



A REPORT
TO THE
MONTANA
LEGISLATURE

FINANCIAL-COMPLIANCE AUDIT

*Office of the State Public
Defender*

*For the Two Fiscal Years Ended
June 30, 2014*

NOVEMBER 2014

LEGISLATIVE AUDIT
DIVISION

14-28

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FINANCIAL-COMPLIANCE AUDITS

Financial-compliance audits are conducted by the Legislative Audit Division to determine whether an agency's financial operations are properly conducted, the financial reports are presented fairly, and the agency has complied with applicable laws and regulations. In performing the audit work, the audit staff uses standards set forth by the American Institute of Certified Public Accountants and the United States Government Accountability Office. Financial-compliance audit staff members hold degrees with an emphasis in accounting. Most staff members hold Certified Public Accountant (CPA) licenses.

Government Auditing Standards, the Single Audit Act Amendments of 1996 and OMB Circular A-133 require the auditor to issue certain financial, internal control, and compliance reports. This individual agency audit report is not intended to comply with these reporting requirements and is therefore not intended for distribution to federal grantor agencies. The Legislative Audit Division issues a statewide biennial Single Audit Report which complies with the above reporting requirements. The Single Audit Report for the two fiscal years ended June 30, 2013, was issued March 28, 2014. The Single Audit Report for the two fiscal years ended June 30, 2015, will be issued by March 31, 2016. Copies of the Single Audit Report can be obtained by contacting:

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November 2014

The Legislative Audit Committee
of the Montana State Legislature:

This is our financial-compliance audit report on the Office of the State Public Defender (office) for the two fiscal years ended June 30, 2014. The report contains four recommendations to the office regarding complying with state law and state accounting policy governing the management and collection of accounts receivables, establishing internal controls over payments received by mail, and properly accounting for reimbursements received.

This report includes the office's financial schedules. The financial schedule presentation is intended to provide the legislative body with information necessary for decision-making purposes; it is not intended to conform to the financial reporting requirements established in generally accepted accounting principles (GAAP). The financial schedule presentation has not changed, but audit reporting standards have changed. Auditing standards require us to clearly communicate that the financial schedule presentation is not intended to, and does not, conform to GAAP reporting requirements. The Independent Auditor's Report on page A-1 contains language to this effect in the section titled "Adverse Opinions on U.S. Generally Accepted Accounting Principles." This section does not imply the amounts presented on the office's financial schedules are not fairly stated. Page A-1 also communicates the extent to which the user can rely on the information contained in the financial schedules in the section titled "Unmodified Opinions on Regulatory Basis of Accounting."

The office's written responses to the audit recommendations are included in the audit report beginning at page B-1. We have considered the office response to Recommendation 1. As noted on page 7, "We acknowledge that fees are assessed by the courts, and that the courts can modify the fee assessments." However, this does not preclude the office from implementing procedures for the financial management of amounts owed to the office once higher priority assessments are satisfied.

While the office concurs with Recommendation 2(b), we will not pre-suppose the outcome of a legislative proposal. However, regardless of the outcome, the responsibility to record money due the state in accordance with state law and accounting policy remains.

We thank the Chief Public Defender, Chief Appellate Defender, Conflict Coordinator, and office staff for their cooperation and assistance throughout the audit.

Respectfully submitted,

/s/ Tori Hunthausen

Tori Hunthausen, CPA
Legislative Auditor

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APPOINTED AND ADMINISTRATIVE OFFICIALS

		<u>Term Expires</u>
Public Defender Commission	Richard “Fritz” Gillespie, Chair	2016
	Kenneth R. Olson, Vice-Chair	2017
	Roy Brown	2016
	Brian Gallik	2016
	Dr. Michael Metzger	2016
	Margaret Novak	2016
	Charles Petaja	2015
	Majel Russell	2015
	Ann Sherwood	2017
	Bonnie Olson	2016
	Terry Jessee	2017

**Office of the State Public
Defender**

William F. Hooks, Chief Public Defender
 Wade Zolynski, Chief Appellate Defender
 Kristina Neal, Conflict Coordinator
 Harry Freebourn, Administrative Director

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MONTANA LEGISLATIVE AUDIT DIVISION

FINANCIAL-COMPLIANCE AUDIT

Office of the State Public Defender

For the Two Fiscal Years Ended June 30, 2014

NOVEMBER 2014

14-28

REPORT SUMMARY

The Office of the State Public Defender provides legal defense services to low income Montanans. In fiscal years 2013 and 2014 combined, the office spent approximately \$55.9 million dollars to provide these services.

Context

The Office of the State Public Defender (office) is divided into three programs: the Public Defender Program provides non-appellate representation to qualifying individuals, including criminal defense, child abuse or neglect, and involuntary commitment services; the Appellate Defender Program provides appellate representation to qualifying individuals; and the Conflict Coordinator Office provides appellate and non-appellate representation to qualifying individuals in circumstances where a conflict of interest prohibits the other programs from representing the defendant.

The office's operations are funded primarily by the state's General Fund, although the office also collects public defender fees in the State Special Revenue Fund. Additionally, in fiscal year 2014, the office received a \$625,000 allocation from the Governor's Operations Account established in the 2013 Legislative Session. Of the \$55.9 million spent in fiscal years 2013 and 2014 combined, \$54.6 million was charged to the General Fund.

Results

The current audit report contains four recommendations to the office. The first two recommendations relate to compliance with state law and state accounting policy

requirements governing the financial management and collection of public defender fees. We determined the office does not have procedures in place to manage and collect unpaid public defender fees. These unpaid fees approximated \$2.4 million as of June 30, 2014.

The third recommendation is related to establishing internal controls over payments received by mail. We determined the office's procedures were not adequate to ensure all payments received by mail are deposited.

The final recommendation is related to properly accounting for reimbursements received. Based on our review, the office improperly accounted for approximately \$90,000 of reimbursements received during fiscal years 2013 and 2014, combined.

Recommendation Concurrence	
Concur	3
Partially Concur	1
Do Not Concur	0
Source: Agency audit response included in final report.	

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Chapter I – Introduction

Introduction

We performed a financial-compliance audit of the Office of the State Public Defender (office) for the two fiscal years ended June 30, 2014. The objectives of the audit were to:

1. Obtain an understanding of the office’s control structure to the extent necessary to support the audit of its financial schedules and, where necessary, make recommendations for improvement in the office’s management and internal controls.
2. Determine the office’s compliance with selected state laws and regulations during the two fiscal years ending June 30, 2014.
3. Determine whether the office’s financial schedules present fairly its financial position and results of operations as of, and for each of the fiscal years ended June 30, 2014, and June 30, 2013.
4. Determine the implementation status of prior audit recommendations.

Auditing standards require us to communicate, in writing, deficiencies in internal control we identified as a result of audit objective #1 above and considered to be significant or material. A deficiency in internal control exists when the design or operation of a control does not allow management or employees to prevent or detect and correct misstatements on a timely basis. A material weakness is one or more deficiencies in internal control, such that there is a reasonable possibility that a material misstatement of the entity’s financial schedules will not be prevented, or detected and corrected on a timely basis. A significant deficiency is one or more deficiencies in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance.

Table 1 below outlines the status of significant deficiencies we identified during the audit.

Subject	Type of Deficiency	Page
Reporting Related Party Transactions	Significant	2
Inadequate Controls Over Payments Received By Mail	Significant	11

Our consideration of internal control was not for the purpose of expressing an opinion on the effectiveness of internal controls. Therefore, material weaknesses or significant deficiencies may exist that were not identified. The following paragraph describes one of the significant deficiencies identified during the audit.

Reporting Related Party Transactions

Under generally accepted accounting principles, transactions between a governmental entity and members of its management are considered to be related party transactions and are required to be disclosed for financial reporting purposes. As part of the audit, we determined the office did not have adequate internal controls in place to ensure related party transactions were disclosed in the notes to the financial schedules. We communicated the deficiency in internal control to the office as part of the audit, and the office modified its procedures and disclosed the related party transactions in the notes to the financial schedules found on page A-9. As a result, we make no recommendation to the office. Even though the significant deficiency was remediated during the audit period, we provide this information for the benefit of those responsible for the oversight of the office and its operations.

Background

The statewide public defender system was created in 2005 by the Montana Public Defender Act. The system unifies the state's public defense services in order to provide more effective assistance of counsel to qualifying citizens of Montana. Oversight of the system comes from the Public Defender Commission (commission). The commission is comprised of 11 members who are appointed by the Governor and serve staggered three-year terms.

The statewide public defender system was initially comprised of two programs, the Public Defender Program and the Appellate Defender program. As of 2011, §47-1-118, MCA, requires the commission to establish a conflicts office. In fiscal years 2012 and 2013, the financial activity of the conflicts office was included within the Public Defender Program. In fiscal year 2014, the conflicts office financial activity is included in a new program titled "Conflict Coordinator."

State law tasks the commission with appointing a Chief Public Defender, Chief Appellate Defender, and Conflict Manager, to oversee these three programs. The Chief Public Defender, Chief Appellate Defender, and Conflict Coordinator hire staff to carry out the functions of the public defender system. More information on the three programs and the associated full-time equivalent (FTE) positions is presented below.

Office of Public Defender Program (202.5 FTE) – The program is organized into 11 regions, with a regional deputy public defender supervising each region. The regional offices are located in Kalispell, Missoula, Great Falls, Helena, Butte, Havre, Lewistown, Bozeman, Billings, Glendive, and Miles City. These regional offices employ and contract with attorneys to provide legal representation to qualifying individuals, including criminal defense, child abuse or neglect, and involuntary commitment services. The program also includes the central office in Butte, which supports the commission and the Public Defender, Appellate Defender, and Conflict Coordinator programs.

Office Appellate Defender Program (12 FTE)- The program provides appellate representation to clients of the statewide public defender system and is located in Helena. The appellate program assists in the representation of indigent clients who qualify for an appointed attorney under state statutes governing appeals and post-conviction relief.

Conflict Coordinator (3 FTE)- The office provides appellate and non-appellate representation to indigent defendants in circumstances when, because an ethical conflict of interest exists, the Public or Appellate Defender Programs are unable to provide representation. The office is located in Helena.

Prior Audit Recommendations

The prior audit for the two fiscal years ended June 30, 2012, contained four recommendations to the office. The office fully implemented one of the recommendations and partially implemented another. Two of the recommendations are no longer applicable.

The partially implemented recommendation relates to implementing internal controls to ensure all payments received by the mail are secured until deposited. The issue is discussed in greater detail on page 11.

Chapter II–Findings and Recommendations

Public Defender Fee Assessment Background

Section 46-8-113, MCA, allows judges to assess public defender fees against individuals represented by the statewide public defender system, based on the individual's financial ability to pay. Assessed public defender fees are included in the court's judgment, and can be reduced by the court if paying the fees will impose manifest hardship on the defendant or the defendant's family.

Section 46-8-114, MCA, allows the court to order payment within a specific period of time or in specified installments. The law also establishes the method by which defendants are required to pay public defender fees. Chapter 344, Laws of 2011, changed the method of payment, effective July 1, 2011. For fees assessed prior to July 1, 2011, payments must be made to the Office of the State Public Defender (office). For fees assessed on or after July 1, 2011, payments must be made to the clerk of the sentencing court. All payments made are deposited into the Public Defender State Special Revenue Account, and are used to fund a portion of the office's operations.

In accordance with state accounting policy, the office records revenue for the public defender fees received, in the year of payment. The unpaid public defender fee assessments meet the definition of accounts receivables in state accounting policy, as the assessments are claims for money that the office holds against others. Accordingly, the office records the unpaid assessments as accounts receivable, along with an allowance for uncollectible accounts for the amount estimated to be uncollectible. Table 2 summarizes the fee

Table 2
Public Defender Fee Collections and Receivable Balances

Fiscal Year	Fee Revenue Collected	Accounts Receivable Balance as of June 30	Allowance for Uncollectible Accounts
2011	\$123,993	\$900,298	(\$622,777)
2012	\$191,889	\$1,274,121	(\$895,770)
2013	\$255,732	\$1,658,584	(\$1,201,509)
2014	\$285,194	\$2,416,079	(\$1,715,416)

Source: Compiled by the Legislative Audit Division from the Statewide Accounting, Budgeting, and Human Resources System.

assessment revenues and ending accounts receivable and allowance for uncollectible account balances for the last four fiscal years.

The approximate \$2.4 million accounts receivable balance at June 30, 2014, represents the office's estimate of unpaid public defender fee assessments. These unpaid assessments

represent money due to the office that could be used to fund a portion of the office's operations instead of the General Fund. As part of the audit, we reviewed the financial management of public defender fee assessment accounts receivable. In performing this review, we spoke with office staff, as well as staff of the Judicial Branch and several courts in the state to gain an understanding of how fees are assessed and collected. The following two report sections are a result of this work.

Financial Management of Public Defender Fee Assessment Accounts Receivable

Unpaid public defender fee assessment accounts receivable are not actively managed, thereby reducing the likelihood of collection on the approximate \$2.4 million in outstanding receivables recorded as of June 30, 2014.

The office is required to comply with state accounting policy, issued by the Department of Administration in accordance with §17-1-102(2), MCA. State accounting policy sets policies and procedures for financial management and reporting purposes, in accordance with generally accepted accounting principles. Policy specifically addresses the collection of accounts receivable, stating "Agencies should have policies in place to ensure timely billing of receivables to help lower the number of uncollectible receivables recorded on the accounting system." Policy further states that accounts should not sit permanently idle on the state's accounting records. In addition to these requirements in state accounting policy, §17-4-104(1), MCA, requires agencies to make all reasonable efforts to collect money owed to the agency.

As part of the audit, we reviewed the financial management of public defender fee assessment accounts receivable. We determined the office does not have policies in place to collect, and therefore does not make all reasonable efforts to collect, the unpaid public defender fee assessments comprising the approximate \$2.4 million in accounts receivable recorded on the accounting records as of June 30, 2014. These receivables represent money owed to the office, for services the office performed, that could be used to fund a portion of the office's operations instead of the state's General Fund.

Office management does not believe the office has statutory authority to perform the accounts receivable financial management activities required by §17-4-104(1), MCA, and state accounting policy. Office management stated that these requirements are "inconsistent, incompatible, and irreconcilable" with provisions in Title 46 - Criminal Procedure, which provides the framework for assessing fees and the mechanism by which fees are paid. From office management's perspective, the legal framework for assessing fees, paying fees, and enforcing payment of fees essentially serves as the mechanism for collecting public defender fees, and resides within the court system.

We believe there is a difference between the legal framework for assessing fees, paying fees, and enforcing payment in Title 46 and the financial management of accounts receivables, required by Title 17 and state accounting policy. Specifically, office management:

- ◆ Relies on the work performed by the courts, as management considers the court's judgment and sentencing order to be the billing of assessed fees. We agree that this process does bill office clients once, at the time of sentencing. As part of the audit, we spoke with staff from several courts in the state to gain an understanding of collection activities at the courts. Based on these discussions, not all courts actively pursue collection on public defender fees after sentencing. The office should not rely solely on the work performed at the courts to manage unpaid balances. By doing so, the office does not accomplish regular billing of unpaid balances, which is a standard business practice for the financial management and collection of accounts receivables.
- ◆ Believes only the courts have the authority to make collection efforts, given that it is the courts who assess the fees and the courts can reduce previously-assessed fees. We acknowledge that fees are assessed by the courts, and that the courts can modify the fee assessments. However, this does not preclude the office from initiating procedures to collect on the actual amount of fees that have been assessed by the court. The office is required, under Title 17 and state accounting policy, to implement procedures to collect amounts due to the office.

In addition to the items outlined above, office financial management staff stated they do not believe it is cost efficient to pursue collection on accounts receivables, given the low probability of collection from indigent individuals who may not have the ability to pay. Under state law, however, a court cannot assess public defender fees unless an individual is able to pay them.

The financial management of accounts receivable, including implementation of collection activities, is a standard business practice necessary to ensure revenues are maximized. Financial management of receivables is also required by state law and state accounting policy. To comply with state law and state accounting policy, the office should implement procedures for the financial management of the approximate \$2.4 million of public defender fee assessment accounts receivable owed to the State. Without such procedures, the existing unpaid balances, as well as any future unpaid balances, are less likely to be paid.

RECOMMENDATION #1

We recommend the office comply with state law and accounting policy by implementing procedures for the financial management of public defender fee accounts receivables.

Accounting for Public Defender Fee Assessments and Collections

In fiscal year 2014, the office did not account for approximately \$1 million of new public defender fee assessments and \$225,000 of paid public defender fees on an individual account balance.

As the previous report section outlines, state law and state accounting policy require the office have procedures in place for the financial management and collection of public defender fee assessment accounts receivable. A key factor in the office's ability to comply with these requirements is to know the dollar amounts owed by individual clients.

In fiscal year 2013, the office started using functionality in the state's accounting system to track fee assessments on an individual client basis. All clients were given a unique ID on the system, and as payments were received or new fees were assessed during fiscal year 2013, individual client accounts were updated to reflect the activity. In fiscal year 2014, however, the office did not account for fee assessments or payments on an individual client basis. The office did not attribute the approximate \$1 million of new public defender fee accounts receivables established during the fiscal year to individual clients. Similarly, the office did not apply the approximate \$225,000 of fees paid to the various clerks of court and remitted to the office to individual client accounts. Because of this, the office does not know how much money individual clients owe on their public defender fee assessments as of June 30, 2014. As a result, the office is not in a position to comply with state law and state accounting policy requirements governing the financial management and collection of accounts receivable, discussed in the previous report section.

Additionally, because the office did not account for fee assessments and collections on an individual client level in fiscal year 2014, it does not currently have the information necessary to comply with reporting requirements in state law. Section 47-1-201(10)(b), MCA, requires the office to report annually to the Legislative Fiscal Analyst, by

September 30, the amount of public defender fees collected, including the number of cases on which collections were made, the number of cases on which an amount is owed, the amount collected, and the amount remaining unpaid.

Office management attribute their accounting practices in fiscal year 2014 to changes in the nature of information received from the courts throughout the state. Prior to fiscal year 2014, the office recorded individual client accounts receivables based on court sentencing documents and applied fee assessment payments to individual client accounts based on detailed reports provided by the courts where the fees were paid. Office management stated this was a time consuming process, often requiring follow-up with individual courts.

In response, in office staff met with individuals in the Judicial Branch in January 2013 to determine if there was a more efficient way to gather the information the office needed to fulfill its accounting requirements. Based on our review of the meeting minutes, and follow-up discussions with office staff and Judicial Branch staff, there was miscommunication in this meeting, resulting in the Judicial Branch notifying the clerks of courts they no longer needed to provide the office with detailed, client specific, assessment and payment information. Instead of the detailed information coming from the individual courts, the Judicial Branch began providing the office with summary reports outlining the total dollar amount of fees assessed by and paid to each court, generated from a computer system called FullCourt. FullCourt is used to track court sentences and payments. The summary reports did not contain the details necessary to account for assessments and payments on an individual client basis. While the office attempted to resolve the miscommunication by following-up with the Judicial Branch staff, the office was unable to resolve the miscommunication. Thus, starting in fiscal year 2014, the office's information needs were ultimately not met.

As a result, the Public Defender Commission (commission) passed a resolution in October 2013 that reads, in part: "1. The Commission understands that OPD can only record cash collected in summary...because the agency does not receive detailed information from the courts and therefore will be out of compliance with state and accounting policy." Although the commission passed its resolution, the resolution does not absolve the office from complying with state law and accounting policy requirements governing the accounting, management, and collection of accounts receivable and state law requirements governing annual reporting of assessment data for fiscal year 2014.

As part of the audit, we met with Judicial Branch employees. Based on that meeting, while the Judicial Branch does not require the clerks of courts to submit detailed reports to the office, the office is not prohibited from contacting the courts to obtain

the information. Office management is concerned that contacting the courts would not be productive, given that the courts were told by the Judicial Branch that they did not need to provide the information. Additionally, office management does not believe the office has sufficient staff resources to contact each of the individual courts to obtain the client-specific details. As part of the audit, we spoke with three clerks of court, to determine the report functionality of FullCourt. Based on these conversations, FullCourt has functionality that allows the courts to quickly and easily generate reports on public defender fee assessments and payments, including the client-specific details the office needs.

The office's information needs can be met by the various courts. The office should work with the courts and the Judicial Branch to obtain the detailed information needed to account for public defender fee assessments and payments on an individual client basis.

In addition to the resolution passed by the commission, the office approached the Law and Justice Interim Committee on September 3, 2014, to request approval to draft a bill for the 2015 Legislative Session that would move the public defender fee assessment collections out of the State Special Revenue Account and into the state's General Fund and remove the office's reporting requirements in §47-1-201(10)(b), MCA. The intent of this bill draft is to remove the office's obligation to report on and account for the public defender fee assessments and to manage and collect the related accounts receivables. The committee authorized the office to draft the bill.

The bill draft requested at the September 2014 Law and Justice Interim Committee would not remove the requirements in state law and state accounting policy for fee assessments to be accounted for, and the related unpaid balances to be managed and collected upon. While the bill draft requested may change the state agency responsible for these activities, it would not remove the requirement for the management and collection activities to be performed.

RECOMMENDATION #2

We recommend the office:

- A. *Work with the Judicial Branch and courts to obtain detailed public defender fee assessment and payment information.*
 - B. *Account for public defender fee assessments and payments on an individual account basis, to facilitate compliance with state law and policy governing the financial management of accounts receivable and the annual reporting of assessment data.*
-

Controls Over Payments Received by Mail

The office does not have adequate internal controls to ensure all payments received by mail are deposited.

As stated on page 5, the office is responsible for the direct collection of public defender fees assessed prior to July 1, 2011. The office receives payments in the mail for these public defender fees. The office deposited approximately \$153,000 in payments received by mail for fiscal years 2013 and 2014, combined.

State accounting policy requires agencies establish and maintain a system of internal controls over collections and deposits. Policy further states collections should be appropriately secured until deposited, and advises that in an operation where a large volume of payments are received in the mail, more than one person should be assigned to the mail opening and receipt preparation process.

In the prior audit, we recommended the office implement internal controls to ensure all payments received by mail were secured until deposited. In the audit, we noted the office's practices did not ensure mail was secured until such time as it was opened, and the office's policies designated one employee to open the mail and log payments for deposit. In response to the recommendation in the prior audit, the office purchased a locked mail drop box. However, office policy still designates only one employee to open mail and log payments for deposit.

The office does not send statements to clients that would allow external validation that all payments received were properly applied to client accounts. Additionally, due to the nature of the fees assessed, the expectation of collection on public defender fee assessments is low. Because of these factors, we believe having one individual opening mail and logging payments is insufficient to ensure all payments received by mail are deposited, elevating the risk of misappropriated collections.

Office management stated the dollar amount of collections received via the mail has decreased over time, and the amount of exposure to theft or loss does not merit the additional resources required to have two people open the mail. Per office staff, it takes approximately 15 minutes to open the mail.

The office's current practice of having only one individual open the mail and log payments for deposit increases the exposure of payments to theft or loss. Additionally, the office's policies are not adequate to ensure all payments received in the mail are deposited. While the amount of deposited mailed-in payments has decreased since

the prior audit, the deposits approximated 37 percent and 21 percent of total public defender fee collections in fiscal years 2013 and 2014, respectively. As these numbers show, mailed-in deposited fees still represent a significant portion of the office's fee collections during the audit period.

RECOMMENDATION #3

We recommend the office comply with state accounting policy by implementing internal controls to ensure all payments received by mail are deposited.

Improper Expenditure Abatements

The office improperly abated expenditures for certain payments received during the audit period, understating both revenues and expenditures.

Expenditure abatement transactions reduce specific expenditure activity previously recorded on the state's accounting records, there by increasing available appropriation authority. State accounting policy allows the use of expenditure abatements in limited situations, including when an agency receives reimbursement of specific items it previously paid, provided they are nonrecurring and nonroutine in nature. The policy specifically prohibits the use of expenditure abatements for expected reimbursements.

During the audit period, the office received reimbursements and recorded expenditure abatements in the General Fund for the following three types of activities.

- ◆ **State Bar Dues:** The office pays the cost of staff attorney annual dues for membership in the State Bar of Montana. When a staff attorney terminates employment with the office, the former employee is required to repay the office a pro-rated share of the annual dues.
- ◆ **Subleased Office Space:** The office pays to lease office space to conduct its operations. The office subleased two of these office spaces during the audit period.
- ◆ **Evaluations:** Judges can order office clients to have an evaluation completed as part of the defendant's sentence. If the office has already completed an evaluation for the client, the judge can use the results of that evaluation instead of ordering new one. In these situations, the judge orders the court to reimburse the office for the cost of the evaluation.

The office historically recorded reimbursements for these activities as expenditure abatements because staff considered the activities to neither be a part of the office's normal business operations nor recurring in nature. However, the office had an expectation of reimbursement for the activities, and the accounting records showed the reimbursements were recurring and routine in nature. Therefore, these activities

Table 3
Improper General Fund Expenditure Abatements
by Type

	FY2013	FY2014
State Bar Dues Reimbursements	\$2,854	\$2,438
Sublease Payments for Rented Office Space	7,350	9,600
Evaluation Reimbursements	28,003	40,631
Total	\$38,207	\$52,669

Source: Compiled by Legislative Audit Division from Office of the State Public Defender records.

were not valid expenditure abatements, and the office should have recorded the reimbursements as revenues.

As part of the audit, we estimated the dollar amount of improper expenditure abatements recorded in fiscal years 2013 and 2014, through the date of testing. These errors were communicated to the office, and the office performed additional analysis on the

reimbursements received. Table 3 outlines the dollar amount of incorrect expenditure abatements, per the office's analysis. These amounts represent the dollar amount of understated expenditures and revenues as a result of the improper use of expenditure abatements.

In fiscal year 2014, the office recorded entries on the state's accounting records to properly account for the fiscal year 2014 activity. The office also recorded entries in fiscal year 2014, which were intended to correct the errors in the state bar dues and sublease payment activity for fiscal year 2013. These entries correctly recorded revenue for the activity, but reduced an accrued liability instead of increasing expenditures. As a result, expenditures are still understated for the fiscal year 2013 activity, and fund equity is overstated. Additionally, the office did not record entries in fiscal year 2014 to correct the errors in the fiscal year 2013 evaluation reimbursements. Accordingly, expenditures and revenues are still understated for the fiscal year 2013 evaluation reimbursements. Table 4, see page 14, represents the errors on the state's accounting records, for the 2013 activity, as of fiscal year-end 2014.

Table 4
General Fund Accounting Errors in Fiscal Year 2013 Activity
as of June 30, 2014

	Prior-Year Revenue Understated	Prior-Year Expenditures Understated	Accrued Liabilities Understated	Fund Equity Overstated
State Bar Dues Reimbursements		\$ 2,854	\$2,854	\$2,854
Sublease Payments for Rented Office Space		7,350	7,350	7,350
Evaluation Reimbursements	\$28,003	28,003		
Total	\$28,003	\$38,207	\$10,204	\$10,204

Source: Compiled by the Legislative Audit Division.

Because more than two years have passed, the office can no longer correct the revenue and expenditure errors on the state's accounting records for the fiscal year 2013 activity. The office still has the opportunity to correct the errors in fund equity and accrued liability accounts.

RECOMMENDATION #4

We recommend the office:

- A. *Comply with state accounting policy by recording revenues for reimbursements received that are recurring and routine in nature.*
 - B. *Analyze the remaining errors on the state's accounting records and make correcting entries.*
-

Independent Auditor's Report and Office Financial Schedules

LEGISLATIVE AUDIT DIVISION

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



Deputy Legislative Auditors:
Cindy Jorgenson
Angus Maciver

INDEPENDENT AUDITOR'S REPORT

The Legislative Audit Committee
of the Montana State Legislature:

Introduction

We have audited the accompanying Schedules of Changes in Fund Equity, Schedules of Total Revenues & Transfers-In, and Schedules of Total Expenditures & Transfers-Out of the Office of the State Public Defender for each of the fiscal years ended June 30, 2014, and 2013, and the related notes to the financial schedules.

Management's Responsibility for the Financial Schedules

Management is responsible for the preparation and fair presentation of these financial schedules in accordance with the regulatory format prescribed by the Legislative Audit Committee, based on the transactions posted to the state's accounting system without adjustment; this responsibility includes recording transactions in accordance with state accounting policy; and designing, implementing, and maintaining internal controls relevant to the preparation and fair presentation of the financial schedules that are free from material misstatement, whether due to fraud or error.

Auditor's Responsibility

Our responsibility is to express opinions on these financial schedules based on our audit. We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial schedules are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial schedules. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial schedules, whether due to fraud or error. In making those risk assessments, the auditor considers internal controls relevant to the office's preparation and fair presentation of the financial schedules in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the office's internal control, and accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as the overall presentation of the financial schedules.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinions.

Basis for Adverse Opinions on U.S. Generally Accepted Accounting Principles

As described in Note 1, the financial schedules are prepared from the transactions posted to the state's primary accounting system without adjustment, in the regulatory format prescribed by the Legislative Audit Committee. This is a basis of accounting other than accounting principles generally accepted in the United States of America. The financial schedules are not intended to, and do not, report assets and liabilities.

The effects on the financial schedules of the variances between the regulatory basis of accounting described in Note 1 and accounting principles generally accepted in the United States of America, although not reasonably determinable, are presumed to be material.

Adverse Opinions on U.S. Generally Accepted Accounting Principles

In our opinion, because of the significance of the matter discussed in the "Basis for Adverse Opinions on U.S. Generally Accepted Accounting Principles" paragraph, the financial schedules referred to above do not present fairly, in accordance with accounting principles generally accepted in the United States of America, the financial position of the office as of June 30, 2014, and June 30, 2013, or changes in financial position for the years then ended.

Unmodified Opinions on Regulatory Basis of Accounting

In our opinion, the Schedules of Changes in Fund Equity, Schedules of Total Revenues & Transfers-In, and Schedules of Total Expenditures & Transfers-Out, present fairly, in all material respects, the results of operations and changes in fund equity of the Office of the State Public Defender for each of the fiscal years ended June 30, 2014, and 2013, in conformity with the basis of accounting described in Note 1.

Respectfully submitted,

/s/ Cindy Jorgenson

Cindy Jorgenson, CPA
Deputy Legislative Auditor
Helena, MT

September 17, 2014

PUBLIC DEFENDER
SCHEDULE OF CHANGES IN FUND EQUITY
FOR THE FISCAL YEAR ENDED JUNE 30, 2014

	<u>General Fund</u>	<u>State Special Revenue Fund</u>
FUND EQUITY: July 1, 2013	\$ <u>(1,984,811)</u>	\$ <u>164,390</u>
ADDITIONS		
Budgeted Revenues & Transfers-In	60,393	285,313
Nonbudgeted Revenues & Transfers-In		0
Prior Year Revenues & Transfers-In Adjustments	10,204	50
Direct Entries to Fund Equity	<u>28,381,129</u>	<u>597,719</u>
Total Additions	<u>28,451,725</u>	<u>883,083</u>
REDUCTIONS		
Budgeted Expenditures & Transfers-Out	28,688,957	1,080,788
Prior Year Expenditures & Transfers-Out Adjustments	<u>(4,613)</u>	
Total Reductions	<u>28,684,344</u>	<u>1,080,788</u>
FUND EQUITY: June 30, 2014	\$ <u><u>(2,217,430)</u></u>	\$ <u><u>(33,316)</u></u>

This schedule is prepared from the Statewide Accounting, Budgeting, and Human Resources System (SABHRS) without adjustment. Additional information is provided in the notes to the financial schedules beginning on page A-9.

PUBLIC DEFENDER
SCHEDULE OF CHANGES IN FUND EQUITY
FOR THE FISCAL YEAR ENDED JUNE 30, 2013

	<u>General Fund</u>	<u>State Special Revenue Fund</u>
FUND EQUITY: July 1, 2012	\$ <u>(1,679,823)</u>	\$ <u>94,346</u>
ADDITIONS		
Budgeted Revenues & Transfers-In	5,961	256,136
Nonbudgeted Revenues & Transfers-In	42,371	28,224
Direct Entries to Fund Equity	<u>25,562,157</u>	
Total Additions	<u>25,610,488</u>	<u>284,360</u>
REDUCTIONS		
Budgeted Expenditures & Transfers-Out	25,880,933	186,093
Nonbudgeted Expenditures & Transfers-Out	35,388	28,223
Prior Year Expenditures & Transfers-Out Adjustments	<u>(844)</u>	
Total Reductions	<u>25,915,477</u>	<u>214,316</u>
FUND EQUITY: June 30, 2013	\$ <u>(1,984,811)</u>	\$ <u>164,390</u>

This schedule is prepared from the Statewide Accounting, Budgeting, and Human Resources System (SABHRS) without adjustment. Additional information is provided in the notes to the financial schedules beginning on page A-9.

PUBLIC DEFENDER
SCHEDULE OF TOTAL REVENUES & TRANSFERS-IN
FOR THE FISCAL YEAR ENDED JUNE 30, 2014

	<u>General Fund</u>	<u>State Special Revenue Fund</u>	<u>Total</u>
TOTAL REVENUES & TRANSFERS-IN BY CLASS			
Charges for Services	\$ 45,722	\$ 285,194	\$ 330,916
Investment Earnings		169	169
Sale of Documents, Merchandise and Property	7,827		7,827
Rentals, Leases and Royalties	16,950		16,950
Miscellaneous	97		97
Total Revenues & Transfers-In	<u>70,597</u>	<u>285,363</u>	<u>355,960</u>
Less: Nonbudgeted Revenues & Transfers-In		0	0
Prior Year Revenues & Transfers-In Adjustments	<u>10,204</u>	<u>50</u>	<u>10,254</u>
Actual Budgeted Revenues & Transfers-In	60,393	285,313	345,706
Estimated Revenues & Transfers-In	<u>60,393</u>	<u>285,313</u>	<u>345,706</u>
Budgeted Revenues & Transfers-In Over (Under) Estimated	<u>\$ (0)</u>	<u>\$ 0</u>	<u>\$ (0)</u>
 BUDGETED REVENUES & TRANSFERS-IN OVER (UNDER) ESTIMATED BY CLASS			
Charges for Services	\$ (0)		\$ (0)
Budgeted Revenues & Transfers-In Over (Under) Estimated	<u>\$ (0)</u>	<u>\$ 0</u>	<u>\$ (0)</u>

This schedule is prepared from the Statewide Accounting, Budgeting, and Human Resources System (SABHRS) without adjustment. Additional information is provided in the notes to the financial schedules beginning on page A-9.

PUBLIC DEFENDER
SCHEDULE OF TOTAL REVENUES & TRANSFERS-IN
FOR THE FISCAL YEAR ENDED JUNE 30, 2013

	General Fund	State Special Revenue Fund	Total
TOTAL REVENUES & TRANSFERS-IN BY CLASS			
Charges for Services		\$ 255,732	\$ 255,732
Investment Earnings		179	179
Grants, Contracts, and Donations		28,423	28,423
Transfers-in	\$ 5,807		5,807
Inception of Lease/Installment Contract	42,371		42,371
Miscellaneous	154	25	179
Total Revenues & Transfers-In	48,332	284,360	332,691
Less: Nonbudgeted Revenues & Transfers-In	42,371	28,224	70,595
Prior Year Revenues & Transfers-In Adjustments			0
Actual Budgeted Revenues & Transfers-In	5,961	256,136	262,096
Estimated Revenues & Transfers-In	5,961	256,136	262,096
Budgeted Revenues & Transfers-In Over (Under) Estimated	\$ 0	\$ 0	\$ 0
BUDGETED REVENUES & TRANSFERS-IN OVER (UNDER) ESTIMATED BY CLASS			
Budgeted Revenues & Transfers-In Over (Under) Estimated	\$ 0	\$ 0	\$ 0

This schedule is prepared from the Statewide Accounting, Budgeting, and Human Resources System (SABHRS) without adjustment. Additional information is provided in the notes to the financial schedules beginning on page A-9.

PUBLIC DEFENDER
SCHEDULE OF TOTAL EXPENDITURES & TRANSFERS-OUT
FOR THE FISCAL YEAR ENDED JUNE 30, 2014

PROGRAM (ORG) EXPENDITURES & TRANSFERS-OUT	<u>Conflict Coordinator</u>	<u>Office of Appellate Defender</u>	<u>Office of Public Defender</u>	<u>Total</u>
Personal Services				
Salaries	\$ 145,601	\$ 752,930	\$ 11,270,170	\$ 12,168,701
Employee Benefits	53,781	241,118	3,856,212	4,151,110
Total	<u>199,382</u>	<u>994,048</u>	<u>15,126,381</u>	<u>16,319,811</u>
Operating Expenses				
Other Services	5,200,353	367,346	5,424,197	10,991,896
Supplies & Materials	180	19,958	312,147	332,285
Communications	511	24,759	484,282	509,551
Travel	1,022	1,194	156,341	158,558
Rent		64,668	1,191,719	1,256,386
Utilities			991	991
Repair & Maintenance		5,980	117,048	123,028
Other Expenses			66,127	66,127
Total	<u>5,202,066</u>	<u>483,905</u>	<u>7,752,850</u>	<u>13,438,821</u>
Equipment & Intangible Assets				
Equipment			6,500	6,500
Total			<u>6,500</u>	<u>6,500</u>
Total Expenditures & Transfers-Out	<u>\$ 5,401,448</u>	<u>\$ 1,477,953</u>	<u>\$ 22,885,732</u>	<u>\$ 29,765,133</u>
EXPENDITURES & TRANSFERS-OUT BY FUND				
General Fund	\$ 5,401,448	\$ 1,477,953	\$ 21,804,943	\$ 28,684,344
State Special Revenue Fund			1,080,788	1,080,788
Total Expenditures & Transfers-Out	<u>5,401,448</u>	<u>1,477,953</u>	<u>22,885,732</u>	<u>29,765,133</u>
Less: Nonbudgeted Expenditures & Transfers-Out				
Prior Year Expenditures & Transfers-Out Adjustments			(4,613)	(4,613)
Actual Budgeted Expenditures & Transfers-Out	<u>5,401,448</u>	<u>1,477,953</u>	<u>22,890,344</u>	<u>29,769,745</u>
Budget Authority	<u>5,401,448</u>	<u>1,477,953</u>	<u>22,930,289</u>	<u>29,809,690</u>
Unspent Budget Authority	<u>\$ 0</u>	<u>\$ 0</u>	<u>\$ 39,945</u>	<u>\$ 39,945</u>
UNSPENT BUDGET AUTHORITY BY FUND				
General Fund			\$ 20,189	\$ 20,189
State Special Revenue Fund			19,756	19,756
Unspent Budget Authority	<u>\$ 0</u>	<u>\$ 0</u>	<u>\$ 39,945</u>	<u>\$ 39,945</u>

This schedule is prepared from the Statewide Accounting, Budgeting, and Human Resources System (SABHRS) without adjustment. Additional information is provided in the notes to the financial schedules beginning on page A-9.

PUBLIC DEFENDER
SCHEDULE OF TOTAL EXPENDITURES & TRANSFERS-OUT
FOR THE FISCAL YEAR ENDED JUNE 30, 2013

PROGRAM (ORG) EXPENDITURES & TRANSFERS-OUT	Office of Appellate Defender	Office of Public Defender	Total
Personal Services			
Salaries	\$ 576,188	\$ 9,790,779	\$ 10,366,968
Hourly Wages		1,025	1,025
Employee Benefits	191,582	3,379,153	3,570,735
Total	767,770	13,170,957	13,938,727
Operating Expenses			
Other Services	409,898	9,207,065	9,616,962
Supplies & Materials	6,843	321,599	328,442
Communications	22,694	533,090	555,783
Travel	1,504	188,974	190,477
Rent	66,132	1,187,599	1,253,731
Utilities		996	996
Repair & Maintenance	2,038	105,838	107,875
Other Expenses		57,461	57,461
Total	509,108	11,602,620	12,111,728
Equipment & Intangible Assets			
Capital leases - equipment	6,168	29,609	35,777
Total	6,168	29,609	35,777
Debt Service			
Capital Leases	6,671	36,890	43,561
Total	6,671	36,890	43,561
Total Expenditures & Transfers-Out	\$ 1,289,717	\$ 24,840,076	\$ 26,129,793
 EXPENDITURES & TRANSFERS-OUT BY FUND			
General Fund	\$ 1,289,717	\$ 24,625,759	\$ 25,915,477
State Special Revenue Fund		214,316	214,316
Total Expenditures & Transfers-Out	1,289,717	24,840,076	26,129,793
Less: Nonbudgeted Expenditures & Transfers-Out	6,168	57,444	63,612
Prior Year Expenditures & Transfers-Out Adjustments		(844)	(844)
Actual Budgeted Expenditures & Transfers-Out	1,283,549	24,783,476	26,067,026
Budget Authority	1,283,549	24,782,683	26,066,232
Unspent Budget Authority	\$ 0	\$ (793)	\$ (793)
 UNSPENT BUDGET AUTHORITY BY FUND			
General Fund		\$ (844)	\$ (844)
State Special Revenue Fund		51	51
Unspent Budget Authority	\$ 0	\$ (793)	\$ (793)

This schedule is prepared from the Statewide Accounting, Budgeting, and Human Resources System (SABHRS) without adjustment. Additional information is provided in the notes to the financial schedules beginning on page A-9.

Office of the State Public Defender
Notes to the Financial Schedules
For the Two Fiscal Years Ended June 30, 2014

1. Summary of Significant Accounting Policies

Basis of Accounting

The office uses the modified accrual basis of accounting, as defined by state accounting policy, for its Governmental fund category (General and State Special Revenue). In applying the modified accrual basis, the office records:

Revenues when it receives cash or when receipts are realizable, measurable, earned, and available to pay current period liabilities.

Expenditures for valid obligations when the department incurs the related liability and it is measurable, with the exception of the cost of employees' annual and sick leave. State accounting policy requires the office to record the cost of employees' annual and sick leave when used or paid.

Expenditures and expenses may include: entire budgeted service contracts even though the office receives the services in a subsequent fiscal year; goods ordered with a purchase order before fiscal year-end, but not received as of fiscal year-end; and equipment ordered with a purchase order before fiscal year-end.

Basis of Presentation

The financial schedule format was adopted by the Legislative Audit Committee. The financial schedules are prepared from the transactions posted to the state's accounting system without adjustment.

The office uses the following funds:

Governmental Fund Category

- ♦ **General Fund** – to account for all financial resources except those required to be accounted for in another fund. The substantial portion of the office's financial activity is included in the General Fund.
- ♦ **State Special Revenue Fund** – to account for proceeds of specific revenue sources that are legally restricted to expenditures for specific state program purposes. The office's State Special Revenue Fund includes collections for legal services provided pursuant to MCA,47-1-110. Additionally, the office received a grant from Missoula County in fiscal year 2013, to staff one social worker position in the Missoula Regional office that is accounted

for in the office's State Special Revenue Fund. The office received a SB410 Disbursement from the Governor's Office in fiscal year 2014 which is also accounted for in the office's State Special Revenue Fund.

2. General Fund Equity Balance

The negative fund equity balance in the General Fund does not indicate overspent appropriation authority. The office has authority to pay obligations from the statewide General Fund within its appropriation limits. The office expends cash or other assets from the statewide fund when it pays General Fund obligations. The office's outstanding liabilities exceed the assets it has placed in the fund, resulting in negative ending General Fund equity balances for each of the fiscal years ended June 30, 2013 and June 30, 2014.

3. Direct Entries to Fund Equity

Direct entries to fund equity in the General Fund and State Special Revenue Fund include entries generated by SABHRS to reflect the flow of resources within individual funds shared by separate agencies.

4. Related Party Transactions

The office rents the office space that is leased to one of its regional deputies. The deputy leases it from a third party and the office reimburses the deputy for the lease payment. During fiscal year 2013 the office paid approximately \$22,000 and during fiscal 2014 the office paid approximately \$23,000.

5. Establishment of the Conflict Coordinator Program

The office established the conflict coordinator program during fiscal 2014. This program assigns and manages all cases deemed to be a conflict case by the public defender and appellate defender programs.

OFFICE OF THE STATE
PUBLIC DEFENDER

OFFICE RESPONSE



Steve Bullock
Governor

OFFICE OF THE STATE PUBLIC DEFENDER
STATE OF MONTANA

William F. Hooks
Chief Public Defender

November 5, 2014

Tori Hunthausen, CPA
Legislative Auditor
PO Box 201705
Helena MT 59620-1705

RECEIVED
NOV 06 2014
LEGISLATIVE AUDIT DIV.

Re: Response to Legislative Audit Recommendations

Dear Ms. Hunthausen:

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

Recommendation #1:

We recommend the office comply with state law and accounting policy by implementing procedures for the financial management of public defender fee accounts receivables.

Response: We partially concur. The following paragraphs outline our view point of the issue noted by the auditor and illustrates the difficulty with full compliance.

¶1 At the top of page 8 of Report 14-28 the Legislative Audit Division recommends that OPD "... comply with state law and accounting policy by implementing procedures for the financial management of public defender fee accounts receivables." OPD partially concurs to the extent the procedures adopted will be consistent, compatible, and reconcilable with the *Title 46* procedures for court assessments for the costs of assigned counsel, those being what the audit calls "public defender fee accounts receivables." Several examples will be given of the *Title 17* procedures and the state accounting policy not seeming consistent, compatible, or reconcilable with *Title 46* procedures.

¶2 One instance involves when payment is receivable and collectible. In the last paragraph on page 7 the audit states that the implementation of collection activities is a standard business practice necessary for ensuring the maximization of revenues. In the second bullet point on page 7 the audit says *Title 46* does not preclude OPD from initiating procedures for collections of the amounts assessed by the courts. However, OPD has the impression, perhaps mistaken, of there being a notion that *Title 17* and the state accounting policy make payment of the costs of assigned counsel receivable and collectible from the time the court levies the assessment. Yet, under the combination of *M.C.A. §46-8-113(2)*, *M.C.A. §46-18-234*, and *M.C.A. §46-18-251* provisions, defendants are not obligated to pay for the costs of assigned counsel assessed until all other assessments are paid, and then only at the rate and over the time set by the court. Put differently, *M.C.A. §46-8-113(2)* and *M.C.A. §46-18-251* give an absolute defense against any OPD effort at collecting the costs of assigned counsel until all other assessments are paid. For this reason and others, OPD believes *Title 46* trumps *Title 17* and the state accounting policy. *M.C.A. §1-2-102*; *M.C.A. §1-3-225*. Assessments for the costs of assigned counsel are not receivable or collectible until the

court permits regardless of *Title 17* or the state accounting policy. No efforts at collection should be made and accounts should sit idle until then.

¶3 At the top of page 7 the audit states that there is a difference between the *Title 46* “framework for assessing fees, paying fees, and enforcing payment” and the requirements of *Title 17* and the state accounting policy for the financial management of accounts receivable. There is. As outlined in more detail later, in *Title 46* the Legislature has already laid out the statutory procedures governing the creation, billing, management, and collection of court ordered assessments including the costs of assigned counsel. *Title 17* and the state accounting policy for the financial management of accounts receivable are general requirements while the *Title 46* statutory procedures are specific with regard to the management of court ordered assessments. *M.C.A. §1-3-225* is a maxim of jurisprudence that “Particular expressions qualify those which are general.” And *M.C.A. §1-2-102* consistently provides:

In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.

As the audit notes near the bottom of page 6, OPD did say the requirements of *M.C.A. §17-4-104(4)* and the state accounting policy are inconsistent, incompatible, and irreconcilable with provisions in *Title 46* because, as set out in ¶2 and the balance of this response, there is inconsistency, incompatibility and, in some instances, the differences appear irreconcilable. Procedures adopted by OPD will be conciliatory with *Title 17* and the state accounting policy to the extent such are consistent and compatible with *Title 46* procedures.

¶4 **Creation of assessments.** In pertinent part *M.C.A. §46-18-241(1)* provides:

As provided in 46-18-201, a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss. The duty to pay full restitution under the sentence remains with the offender or the offender’s estate until full restitution is paid, whether or not the offender is under state supervision.

“Except as provided in subsection (2), there must be imposed by all courts of original jurisdiction on a person upon conviction for any conduct made criminal by state statute or upon forfeiture of bond or bail a charge that is in addition to other taxable court costs, fees, or fines, as follows:

“(a) \$15 for each misdemeanor charge;

“(b) the greater of \$20 or 10% of the fine levied for each felony charge; and

“(c) an additional \$50 for each misdemeanor and felony charge under Title 45, 61-8-401, 61-8-406, or 61-8-411.”

M.C.A. §46-18-236(1). A probationer, parolee, or person committed to the department who is supervised by the department must pay a supervisory fee of no less than \$120 a year and no more than \$360 a year, prorated, or pay no more than \$4,000 a year if under continuous satellite-based monitoring. *M.C.A. §46-23-1031(1)(a)*. A court may require a convicted defendant in a felony or misdemeanor case to pay costs defined in *M.C.A. §25-10-201*, costs of jury service, costs of prosecution, and the cost of pretrial, probation, or community service supervision as a part of the sentence. *M.C.A. §46-18-232(1)*. However, the court may not sentence a defendant to pay costs unless the defendant is or will be able to pay them. *M.C.A. §46-18-232(2)*. Whenever an offender has been found guilty of an offense for which a felony penalty of imprisonment could be imposed the court may, in lieu of or in addition to a sentence of imprisonment, impose a fine except that a fine may not be imposed unless the offender is or will be able

to pay the fine. *M.C.A. §46-18-231(1)* and (3). In misdemeanor cases the court can also impose a fine that the offender is or will be able to pay. *M.C.A. §46-18-231(2)* and (3).

¶5 The authority to order a convicted defendant to pay all or some portion of the costs of assigned counsel is strictly and completely within the province of the 208 courts before which public defenders represent indigent clients. *M.C.A. §46-8-113(1)*. A court cannot order a convicted defendant without any financial resources to pay the costs of assigned counsel. *Fuller v. Oregon*, 417 U.S. 40, 49-50, 94 S.Ct. 2116, 2123 (1974); *James v. Strange*, 407 U.S. 128, 92 S.Ct. 2007 (1972); *Hirt*, ¶22; *State v. Farrell*, 207 Mont. 483, 492, 676 P.2d 168, 173 (1984). Instead of OPD, only those 208 courts decide the amount and method of payment after conducting a meaningful ability to pay hearing. *M.C.A. §46-8-113(4)*; *M.C.A. §46-8-114*; *State v. Moore*, 2012 Mont. 95, ¶11, 365 Mont. 13, 277 P.3d 1212; *State v. Ellis*, 2010 MT 2010, ¶17, 339 Mont. 14, 167 P.3d 896; *State v. Hirt*, 2005 MT 285, ¶20-¶21, 329 Mont. 267, 124 P.3d 147 (decided before OPD went into operation). At the critical stage of sentencing, the role of the public defender is the presentation of facts and argument aimed at an order assessing a payment no greater than the defendant has the ability to pay. *M.C.A. §46-8-113(4)*.

¶6 **Management of assessments.** *Title 46* puts in place statutory procedures for the financial management of assessments levied in a sentencing judgment, including assessments for the costs of assigned counsel. Even after sentencing, the courts have latitude in adjusting original orders for payments by lowering the amount to be paid or extending the time for payment. “If the court finds that the circumstances upon which it based the imposition of restitution, amount of the victim’s pecuniary loss, or method or time of payment no longer exist or that it otherwise would be unjust to require payment as imposed, the court may adjust or waive unpaid restitution or the amount to be paid pursuant to *46-18-241(2)(a)* or modify the time or method of making restitution.” *M.C.A. §46-18-246*. The court may also extend the restitution schedule. *Id.* A court must waive payment of the charge imposed by *M.C.A. §46-18-236(1)* if the court determines under *M.C.A. §46-18-231* and *M.C.A. §46-18-232* that the person is not able to pay the fine and costs or that the person is unable to pay within a reasonable time. *M.C.A. §46-18-236(2)*. The court, department, or board may reduce, waive, or suspend the monthly payment of the supervisory fee if it determines that the payment would cause the person a significant financial hardship. *M.C.A. §46-23-1031(1)(c)*. Upon petition of a defendant not in default a court “... may remit all or part of the amount due in costs or modify the method of payment” at any time after entry of a judgment to pay some or all of those costs such as the costs of a jury or the costs of prosecution. *M.C.A. §46-18-232(3)*. Apparently a court does not have the authority to reduce the amount or remit payment of a fine. *M.C.A. §46-18-231(3)*. But the court may extend the time for payment of a fine. *M.C.A. §46-18-234*.

¶7 The 208 courts collect payments by defendants for restitution, *M.C.A. §46-18-236* mandatory charges, supervisory fees, fines, and costs including the costs of assigned counsel. The courts must allocate payments made by a defendant as provided in *M.C.A. §46-18-201, et seq.*, and distribute those payments in accordance with the priorities set in *M.C.A. §46-18-251*. Payments for the cost of appointed counsel should not be collected and deposited with the Department of Revenue into the *M.C.A. §47-1-110* OPD special revenue account until the defendant has paid the restitution, charges, supervisory fees, other costs, and fines in that order. *M.C.A. §46-8-113(2)*; *M.C.A. §46-8-114*; *M.C.A. §46-18-251*.

¶8 Consequently, the time when payments are made directly to OPD or deposits are made into the OPD special revenue account may be accelerated by reducing the amounts of other assessments or, more likely, may be extended beyond when OPD could have originally anticipated payments. That could be years depending on whether the court allows *M.C.A. §46-18-234* installments or authorizes modifications to the installment payment schedule, mandatory minimum sentences of incarceration, the length of the incarceration during which time the Department of Corrections might send OPD often less than a dollar a month, and other factors.

¶9 **Billing of assessments.** Meeting the expectation of the state accounting policy for timely billing, the 208 courts “bill” for any payments there might be by the sentencing judgment. *M.C.A. §46-8-113(6)*. “Whenever a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere, a sentencing judge may impose a sentence that may include ... payment of costs of assigned counsel as provided in 46-8-113.” *M.C.A. §46-18-201(3)(a)(ii)*.

¶10 Payments for the costs of assigned counsel can be modified, too. None of the 208 courts can reserve authority to increase the amount ordered in the sentence judgment for reimbursement of court-appointed counsel. Once imposed, payments may be modified as allowed by *M.C.A. §46-8-113(5)*:

A defendant who has been sentenced to pay costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

M.C.A. §46-8-113(5); Hirt, ¶19-¶20. Or pursuant to *M.C.A. §46-8-115(4)*:

If it appears to the satisfaction of the court that the default in the payment of costs is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount of the payment or of each installment, or revoking the order for payment of the unpaid portion of the costs in whole or in part.

Being the last priority for payment, there may be an increased likelihood for a court lowering, eliminating, or extending the time for payment of the costs of appointed counsel. *M.C.A. §46-8-113(2)* and (5); *M.C.A. §46-18-251(2)(e)*. The defendant will have been newly “billed” for payment of the other assessments or for the costs of appointed counsel by the court through the amendment to the sentencing judgment.

¶11 **Routine billing by OPD.** OPD agrees with the statement in the first bullet point that regular billing of unpaid balances is a standard business practice for financial management and collection of accounts receivables. However, regular billing for payment of assessments for the costs of assigned counsel without regard to *Title 46* provisions would be a waste of resources and would not be fruitful. Again, assessments for the costs of assigned counsel are not collectible until all other assessments are paid. That could be years, sometimes many years. OPD billing convicted defendants for payment of the costs of assigned counsel would have to be in the same terms the court ordered and would, therefore, merely duplicate what the court put in the judgment or amended judgment.

¶12 Routine bills sent before other assessments are paid would contain information like:

You were ordered by the court to pay \$XXX toward the costs of your representation.

You were also assessed for paying \$AAA in restitution, \$BBB as mandatory charges, \$CCC of supervisory fees, \$DDD for other costs (jury, prosecution, etc.), and \$EEE in fines. Your payments for these assessments will be due on the schedule and in the amount set by the court.

You may return to the court for relief in paying those assessments if payment of the amount due will impose manifest hardship on you or your immediate family. You will have the right to appeal if you are not satisfied with the decision.

All of those other assessments must be paid before paying toward the costs of your representation. Payments for the cost of your representation will be due on the schedule and in the amount set by the court.

You may at any time petition the court for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on you or your immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

You will have the right to appeal if you are not satisfied with the decision.

Sending routine bills before other assessments are paid would not be fiscally responsible. Sending a premature bill would not make the assessment for the costs of appointed counsel any more collectible. The costs of postage and the time spent in preparing the bills would be wasted. Accounts should sit idle, bills should not be sent, and efforts at collection should not be made until after OPD has information that other assessments are nearly paid and has conducted an analysis of the degree to which the assessed costs of assigned counsel are then collectible.

¶13 **Collection of assessments for the costs of assigned counsel.** In the first full paragraph just past the middle of page 7 the audit is critical of OPD staff for saying the pursuit of collecting the costs of assigned counsel is not cost effective and says, “Under state law, however, a court cannot assess public defender fees unless an individual is able to pay them.” A more accurate statement would be that under state law a court should not assess public defender fees unless an individual is able to pay them. In May 2013 on an OPD appeal from an assessment of an unspecified amount of costs, the Montana Supreme Court remanded in *State v. Yarlott*, DA 12-14, and ordered the district court to conduct a hearing on Yarlott’s ability to pay. In hindsight, Anne Stout (¶17) is an instance in which the court ordered her to pay more than she has the ability to pay. Plea agreements for payments of \$250 or \$800 for the costs of assigned counsel under *M.C.A. §46-8-113(1)(a)* have been approved in at least one jurisdiction without regard to the person’s ability to pay. Defendants have entered into those agreements to take the benefit of advantages by pleading but still have the statutory right to petition the court for a reduction in the amount. *M.C.A. §46-8-113(5)*.

¶14 The audit reports in the first bullet point on page 7 that discussions with the staff of several courts revealed that “... not all courts actively pursue collection of public defender fees after sentencing.” Defendants were to pay OPD directly before *M.C.A. §46-8-114* was amended in 2011 to require the payments be made to the clerks of the courts. Courts may not have actively pursued collections of those assessments and maybe others for a variety of reasons. A review of assessments levied before *M.C.A. §46-8-114* (2011) became effective will be undertaken for determining what best course of action might be taken for collection. The review will include, among perhaps other inquiries, how much is owed; whether there are outstanding balances for restitution, *M.C.A. §46-18-236* charges, supervisory fees, other costs, or fines; whether the court has made adjustments to the sentencing judgment for payments of other assessments; whether the person is incarcerated and, if so, for how much longer; and what the person’s ability to pay in the foreseeable future is. The courts should know how much is owed for restitution, charges, supervisory fees, other costs, fines, and the costs of assigned counsel. OPD will have no way of knowing if the costs of assigned counsel are ripe for collection if the courts do not know how much remains owing on other assessments. The costs of assigned counsel will not be collectible if balances remain on the other assessments. *M.C.A. §46-8-113(2)*; *M.C.A. §46-18-251*. OPD will simply need to wait on pursuing collection if a court is not actively pursuing collection of assessments with a higher priority. If there are no other balances owing, the better course of action would be an *M.C.A. §46-8-113(5)* proceeding if the person’s ability to pay the costs of assigned counsel has diminished or the person’s incarceration is likely to continue into the foreseeable future. The Anne Stout situation set out in ¶17 will illuminate the rationale behind an *M.C.A. §46-8-113(5)* proceeding. An *M.C.A. §46-8-115* proceeding might be appropriate if the person has an ability to pay and the assessments for restitution, charges, supervisory fees, other costs, and fines are paid.

¶15 Whether an amount owed for the costs of assigned counsel is collectible is really a decision only for the courts to make. *M.C.A. §46-8-113(4) and (5); M.C.A. §46-8-115(1)*. Only a court may order a defendant to show cause why he or she should not be held in contempt for a default in the payment of the costs of assigned counsel. *M.C.A. §46-8-115(1)*. A defendant represented by OPD during the offense stage will likely be represented by a public defender at an *M.C.A. §46-8-115(4)* hearing because of the potential for incarceration. The role of the public defender at an *M.C.A. §46-8-115* hearing is the presentation of facts and argument aimed at demonstrating “the default was not attributable to an intentional refusal to obey the order of the court or to a failure on the defendant’s part to make a good faith effort to make the payment” and seeking an order assessing a payment no greater than the defendant then has the ability to pay. *M.C.A. §46-8-115(2) and (4)*. “If it appears to the satisfaction of the court that the default in the payment of costs is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount of the payment or of each installment, or revoking the order for payment of the unpaid portion of the costs in whole or in part.” *M.C.A. §46-8-115(4)*. Given the *Title 46* statutory scheme, and notwithstanding *Title 17* and state accounting policy, OPD does not have the authority to countermand a court’s judgment and decide differently about the collectability of the amount ordered to be paid.

¶16 Only when the court concludes the default is civil contempt can steps be taken for collection. A “term of imprisonment for contempt for nonpayment of the costs of assigned counsel must be set forth in the judgment and may not exceed 1 day for each \$25 of the payment, 30 days if the order for payment of costs was imposed upon conviction of a misdemeanor, or 1 year in any other case, whichever is the shorter period.” *M.C.A. §46-8-115(3)*.

A default in the payment of costs or any installment may be collected by any means authorized by law for the enforcement of a judgment. The writ of execution for the collection of costs may not discharge a defendant committed to imprisonment for contempt until the amount of the payment for costs has actually been collected.

M.C.A. §46-8-115(5). *M.C.A. §25-13-101, et seq.*, provides for the enforcement of judgments. *M.C.A. §25-13-301, et seq.*, covers the form and content of writs of execution, notably that the writ of execution must “be directed to the sheriff or levying office” by the court imposing the sentencing. *M.C.A. §25-13-301(1)(b); M.C.A. §46-8-115(1)*. The return of the writ by the sheriff or levying officer will determine whether the order for the payment of the costs of appointed counsel is collectible if the court has not already made the determination that some or all of the amount is not collectible. *M.C.A. §25-13-401, et seq.; M.C.A. §46-8-115(4)*.

¶17 Anne Stout offers an example of procedural issues with the assessment for the costs her assigned counsel. Stout was found guilty of deliberate homicide in 2008. The Court sentenced her to the Montana State Prison for Women for the rest of her natural life. She will not be eligible for parole until she has completed psychological treatment that is both recommended and available to her. Born in 1964, Stout will likely die in prison. The Court did not fine her but ordered that she pay the Ravalli County District Court \$14,570.99 for the costs of prosecution and of her jury and that she pay \$57,127.00 for the costs of her assigned counsel upon finding that she owned a half interest in the family home listed for sale at \$795,000.00 with a \$204,300.00 debt against the property when refinanced in 2006. Stout has the rest of her life and beyond to pay for the costs of her assigned counsel. That is the management plan for the payment to OPD set by the sentencing judgment. Because she is in prison she does not have the means to earn enough to pay the assessment by periodic installment payments. What she owes for the costs of her assigned counsel is collectable when the family home is sold if there is enough left after deduction for the debt against the property, the homestead allowance, the costs of her jury and the costs of prosecution. OPD has never had the money to buy out those superior priorities for payment. Thus, OPD, and probably Ravalli County, have always been dependent on what the Department of Corrections might send monthly.

The best approach is for OPD to return to the court seeking an *M.C.A. §46-8-115(5)* determination of what Anne Stout has the ability to pay OPD.

¶18 The foregoing sets out the reasons why procedures adopted by OPD will be conciliatory with *Title 17* and the state accounting policy to the extent such are consistent and compatible with *Title 46* procedures.

Recommendation #2:

We recommend the office:

- A. *Work with the Judicial Branch and courts to obtain detailed public defender fee assessments and payment information.*
- B. *Account for public defender fee assessments and payments on an individual account basis to facilitate compliance with state law and policy governing the financial management of accounts receivable and the annual reporting of assessment data.*

Response: Part A: We concur. The audit recommends that OPD work with the Judicial Branch to obtain details regarding the assessments for the costs of assigned counsel and payment information and then account for the assessments and payments on an individual account basis. OPD concurs that it will do what it can to get the information and account accordingly. However, based on past experience there can be no guarantee on how successful that endeavor will be. OPD believes all 208 courts are now using FullCourt. As noted when this issue arose before, OPD could comply if the detailed information is delivered in a form that is easy to input directly into the state's accounting systems. However, OPD is of the understanding that the information the 208 courts put into FullCourt goes into 208 databases instead of a single, central database. Given that situation, as noted before, OPD does not have the central office accounting staff to work with 208 databases and 208 courts to track thousands of individual assessments for the costs of assigned counsel. With the appropriate resources this recommendation could be implemented in approximately one year.

Response: Part B: We also concur with the audit report on pages 8, 9, and 10 about the factual background for the recommendation except, perhaps, the last paragraph on page 10. The goal behind the bill request is to have assessments collected by the clerks of court deposited into the general fund, remove management and collection activities for those assessments from OPD, and remove OPD's reporting requirement in *M.C.A. §47-1-201(10)(b)*.

It is unclear what is meant by the last sentence on page 10 before the recommendation. The intent behind the bill draft is to remove any financial management and collection activities from OPD given how infeasible it is for OPD to perform those activities. As outlined in this response, *Title 46* already lays out the mechanism and procedures for the assessment, billing, management, and collection of court assessments including assessments for the costs of assigned counsel without over layering those procedures and mechanism with incompatible *Title 17* procedures and state accounting policies. The courts levy the assessments and bill through the sentencing judgments and amended judgments. The courts manage the assessments, account for the person's payments by allocation according to the schedule set or amended and the priorities set in *M.C.A. §46-18-251(2)*, and can enforce collection of the costs of assigned counsel assessed through *M.C.A. §46-8-115*. The *Title 17* and state accounting policy goals can be fulfilled through *Title 46*.

Recommendation #3:

We recommend the office comply with state accounting policy by implementing internal controls to ensure all payments received by mail are deposited.

Response: We concur. Effective immediately, the agency will have two people present to open mail and log payments for deposit. Before implementing certain changes to our operation it sometimes took personnel up to two hours to open and log mail, and the agency did not have the resources to adopt this internal control. However, we have reduced the time it takes to perform this function to approximately 15 minutes per day and can now implement the recommendation.

Recommendation #4:

We recommend the office:

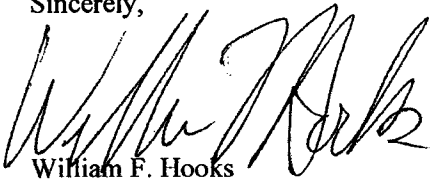
- A. Comply with state accounting policy by recording revenues for reimbursements received that are recurring and routine in nature.*
- B. Analyze the remaining errors on the state's accounting records and make correcting entries.*

Response: Part A: We concur. The agency fixed this item before the close of fiscal 2014.

Response: Part B: We concur. The agency will prepare the entries noted by the audit to comply with the recommendation. However, the original entries were prepared by the agency under the guidance of state accounting, and state accounting will need to approve the posting of the new entries as they are the final authority on any adjustments made to fund balance.

We appreciate the legislative staff time devoted to this audit and appreciate them for acting in a helpful, cooperative and professional manner. We look forward to working with your office in the future.

Sincerely,



William F. Hooks
Chief Public Defender

cc: Richard E. "Fritz" Gillespie, Chair, Public Defender Commission
Harry Freebourn, Administrative Director