

Letter Report

**Office of the State
Public Defender**

April 2005



Legislative Audit Bureau

22 E. Mifflin St., Ste. 500, Madison, Wisconsin 53703-4225 ■ (608) 266-2818

Fax: (608) 267-0410 ■ Web site: www.legis.state.wi.us/lab



STATE OF WISCONSIN
Legislative Audit Bureau

22 E. Mifflin St., Ste. 500
Madison, Wisconsin 53703
(608) 266-2818
Fax (608) 267-0410
Leg.Audit.Info@legis.state.wi.us

April 12, 2005

Janice Mueller
State Auditor

Senator Carol A. Roessler and
Representative Suzanne Jeskewitz, Co-chairpersons
Joint Legislative Audit Committee
State Capitol
Madison, Wisconsin 53702

Dear Senator Roessler and Representative Jeskewitz:

We have completed audit work at the Office of the State Public Defender to meet our audit requirements under s. 13.94, Wis. Stats. We reviewed the Office's fiscal operations and related activities to assess whether they are effectively managed, well-controlled, and in compliance with statutory requirements. The Office is responsible for providing legal representation that is constitutionally guaranteed for defendants who are unable to afford private attorneys. In fiscal year (FY) 2003-04, it provided legal services to almost 145,000 indigent clients through staff attorneys who are directly employed by the Office and private attorneys who are paid on an hourly basis through fixed-fee contracts.

The Office is funded primarily through general purpose revenue, although it receives some program revenue from the indigent clients it serves and through sponsorship of training conferences. In FY 2003-04, it had 527.5 full-time equivalent employees in 38 locations statewide, and its expenditures totaled \$79.9 million.

Over the past five years, the Office's expenditures for private attorneys increased 44.1 percent. Such increases present continuing budgeting challenges for the State. Currently, the invoices that private attorneys and investigators submit during the final quarter of a biennium are not funded until the next budget period, which delays payment for up to three months after they are submitted. This budget practice has been in place for many years, but warrants careful review to ensure it is in compliance with established budget provisions. We also identified several areas in which the Office could improve internal controls and fiscal processes, including private attorney certifications, employee travel reimbursements, fixed assets, and password security. The Office agrees with the recommended improvements and has identified its plans to implement our recommendations. Its responses have been incorporated into this letter.

We appreciate the courtesy and cooperation extended to us by Office staff during our audit.

Sincerely,

A handwritten signature in cursive script that reads "Janice Mueller".

Janice Mueller
State Auditor

JM/CS/bm

cc: Senator Robert Cowles
Senator Scott Fitzgerald
Senator Mark Miller
Senator Julie Lassa

Representative Samantha Kerkman
Representative Dean Kaufert
Representative David Travis
Representative David Cullen

OFFICE OF THE STATE PUBLIC DEFENDER

The Office of the State Public Defender provides legal defense services to indigent clients. Representation is constitutionally guaranteed to individuals who are charged with crimes and face a potential sentence of imprisonment. In addition, the Legislature has statutorily extended the rights to representation in other cases, including those involving paternity determinations, terminations of parental rights, involuntary commitments, and certain post-conviction and post-judgment appeals. Representation is provided by staff attorneys directly employed by the Office and by private attorneys who are paid on an hourly basis or through fixed-fee contracts. The Office and the private attorneys provided legal services to almost 145,000 indigent clients in fiscal year (FY) 2003-04.

The Office, which is governed by a Public Defender Board selected by the Governor and approved by the Senate, has 527.5 full-time equivalent employees in 38 field offices located throughout the State. An organization chart is provided as an appendix. The State Public Defender is appointed by the Public Defender Board. Administrative functions are centralized in the Madison administrative office, which is also responsible for recruiting, training, certifying, and paying approximately 1,200 private attorneys appointed to provide legal services to indigent clients.

As part of our statutory responsibilities to periodically audit every state agency, we completed a review of the Office's fiscal processes, internal controls, and compliance with selected statutory provisions. Overall, we found the Office has appropriate fiscal policies and procedures in place, although we identified several areas in which improvements could be made.

Financial Operations

The Office, which has a \$140.9 million budget for the 2003-05 biennium, is primarily funded through general purpose revenue (GPR). It also receives program revenue through payments from indigent clients for legal services and through fees for training conferences it sponsors. The Office's expenditures are largely associated with the salary and fringe benefit costs of its staff and payments to private attorneys. Increasing expenditures for private attorneys present continuing budgeting challenges to the Office and the State.

Revenues

Approximately 90.0 percent of the Office's program revenue of \$2.2 million in FY 2003-04 was payments from clients to offset the cost of their representation. Payments from clients increased 23.1 percent over the last five years, as shown in Table 1.

Table 1

Payments from Clients
FY 1999-00 through FY 2003-04

Source	FY 1999-00	FY 2000-01	FY 2001-02	FY 2002-03	FY 2003-04	Percentage Change
Collected by the Office	\$ 900,000	\$ 891,800	\$ 998,000	\$1,045,700	\$1,071,500	19.1%
Juvenile Recoupment	365,000	347,400	359,800	341,900	505,300	38.4
Court Ordered Collections	148,200	124,500	120,600	93,000	93,000	(37.2)
County Reimbursement	14,400	7,400	17,700	5,200	4,300	(70.1)
Collected by Collection Agency	185,700	201,900	267,400	265,900	311,700	67.9
Total	\$1,613,300	\$1,573,000	\$1,763,500	\$1,751,700	\$1,985,800	23.1%

1995 Wisconsin Act 27 required the Office to determine each client’s ability to pay for representation and to collect for the cost of that representation. Two options are provided for clients who have some ability to pay:

- Clients may “prepay” a fixed amount within 60 days of appointment of counsel by the Office. If a client prepays, no other fees are assessed.
- Clients who do not exercise the prepayment option are required to pay for the average cost of representation by the Office based on a fee schedule, subject to their ability to pay.

On average, approximately 16.0 percent of clients take advantage of the prepayment option, which costs them significantly less than the average cost-based fee schedule, as shown in Table 2. Once the prepayment date has passed, a client has 60 days to begin making minimum monthly payments of \$25. The accounts of clients who do not pay the required fees are referred to a collection agency, which retains half of the fees it collects.

Table 2

**Payment Schedules for Selected Case Types
for Clients Determined to Have Some Ability to Pay¹**

Case Type	Prepayment Option	Fees Based on Average Costs
First Degree Intentional Homicide	\$600	\$7,500
Other Class A or B Felony	120	1,200
Sexual Predator under s. 980.02	120	1,200
Trial Appeal	120	1,200
Other Felony	60	480
Termination of Parental Rights	60	480
Misdemeanor	60	240
Commitment	30	120

¹ The payment amounts were implemented under a pilot program that has been in place since 2002. The Office has submitted proposed rule changes to the Legislature to permanently adopt these schedules. Before 2002, similar schedules were in place with lower amounts.

In addition to fees that are charged by the Office for representation, the court may order parents to reimburse the State for legal services provided to a juvenile alleged to be delinquent or in need of protective services. The court also may order that attorney fees be paid as a condition of probation, which are collected by Department of Corrections probation and parole agents. Finally, the Office receives a small amount of reimbursements from counties for cases in which they are ordered to provide legal services to clients who are ineligible under the Office's indigency criteria.

Expenditures

Approximately 90.0 percent of the Office's expenditures are for staff costs and payments to private attorneys and investigators. Overall, expenditures increased by 24.1 percent from FY 1999-00 to FY 2003-04, as shown in Table 3.

Table 3

Expenditures
FY 1999-00 through FY 2003-04
(in millions)

Category	FY 1999-00	FY 2000-01	FY 2001-02	FY 2002-03	FY 2003-04	Percentage Change
Salaries and Fringe Benefits	\$36.6	\$40.3	\$39.0	\$41.7	\$42.9	17.2%
Private Attorney and Investigator Payments	21.1	17.3	23.5	18.4	30.4	44.1
Other Legal Services ¹	1.4	1.5	1.4	1.4	1.4	0.0
Office Space	1.8	1.9	1.9	2.0	2.0	11.1
Miscellaneous	3.5	3.5	3.6	3.6	3.2	(8.6)
Total	\$64.4	\$64.5	\$69.4	\$67.1	\$79.9	24.1%

¹ Includes payments for transcripts, interpreters, and discovery materials.

Private Attorney and Investigator Payments

Payments to private attorneys and investigators represented the largest increase: 44.1 percent over the five-year period. The increase in private attorney and investigator payments are largely associated with a 16.7 percent increase in caseload from 124,020 cases in FY 1999-00 to 144,678 cases in FY 2003-04. Expenditures for private attorneys and investigators are paid primarily through a GPR biennial appropriation. Typically, they are greater in the first year of the biennium (FY 1999-00, FY 2001-02, and FY 2003-04 in Table 3). The Office is not budgeted funds to pay attorney invoices that are submitted during the final quarter of a biennium until the next budget period; that is, five quarters of attorney costs are paid in the first year of a biennium, and three quarters of costs are paid in the second year. According to its staff, this three-month delay has been built into the Office's budgets since the early 1980s.

Typically, state agencies are statutorily required to pay interest on invoices not paid within 30 days. However, statutes allow for a variety of exceptions, including when payment provisions have been made through a purchase order or contract. In accepting cases, private attorneys agree to allow the Office up to 120 days to pay invoices before interest will be assessed on late payments. In an opinion requested by the Office in 2001, the Department of Justice (DOJ) questioned the Office's practice of delaying payments because s. 20.903, Wis. Stats., prohibits contracting or creating any debt or liability in excess of an appropriation to pay such debt or liability.

Under 2001 Wisconsin Act 16, the Office's 2001-03 biennial GPR appropriation for private attorney payments was \$6.7 million less than in the preceding biennium, even though the caseload handled by private attorneys was not expected to decrease. In anticipation of exhausting its private attorney appropriation well before of the end of the 2001-03 biennium and the possibility of holding private attorney invoices significantly longer than one quarter, the Office sought advice from DOJ in 2001. In correspondence dated November 2001, an assistant attorney general with DOJ concluded:

asking private attorneys to take cases during this biennium and further ask[ing] them to delay billing or agree to accept payment after the beginning of the next biennium would violate s. 20.903, Wis. Stats. The statute prohibits any arrangement made by an agency with a vendor or contractor to provide services and inordinately delay the billing for such merchandise or services for the purpose of circumventing budgetary intent.

In response to a question about when s. 20.903, Wis. Stats., would be triggered, the assistant attorney general concluded, "the agency risks violating s. 20.903, Wis. Stats., at the point it can reasonably predict that a bill from an appointment will be submitted after its appropriation is exhausted." Further, the assistant attorney general stated, "such an arrangement would violate not only s. 20.903, Wis. Stats., but also s. 20.002(4), Wis. Stats., which provides that no appropriation shall be available for payment of indebtedness incurred prior to the time such appropriation is to take effect unless otherwise specifically provided by law."

Subsequently, in 2001 Wisconsin Act 109 the Legislature appropriated an additional \$9.7 million to the Office for its private attorney payments during the 2001-03 biennium. Similarly, in 2003 Wisconsin Act 129 the Legislature appropriated an additional \$9.2 million in the 2003-05 biennium for private attorney payments. However, the additional appropriations made in each of the biennium were still based on delaying payments on billings received in the final quarter. The Office delayed payment on \$5.6 million in attorney billings from the last quarter in 2001-03 biennium and anticipates delaying payment on an estimated \$7.2 million in billings from the 2003-05 biennium.

The correspondence from DOJ was prepared in anticipation of payment delays in excess of one year. Consequently, whether a three-month delay also represents an "inordinate delay" in billing could be questioned along with whether it circumvents budgetary intent when all parties involved in the budget process, including the agency, the Department of Administration, and the Legislature, are aware of the practice. However, this practice warrants careful review to ensure it is in compliance with established budget provisions.

Suggested Improvements to Fiscal Management Practices

While the Office has adequate fiscal management practices in place, we identified several areas in which improvements could be made to ensure that the private attorney certification process is functioning properly, employee travel expenses are properly reimbursed, assets are safeguarded and properly accounted for, former employees and employees on military leave are promptly removed from the payroll, and passwords are adequately protecting access to the Office's information systems.

Certification Processing

Approximately 1,200 private attorneys are certified to provide legal services to Office clients as assigned. Under s. 977.08(3), Wis. Stats., private attorneys must be certified before they can be placed on a list to provide legal services to indigent clients. To become certified, an attorney completes and submits an application detailing his or her legal education and experience, which is reviewed by staff in the Assigned Counsel Division to determine the types of cases the attorney is qualified to take. Once the application is approved, the attorney is added to a certified list of available attorneys and is assigned cases on a rotating basis.

Thereafter, s. PD 1.04(9), Wis. Adm. Code, requires that in order to remain certified attorneys must annually earn six continuing legal education (CLE) credits that meet Office-established criteria and report them to the Office. Each February, the Office asks certified attorneys to submit a listing of CLE credits earned during the previous year. If staff determine the credits are acceptable, the credits are entered into the Electronic Office Public Defender system, which is an integrated database implemented in January 2003 for attorney certifications, client collections, attorney invoice processing, and case management. Attorneys provide information on paper or directly on the system. The electronically submitted CLE information is stored in the system until staff are able to review and approve it.

Our review of the CLE credits related to a sample of private attorney payments in FY 2003-04 disclosed several record-keeping problems:

- credits earned for 2003 and submitted in paper form had not yet been entered on the system;
- paper documentation of the credits earned in 2002 and 2003 was stored in multiple locations and had not been organized; and
- some of the electronically submitted CLE information was accidentally deleted when the system malfunctioned.

As a result, the Office's procedures do not adequately ensure that attorneys have obtained their required CLEs before cases are assigned to them.

Further, we believe the Office of Training and Development's electronic attendance records could be used to improve the efficiency of the CLE reporting process. The Assigned Counsel Division could obtain attendance records directly from the Office of Training and Development instead of requesting the same information from 1,200 attorneys. Savings could be realized through reduced staff time, materials, and postage. Even greater efficiencies could be gained if the electronic training records could be linked or downloaded into the system's certification records, eliminating the need to manually enter data. Once training records were entered into the system, a report identifying the attorneys still needing to report CLE credits for the year could be generated.

☑ **Recommendation**

We recommend the Office of the State Public Defender:

- improve procedures for the processing of paper records of continuing legal education credits to ensure they are promptly entered into the Electronic Office Public Defender system and stored in an organized manner to facilitate their retrieval;
- correct problems with the Electronic Office Public Defender certification function to ensure it is properly recording and maintaining all continuing legal education credit information; and
- incorporate training records maintained by the Office of Training and Development into the process for obtaining continuing legal education credits from attorneys.

Office Response: Staff became up-to-date in entering 2003 and 2004 CLE credits in August 2004. All CLE submissions are now acted on within five working days of receipt. All paper documentation has been consolidated and organized in one place and all records are alphabetized by attorney.

Changes and enhancements have been developed and implemented in the system's certification function. The Office of Training and Development is incorporating a State Bar identification number in all of its registration forms for training sponsored by the Office. Information technology staff will establish procedures for importing all training CLEs into the system by July 1, 2005, which is before the fall conference when most attorneys earn their CLEs.

Per s. 1.04(9), Wis. Adm. Code, the Office maintains the authority to establish procedures and monitor compliance with the CLE requirement. The Office will evaluate the CLE compliance process to determine what efficiencies will be gained through the increased use of technology. This review will be completed for implementation of the 2005 CLE credit accounting process.

Travel Reimbursements

Many of the Office's field offices have state vehicles which, if available, are to be used by employees for business travel. When a state vehicle is not available, State Uniform Travel Guidelines allow employees to be reimbursed at \$0.325 per mile for use of a personal vehicle, provided a signed certificate of non-availability is included with the travel reimbursement request. Otherwise, the reimbursement rate is \$0.22 per mile. Employees working in offices without access to state vehicles may be reimbursed \$0.325 per mile without having to submit a certificate. Reimbursement forms, which are completed by the employee and signed by the local office supervisor, are submitted to fiscal staff in the central administration office in Madison for payment.

To make the most efficient use of its state vehicles, the Office monitors mileage and occasionally reassigns vehicles to different offices. Fiscal staff must know which cars are assigned to a field office on a particular date to determine whether a certificate of non-availability is required to reimburse an employee at the higher rate. However, fiscal staff are not always informed in a timely manner that a vehicle has been reassigned. The late notice and a lack of detailed documentation of which cars are assigned to an office on a specific date sometimes prevents staff from correctly determining the proper reimbursement rate. Therefore, employees may mistakenly receive the higher reimbursement rate.

☑ **Recommendation**

We recommend the Office of the State Public Defender implement procedures to better track fleet vehicle locations so that fiscal staff are able to correctly determine whether employees are required to submit certificates of non-availability in order to receive the higher reimbursement rate for use of a personal vehicle.

Office Response: The Office has implemented a procedure in which its agency fleet coordinator will maintain a list of state cars and fleet coordinators by field office. The list will include dates of changes of location or status of the cars. The agency fleet coordinator will update this list whenever there is a change and share it with the fiscal unit, which can use the list in determining who is eligible for higher mileage reimbursement.

Safeguarding of Checks

The Office received over \$1.5 million in checks and cash during FY 2003-04. The largest deposit made during the year was \$126,249. Sound internal controls require receipts be adequately secured to prevent theft or loss. While we found controls are in place to ensure cash received is secured, improvements are needed to further secure checks. Checks are initially stored in a safe until they are entered by collection staff into the Electronic Office Public Defender system. After being entered and restrictively endorsed, the checks are given to the fiscal unit, at which time they are stored in an unlocked desk drawer until they are deposited. Keeping the checks in an unsecured location increases the risk of loss.

☑ **Recommendation**

We recommend the Office of the State Public Defender store checks in a secure location until they are deposited.

Office Response: A safe deposit box that is both fire and waterproof has been purchased for the fiscal unit and reception area.

Fixed Asset Inventory

Agencies need to maintain accurate and current fixed-asset inventory records and to complete periodic physical inventories in order to adequately safeguard the State's assets and to accurately report fixed assets for financial reporting and risk management purposes. The *State Accounting*

Manual requires that assets with a purchase amount of \$5,000 be capitalized for financial reporting, and all items with a purchase amount greater than \$1,000 be inventoried for insurance purposes. In addition, the *State Accounting Manual* requires each state agency to complete an annual physical inventory of fixed assets. The Office, which reported fixed assets of \$872,170 in FY 2002-03, owns fixed assets typical for the general operation of a state agency, such as office furniture, computer equipment, and miscellaneous office equipment. However, we found the Office's procedures and records do not adequately ensure that its fixed assets and inventory are being properly controlled and reported for state financial reporting and insurance purposes.

Central administrative staff maintain two sets of inventory records. Fiscal staff maintain one set, which is based on generally accepted accounting principles (GAAP), for financial reporting purposes. Information technology staff maintain another solely for computer equipment. We determined that the GAAP report is inaccurate because fixed assets had not been recorded for assets obtained in FYs 2001-02 and 2002-03. The GAAP-related records also lacked required information such as serial numbers, inventory tag numbers, and item location, while the computer inventory records lack information on costs and purchase dates. Because neither meets the requirements of the *State Accounting Manual* or is up-to-date, the Office has no complete and current source of information for current GAAP reporting or insurance purposes.

The problems result from insufficient written procedures for maintaining inventory records, as well as administrative staff turnover. Also, computer equipment and software purchases are typically coded as minor equipment on the State's accounting system, making it more difficult to identify items that should be capitalized. Finally, inventory records and completion of physical inventories, the last of which was completed in the early 1990s, appear to have been a low priority.

☑ **Recommendation**

We recommend the Office of the State Public Defender:

- develop an adequate system to record all inventory and fixed-asset purchases, including specific information as required by the State Accounting Manual; and
- prepare written procedures for maintaining capital asset and inventory records, reporting capital assets for financial reporting purposes, and completing regular physical inventories of its fixed assets.

As part of these efforts, we recommend the Office of the State Public Defender:

- capitalize for financial reporting purposes all assets, including computer equipment and software, with costs in excess of \$5,000;
- identify and record in its inventory records future acquisitions with costs in excess of \$1,000;

- *maintain sufficient detailed information to support amounts submitted for state financial reporting purposes, including capital asset acquisitions and disposals; and*
- *complete a physical inventory of its fixed assets, particularly for items more subject to loss, such as computers.*

Office Response: The Office's fiscal officer recently developed written procedures to comply with *State Accounting Manual* requirements for financial reporting and insurance purposes. The computer equipment inventory has been updated to include dates of purchase and purchase price. GAAP-related records will be updated to include serial numbers, inventory tag numbers, and item location. The new procedures will be in place prior to year-end accounting for FY 2004-05 and will ensure that information is accurate beginning with FY 2003-04.

Removal of Employees from Payroll

The Office's employee handbook requires employees who resign to submit a letter of resignation to their division director, with copies to their supervisor, the human resources office, the personnel assistant, and the central payroll unit at least 14 days in advance of the last day of work. The handbook also requires employees departing on military leave to provide a copy of military orders to report for duty to the payroll unit before departure. This information is sometimes not provided, allowing persons to remain on the payroll beyond their termination or departure dates.

During our audit, we found two employees continued to be paid after they should have been removed from the payroll. First, an employee received five paychecks totaling \$10,361 after beginning a military leave during which he was not entitled to receive state pay because his military pay was greater than his state pay. The employee eventually called the payroll unit to notify them he should be taken off the payroll after receiving pay stubs in the mail from the local field office. Before the phone call from the employee, payroll staff had not been informed that the person should be removed from the payroll. Subsequently the checks were re-deposited, and payroll staff made the appropriate changes.

Second, we found an employee received one paycheck after leaving employment with the Office for another state agency, because payroll staff were not aware of the change. Once the error was discovered, the check was re-deposited and the payroll properly changed.

Recommendation

We recommend the Office of the State Public Defender implement new procedures to ensure departing employees are removed from the payroll in a timely manner.

Office Response: The payroll unit will develop a checklist for supervisors to follow for leaves and terminations. The checklist, which will be distributed to all managers, will include the requirement to inform in writing the division directors, human resources, and the payroll unit. Division directors will be informed by the payroll unit of noncompliance with this policy.

Information System Access

Controlling access to the Electronic Office Public Defender system is important because of the critical and sensitive nature of the system's operations and information. The system, along with other software applications, resides on a local area network. Agencies limit access by implementing physical and electronic controls. Use of passwords is an important electronic control used to limit access to authorized users. If unauthorized individuals obtain an authorized user's password, they may sign on and obtain unauthorized access to data and transactions, which may be difficult to detect in a timely manner. Therefore, protecting the confidentiality of passwords is important to overall system security.

During our audit work, we identified several areas in which the Office could improve its password policies. First, the Office's employee handbook required employees to provide their computer, e-mail, and voice mail passwords to their supervisors. Staff were unsure of why the policy was implemented but believed it was established before the development of technology that allows files and data to be easily shared. In response to concerns we raised about increased risks associated with sharing passwords, the Office changed its policy to require staff to keep their passwords secret.

Second, the Office could improve the effectiveness of its staff's passwords by requiring longer and more complex passwords and by increasing the frequency of required password changes. We do not provide detailed discussion of our concerns with the Office's password practices in this document because of an increased risk of inappropriate access to the system and confidential data if the concerns are publicly disclosed. However, we advised the Office on steps to take to conform to industry standards, which the Office agreed to implement by June 30, 2005.

Finally, the Office could improve security by implementing lock-out features in its computers. A computer can be programmed to automatically lock out, after a short period of inactivity, any use until the proper password is typed. We noted instances in which screens of unattended computers had not been locked out. The effectiveness of password controls is reduced if active terminals or computers are left unattended.

Recommendation

We recommend the Office of the State Public Defender establish a policy that requires that unattended computer terminals be protected through a time lock-out feature.

Office Response: The Office will create a policy that requires users to enable a screen-saver lock-out feature on their workstation. The policy will be evaluated by March 1, 2005, and implemented by July 1, 2005, the date by which we estimate our workstation hardware to be fully upgraded throughout the agency.

Appendix

Office of the State Public Defender Organizational Chart

