsibilities for implementation,*
 - C. Develop controls and automation to improve ease of data entry and accuracy,*
 - D. Establish data-based performance measurements and targets,*
 - E. Develop reports or products to inform staff and stakeholders of performance metrics, and*
 - F. Pursue future integration or data warehousing with other justice-related state entities to improve data access and decrease manual entry.*
-

OFFICE OF STATE PUBLIC
DEFENDER

OFFICE RESPONSE



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RECEIVED

September 17, 2020

LEGISLATIVE AUDIT DIV.

September 17, 2020

Angus Maciver, Legislative Auditor
Legislative Audit Division
P.O. Box 201705
Helena, MT 59620-1705
Sent via email with hardcopy to follow

Re: Response to Legislative Audit Recommendations

Dear Mr. Maciver:

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

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

Sincerely,

Rhonda Lindquist
Director

cc: Alyssa Sorenson
Julia Conway
Joe Tschida
Will Soller

Recommendation #1

We recommend the Office of State Public Defender improve centralized oversight to ensure effective counsel is provided by attorneys performing public defense work by:

- A. Updating, communicating, and enforcing a policy for performance evaluations to be used consistently across the state for evaluating the performance of staff attorneys.**
- B. Continuing to evaluate contract attorneys on a biennial basis and use the results to determine whether MOUs should be renewed or if remedial action is required.**
- C. Clarifying, communicating, and enforcing the client grievance tracking policy and procedures.**

OPD concurs with this recommendation.

Regarding recommendation 1(A), OPD acknowledges it has not routinely performed **formal** FTE attorney evaluations during the audit period. Instead, OPD managers have been conducting **informal** evaluations and discussions with FTE attorneys on an on-going basis. These informal evaluations reduce the burden of a formal evaluation process while giving employees greater opportunities for feedback to their managers. Informal evaluations provide OPD managers with the information they need to make informed decisions. The following is a non-inclusive list of activities OPD managers continue to use to ensure their FTE attorneys are providing effective representation:

- regularly checking in with FTE attorneys regarding their caseloads, clients, and other issues affecting their work;
- regularly observing FTE attorneys representing clients in court;
- regularly interacting with and soliciting feedback from judges, judicial staff, and prosecutors;
- regularly reviewing FTE attorney's case weights and caseloads; and,
- regularly reviewing, evaluating, and responding to client complaints in a timely manner concerning FTE attorneys.

OPD acknowledges there is a lack of centralized guidance and enforcement for FTE attorney evaluations, and will update, communicate, and enforce a consistent evaluation process across the Agency.

Regarding recommendation 1(B), OPD acknowledges that it was historically unable to conduct contract attorney evaluations for each contract attorney during each MOU term. However, prior to the start of this Performance Audit, OPD was already overhauling the entire Contracts Program, which included designing and implementing a consistent, effective, and efficient process to evaluate all contract attorneys. OPD is now in compliance with the evaluation process for all current contract attorneys and will be able to maintain compliance going forward. In addition to identifying issues with individual contractors and with the Contracts Program in general, the primary purpose of the Contract Attorney Performance Evaluation process is to provide OPD with appropriate information to determine whether to renew a contract attorney's MOU. OPD will continue to evaluate each contract attorney at least once during the term of their MOU and to use the evaluation process to inform the decision as to whether to renew an individual contract attorney's MOU.

Regarding recommendation 1(C), OPD acknowledges that the prior Client Grievance policy and procedure were not consistently followed or enforced. A major barrier to compliance was the complexity of the process, which was not only burdensome, but created opportunities for data entry errors. Further, the prior Client Grievance process did not capture useful information regarding the type or resolution of a complaint. As a result, and prior to the beginning of work on this Performance Audit, OPD began overhauling the Client Grievance process to obtain greater compliance and provide useful information about complaints against OPD attorneys. The new process, which went into effect in October 2019, is much simpler, takes much less time for staff and managers, is much less prone to data-entry errors, and provides additional, useful information about the type of complaints received and the outcomes of those complaints.

OPD will continue to clarify, communicate, and enforce the Client Grievance process.

Recommendation #2

We recommend the Office of State Public Defender develop a targeted recruitment plan to provide incentives to recruit and retain attorneys, expand recruitment efforts, and restructure the recruitment process to increase ease of the process for applicants and provide more flexible ability to extend job offers.

OPD concurs with this recommendation.

Since work on this Audit began, OPD has begun piloting an incentive policy in Region 9 to provide reimbursements for relocation and bar admission to attorney applicants. OPD is monitoring the pilot reimbursement program to determine if it has a positive effect on recruitment and retention in Region 9, and if so, will look to scale the incentives to other parts of the Agency. OPD is also looking at other types of incentives, such as opportunities for student loan repayment.

OPD will develop and implement a recruitment plan aimed at reducing chronic turnover across the agency, addressing continuing vacancies in OPD's hardest hit regions, and providing appropriate incentives for prospective employees to come to – and remain with –OPD.

Recommendation #3

We recommend the Office of State Public Defender investigate and propose methods to the legislature to address excessive differences in pay between OPD staff attorneys and other public attorneys.

OPD concurs with this recommendation.

Despite significant progress during the 2019 Legislative Session, allowing OPD to restore attorney pay ladders and increase the caps at each step, OPD still pays its attorneys, on average, the least amount of any Agency in State Government. Specifically, OPD attorneys' salaries are capped at 77.5% of the 2018 Department of Administration market rates for attorney classifications. Further, as addressed in the

Audit, there is a disparity between OPD attorneys and their Prosecuting Attorney counterparts in many areas across the state. OPD acknowledges that attorney pay has made Agency recruitment and retention issues more difficult.

OPD will investigate, prepare, and propose a funding request to the Legislature that brings OPD attorneys in line with other public attorneys and the market rate.

Recommendation #4

We recommend the Office of State Public Defender assess the need for an increase of the contract professional or travel rate to attract willing and competent attorneys in high demand areas of the state.

OPD concurs with this recommendation.

In an effort to address a budgetary shortfall for FY 2018 and FY 2019 OPD took a number of steps to reduce its operating expenses. As part of this effort, and after a public comment period, OPD amended the rates for contract work beginning April 1, 2018.

While OPD may have realized cost-savings by lowering the rates, OPD concurs with the Audit findings that the current rates may negatively impact OPD's ability to provide cost-effective, competent contract counsel across the state. OPD recognizes that it may be able to incentivize contract attorneys to accept more cases or certain kinds of cases, including cases requiring travel, if it revisits contract rates.

OPD will explore all available options to increase the effectiveness and efficiency of the contract attorney workforce and take appropriate action.

Recommendation #5

We recommend the Office of State Public Defender establish and implement policy for moving cases between divisions to increase the use of the Conflict Division for select case overflow relief for non-conflict cases.

OPD concurs with this recommendation.

OPD will develop and implement a process for normalizing caseloads between the divisions, including the assignment of non-conflict overflow cases to internal conflict counsel.

Recommendation #6

We recommend the Office of State Public Defender improve agency time tracking completeness and accuracy by:

- A. Increasing centralized oversight of the completeness and accuracy of time tracking by monitoring frequency of submissions and quantity of time.**
- B. Enforcing the requirement managers review and approve time each week.**
- C. Improving the ease of time-tracking by exploring easier methods of electronically entering and tracking time and incorporating tracking into daily workflow processes.**

OPD concurs with this recommendation.

Regarding recommendations 6(A) and 6(B), since work on this Audit began, OPD has taken several steps towards increasing timekeeping completeness and accuracy.

- On January 1, 2020, the Director and each Division Administrator set clear expectations for attorneys on timekeeping completeness and accuracy;
- Similar expectations were also set for Regional Managers and Managing Attorneys to review an attorney's timekeeping during each pay period and hold their attorneys accountable for timekeeping completeness and accuracy; and,
- Division Administrators, Regional Managers, and Managing Attorneys were also provided tools allowing for quick and easy review of an attorney's timekeeping on a daily or pay period basis, allowing for near-real time accountability and identification of time entry errors.

Regarding recommendation 6(C), OPD is in the process of replacing its case management system, which is its primary operational platform and database. As part of the replacement, OPD is seeking technological solutions to ease the burden of timekeeping while increasing compliance. OPD will continue to seek solutions to increase the quality of timekeeping data without overburdening its attorneys and staff.

Recommendation #7

We recommend the Office of State Public Defender increase centralized oversight of contracting billing on an agency level to improve efficiency and consistency in contractor billing by:

- A. Reviewing agency wide billing records relative to assigned cases, case weight hours, and expected work hours for a given time period during the biennial contractor evaluation process to determine whether to renew their MOU,**
- B. Providing guidance for regional managers regarding appropriate and inappropriate contractor billing circumstances to increase consistency between regions,**
- C. Revising the contracting policy to specify aggregating time billed for each OPD client to the nearest one-tenth hour by contractors, and**
- D. Communicating the option to use assistants for certain tasks, revising *policy to allow work to be completed under the attorney's supervision* and MOU at the assistant rate, and considering an increase in the assistant rate.**

OPD concurs with this recommendation.

Regarding recommendation 7(A), since work on this Audit began, OPD has provided Supervising Attorneys with additional tools and resources to review a contract attorney's billable hours in a month statewide across regions and divisions. Tools currently in development include reviewing a contract attorney's billing relative to cases and assigned case weight (billing standard). OPD will continue to develop tools and resources to improve the efficiency and effectiveness of the contract attorney claim review and approval processes.

Regarding recommendation 7(B), OPD acknowledges it has not provided Supervising Attorneys with effective criteria and guidance for reviewing contract attorney claims. OPD will develop criteria and guidance for the review and approval of contract attorney claims.

Regarding recommendation 7(C), OPD has provided notice to its contract attorneys of its intent to amend the Pre-Approval and Claims Procedure to address this "micro billing" issue and will use the Audit Findings and any feedback received to develop and implement a plan moving forward.

Regarding recommendation 7(D), OPD will develop and implement a plan to encourage an appropriate use of administrative staff by contract attorneys.

Recommendation #8

We recommend on the Office of State Public Defender develop and implement a data management program and policy to:

- A. Identify data needs for measuring agency performance,**
- B. Specify staff responsibilities for implementation,**
- C. Develop controls and automation to improve ease of data entry and accuracy,**
- D. Establish data-based performance measurements and targets,**
- E. Develop reports or products to inform staff and stakeholders of performance metrics, and**
- F. Pursue future integration or data warehousing with other justice-related state entities to improve data access and decrease manual entry.**

OPD concurs with this recommendation.

Regarding recommendations 8(A) to 8(E), since work on this Audit began, OPD internally identified the need for an Agency Data Management Plan to address many of the same issues identified in this Audit. Dedicated staff working out of the Director's Office developed an Agency Data Management Plan with the following scope:

- Identify OPD's data collection needs from an internal operations perspective;
- Establish policies, standards, and procedures related to data entry, data accuracy, data validation, and data auditing;
- Identify, document, and address issues with accuracy, reliability, or validity of Agency data (e.g. business rules, collected data fields and meanings, SQL databases, SOPs, training, etc.);
- Establish process or standards for data requests;
- Develop, implement, and manage an effective on-demand data process, including Operations Dashboards, case management system reports, and other available reports, to support and improve operational decision making;
- Design and implement a standardized and consistent reporting scheme; and,
- Collect, analyze, and interpret Agency data to inform effective operational decision-making, stakeholder engagement, and public policy efforts.

Since OPD began implementing the Agency Data Management Plan, it has corrected numerous data entry errors, improved various data entry processes, revamped a number of data tracking functions (such as the Client Grievance and Contract Evaluation Processes referenced above), and developed a number of data tools and resources for Agency staff (such as the Contractor Billing or Timekeeping tools referenced above). OPD is looking towards the future and seeking technological solutions wherever possible to increase the effectiveness and efficiency of Agency operations while also reducing the data entry burden on staff and attorneys. The staff responsible for managing Agency data are also responsible for designing and implementing a new case management system, where OPD hopes to address a large number of long-standing data process issues.

The largest discrete project under the Agency Data Management Plan to date is the

currently-in-development master data structure and analytical database. Referred to as OPD's "Data Mart," when completed, OPD will have the ability to:

- Create an ad hoc data analytics environment;
- Provide for rapid data exceptions monitoring, correction, and reporting;
- Greatly ease the transition to a new case management system; and,
- Prepare the Agency to integrate with other agencies' systems.

OPD will continue to further its data management program in an effort to increase the effectiveness and efficiency of Agency operations while also reducing the burden on staff and attorneys for data entry.

Regarding recommendation 8(F), during the Audit period OPD has begun to engage other justice system stakeholders on the need for an integrated Montana justice system data exchange or warehouse. OPD strongly believes such a project is necessary for the Legislature to truly engage in evidence-based, data-supported public policy decision making and analysis. Further, without such an information exchange, it is difficult to compare metrics or perform other analytics between agencies or across the state, as data entry processes vary and the same information may be entered differently by various agencies or locations. Finally, the duplication or triplication of data entry for the same information across various agencies is not only an inefficient use of staff time and resources, but greatly increases the possibility of data entry errors at every level. OPD will continue to engage other justice system stakeholders and seek Legislative action on a statewide integrated justice system data exchange or warehouse.