

Practice Standards

December, 2012

Section IV, Administration of Defender Services

2. Delivery of Services:

Goal: Counsel shall strive for excellence in the representation of the indigent client.

A. Counsel representing indigent clients should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of counsel for specific cases should not be made by the judiciary, but should be arranged for by the administrators of the public defender office, assigned counsel, and contract-for-service programs.

B. The Chief Public Defender and his or her staff should be compensated at a rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices.

C. The Office of the State Public Defender shall award contracts for indigent legal services only after determining that counsel or the firm chosen can meet the standards set forth herein. Under no circumstances should a contract be awarded based solely on the lowest bid or provide compensation to contractors based solely on a fixed fee paid irrespective of the number of cases assigned. Counsel or firms bidding for contracts must demonstrate their ability to meet these standards. While the Office of the State Public Defender may, in the sole discretion of the Chief Public Defender, choose to consult with judges, the Attorney General's Office, city attorneys, county prosecutors, and law enforcement officers in deciding who to select as attorneys to provide services as assigned counsel, those parties may neither select nor prohibit the selection of any counsel or law firm.

D. Contracts for public legal representation services should be awarded for at least one-year terms. Removal of the contracting counsel or firm before the agreed term should be for good cause only. The contract shall define "good cause" as "a failure by contracting counsel to comply with the terms of the contract that impairs the delivery of services to clients, or a willful disregard by contracting counsel of the rights and best interest of clients."

E. Contracts for services must be awarded on a competitive process and must involve the following considerations:

- a. The categories of cases in which contracting counsel is to provide services;
- b. The term of the contract and the responsibility of contracting counsel for completion of cases undertaken within the contract term;
- c. Identification of counsel who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;
- d. Allowable representation workloads for individual counsel, including the amount of private practice engaged in outside the contract, and measures to address excessive workloads, consistent with these Standards;

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- e. Minimum levels of experience and specific qualification standards for contracting counsel, including special provisions for complex matters, compliance with standards established by the Montana Supreme Court in capital cases, and compliance with the standards of the Montana Public Defender Commission for capital cases;
 - f. A policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;
 - g. Reasonable compensation levels consistent with these standards and a designated method of payment;
 - h. Sufficient support services and provision for reasonable expenses, subject to prior approval as outlined by the Office of the State Public Defender in its policy manual, for paralegal and investigative services, expert witnesses, and other litigation costs to be paid on an “as needed” basis in addition to the contract compensation;
 - i. A process for the professional development of assigned counsel, including supervision, evaluation, and training in accordance with standards set by the Montana Public Defender Commission;
 - j. Protection of client confidences, attorney-client information, and work product related to contract cases, except under a legal court order to divulge, or after receiving a voluntary, knowing, and intelligent waiver from the client in the case, or to a subsequent attorney in the case;
 - k. A system of case management and reporting as required by the Office of the State Public Defender;
 - l. The grounds for termination of the contract by the parties;
 - m. A requirement that contracting counsel provide for retention of client files in a manner that affords protection of the client’s confidentiality interest for three years from the date of conclusion of the matter in the trial court, or until the client is no longer subject to State supervision, whichever is longer.
- F. Determination of indigence after initial representation by retained counsel.
- a. It is of primary importance to the members of the bar and to the public that a lawyer who undertakes representation of a client in criminal proceedings continues to represent the client at least through the trial stage of the proceedings, unless the continued representation would result in the violation of a disciplinary rule. Continuity of counsel in proceedings should be mandated in order to protect the rights of the client by avoiding, wherever possible, the adverse effect and possible prejudice to the client caused by an attorney's withdrawal.
 - b. The Office of the State Public Defender shall assign counsel to a client initially represented by retained counsel only after a written motion has been made by retained counsel.
 - c. If retained counsel has filed a written motion for a determination of indigence and to withdraw from the case no later than sixty days after counsel has either filed a

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notice of appearance or actually made a court appearance on behalf of the client, and not less than thirty days prior to trial or any evidentiary hearing, OPD, subject to a determination of indigence, shall assign new counsel to the client.

- d. When retained counsel makes a written motion for a determination of the client's indigence at a time other than that set forth in paragraph (c), above, and the client meets the financial eligibility requirements for indigent services, OPD shall assign the moving counsel to provide legal services for the client.
- e. If, upon motion by the Regional Public Defender's Office, a court determines that the foregoing practice has led to abuse by an attorney who has in the past repeatedly requested a determination of his client's indigence after undertaking representation as retained counsel, the court may order continued representation by that attorney without assignment by the public defender's office or cost to the public.
- f. If contract counsel becomes aware of a client, who has been assigned to a contract attorney by OPD, having or acquiring sufficient funds to hire counsel, the contract counsel shall contact the Regional Deputy Public Defender and request a redetermination of indigency.
- g. Contract counsel is prohibited from taking any fee from a client assigned by OPD.

G. The Chief Public Defender and Regional Public Defenders shall provide for contract oversight and enforcement to assure compliance with these Standards and applicable Montana statutes. For conflict of interest cases, the Conflicts Coordinator shall provide such oversight.