



**Thomas A. Schweich**  
Missouri State Auditor

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# Missouri State Public Defender

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<http://auditor.mo.gov>



**Thomas A. Schweich**  
Missouri State Auditor

# CITIZENS SUMMARY

## Findings in the audit of the Missouri State Public Defender

Background	The Missouri State Public Defender (MSPD) was created by statute in 1972 to provide legal services to eligible persons. The MSPD has three legal services divisions: the Trial Division responsive to the trial courts, the Capital Division responsible for death penalty trial representation, and the Appellate/Post-Conviction Relief Division responsible for appellate and post-conviction litigation.
Caseload and Resources	The MSPD is unable to accurately determine the resources needed to manage caseloads. The MSPD does not track staff time spent by case type, so the MSPD lacks detailed information to estimate staff hours per caseload. Audit staff reviewed the caseload protocol calculation procedures and noted significant concerns with the methodology and data used to calculate key components and the final calculation as to whether maximum caseload has been exceeded. The MSPD lacks support or basis for many components of the caseload protocol calculation, and there is a lack of assurance various components are comparable. The MSPD determines the number of needed attorney hours based upon converted national standards with the assumption of each attorney working on cases 2,080 hours per year, but calculates the number of available attorney hours based upon each attorney working on cases an average of 1,536 hours per year. In addition, the MSPD lacks adequate procedures to measure the need for additional support staff.
Indigence Determinations	The MSPD lacks sufficient policies and procedures for determining indigence to ensure public defender services are provided to only eligible applicants. Some opened cases reviewed lacked sufficient documentation to support the indigence determination; and sufficient information is frequently not entered in the Case Management System, which prevents the MSPD from monitoring indigence determinations and court appointments on a state-wide basis.
Liens and Promissory Notes	Under state law the MSPD is required to file a lien with the circuit court for the reasonable value of services rendered to each defendant, and the court must rule on whether to allow all or any part of the lien. The MSPD does not always properly charge applicable costs to defendants and did not file liens or prepare promissory notes for some cases tested. The amount of liens filed and promissory notes prepared were often insufficient, and the MSPD had no documentation to support the lien and promissory note fee schedule.
Collection Procedures	Some circuit courts frequently deny liens filed, making it impossible for the MSPD to recover costs associated with services provided, and some courts do not attempt to collect MSPD liens. The MSPD does not monitor court collection efforts or encourage the courts to collect liens. Currently, the MSPD collects payments on liens and promissory notes through tax and lottery intercepts, collections by some courts, and direct payments from defendants, but other collection methods may be available which the MSPD has not considered or evaluated. As of June 30, 2010, the MSPD had approximately \$70.1 million in unpaid liens and promissory notes.

Conflict Cases	Under MSPD guidelines and a Supreme Court rule, an attorney cannot provide representation in cases that present a conflict of interest, but the MSPD does not always adequately document conflict cases. The MSPD policy requiring automatic transfer of conflict cases to another district office or contract attorney may unnecessarily increase costs and decreases attorney time available to represent cases.
Contract Attorneys	The MSPD contracts with private attorneys to provide representation for certain cases, but the MSPD does not track or monitor the disposition of cases handled by the contract attorneys and does not maintain documentation of the selection process.
Professional Consultants	MSPD attorneys did not always solicit bids or use state contracts for court reporting services and did not always maintain documentation supporting the selection of other professional consultants. The MSPD does not adequately monitor payments to professional consultants. Agreed-upon terms are not always documented in retention letters and/or encumbrance requests, and the expert database lacks sufficient data needed to ensure payments to consultants are reasonable.
Transcripts on Appeal	A state law requiring the MSPD to pay for transcripts on cases under appeal may cause excessive and unnecessary costs to the state. Court reporters were paid a total of \$600,000, \$515,000, and \$350,000, for transcripts on appeal in addition to their state salaries during the years ended June 30, 2010, 2009, and 2008, respectively.
Employee Travel Costs	The MSPD spends approximately \$1.7 million per year on employee travel and has not performed a comprehensive analysis to identify ways to reduce travel costs and increase employee productivity. MSPD travel policies and procedures do not minimize mileage and lodging costs.

In the areas audited, the overall performance of this entity was **Fair**.\*

American Recovery and Reinvestment Act (Federal Stimulus)	During the year ended June 30, 2010, the MSPD spent \$499,890 from the Federal Budget Stabilization - Medicaid Reimbursement Fund for contract attorneys for caseload relief.
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\*The rating(s) cover only audited areas and do not reflect an opinion on the overall operation of the entity. Within that context, the rating scale indicates the following:

- Excellent:** The audit results indicate this entity is very well managed. The report contains no findings. In addition, if applicable, prior recommendations have been implemented.
- Good:** The audit results indicate this entity is well managed. The report contains few findings, and the entity has indicated most or all recommendations have already been, or will be, implemented. In addition, if applicable, many of the prior recommendations have been implemented.
- Fair:** The audit results indicate this entity needs to improve operations in several areas. The report contains several findings, or one or more findings that require management's immediate attention, and/or the entity has indicated several recommendations will not be implemented. In addition, if applicable, several prior recommendations have not been implemented.
- Poor:** The audit results indicate this entity needs to significantly improve operations. The report contains numerous findings that require management's immediate attention, and/or the entity has indicated most recommendations will not be implemented. In addition, if applicable, most prior recommendations have not been implemented.

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# Missouri State Public Defender

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# **THOMAS A. SCHWEICH**

## **Missouri State Auditor**

Honorable Jeremiah W. (Jay) Nixon, Governor  
and  
Members of the Missouri General Assembly  
and  
Members of the Public Defender Commission  
and  
Cathy R. Kelly, Director  
Missouri State Public Defender  
Jefferson City, Missouri

We have audited certain operations of the Missouri State Public Defender (MSPD) in fulfillment of our duties under Chapter 29, RSMo. The objectives of our audit were to:

1. Evaluate internal controls over significant management and financial functions.
2. Evaluate compliance with certain legal provisions.
3. Evaluate the economy and efficiency of certain management practices and operations, including certain financial transactions.
4. Evaluate procedures to determine and manage caseload.

For the areas audited, we (1) identified deficiencies in internal controls, (2) identified noncompliance with legal provisions, (3) identified the need for improvement in management practices and procedures, and (4) determined the MSPD lacks sufficient information necessary to accurately evaluate and determine resources needed to effectively manage its caseload.

We conducted our audit in accordance with the standards applicable to performance audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require that we plan and perform our audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides such a basis.



Thomas A. Schweich  
State Auditor

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# Missouri State Public Defender

## Introduction

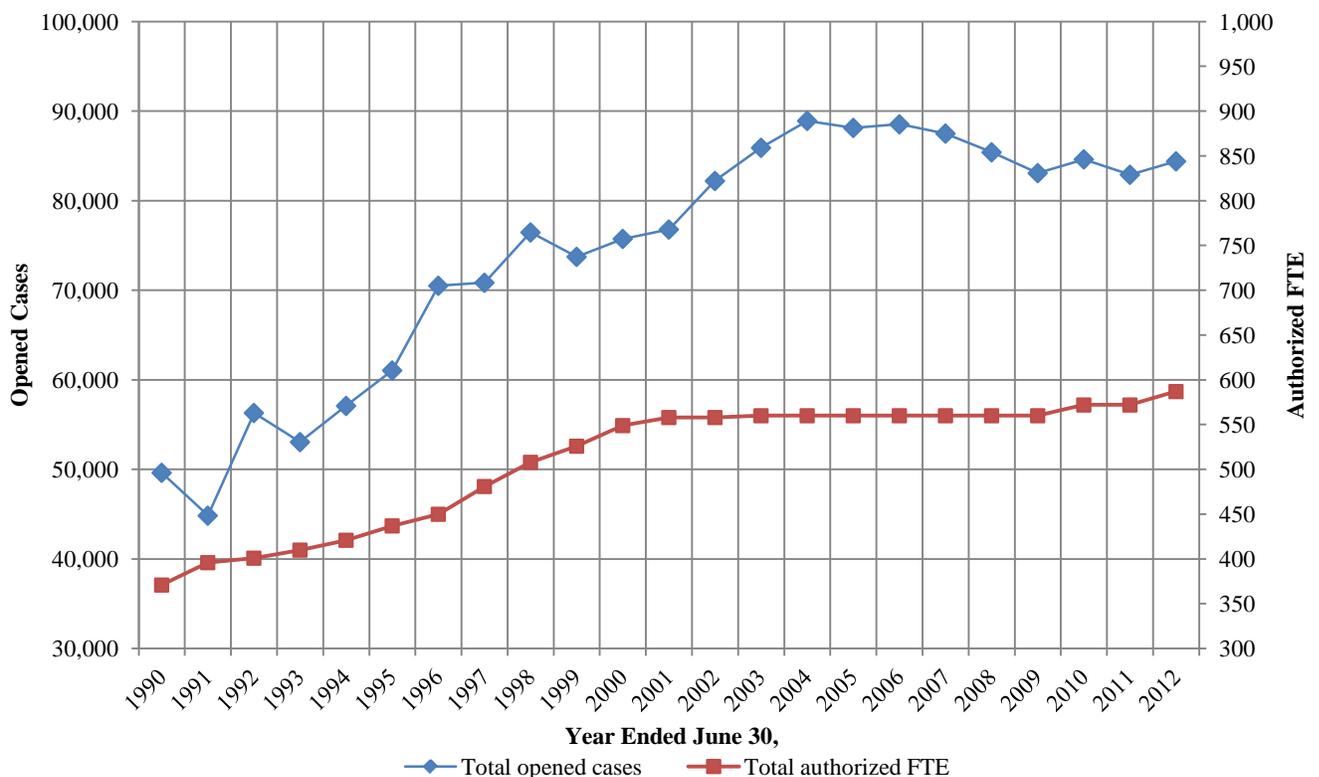
### Background

The Missouri State Public Defender (MSPD) spends approximately \$36 million per year providing legal representation to indigent defendants accused of state crimes in Missouri's trial, appellate, and Supreme Courts. MSPD officials stated the MSPD cannot fully meet its defense obligations because it lacks the resources needed to meet its caseload. The MSPD has responded to its workload problems by reorganizing certain programs, redistributing caseloads to certain district offices, creating volunteer attorney programs, requesting additional resources from the legislature, and developing a caseload protocol to identify district offices in which caseload is excessive and a corresponding administrative rule allowing the refusal of new cases in those district offices. The MSPD's caseload and its ability to efficiently meet its caseload affects not only the MSPD, but the entire court system.

### MSPD caseload and resources

Like many public defenders in other states, as well as other entities in the criminal justice system, the MSPD's growth in caseload has outpaced its growth in staffing resources. Increases in the MSPD's caseload and staffing levels since the MSPD assumed state-wide responsibility in 1989 are noted below:

MSPD Caseload and Staffing



Source: MSPD annual reports



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As noted above, the difference between new cases and staffing levels has decreased in recent years. According to MSPD officials, this is primarily due to efforts by some courts to decrease the MSPD caseload and additional staff granted by the legislature. Since 1990, the MSPD's caseload has increased by 70 percent, while the number of staff has increased by 58 percent.

### Caseload

The cost and amount of staff time needed to defend a case varies by case type. The distribution of cases opened during fiscal years 2010 and 2011, by case type, was as follows: felony cases - 43 percent, misdemeanor cases - 28 percent, juvenile cases - 3 percent, post-conviction release cases - 1 percent, probation violation cases - 24 percent, and appeals cases - 1 percent.

### Resources

According to MSPD annual reports, Missouri's per capita spending on public defense ranks 49th in the nation. MSPD expenditures totaled approximately \$36 million, \$35.7 million, and \$34.6 million during the years ended June 30, 2010, 2009, and 2008, respectively. Approximately 72 percent of MSPD fiscal year 2010 expenditures was for salaries. Other significant expenditures included professional services and travel. Costs per opened case during fiscal year 2010 averaged \$295, \$19,572, \$1,615, and \$94,675 for the Trial Division, Civil Commitment Defense Unit (CDU), Appellate Division, and Capital Division, respectively. See Appendixes B and C for further details regarding MSPD expenditures.

For many years, MSPD budget requests have included funding for additional staff to meet caseload demands. Each recent budget request has included additional attorneys and support staff (secretaries, legal assistants, and investigators). Using the caseload protocol (see below), the MSPD's fiscal year 2010 budget request indicated the MSPD needed an additional 192 (up from 300) Trial Division attorneys, an additional 14 (up from 36) Appellate/Post-Conviction Relief (PCR) Division attorneys, and an additional 179 (up from 150) support staff.

Despite these requests, the MSPD has received only small appropriation increases in recent years. Beginning in fiscal year 2008, the MSPD received approximately \$1.2 million annually to contract approximately 750 additional cases to private counsel. Beginning in fiscal year 2009, the MSPD was authorized to use approximately \$800,000 of these funds to hire 12 attorneys and continue to use the remaining funds to contract cases to private counsel. In fiscal year 2010, the MSPD received approximately \$500,000 in American Recovery and Reinvestment Act of 2009 monies to contract additional cases to private counsel. Beginning in fiscal years 2010 and 2011, the MSPD received funds to hire a total of 15 additional support staff. For fiscal year 2013, the MSPD received approximately \$442,000 to contract additional cases for caseload relief.

MSPD staffing resources have been further impacted by attorney turnover. MSPD annual reports show the percentage of attorneys leaving the MSPD



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## Missouri State Public Defender Introduction

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during the past 15 years has ranged from 7 percent in fiscal year 2009 to 22 percent in fiscal year 2003. Annual reports indicate attorney turnover has declined in recent years due to the condition of the economy and salary adjustments given in fiscal year 2007; however, the rate increased to 12 percent in fiscal year 2012.

MSPD payroll data shows many employees work extra hours without compensation. A report of uncompensated overtime reported on timesheets during fiscal year 2011, by the 421 employees exempt from overtime provisions, showed an average of 67 hours per employee for the year. A report of annual leave forfeited by employees as of October 31, 2010, showed 98 MSPD employees forfeited a total of 4,392 earned annual leave hours, or an average of 45 hours per employee.

### Caseload protocol

In response to its growing caseload and lack of resources, the Public Defender Commission adopted administrative rule 18 CSR 10-4.010, and the related caseload protocol (Appendix D) in November 2007. The rule and protocol together establish a procedure for determining the maximum caseload attorneys in each public defender office can be expected to manage. When the total hours needed to manage the cases assigned to the office exceed the available hours for that office for 3 consecutive months, the rule authorizes the MSPD to certify the district office as having limited availability and begin turning away excess cases. The rule became effective in July 2008, and the MSPD began placing offices on limited availability shortly thereafter. As noted above, the MSPD also uses the caseload protocol to calculate and request additional staffing in annual budget requests.

The MSPD's authority to set maximum caseloads was challenged. In December 2009, the Missouri Supreme Court ruled the MSPD could not limit offices to "categories" of case types as part of the certification process. Subsequently, the MSPD began limiting offices for "all" cases when caseload limits were reached. The administrative rule eventually became the subject of litigation before the Missouri Supreme Court. The Supreme Court appointed a Special Master to review the appropriateness and accuracy of, and the MSPD's compliance with, the administrative rule and caseload protocol. The Special Master's reports were issued in February and April 2011. The Special Master reported the MSPD followed the procedures in the administrative rule and "the MSPD protocol is not inaccurate, but there is serious question as to whether it is sufficiently accurate to justify the imposition of negative consequences on the rest of the criminal justice system." The Special Master reported on various alternatives in indigent defense, but indicated "none of the alternatives in indigent defense are as cost-effective or professionally effective as a well-funded and well-managed public defender system." He further reported a potential solution lies in the revision of the Missouri Criminal Code, suggesting revisions of penalties for certain crimes could reduce the caseload of the entire criminal justice system.



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The MSPD placed new certifications of limited availability on hold pending the resolution of the Supreme Court litigation. As of October 1, 2011, 8 of 42 district offices had been certified as exceeding their maximum allowable caseloads, and an additional 8 offices had been given notice they were at risk of certification. However, due to the pending litigation, most courts continued to appoint cases to the MSPD. In July 2012, the Supreme Court held it is the MSPD's duty to comply with the administrative rule to determine maximum caseloads. The Supreme Court did not conclude on the applicability or validity of the administrative rule and caseload protocol because these issues were not challenged in the case.

Several prosecutors have questioned the MSPD's claims of being in a caseload crisis and publically voiced concerns regarding the adequacy and methodology used in the caseload protocol. Specifically, they have questioned the applicability of the 1973 national caseload standards to MSPD practices, the number of hours allocated to certain case types, and the method of counting cases. Various members of the criminal justice system have stated they believe the entire criminal justice system is experiencing a caseload crisis as a result of insufficient funding.

### External party responses to caseload problems

Efforts have been made by various external parties to address MSPD caseload problems and relieve the stress of increasing caseloads on the court system as a whole.

- In 2005, the Missouri Bar Task Force on the Missouri State Public Defender was created to identify and solve needs related to indigent criminal defense. The task force contracted with a criminal justice consultant to assess MSPD operations. The consultant's overall assessment was that the MSPD was operating in "crisis mode" and violating seven of the ten principles<sup>1</sup> on public defense systems. The consultant reported the MSPD was experiencing continuous staff turnover, loss of experienced attorneys, extremely low salaries, low morale, and a real perception of case overload. The consultant also questioned the adequacy of the MSPD's current caseload standards because the standards were not based on a "meaningful case weighting analysis."
- In 2006, the Office of Administration Personnel Advisory Board reviewed MSPD attorney salaries, finding the salaries were low relative to the salaries of attorneys working in prosecuting attorney offices and other state and federal public defender offices. The report resulted in salary increases of 4 to 8 percent for Assistant Public Defender positions.

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<sup>1</sup> *ABA Ten Principles of a Public Defense Delivery System* (2002).



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- In 2006, the Senate Interim Committee on the Missouri State Public Defender was established to review the effectiveness of the MSPD. The committee recommended a reduction in caseload and an increase in support staff and public defenders (through hiring or contracting with attorneys), and an increased base salary of public defenders and additional funding be provided. The committee's report provided various suggestions for implementing these recommendations.
- In 2006, the Missouri Bar offered free Continuing Legal Education to attorneys who volunteered to take minor traffic offense cases for the overloaded MSPD offices. According to the MSPD annual reports, approximately 100 attorney volunteers took a case or two each.
- In 2008, the Missouri Bar hired the consultant who had performed the 2005 assessment to conduct a follow-up evaluation of the MSPD and develop caseload standards for determining staffing needs. The consultant concluded caseload standards could not be developed due to poor practices resulting from inadequate funding and excessive caseload. However, a 2010 review of the report by a University of Missouri professor questioned the validity of the consultant's report.
- In 2008, in response to the placement of the Springfield Public Defender office on limited availability due to its excessive caseload, the Springfield Metro Bar developed a 1-year initiative where approximately 80 volunteers covered all probation revocation cases in the 31st Judicial Circuit. The program expired in 2009.
- In the 2009 legislative session, Senate Bill 37, which would have given the MSPD the statutory authority to establish and enforce caseload limits, was passed by the legislature but vetoed by the Governor.
- In 2009, the Missouri Bar Criminal Justice Task Force was created to review issues related to resources within the criminal justice system. The task force concluded additional funding for the criminal justice system was needed but acknowledged funding is not always available. The task force developed seven recommendations to facilitate better utilization of existing resources. These recommendations were considered by the Missouri Bar Criminal Council and the Missouri Bar Board of Governors who supported proposed legislation and Supreme Court rule changes to improve efficiency of prosecutors and the MSPD.



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- In 2010, in response to the MSPD's certifications of low availability for several circuits, some courts began efforts to reduce the number of cases referred to the MSPD by appointing private attorneys to handle juvenile cases, waiving jail time on certain offenses, and referring fewer probation violations to the MSPD.
- House Bill 253 was passed in the 2011 legislative session reducing the penalties for various first time misdemeanors.
- In 2011, the Missouri Working Group on Sentencing and Corrections was formed to analyze and make recommendations to improve public safety, enhance offender accountability, and reduce corrections spending. The Group made several recommendations related to offender sentencing and supervision. Senate Bill 872 seeking to restructure the state's criminal code was introduced, but did not pass, in the 2012 legislative session.

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## Scope and Methodology

Our methodology included the following procedures:

- Reviewing minutes of meetings, written policies and procedures, and relevant statutes, regulations, and Supreme Court rules.
- Interviewing various personnel of the system, as well as certain external parties.
- Interviewing and/or researching various practices of other state public defender offices.
- Reviewing national caseload standards, guidelines, opinions, and reports related to indigent defense.
- Reviewing and analyzing case and financial data obtained from the system and external sources.
- Reviewing the support for the Caseload Crisis Protocol and monthly caseload protocol calculations.
- Reviewing the indigence determination documentation of 68 opened cases and 60 denied applications.
- Reviewing the liens filed or promissory notes prepared for 66 cases, 10 additional cases with litigation expenses, and 190 closed cases represented by contract attorneys.
- Reviewing the documentation supporting conflicts for 17 cases.



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- Reviewing the selection documentation, encumbrance requests, invoices, and/or agreements for 7 contract attorney and 23 professional service engagements.
- Reviewing certain employee expense reimbursements and corresponding lodging invoices for 18 employees, lodging invoices associated with one capital case, and invoices and bids associated with one system-wide workshop.
- Reviewing other pertinent documents as necessary.

The audit focused on procedures as of August 2011 and during the years ended June 30, 2010, 2009 and 2008.

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# Missouri State Public Defender Management Advisory Report State Auditor's Findings

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## **1. Caseload and Resources**

The Missouri State Public Defender (MSPD) lacks sufficient information to accurately determine the resources needed to manage caseloads. The MSPD's ability to accurately determine needed resources is further hampered by numerous MSPD processes that are not conducted efficiently.

In November 2007, the MSPD adopted the Caseload Crisis Protocol (Appendix D) to determine if attorney resources are sufficient to manage caseloads and meet its statutory responsibility. The caseload protocol calculations are used to evaluate each district office's caseload monthly and certify those offices as having limited availability, as applicable, and to estimate additional attorney resources needed for annual budget requests.

Our review of the calculations and available data supporting the caseload protocol noted the MSPD lacks sufficient support for the data and methodology used for protocol calculations. As a result, the amount of resources needed to meet MSPD caseloads is unclear. Instead of tracking actual employee time spent by case type and using that data to estimate needed and available attorney hours, these amounts are determined through complex calculations based on various unsupported assumptions and estimates discussed below. In addition, the MSPD lacks adequate support for estimated support staff needed to assist attorneys in meeting caseload.

### **1.1 Tracking and recording staff hours**

The MSPD does not track staff time spent by case type; as a result, the MSPD lacks detailed actual information to estimate staff hours per caseload. Although the MSPD conducted a time study in 2006, the time study results were not utilized to determine or estimate the number of staff hours needed to manage assigned caseload. Instead, as noted below, converted caseload standards are used in the caseload protocol calculations.

Although the Case Management System includes a time log system for tracking and recording staff time by case and task, this system has not been utilized since the 2006 time study. MSPD officials indicated the system is not routinely utilized because staff lack the time to perform this additional administrative task. They also indicated tracking time data would not be useful because it does not account for the impact on work quality due to excessive caseloads. In 2009, an external consultant retained by the Missouri Bar Association to evaluate the MSPD reviewed the MSPD internal time study procedures and data. The consultant concluded MSPD case standards (case weights) could not be derived from the time study for several reasons including 1) MSPD attorneys spent significant amounts of time performing duties that should be performed by support staff (legal assistants, clerical staff, paralegals, and investigators), 2) MSPD attorney caseload was too high and the MSPD lacked sufficient resources, and 3) MSPD indigence determination procedures were inadequate. The consultant reported improvement was needed in these areas before caseload standards could be developed.



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Without tracking and recording staff hours by case and task and analyzing the sufficiency of those hours, the MSPD lacks the data needed to accurately assess time spent on various cases and develop reasonable and representative estimates of attorney and staff hours needed to meet caseload. Because numerous external and internal factors affect the workload of individual public defender offices, it is imperative that staff hours be tracked, analyzed, and used to determine staff hours needed to meet the caseload for each office. Sufficient procedures should be established to identify and estimate any adjustments to actual hours needed to allow staff to provide competent representation.

## 1.2 Caseload protocol (attorneys)

Our review of the caseload protocol calculation procedures noted significant concerns with the methodology and data used to calculate the key components as well as the final calculation of whether maximum caseload has been exceeded. Of overall concern is the lack of assurance the components used in the calculation are comparable. While the number of needed attorney hours is calculated based on converted national caseload standards with the assumption attorneys work on cases 2,080 hours per year, the number of available attorney hours is calculated based on an estimation that the MSPD attorneys work on cases an average of 1,536 hours per year (see further explanations below).

Needed attorney hours are calculated by multiplying case weights (number of case-related hours needed per case) by the number of cases assigned a district during a specified period of time. The MSPD determined the case weights by converting national caseload standards from number of cases per year to number of hours per case type. Both of these components, case weights and number of cases, significantly impact the calculated attorney hours needed to meet caseload.

The caseload protocol provides for the calculation and comparison of the number of needed and available attorney hours to manage assigned caseload during a specified time period for each district office. If calculated needed hours exceed available hours, the MSPD considers the district to have exceeded its maximum allowable caseload standard for the specified period, and may certify that district office as unavailable to take new cases.

### Case weights

Most case weights were calculated based on national caseload standards without sufficient procedures to verify the applicability of the national standards to the MSPD. The MSPD conversion of the national caseload standards from years to hours by case type is based on assumptions for which the MSPD could provide no support or basis. As a result, the accuracy and reasonableness of these assumptions and the resulting calculated case weights is unclear.

National caseload standards outlined in Standard 13.12, Workload of Public Defenders, developed in 1973 by the National Advisory Commission



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(NAC) on Criminal Justice Standards and Goals, Department of Justice (national caseload standards), are the basis for most case weights. Those standards designate a maximum number of cases per year that public defender attorneys should manage for felonies, misdemeanors, juvenile, Mental Health Act, and appeals cases. According to the caseload protocol, these standards have formed the basis for most public defender caseload standards presently in existence around the country. For each significant case type included in the national caseload standards, the MSPD converted the national caseload standard to number of hours per case assuming a 2,080 hour work year (annual hours based on 40-hour work weeks). For certain case types not identified in the national caseload standards, the MSPD used alternative procedures to establish case weights. The national caseload standards, converted case weights, and time study results by case type are reflected below:

National Caseload Standards		MSPD converted case weights (hours per case unless otherwise indicated)	Average number of hours per 2007 time study
Case Type	Caseload Standard		
Capital Homicides	NA	6 open cases per attorney	NA
Sexually Violent Predator	NA	8 open cases per attorney	NA
Non-capital Homicides	NA	173	153
Sex Offenses	NA	31	30
Other Felony Offenses	150 cases per year or 12.5 new cases per month**	14***	8
Misdemeanors	400 cases per year or 33 new cases per month	5***	4
Juveniles	200 cases per year or 17 new cases per month	10***	6
Appeals	25 cases per year or 2 new cases per month	83***	NA
29.15* Post Convictions	NA	62****	NA
24.035* Post Convictions	NA	21*****	NA
Probation Violations	NA	5	4

- \* Missouri Supreme Court Rule
- \*\* National caseload standard applies to all types of felonies
- \*\*\* 2,080 hours divided by national caseload standard number of cases per year
- \*\*\*\* three-fourths of the appeals case weight
- \*\*\*\*\* one-fourth of the appeals case weight

MSPD officials stated national caseload standards were used to develop case weights because those standards are independent, reasonable, and commonly used in other states. However, the MSPD made no adjustments to the national caseload standards to account for any significant conditions specific to the MSPD or changes experienced by the criminal justice system since 1973, such as advancements in technology, changes to state and local laws, and changes in caseload and resources.



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In addition, the national caseload standards provide very little information regarding the methodology and factors considered in the development of the standards. Therefore, the MSPD made various assumptions when converting the national caseload standards to case weights. The MSPD conversion methodology assumes the national caseload standards were based on attorneys spending 100 percent of the work year on case-related work, without any absences due to vacations or illness. The caseload protocol states the national caseload standards assume a standard 40-hour work week, or 2,080 available attorney hours per year; and the national caseload standards "did not allot any attorney time for non-case hours for supervisory, administrative, or training tasks, account for travel time in rural versus urban jurisdictions, or consider the availability or lack of support staff as factors in determining the time lawyers would have available to spend preparing their cases." However, such information was not documented in the standards and the MSPD could provide no documentation to support the accuracy of these assumptions.

Further, as indicated in the caseload protocol, national caseload standards did not distinguish between types of felony offenses and were not established for certain types of cases. While case weights for sex offense cases were based on the results of the internal time study because these cases are more time consuming than other felony cases, the MSPD could provide no documentation to support the methodology for determining case weights for other types of cases not included in the national caseload standards.

Without adequate information to support how the national caseload standards were derived or maintaining documentation to support assumptions and decisions regarding case weights, the MSPD is unable to demonstrate it has accurately converted the standards to case weights. The May 2006 American Bar Association (ABA) Ethical Advisory Opinion No. 06-0441, regarding the national caseload standards provides that "although [National] standards may be considered, they are not the sole factor in determining if a workload is excessive. Such a determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties." Similarly, principle five of the ABA's Ten Principles of a Public Defense Delivery System, adopted in February 2002, states, "national caseload standards should in no event be exceeded, but the concept of workload (i.e. caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement."

#### Case counts

The MSPD method of counting cases for caseload protocol calculations is not consistent with national caseload standards.

The caseload protocol calculation of needed attorney hours provides for the multiplication of the number of each type of case in the assigned caseload



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by the applicable case weights. To determine assigned caseload for each case type, the MSPD counts the number of new opened cases less the number of cases withdrawn, transferred to another district office, or contracted to private counsel. Because the MSPD counts each individual opened case as one case, regardless of the circumstances, incidents where charges were filed in separate cases are counted as more than one case for caseload protocol calculation purposes. MSPD officials explained procedures for assigning case numbers to incidents vary among courts and prosecuting attorneys. While some courts and prosecuting attorneys assign separate cases for each charge associated with an incident, others combine all charges associated with an incident in one case. However, the MSPD has not analyzed or determined the time and costs associated with representing defendants on multiple cases associated with one incident to evaluate the propriety of the practice to count each case equally.

This practice does not appear consistent with the national caseload standards which state, "for purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding." Counting each case individually results in a higher calculated number of needed attorney hours than combining cases associated with one incident for case counting purposes. Without analyzing the methodology for counting cases for caseload protocol calculation purposes, the MSPD cannot ensure the appropriateness of the case counts utilized.

Available attorney hours

The MSPD does not have adequate documentation to support significant adjustments made to the calculated number of available attorney hours.

In the caseload protocol calculations, the MSPD reduced total annual attorney hours of 2,340 (based on a 45-hour work week) for the following: average non-case-related tasks (320.5 hours, or 13.7 percent), average holidays and annual leave (216 hours, the minimum annual employee leave accrual plus holidays), average sick leave (51.5 hours, or 2.2 percent), average travel time (varies based on actual miles traveled by district), and average management and supervision time (varies based on number of district employees, multiplied by 1.5 hours per week). Monthly caseload protocol calculations for the year ended June 30, 2010, ranged from 1,363 to 1,635 hours per attorney per district, an average of 1,536 hours. These calculations provide that MSPD attorneys spend an average of 74 percent (5.9 hours per 8-hour day) on case-related responsibilities.

While most adjustments are supported by the 2006 time study or actual data, the MSPD maintained no documentation to support the 2,340 total annual attorney hours and the 1.5 hours per week adjustment for management and supervision. According to an MSPD official, these adjustments were based on management judgment and experience and no tracking or study of actual data was performed to determine the reasonableness of these adjustments.



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Without maintaining documentation to support all components of the calculation of available attorney hours, the MSPD is unable to demonstrate the accuracy and reasonableness of the calculated number of available attorney hours.

### NCSC review

A November 2010 review of the caseload protocol by the National Center for State Courts (NCSC) prepared for the Special Master also identified various concerns with the protocol. These concerns included 1) the use of the national caseload standards which are old, very broad, and do not represent practices in Missouri, 2) the apparent inability to make further use of the 2006 time study, and 3) the lack of means to measure support staff needs. In March 2011, the MSPD submitted an affidavit to the Supreme Court outlining errors and inconsistencies in the NCSC review.

### 1.3 Support staff

The MSPD has not developed adequate procedures to measure the need for additional support staff. MSPD caseload protocol indicates, and the 2006 time study supports, that attorneys spend a significant amount of time performing tasks that could otherwise be performed by support staff. Recent budget requests indicate the MSPD needs to increase support staff levels from one legal assistant per approximately nine attorneys, one clerical staff per approximately five attorneys, and one investigator per approximately six attorneys; to one legal assistant, one clerical staff, and one investigator per three attorneys. However, these ratios were developed using national guidelines rather than MSPD data. While support staff time was tracked in the 2006 time study, this time has not been utilized in estimating support staff needed.

Procedures to accurately estimate support staff hours needed to assist attorneys are necessary to support management decisions and budget requests. Such procedures should include an analysis of actual time spent by attorneys and support staff in performing administrative tasks that could more efficiently be performed by support staff.

### Conclusions

According to the National Legal Aid and Defender's (NLADA) Guidelines for Legal Defense Systems in the United States, ". . . every defender system should establish maximum caseloads for individual attorneys in the system. Caseloads should reflect national standards and guidelines. The determination by the defender office as to whether or not the workloads of the defenders in the office are excessive should take into consideration the following factors: (a) objective statistical data; (b) factors related to local practice; and (c) an evaluation and comparison of the workloads of experienced, competent private defense practitioners." The NLADA further states, ". . . when faced with an excessive caseload, the defender system should diligently pursue all reasonable means of alleviating the problem, including: (a) declining additional cases and, as appropriate, seeking leave of court to withdraw from cases already assigned; (b) actively seeking the



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support of the judiciary, the Defender Commission, the private bar, and the community in the resolution of the caseload problem; (c) seeking evaluative measures from the appropriate national organization as a means of independent documentation of the problem; (d) hiring assigned counsel to manage the additional cases; and (e) initiating legal causes of action." These steps should be accompanied by sufficient actions to improve efficiency and accurately assess MSPD workload.

Due to numerous variables, as noted above, the process of determining the acceptable caseload for a public defender office and additional resources needed, if any, is very complex. The MSPD needs to perform a comprehensive analysis of its caseload protocol and make appropriate revisions to ensure the calculations accurately estimate and compare needed and available staff hours. Such analysis should include review of actual staff time spent on each case type and sufficiency of that time. If the MSPD continues to use the national caseload standards for case weights, sufficient procedures should be performed to determine applicability of the national standards to the MSPD and to accurately identify any adjustments needed. The caseload protocol calculation process should be periodically analyzed and adjusted as needed, and documentation should be maintained to support all data, assumptions, and adjustments included in the caseload protocol calculations. Finally, as the MSPD implements the recommendations of this report and improves efficiency of its operations, the caseload protocol calculations should be revised as needed.

## Recommendations

The MSPD:

- 1.1 Establish procedures to track and analyze staff hours by case type, and use that data to support significant management decisions including estimating staff hours needed to meet caseload.
- 1.2 Perform and document a comprehensive analysis of the caseload protocol and make appropriate revisions to ensure calculations accurately estimate and compare needed and available staff hours. Periodic analysis of the caseload protocol should be performed and revisions made as necessary.
- 1.3 Develop procedures to accurately estimate support staff hours needed to assist attorneys in meeting caseload.

## Auditee's Response

- 1.1 *MSPD agrees that tracking staff hours by case type should be implemented, and this has already begun. Indeed, the Missouri State Public Defender Commission had already come to this same conclusion independently and made the decision in their conference call meeting on August 8, 2012, to institute across-the-board timekeeping. That decision was communicated to the system's District Defenders at their meeting on August 24, 2012. Staff is*



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*currently reacquainting themselves with the time keeping software used in our 2006 time-tracking study and making recommendations for updates and changes to make it both more effective and more user-friendly. Once their feedback has been received and the needed changes finalized, the IT staff will complete the necessary programming changes and time-keeping will officially begin for all MSPD employees. The exact date for that will depend on the number and complexity of programming changes needed to incorporate the new functionality and management recommendations, but we are hopeful that we will have that fully underway before the end of the calendar year.*

1.2 *MSPD agrees that its caseload protocol could be improved and that it will continue to be an ongoing process of revision and improvement over time. Plans are underway to utilize the same approach as that utilized by the NCSC to determine jurisdiction-specific case weights for public defenders in New Mexico, Maryland, and Virginia. Those studies consisted of:*

- (1) A 4-6 week time study to track what is currently being done on cases;*
- (2) A time sufficiency survey of the employees to determine what is currently not being done on cases that should be, due to insufficient time;*
- (3) A gathering together of experienced criminal defense lawyers -- both public defenders and private attorneys -- to identify the average time necessary to effectively complete the various items not now being done because of a lack of time; and,*
- (4) Adding together the time currently being spent on each particular case type and the additional time needed to effectively do the things that are not getting done because of case overload. The end result is a Missouri-specific case weight for each case type.*

*When developing its current protocol, MSPD undertook the first two steps of this process, but chose to incorporate a slightly modified version of the NAC's caseload standards in lieu of completing the last two steps described above. This was because:*

- (1) The Maryland study conducted by the NCSC cost over \$200,000 to complete, and when MSPD contacted them in 2006 about overseeing just the last two steps of the process for us using our time data and time sufficiency survey, their fee was still \$135,000; and,*
- (2) The ABA's Ten Principles of a Public Defense Delivery System, adopted in February 2002, stated, "national caseload standards should in no event be exceeded." Since MSPD's caseloads were*



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*so far in excess of national standards, the decision was made to first work on getting caseload down to that NAC standard; and then undertake the extra steps of determining what is still not being done on cases and how much more time it would take attorneys and staff to get those things done – i.e. developing a Missouri-specific weighted caseload protocol.*

- (3) *While the audit is correct that the national (NAC) standards do not expressly state that they have not already taken into account the non-case-related attorney time such as travel, supervision, support staff, etc. that MSPD's protocol goes on to deduct, MSPD relied upon the ABA's assumption that these things were not encompassed within the NAC standards. That assumption is built into the ABA's Ethical Advisory Opinion No. 06-0441:*

*"Although [National] standards may be considered, they are not the sole factor in determining if a workload is excessive. Such a determination depends not only on the number of cases, but also on such factors as ... the lawyer's nonrepresentational duties."*

*Since this latter qualifier would make no sense if the national standards already encompassed the lawyer's nonrepresentational duties, MSPD did indeed operate under the assumption that the national standards address caseload only, and not a lawyer's total workload, which would vary widely by jurisdiction.*

*Nonetheless, MSPD agrees that the recommended model would be likely to create a more accurate caseload protocol, and as soon as we have a statistically significant period of new time-tracking data compiled, we will proceed accordingly. MSPD also agrees that time-tracking will allow us to more accurately determine the time needed for adequate supervision within each office than the current estimate of 1.5 hours per week per employee utilized in the protocol.*

*It is worth noting, however, that the total number of attorney hours per year available for case work under MSPD's current protocol aligns fairly closely with the findings of both the NCSC's 2005 Maryland study and a similar 2008 study conducted by the University of Nebraska Public Policy Center of the Lancaster County Public Defender, which has tracked time for 20 years. In the latter study, the number of attorney hours per year available for case work came out to be 1,575 as compared to MSPD's average across all offices, after travel and supervisory hours are deducted, of 1,536 hours per year. The Maryland Public Defender study, conducted by the NCSC, wound up with an average of 1,375 hours per attorney per year available for case work, as compared to Missouri's range of 1,363 in the offices with the most travel time to 1,635 in those with the least.*



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*The question then is what MSPD should do in the interim, until the recommended revisions to the protocol can be finalized and implemented. In deciding that, MSPD has considered both the above comparisons of available attorney case hours and the affidavit of Professor Norman Lefstein, the nation's leading expert on indigent defense caseload issues, who reviewed our existing caseload protocol and MSPD attorney caseloads in State ex rel Missouri Public Defender Commission v. Waters. While agreeing with the auditor's recommendation that MSPD should develop Missouri-specific case weights in lieu of relying on the NAC, Professor Lefstein also found unequivocally that MSPD's lawyers were handling excessive caseloads. He further indicated his assessment that under our existing protocol, MSPD lawyers would continue to take on more cases than they should or would under a protocol developed using the NCSC model.*

*MSPD has also considered the testimony and affidavits of those outside of MSPD doing criminal defense work in Missouri, to wit: 1) the testimony of Christa Hogan of the Springfield Metropolitan Bar Association at the Special Master's hearing in State ex rel Missouri Public Defender Commission v. Waters, that most of the lawyers who took on probation revocation cases during that organization's year-long pro bono initiative to assist the Springfield Public Defender office reported spending an average of 5-6 hours per case, which is consistent with MSPD's modification of the NAC standards in assigning 5 hours to probation revocation cases under the existing protocol; and 2) the affidavits of then President of the Missouri Association of Criminal Defense Lawyers, Travis Noble, and Sean O'Brien, Director the Public Interest Law Clinic at UMKC, both of whom reviewed the assigned hours per case type under Missouri's current protocol and concluded that the times allotted, while a little low, were nonetheless reasonable.*

*While MSPD does not want its lawyers handling more cases than they ethically should be and wants to move as expeditiously as possible to correct that possibility within our current protocol, MSPD leadership is comfortable, given the above assessments and confirmations, that its existing protocol does not create a risk of us turning away more cases than is necessary. As a result, for the interim, until the revisions identified through the new study can be fully developed and implemented, MSPD leadership believes that the most responsible course is to continue utilizing the existing protocol in order to provide what caseload relief it can bring while we continue to work on improving the protocol as recommended.*

*Case Counts: MSPD agrees that it would be ideal to have a single standard utilized by all prosecuting attorneys in their filing of charges so that we do not have the situation of ten counts arising*



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*out of a single incident filed as ten separate cases in one jurisdiction and as a single case in another. However, that is a decision controlled by Missouri's prosecuting attorneys and not by MSPD, therefore it is not one that MSPD can unilaterally resolve. The caseload protocol is tied to MSPD's Case Management System. We do not have someone individually assigning case weights to 84,000+ cases per year and could not. It must be automated and it must utilize the existing cases in the caseload management system. Each of those cases must match the cause numbers assigned by the court to the charging documents filed by the prosecuting attorney in order to generate pleadings, download electronic discovery, accurately post payments, etc.*

*It is also important to recognize that, just as there is an argument that extra weight is being given to those cases that are charged separately, it is also likely that insufficient weight is being given to those cases with multiple counts all charged together. Currently, in situations where 10 or 15 counts are charged under a single cause number, MSPD's protocol counts the case weight of only the single most serious charge for that entire case, even though most lawyers would argue that a case with that many counts will be significantly more work than a case with only one count. MSPD will explore ways to address both of these concerns in future protocol revisions and will continue to support any efforts to improve consistency in charging practices across the state.*

- 1.3 *MSPD agrees that support staff hours should also be time-tracked and is implementing this expectation for all staff. Having attorneys copying court files and police reports is not an effective use of attorney time. Beyond that, there are many tasks currently being performed by MSPD attorneys that paralegals or legal assistants could perform much more cost-effectively, freeing up attorney time to focus on those tasks that only attorneys can do. MSPD has consistently requested additional support staff to correct this imbalance and will continue to do so. The new time-tracking data that will be obtained as both support staff and attorneys begin tracking their time will help MSPD better support this critical request.*

## **2. Indigence Determinations**

The MSPD has not established adequate policies and procedures for determining defendant indigence to ensure public defender services are provided to only eligible applicants. Indigence determinations for opened (accepted) cases often lacked sufficient documentation of applicant financial status and MSPD indigence decisions; and as a result, it was difficult to determine the reasons defendants were deemed indigent.



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State law and MSPD policy establish responsibilities and criteria to be considered when MSPD district staff determine defendant indigence. State law provides that any applicant determined ineligible for services by the MSPD may appeal the determination to the court and the court shall determine whether to appoint the MSPD to represent the defendant.

Our review noted in some other states, indigence determinations are performed by independent parties, such as courts rather than public defender offices. A 2005 review of MSPD operations by a criminal justice consultant noted the use of public defenders to perform indigence determinations for their own clients creates an appearance of a conflict of interest.

We reviewed MSPD indigence determination policies and tested 68 cases opened by 27 MSPD Trial Division offices during the 2 years ended June 30, 2010. In addition, we reviewed 60 applications for MSPD services that were denied by 14 MSPD Trial Division offices during June and July 2010. We also analyzed indigence determination information recorded in the Case Management System during the 3 years ended June 30, 2010.

## 2.1 Policies and procedures

The MSPD lacks sufficient policies and procedures for determining defendant indigence.

### Indigence criteria and training

Indigence policies identify various criteria and instruct employees to consider all criteria when determining defendant indigence. However, the policies provide very few thresholds, weights, or other guidance for evaluating the criteria to identify ineligible financial situations. The only specific dollar threshold identified in the policies as an indicator of indigence is gross income less than or equal to federal poverty guidelines. In addition, staff have not received sufficient training regarding indigence determinations. The most recent system-wide training on indigence determinations was held in 2007 for District Defenders and upper management. District offices are responsible for training staff who perform indigence determinations. Because policies lack sufficient guidance and staff training is inconsistent, the indigence determination process is very subjective.

Prior to January 2007, indigence determination policies contained additional thresholds for certain eligibility criteria including bond amount, home equity, other asset values, and the amount of cash on hand for certain defendants. Previous policies included limits for each criteria for an applicant to be considered indigent. For example, previous policies indicated applicants who posted a bond of \$5,000 or more were presumed to be not indigent. An MSPD official told us the limits were removed to encourage employees to consider all criteria in the indigence determinations rather than focusing on only one or a few criteria. However, MSPD officials acknowledged disparity between indigence determination practices continues to exist.



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Verification of application  
data

Our review of indigence criteria used by five other state public defender offices identified at least two other states which have established more detailed criteria, thresholds, and/or guidance for determining indigence than that used by the MSPD.

The MSPD does not have procedures to ensure the accuracy and completeness of data reported on indigence applications. Office policies do not require documentation or other verification of information to substantiate applicant reported data such as income, bank balances, and other assets.

None of the 125 applications we reviewed contained documentation supporting whether application data had been verified. Our comparison of Department of Labor and Industrial Relations, Division of Employment Security (DES) wage data to indigence applications for 66 opened cases identified 2 cases where the defendant understated income on their application. For one case, the defendant reported income from only one job; however, DES records showed he also worked at another job during the quarters before, during, and after the date he applied for public defender services. For the other case, the defendant reported he had no job; however, DES data showed he had two jobs before and during the quarter he applied for services and one job in the following quarter. For both cases, the defendants' income exceeded federal poverty guidelines during the quarter they applied for services.

Section 600.086, RSMo, authorizes the MSPD to access public and private records necessary to perform indigence determinations. This section also provides that any person who intentionally falsifies information in order to obtain public defender services shall be guilty of a class A misdemeanor. Our review of indigence procedures of five other state public defender offices identified at least two states which require applicants to submit documentation supporting the information reported on their application. While verification of applicant data would require some additional staff resources, these resources would likely be less costly than the resources needed to represent ineligible individuals.

Supervisory review

There is no supervisory review of defendant indigence determinations. These determinations are made by numerous support staff and attorneys in district offices. One District Defender indicated court requirements for prompt indigence determinations does not provide enough time for supervisory review of the determinations.

Policies and procedures

Without sufficient indigence determination policies and procedures, there is increased risk of 1) inefficient allocation of limited MSPD resources for representation of ineligible individuals and/or 2) failure to provide statutorily required representation to eligible individuals. To achieve consistent indigence decisions, the MSPD should modify policies and



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procedures to provide clear guidance and specific instructions for evaluating established financial criteria. In addition, policies and procedures should define when supporting documentation from applicants and verification of applicant financial status with external sources is necessary. Further, policies and procedures should require supervisory review of indigence determinations and provide for training of MSPD staff performing the determinations.

## 2.2 Documentation of indigence determinations

Eleven of 68 opened cases reviewed lacked sufficient documentation supporting the indigence determination. Overall, it was difficult to determine how applicants were determined indigent because applications were either not prepared, lacked significant financial information, and/or lacked documentation of the reasons MSPD staff concluded the applicants were indigent. While documentation was generally maintained to support denied applications reviewed, numerous opened cases lacked such documentation.

- Applications for public defender services were not prepared for three cases. For one case, the MSPD did not require an existing client prepare a new application for services related to a second case; and as a result, the client was deemed indigent based on an application over a year old. MSPD officials indicated new applications are not always required for existing clients; however, formal criteria for these situations have not been established. The District Defender from the applicable office indicated that under his current office practice, a new application should have been prepared for this case. For two cases, District Defenders indicated applications were not completed because the MSPD was appointed by the court to represent juveniles. One District Defender indicated the court generally appoints the MSPD to represent juveniles, therefore applications are not completed. The other District Defender indicated the court appointed the MSPD before an application could be completed.
- Applications lacked significant income data for four cases, making it unclear whether applicant income was considered in the indigence determination. Three applications indicated the applicant or the applicant's spouse was employed or received Veteran's Administration benefits; however, the amount of income or benefits was not documented. For one of these applications, the District Defender indicated the spouse's income was not considered because the spouse was estranged and hostile toward the applicant; however, this justification was not documented. For the fourth application, the total income of a parent of a juvenile could not be readily determined from information included in the application.
- Application information did not support the indigence determination for four cases. For three of these cases, income and family size data



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reported on the applications exceeded federal poverty guidelines. MSPD officials provided various reasons these applicants were determined indigent despite reporting income in excess of poverty guidelines; however, documentation of these reasons was not maintained. For another case, the district office denied the application, but ultimately accepted the applicant when they learned another district office had recently represented the applicant.

- Although application forms contain a section for MSPD employees to document the indigence decision and any related comments, most applications for opened cases contained no explanatory comments, and this section was not completed for four applications reviewed. Most denied application forms reviewed and/or information contained in the Case Management System included documentation of the reasons the applicants were determined not indigent and denied services. The Case Management System requires such documentation for denied applications, but not for accepted applications.

Section 600.086, RSMo, and 18 CSR 10-3.010, require that all individuals claiming indigence must complete an application and MSPD Indigence Determination Policy, Section 10-30-10-1, requires a juvenile application be filed for each juvenile case. The policies require applicant gross pay and other sources of income, including spouse and parent income in certain cases, be considered in the indigence determination. To demonstrate compliance with indigence policies, the MSPD should ensure applications contain complete information and indigence determinations contain adequate documentation of the basis for the determination.

## 2.3 Monitoring

MSPD management is unable to monitor indigence determinations and court appointments on a state-wide basis because sufficient information is frequently not entered in the Case Management System.

Of 60 denied applications reviewed, the MSPD did not enter 18 in the system. Our analysis of system data identified at least five district offices which entered only a few denied applications in the system during fiscal year 2010. District Defenders from these offices indicated staff were not aware denied applications should be recorded in the system. While the Case Management System requires MSPD employees to enter application information when opening a case, there is no system control to ensure denied applications are entered.

In addition, while the MSPD identifies cases appointed by the court in the Case Management System, the reasons for the court appointments, such as denied applications appealed to the court and overruled or other reasons determined by the court, are not tracked in the system and these reasons are not always documented in the case files. For two of the four opened cases reviewed where the MSPD denied the application and the court overruled



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that decision, the reasons the court overruled the MSPD decision were not documented. Also, the juvenile cases noted above contained no documentation supporting the court appointment. MSPD Indigence Determination Policy, Section 10-30-10-1, provides it is not within the court's authority to make direct appointment of the MSPD, absent an application and MSPD's consideration of the defendant's eligibility and that the MSPD should aggressively pursue legal course of action when courts misuse public defender services in a manner contrary to the law, legislative intent, and MSPD policy. According to Case Management System data, approximately 5 percent of cases opened during the years ended June 30, 2010, 2009, and 2008, were appointed by the courts.

The Case Management Manual, Chapter 1, Titles 180 and 183, requires MSPD employees to record in the system each application, whether the application was approved or denied, and the denial reason, if applicable. Without ensuring all denied applications are entered in the Case Management System, MSPD management cannot review and monitor acceptance, denial, and court appointment rates and trends by district and/or employee and identify potential areas in need of improvement. Without documenting or tracking the reasons or other data regarding the court appointments, the MSPD lacks the information it needs to determine the extent courts are appointing the MSPD to cases without appropriate indigence determinations and identify courts which may be inappropriately appointing cases to the MSPD. Due to the subjectivity of indigence determinations and court appointment decisions, procedures should be established to monitor indigence determinations and court appointments for consistency and compliance with MSPD policies and state law.

These conditions were noted in previous audits of the MSPD.

## Recommendations

The MSPD:

- 2.1 Modify policies and procedures to provide clear guidance and training for performing indigence determinations. Policies should address verification of applicant financial status and data, and provide for supervisory review of indigence determinations.
- 2.2 Ensure applications containing complete and clear information are received from all individuals claiming indigence and indigence determinations contain adequate documentation of the basis for the determination.
- 2.3 Ensure all denied applications are entered into the Case Management System, require the reasons for court appointments be entered into the system, and establish procedures to monitor indigence determinations and court appointments on a state-wide basis.



## Auditee's Response

2.1 *For the most part, MSPD agrees with this recommendation, but believes an even more foundational step is necessary first: a re-examination of the indigence guidelines themselves. This issue was discussed by the Public Defender Commission at their October 1, 2010 meeting, but then-Director Marty Robinson recommended and the Commission agreed that no changes to the guidelines should be made at that time because Director Robinson had requested an audit in anticipation of his retirement the following February and both believed there might be recommendations coming out of the audit that should be included in any changes to the CSR. Now that the audit is complete, this will be moving forward.*

*The bright line bond amount as an automatic disqualifier was eliminated due to changes in bonding practices. As bondsmen began taking often minimal monthly payments in return for posting large surety bonds, bond amounts that, in times past, would have been a fairly reliable indicator of a defendant's resources, no longer necessarily meant that. Instead more questions had to be asked to determine the significance of any bond made, so the application was revised and the bright line was removed from the CSR and as a factor in indigence determinations. Under current guidelines, the posting of bond is but one factor to be considered along with all circumstances of the case and charge in the determination of indigence.*

*It is the belief of MSPD's leadership that much of the inconsistency in the application of the current indigence guidelines is due to the disconnect between what qualifies as indigent under the guidelines and what is actually necessary in the real world for someone to retain private counsel. Currently, indigence for purposes of qualifying for a Missouri public defender is tied to federal poverty guidelines, a lower income threshold than is even required to qualify for food stamps or many other basic survival assistance programs. As a result, when reviewing applications for services, some public defenders apply their own understanding of what the market will bear in a particular jurisdiction given the complexity of the case, instead of strictly complying with the federal poverty guidelines threshold and turning away applicants they know will be unable to retain counsel and will eventually become public defender clients, usually by direct appointment by the court. At the same time, those offices that strictly hold to the federal poverty guidelines standard tend to see more of those findings overruled by judges.*

*MSPD will be addressing this issue as follows:*

- (1) Research and revise the indigence guidelines, tying them to a standard relevant to the ability to hire private counsel;*



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- (2) *Seek to coordinate indigence determinations with the courts who are increasingly requiring defendants to complete financial forms for use in determining ability to pay various fees, fines, and costs;*
- (3) *Explore options for undertaking independent verification of applicant data and financial information, including the possibility of live access to the data of other state agencies with income and indigence information of relevance;*
- (4) *Conduct a pilot test in several offices to determine the time involved in verification of financial data on the public defender applications, as well as the impact on the courts of any delays it causes, and the percentage of cases in which relevant information is uncovered that changes the indigence determination.*
- (5) *Develop and conduct system training for those responsible for intake on the new guidelines, procedures and expectations.*
- (6) *Require supervisors and the newly created internal auditor position to periodically monitor a number of randomly selected indigence applications, much as the auditor did here, to identify problems so they can be addressed. (MSPD reorganized upper management with the advent of the new Director in March of 2011 and among those changes was a shuffle in the responsibilities of the Comptroller to include that of internal auditor.)*

*MSPD does have serious concerns about the workload impact of requiring independent data verification in each of our 84,000+ cases, given existing staff shortages and the turnaround time involved in obtaining such verification, which will cause some problematic delays in the processing of cases through the courts. This is especially true since the audit discovered unreported income in only 3 percent of the cases checked. However, we will give it a try as a pilot project in several offices, and monitor both the time impact and the results, then make a determination whether it is cost-effective to continue or if other approaches need to be explored instead.*

*MSPD does support moving the responsibility for indigence determinations out of the State Public Defender System entirely, and placing it, as it is in most other systems around the country, with the judiciary, but until such time as that might occur, MSPD will address the recommendations herein as outlined above.*

- 2.2 *MSPD agrees. Many applications are completed by confined defendants and mailed or faxed by jail personnel to the office. Those who are confined often don't know or have access to all of the information required on the application and others have various disabilities that make completion of the form problematic –*



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*illiteracy, mental health issues, etc. What should happen when incomplete applications are received is that someone from the district office contacts the defendant to obtain the rest of the information necessary to complete the application. Staff shortages, lack of telephone access to confined defendants, the distances involved in traveling to the jails in other counties, and time pressures to get a decision on representation to the court, all contribute to a tendency to make a determination based on the information provided. MSPD will explore ways to address these challenges as part of its broader revamping of indigence guidelines and procedures.*

- 2.3 *The entry of denied applications into the Case Management System is a matter of training and can be rectified fairly easily, and, as stated in MAR finding number 2.1, MSPD will begin requiring supervisors and the newly created internal auditor position to periodically monitor a number of randomly selected indigence applications, much as the auditor did, and to identify problems so they can be addressed.*

*Entering the reasons the court chose to appoint a public defender is more problematic as the court doesn't issue findings of fact or otherwise state its reasons for appointment in those cases in which it appoints MSPD. We generally simply receive an order of appointment and therefore the fact of appointment is all that can realistically be recorded.*

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### **3. Liens and Promissory Notes**

The MSPD needs to improve procedures related to filing liens and preparing promissory notes. Although defendants are informed of their financial responsibilities when they apply for MSPD services, the MSPD does not always properly charge applicable costs to defendants. During the 3 years ended June 30, 2010, the MSPD filed or prepared approximately 153,500 liens and promissory notes totaling approximately \$27 million. Total liens and promissory notes were 26 percent of MSPD expenditures during this period.

Provisions in Chapter 600, RSMo, require (1) the MSPD to file a lien with the circuit court for the reasonable value of services rendered to each defendant, (2) the defendant to reimburse the MSPD for some or all of the services when the defendant becomes financially able to do so, (3) the lien amount be established in accordance with a schedule of charges prepared by the Public Defender Commission, and (4) the court rule on whether all or any part of the lien shall be allowed.

The MSPD Recoupment Policy, Sections 50-50-10-0 and 50-50-10-20, requires MSPD attorneys to file a lien for every case where the court routinely grants them. In the event the court does not routinely grant liens,



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the policy instructs attorneys to prepare a promissory note. The policy requires that liens and promissory note amounts be in accordance with the fee schedule. Liens filed and promissory notes prepared are to be recorded in the Case Management System and uploaded to the Lien and Recoupment System which tracks collection activities.

We tested 66 closed cases for which representation was provided by MSPD attorneys in 27 Trial Division offices during the 2 years ended June 30, 2010. We tested lien amounts for 10 other closed cases in which the MSPD paid additional litigation expenses during the 3 years ended June 30, 2010. We also analyzed lien and promissory note information recorded in the Case Management System for Trial Division cases closed during the 3 years ended June 30, 2010.

### 3.1 Liens not filed

The MSPD did not file liens or prepare promissory notes in many cases. Sufficient guidance and staff training regarding liens and promissory notes have not been established. Attorney and district lien and promissory note procedures are inconsistent. Improvement in the monitoring of lien and promissory note activity is needed. In addition, the practice of filing liens when multiple cases relate to one incident is inconsistent with other MSPD case practices.

Trial Division recoupment reports prepared by the MSPD indicated liens were filed or promissory notes prepared for 73 percent, 70 percent, and 64 percent of Trial Division closed cases for which MSPD attorneys provided representation during fiscal years 2010, 2009, and 2008, respectively.

MSPD attorneys did not file liens or prepare promissory notes for 19 of 66 cases tested:

- For 11 cases, the defendant was represented on multiple cases associated with one incident and a lien was filed for only one case associated with the incident.
- For four cases, liens were not filed or promissory notes prepared because the MSPD provided minimal representation before the case was dismissed, the defendant hired private counsel, or the defendant represented him/herself. Case documentation indicates the MSPD provided at least some services on these cases; however, no liens were filed although the fee schedule provides for fees for early dispositions. We noted similar cases where the MSPD provided minimal services and filed liens.
- For two cases, MSPD officials indicated the attorney failed to file a lien as required. For another case, MSPD officials indicated a lien was not filed since the defendant was deported outside the country. For another case, the court waived MSPD fees.



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For each closed case, MSPD personnel are required to record the lien or promissory note action and amount in the Case Management System. Two codes are used to document that a lien was not filed or promissory note prepared: code 5 is recorded when a lien is filed in another case, and code 6 (no action - discretion) is recorded for all other reasons a lien is not filed.

Liens filed in another case

Our analysis of Case Management System data showed liens were not filed because a lien was filed in another case (code 5) for at least 33,000 (15 percent) Trial Division cases closed during the 3 years ended June 30, 2010. MSPD Memo to Recoupment Policy, Section 50-50-10-0, provides that one lien or promissory note may be sought when multiple cases or counts relate to one incident, but the policy does not provide guidance for determining the fee amount for these incidents (whether fees should be charged for each case, for only one case, etc.). Several MSPD officials in district offices indicated the general practice is to file a lien in accordance with the fee schedule for the defendant's primary case, and not charge a fee for any other cases (companion cases) related to the incident. One District Defender we interviewed explained this practice is followed because attorneys typically represent defendants on all cases related to an incident concurrently and resolution of the primary case often resolves the companion case(s) with minimal additional costs. However, the MSPD has not analyzed or determined the costs associated with representing defendants on multiple cases to evaluate the propriety of this practice. In addition, this practice is not consistent with MSPD caseload protocol which counts all cases, even multiple cases related to one incident, when calculating attorney workload; nor is it consistent with MSPD practice of compensating contract attorneys at a rate of one-half the established fee for companion cases.

We noted instances where liens were filed for more than one associated case. Our analysis of Trial Division lien data by district noted the percentage of liens not filed for this reason ranged from approximately 2 percent in one district to 39 percent in another district. The District Defender from the district with the lowest percentage of liens not filed for this reason indicated he requires a lien be filed for every closed case unless liens are generally denied by the court.

No action - discretion

Based on the average lien/promissory note of \$181, we estimated liens or promissory notes totaling approximately \$1.5 million were not filed or prepared for approximately 8,200 closed cases that were coded as no action - discretion during fiscal year 2010. According to system data, the percentage of Trial Division closed cases coded as no action - discretion was 11 percent, 15 percent, and 22 percent during fiscal years 2010, 2009, and 2008, respectively.

In addition, although the Case Management System contains a field for MSPD personnel to explain why liens were not filed or promissory notes prepared, our scan noted system data often lacked sufficient explanations.



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Reasons frequently documented in the system included "n/a," "no lien filed," "discretion," or no reason was documented.

MSPD officials indicated efforts have been made in recent years to more closely monitor MSPD attorney compliance with the recoupment policy, and the use of the no action - discretion code. Summary reports of closed case lien and promissory note actions by district are prepared from the Case Management System and distributed to district defenders and directors annually; however, because the system lacks sufficient explanatory information regarding cases coded as no action - discretion, MSPD management is unable to properly monitor lien actions.

Contract attorney cases

Contract attorneys frequently fail to file liens and/or submit copies of liens filed to the MSPD. Any liens filed by contract attorneys but not submitted to the MSPD are not recorded in the Lien and Recoupment System and subject to MSPD collection procedures.

Controls and procedures

Section 600.090.2, RSMo, provides that the MSPD charge defendants the "reasonable value of the services rendered." To comply with this statute the MSPD should (1) analyze the costs of representing defendants on multiple cases related to one incident, cases requiring minimal MSPD representation, and other types of cases for which liens and promissory notes are generally not filed or prepared, (2) develop clear and detailed guidance to assist staff and contract attorneys when establishing and determining lien amounts, (3) provide appropriate training related to newly developed guidance, and (4) improve procedures to document and monitor closed cases for lien and promissory note decisions.

3.2 Insufficient lien amounts

The amount of liens filed and promissory notes prepared were often incorrect and the MSPD has not established sufficient guidance for using the fee schedule to establish lien amounts. MSPD personnel indicated attorneys use their discretion when determining lien amounts; however, guidance for using the fee schedule and establishing lien amounts has not been established. Such guidance is necessary to ensure sufficient recovery of MSPD costs and equitable assessment of fees to all defendants. In addition, to ensure lien amounts are reasonable, documentation should be maintained to support any instances where the lien amounts vary from the established fee schedule.

For 9 of 47 liens and promissory notes reviewed, amounts differed from the fee schedule. One lien and one promissory note were based on an outdated fee schedule and seven liens did not correspond with the case disposition. For each of the seven cases, the early disposition or lesser fee was charged, although the case was disposed of through trial, hearing, or plea. For most of these cases, MSPD personnel provided various reasons for charging lower lien amounts, such as insufficient defendant resources and/or less than average attorney time spent on the case; however, these reasons were not documented in the case files.



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Liens and promissory note amounts for 3,382 of 9,731 (35 percent) C and D felony cases (other than drug or sex violations) disposed of through guilty pleas during the year ended June 30, 2010, were lower than required by the fee schedule. Based on Case Management System data for these cases, we estimated lien or promissory amounts should have been at least an additional \$726,000 for these cases.

In addition, litigation expenses (costs of expert witnesses, depositions, transcripts, and investigations) were not included in lien and promissory amounts for 7 of 10 cases reviewed which contained such expenses. These additional state-paid expenses ranged from \$202 to \$1,142 per case. The MSPD lien schedule provides for the inclusion of other identifiable case-related expenses in lien amounts; however, attorney practices regarding these expenses vary. While some District Defenders told us litigation expenses are not routinely added to lien amounts, one District Defender indicated he requires the expenses be added to each lien. During the 3 years ended June 30, 2010, the MSPD spent approximately \$8.8 million for litigation expenses (primarily payments to professional consultants) related to approximately 6,000 cases, or 2 percent of MSPD's caseload during that period.

### 3.3 Fee schedule

The MSPD could locate no documentation supporting the basis for the original lien and promissory note fee schedule or subsequent updates. The schedule was adopted in the 1980s and is periodically updated, with the most recent updates in May 2003 and June 2009. An MSPD official indicated fees were last increased in July 2009 to account for inflation since the last revision.

According to MSPD officials, the fee schedule is not based on actual case costs. However, Section 600.090, RSMo, provides that the MSPD prepare a schedule of charges for public defender services, and liens should set forth the services rendered and a claim for the reasonable value of those services. Our comparison of the lien fee schedule to the contract attorney fee schedule noted lien amounts are significantly lower than the amounts paid to contract attorneys for corresponding case types. For example, for C and D felony cases not involving drug or sex crimes, the lien fee schedule requires a lien amount of \$65 for cases resolved by early disposition or \$375 for cases resolved by plea/hearing, while the contract attorney fee schedule provides for a payment of \$750 for these disposition types. The MSPD has not performed a recent time study; and as a result, the MSPD has not gathered the information necessary to determine costs by case and disposition type.

Without analyzing MSPD costs, the MSPD cannot ensure lien and promissory amounts are reasonable and appropriately cover costs. The MSPD should analyze the costs associated with the various types and



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dispositions of cases and revise the fee schedule if necessary. Such analysis and revisions should be periodically performed and documented.

Similar conditions were noted in previous audits of the MSPD.

## Recommendations

The MSPD:

- 3.1 Establish procedures to ensure liens are filed in accordance with statutory requirements.
- 3.2 Develop guidance and staff training for establishing lien amounts, and require documentation to support any instances where lien amounts vary from the established fee schedule.
- 3.3 Analyze the costs associated with the various types and dispositions of cases and revise the fee schedule if necessary. Such analysis and revisions should be periodically performed and documented.

## Auditee's Response

- 3.1 *This is also a project already underway. In April 2012, the Director appointed a leadership committee to undertake an in-depth review of MSPD's lien procedures, including their consistency/inconsistency with our statutory obligations. A preliminary report of the issues discovered was made to the Public Defender Commission at their June 15, 2012, meeting and additional information requested. MSPD leadership is in the process of researching practices regarding public defender fees in other jurisdictions around the country, as well as in national studies and publications on the topic, to inform us of best practices as we move forward to finalize MSPD procedures.*

*MSPD agrees that the "No Action – Discretion" lien option continues to prove problematic and options for addressing that have been part of the above discussion, even though efforts in recent years to reduce its usage have been somewhat successful, as noted by the audit's finding that it has dropped from an average of 22 percent in fiscal year 2008 down to 11 percent in fiscal year 2010. MSPD also agrees that lien policies involving a single client with multiple cases need to be coordinated with policies regarding multiple case clients in the areas of contracting and case weights so that these situations are being treated consistently in all settings. Differences have arisen because the former two categories are wholly within the discretion and control of MSPD, while the latter is, as discussed earlier, tied to prosecutorial charging practices by virtue of our Case Management System's dependence on cause numbers. Nonetheless, we will explore ways to address those inconsistencies.*



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3.2 *Since one of the factors under re-evaluation by the Public Defender Commission is the lien amounts currently in use, compliance with this audit finding will need to wait until that decision is finalized, but once the Commission has finalized any changes to the lien amounts and the revamping of MSPD's lien and recoupment procedures has been completed, guidelines will be developed and training for staff in the new expectations will be conducted.*

3.3 *MSPD does analyze costs per case every year, as noted in the Resources section of the Background discussion of this audit, but we have not traditionally tracked costs by disposition type. Doing so will require some changes in what we require attorneys to record in our electronic Case Management System, but it can be done.*

*However, the Public Defender Commission has never sought to impose the full cost of services on indigent defendants precisely because they are indigent, and doing so would violate the intent of *Gideon v. Wainwright*. Section 600.090.1, RSMo, requires a defendant's 'ability to pay without substantial hardship' be factored into the costs lodged against an indigent defendant, and the United States Supreme Court, in *Fuller v. Oregon*, found that Oregon's recoupment statute was constitutional only because: "[d]efendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no 'manifest hardship' will result."*

*While an individualized determination in each case of ability to pay would be the ideal, the fee schedule has historically been designed to provide for a reasonable level of reimbursement that the majority of indigent defendants could repay in installment payments without substantial hardship. An informal survey of other public defender systems around the country [Florida, Ohio, Arkansas, Tennessee, Indiana, Louisiana, South Carolina, California, Maryland, Minnesota, and Kentucky] on the question of fees charged, conducted earlier this year as part of our own internal re-examination of lien and recoupment policies, showed that MSPD's existing fee schedule is significantly higher than the fees charged in any of those other states, with only one state (Virginia) imposing fees comparable to Missouri's. Most ranged from a flat fee of \$50 - 150. Those that charged based upon case type and/or manner of disposition fell in the ranges of \$25 - \$275 for a misdemeanor and \$100 - \$350 for felonies. Most do not charge anything if the defendant is acquitted or the case is dismissed (which MSPD currently does) and most all include the ability to waive, in whole or in part, based on a determination of the defendant's ability to pay.*



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*In fact, the Minnesota Supreme Court apparently ruled in 2004 that their public defender fee was unconstitutional because it did not allow for a case-by-case waiver for indigent defendants.*

*A 2010 study conducted by the Brennan Center for Justice, **Criminal Justice Debt: A Barrier to Reentry**, makes a strong case that piling debt on poor people brought into the criminal justice system is an extremely counter-productive public policy that actually increases recidivism. As the overseers of a department of state government integral to the state's criminal justice system, the Public Defender Commission tries to consider all of these factors in the ultimate determination of what are reasonable public defender fees to assess on indigent clients.*

## Auditor's Comment

- 3.3 State law requires the MSPD to file a lien for the reasonable value of services provided to each defendant, and the defendant to reimburse the MSPD for all or some of these services when he or she becomes financially able to do so. If the MSPD does not believe the state law is good public policy, the MSPD should work with the General Assembly to effect such changes to state law.

## 4. Collection Procedures

MSPD lien collection procedures need improvement. Some circuit courts do not provide adequate assistance in the collection process because they frequently deny liens and/or exclude liens from collection procedures. The MSPD does not appropriately monitor circuit court collection efforts or work with the courts to ensure collection efforts include amounts due the MSPD.

The MSPD uses various methods to collect lien and promissory note amounts. Each lien is filed in the circuit court which disposed the case and the court rules whether all or part of the lien should be allowed. Once approved, the lien may or may not be subject to court collection procedures. For those courts which do not routinely approve liens, MSPD attorneys are instructed to prepare promissory notes, which are not subject to court collection procedures. Recoupment actions during the 3 years ended June 30, 2010, consisted of 90 percent liens and 10 percent promissory notes. The MSPD participates in state tax and lottery intercept programs whereby an individual's tax refund or lottery winnings are intercepted to offset his or her unpaid lien or promissory note. Collections from defendants totaled approximately \$5.2 million during the 3 years ended June 30, 2010. During this time period, approximately 66 percent, 27 percent, 6 percent, and 1 percent of payments were from tax intercepts, court collections, direct defendant payments, and lottery intercepts, respectively.

While lien and promissory note collection rates are relatively low, collections can be received many years after liens are filed or promissory notes prepared. MSPD collects approximately 25 percent of liens and



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promissory notes within 10 years of filing. According to MSPD reports, unpaid liens and promissory notes totaled approximately \$70.1 million as of June 30, 2010.

Section 600.090, RSMo, provides that all amounts collected can be used by the MSPD for attorney and staff training, expert witness fees, deposition costs, witness travel expenses, change of venue expenses, and other expenses authorized by the Public Defender Commission.

#### 4.1 Liens denied by courts and promissory notes

Some courts frequently deny liens filed. MSPD data shows approximately 9,200 (7 percent) liens filed during the 3 years ended June 30, 2010, were denied by courts. MSPD officials indicated liens are denied for various reasons, such as the defendant's existing debt level and/or defendant prison sentences.

For the 3 years ended June 30, 2010, the Kansas City Trial Division office had the highest lien denial rate of 38 percent. According to district officials, several judges in that district deny liens for most cases and some judges deny liens for certain types of cases, such as child support cases and when the defendant has been sent to prison. This district prepared no promissory notes during this period. We estimated the MSPD was unable to attempt to collect liens totaling approximately \$280,000 for the 1,566 Kansas City Trial Division office cases in which liens were denied in fiscal year 2010.

When liens are denied by courts, the MSPD is unable to recover costs associated with services provided. While state law requires courts to rule on whether all or part of each lien shall be allowed, judges and courts which routinely deny liens may not be following the intent of the law which provides for the recovery of costs associated with representing cases. An MSPD official indicated the MSPD plans to meet with certain judges in the future to discuss lien approval procedures. The MSPD should work with judges and courts which routinely deny liens in an effort to ensure liens are appropriately considered and ensure promissory notes are prepared for those cases handled by judges and courts which continue to routinely deny liens.

#### 4.2 Circuit court collections

Some circuit courts do not attempt to collect MSPD liens, and the MSPD does not monitor court collection efforts or encourage the courts to collect liens. Our discussions with the MSPD, Office of State Courts Administrator (OSCA) personnel, and court officials noted some courts do not include MSPD liens in amounts subject to court collection procedures. These procedures generally include payment plans, collection agencies, and/or conditions of probation. According to an MSPD report of liens collected by courts during fiscal year 2010, no liens were collected by 47 (41 percent) of the 115 circuit courts.

The failure of circuit courts to include liens in collection procedures hinders the ability of the MSPD to recover costs associated with representing



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defendants. Procedures should be established to monitor circuit court lien collection rates and work with those courts which are not collecting liens.

### 4.3 Additional collection methods

The MSPD should consider additional methods for collecting lien and promissory note amounts.

Currently, the MSPD collects payments on liens and promissory notes through tax and lottery intercepts, collections by some courts, and direct payments from defendants. Other collection methods may be available, but have not been considered or evaluated by the MSPD. For example, the Department of Corrections intercepts monies held in inmate accounts to offset certain inmate obligations such as child support and board bills. The MSPD has not considered whether these intercepts are a feasible collection option for defendants sentenced to a state correctional facility. In addition, we noted at least one other state public defender office that uses garnishments as a means to collect amounts due from defendants for public defender services.

An MSPD official indicated additional MSPD collection efforts may not be cost beneficial because former MSPD clients generally have little or no income for several years after their case is closed. However, without formally evaluating various collection methods and related costs, the MSPD cannot demonstrate all cost-effective methods are used to maximize collection of lien and promissory note amounts due.

## Recommendations

The MSPD:

- 4.1 Work with judges and circuit courts which routinely deny liens in an effort to ensure liens are appropriately considered by courts. The MSPD should ensure promissory notes are prepared for those cases handled by judges and courts which continue to routinely deny liens.
- 4.2 Monitor circuit court lien collection rates and work with the those courts which are not collecting liens in an effort to increase lien collections.
- 4.3 Evaluate additional methods for collecting lien and promissory note amounts due and pursue legislation authorizing additional collection methods, if necessary.

## Auditee's Response

- 4.1 *As noted in the audit, MSPD already has plans underway to reach out to the judges in the one remaining circuit who routinely deny liens to determine their reasons and attempt to address them. MSPD will also be analyzing the role and legality of promissory notes in lieu of liens under the current statutory scheme as it moves forward with the larger evaluation and revamping of MSPD's lien and*



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*recoupment system. While the promissory notes are certainly simpler than the liens and do avoid the problem of judges who routinely deny liens, they are not specifically authorized in the statutes governing MSPD and that does raise some concern. MSPD has in recent years proposed some legislation that would have eliminated the lien requirement in favor of promissory notes across the board, but was unsuccessful in that effort.*

4.2 *MSPD has been attempting to determine the overall cost-effectiveness of court collections of public defender fees due to the number of logistical challenges involved, and will continue to work with this issue. Our leadership met with our counterparts in the OSCA in April 2012, to discuss some of these issues and all agree it is a more complex situation than simply encouraging them to increase their collection efforts. One of the problems is duplication of collection efforts which not infrequently results in duplicate collections: MSPD intercepts a payment through the state's debt offset fund and the court clerk also collects payment of the lien directly from the individual; a judgment has been satisfied, but MSPD's two fiscal clerks haven't yet gotten the final payment posted and so the court clerks are exacting yet another payment from the defendant who thought he had paid it off, but is now being told otherwise. The staff time involved in sorting out these duplications and getting the overpayment refunded is a drain on both MSPD staff and the court clerks time, not to mention hugely problematic to the individual living at or below the poverty line who has been twice-dunned. Court clerks are short-staffed in their own right and maintaining accurate paperwork for public defender fees is not high on their priority list. As a result, we often wind up getting payments without the necessary documentation for us to know what case it should be posted to; and the time involved in tracking it down is more expensive (in terms of staff time) than the \$12 or so payment that was received. For this reason, MSPD has in the past actually asked some courts NOT to collect liens, simply because the cost in staff time sorting out the issues it created was perceived as being greater than the value of the payments received. The move to time-tracking will allow us to determine if that perception is in fact an accurate one. In short, it is a complicated question. MSPD and OSCA have begun working on finding the best solutions and will certainly continue to do so.*

4.3 *MSPD is open to exploring cost-effective ways to improve collections from those who can afford to repay us, though the emphasis has to be on 'cost-effective' given the relatively small amounts at issue in each single case -- an average of \$181 per lien / promissory note as noted earlier in the report -- and "ability to pay." An example of this would be if MSPD is successful in*



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*obtaining access to state employment databases for purposes of data verification of indigence, we could also explore the possibility of identifying former clients reporting incomes above a level that would make additional collection efforts appear to be worthwhile.*

*However, the majority of our clients were, are, and are likely to remain indigent, since few people come out of the criminal justice system financially better off or more employable than they were going in; and for all of the reasons set out in the Brennan Center report described above, it is MSPD's opinion that aggressive collection efforts applied to indigent individuals are counterproductive to the overriding public policy goal of successful re-entry of defendants back into society -- the performance standard against which all of the criminal justice system ought to be evaluated.*

*If the only amount defendants had to repay was the small public defender fee under discussion here, it might be a different equation, but that is not at all the case. The number of fees piled on to each defendant going through the criminal justice system continues to grow and is reaching proportions that would be a struggle for even working, middle class citizens to repay without losing everything: jail board fees for pretrial incarceration that can run to thousands of dollars, hundreds of dollars more in court costs, restitution costs, prosecutor collection fees, law enforcement resource fees, probation and parole supervision fees, drug testing fees, mandatory treatment fees, extended payment plan fees . . . and public defender fees. The list is astronomical, with each of those separate fee stakeholders going after one very small pie with even more limited employment options. The effect is that the convicted felon who is already hugely disadvantaged in finding work is being hounded for amounts of money he can only dream of ever making. It doesn't take long for him to realize 'the straight life' is never going to get him ahead and that going back to selling drugs on the street corner is the only real option available for obtaining and keeping enough money to support himself and his family.*

*This is not good public policy and it is something that all agencies and departments involved in criminal justice need to be taking a long look at. We in state government have to look at the whole picture and adopt policies and procedures that will further, rather than harm, the overriding goal of reducing recidivism.*

*In upholding the Oregon statute imposing public defender fees, the U.S. Supreme Court in Fuller v. Oregon, deemed it constitutional only because it was "carefully designed to insure that only those who actually become capable of repaying the State will ever be*



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*obliged to do so. Those who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay." (Fuller v. Oregon, 417 U.S. 40 (1974), at 53)*

*MSPD has begun conversations about and hopes to pursue legislation that would address these issues by creating a single statewide entity charged with tracking and collecting all criminal justice debt so defendants will have one place to go to determine all that is owed and make payment arrangements based upon a realistic and individual assessment of actual ability to pay, instead of the myriad overlapping piecemeal collection efforts we currently have going on by so many different criminal justice entities that most defendants can't begin to keep up with what is owed to whom.*

## Auditor's Comment

- 4.3 State law requires the MSPD to file a lien for the reasonable value of services provided to each defendant, and the defendant to reimburse the MSPD for all or some of these services when he or she becomes financially able to do so. If the MSPD does not believe the state law is good public policy, the MSPD should work with the General Assembly to effect such changes to state law.

## 5. Conflict Cases

Policies and procedures regarding documentation and assignment of conflict cases are in need of improvement.

Conflict cases are those in which the attorneys or staff of the assigned district office have a conflict of interest in representing a defendant. Under the MSPD Guidelines for Representation Policy, Section 10-10-20-60, and Supreme Court Rule of Professional Conduct 4, an attorney cannot provide representation in cases that present a conflict of interest. Conflicts primarily arise on MSPD cases when the 1) MSPD represents co-defendants facing charges from the same incident and one or both defendants may offer evidence detrimental to the other's case, and 2) a defendant the MSPD previously represented becomes a witness or victim in an MSPD case.

MSPD policy memos provide that when a conflict exists for an attorney, the conflict exists for the entire district office. These cases are designated as "first level" conflict cases. Most conflict cases are first level conflict cases and are transferred to a neighboring district office (conflict office). When an attorney in the conflict office also has a conflict with the case (a "second level" conflict), the case is contracted to a private attorney. Conflict cases are approved by the District Defender of the originating office. During the 3 years ended June 30, 2010, the MSPD had approximately 10,700 conflict cases, excluding Capital Division conflict cases, or approximately 4 percent of MSPD caseload during that period. Approximately 83 percent of these conflict cases were transferred to the designated conflict office, and approximately 17 percent were contracted to private attorneys.



## 5.1 Documentation

The MSPD does not always adequately document conflict cases.

We reviewed documentation for 17 conflict cases from 14 district offices during the period November 2008 to June 2010. Documentation supporting the nature of the conflict and identifying the corresponding conflict case was not sufficient for two of these cases. For one of these cases, a second level conflict case contracted to a private attorney, documentation indicated the conflict involved another client represented by the MSPD and a conflict also existed with the designated conflict office. However, identification of the other client and the reasons for conflict in the conflict office were not documented. For the other case, a first level conflict case transferred to the designated conflict office, documentation indicated the conflict was with a "confidential informant" who the MSPD previously represented, but did not identify the informant or case.

MSPD procedures require attorneys to document information supporting conflicts of interest on conflict forms within the conflict and contract system. These forms contain fields to document a statement of conflict and the case and/or individual for which the conflict exists. Without sufficient documentation supporting conflicts of interest, the MSPD is unable to demonstrate conflicts exist and justify the need to transfer cases to another district office or contract attorney. Such documentation is also necessary for MSPD officials when approving conflict cases and authorizing additional costs associated with conflict cases.

## 5.2 Conflict case assignments

MSPD policy which requires automatic transfer of conflict cases to another district office or contract attorney may unnecessarily cause inefficient use of MSPD resources. When conflict cases are transferred to another district office, the MSPD often incurs additional costs associated with travel to represent these cases. Additionally, contracting conflict cases to private attorneys results in additional costs for attorney fees. These transfers/contracts are generally made without considering more cost-effective options such as assigning the conflict case to another attorney within the district office and screening (isolating) the attorney from participation in matters related to the conflict.

Each district office has one or more attorney(s) whose primary responsibility is to represent conflict cases transferred from other district offices. Because attorneys representing conflict cases must travel outside their own district to represent these cases, they generally spend more time traveling and incur more travel costs than an attorney from the originating district office would spend/incur. This additional travel results in less attorney time available to represent cases and increased travel expenses. One attorney, whose caseload consisted of nearly all conflict cases, received mileage reimbursements totaling approximately \$12,900 during fiscal year 2010.



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MSPD Memos to the Guidelines for Representation Policy, Section 10-10-20-60, effective December 2010, provide that when an attorney has a conflict with a witness or a victim, that conflict exists for the entire office. Furthermore, in 2010 MSPD directors orally informed District Defenders to routinely treat all cases involving co-defendants as if a conflict of interest exists, and transfer those conflict cases for disposition. MSPD officials indicated these policies/directives were established because they determined the ethical and practical problems created by co-defendant representation by the same office had become an unacceptable risk for the MSPD.

Supreme Court Rule of Professional Conduct 4-1.7, generally prohibits a lawyer from representing a defendant if 1) the representation involves a conflict of interest whereby representation of one defendant will be directly adverse to another defendant or 2) representation of one defendant will be limited by the lawyer's responsibilities to another defendant or third person. The MSPD should reevaluate its current policy and directives which require automatic transfer of conflict cases to other district offices or contract attorneys and analyze more cost-effective alternatives. The MSPD should consider adopting criteria to determine the most appropriate and cost-effective assignment of each conflict case. The nature of each conflict should be evaluated to determine whether the case can be assigned within the office and the appropriate attorney screened from participation in matters related to the conflict. If ethical screening is not possible or practical, the MSPD should evaluate additional criteria when determining whether the case should be transferred to the designated district office or contracted to a private attorney. Such criteria should include the type of case, expected disposition, location of the defendant and court, and current caseload of the conflict office.

## Recommendations

The MSPD:

- 5.1 Ensure adequate documentation supporting conflict cases is maintained.
- 5.2 Reevaluate conflict of interest policies and adopt criteria to determine the most appropriate and cost-effective assignment of each conflict case.

## Auditee's Response

- 5.1 *MSPD agrees that documentation supporting the conflict should be maintained and will educate its attorneys on the availability of a secure section in the conflict database where confidential information can be recorded that will not be forwarded to or accessible by the receiving office.*
- 5.2 *MSPD did not adopt its policy of automatically conflicting out co-defendant cases lightly, nor is it unaware of the burden this policy places upon offices and attorneys who must travel to adjoining*



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*counties to handle the number of corresponding conflicts coming into their offices. However, the policy was vetted by the entire MSPD management team and then re-evaluated by all District Defenders across the state at a defender management meeting after it had been in place for a time to determine if those on the ground, carrying that burden, believed it was still the best policy. They overwhelmingly did. It is the cleanest way possible to handle conflict cases. Any time there are co-defendants in a criminal case, there is a possibility of one of them making a deal to testify against the other. That possibility cannot even be broached by an attorney who represents them both because it would be adverse to the interests of the other co-defendant who is also the attorney's client. Co-defendants frequently do not realize their interests are different until the matter has been fully explored and explained to them by an attorney, but when both are represented by the same attorney, that exploration is never performed and the explanation of other options is never forthcoming, setting up exactly the type of conflict envisioned in Supreme Court Rule of Professional Conduct 4-1.7, cited in the audit.*

*MSPD does not believe that these kinds of conflicts could ethically be addressed by assigning the two co-defendants to two separate lawyers within the same office and attempting to screen them from one another. Supreme Court Rule 4-1.10, Imputation of Conflicts of Interest, states:*

*"While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 4-1.7 [Conflict of Interest: Current Clients] or 4-1.9 [Duties to Former Clients] unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."*

*In the commentary to the above rule, it states:*

*"Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated."*

*MSPD does agree that it would generally be more cost-effective to contract these conflict cases out to a private attorney located in the same venue as the cases themselves, rather than assigning them to another trial office one or even several counties away. At this point, MSPD lacks sufficient contract funds to do so. For the last several*



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*years, MSPD has requested additional contract funds from the legislature for this purpose. Some increases in contracting funds have resulted, but not yet enough to contract out all first level contracts. MSPD will continue to pursue this goal.*

## 6. Contract Attorneys

The MSPD does not adequately monitor or adequately document the selection process of contract attorneys.

The MSPD contracts with private attorneys to provide representation for certain cases, primarily second level conflict and caseload relief cases. Contract attorneys are paid based on a fee schedule, with amounts ranging from \$375 for a probation violation or misdemeanor case to \$10,000 for a first degree murder case. The fee schedule provides for additional compensation for cases resolved by trial. According to an MSPD official, the fee schedule amounts are generally based upon an hourly rate of \$75 and the number of attorney hours needed per case type per MSPD caseload protocol. Additionally, contract attorneys are reimbursed certain travel expenses. Any litigation expenses (costs of expert witnesses, depositions, transcripts, investigations) are not included in the contract attorney fee, but are paid directly to the vendor by the MSPD.

During the 3 years ended June 30, 2010, almost 5,000 cases were contracted to private attorneys, representing approximately 2 percent of MSPD caseload during that period. Contract attorneys were paid approximately \$1.5 million, \$1.4 million, and \$1.8 million, during fiscal years 2010, 2009, and 2008, respectively. In fiscal year 2010, payments ranging from \$162 to \$58,650, excluding travel cost reimbursements, were made to almost 200 private firms.

### 6.1 Monitoring procedures

The MSPD does not track or monitor dispositions of cases handled by contract attorneys, including liens filed for costs of services rendered to defendants. MSPD records, as of March 2011, contained no disposition or lien information for approximately 3,600 (72 percent) of the approximately 5,000 cases contracted to private attorneys during the 3 years ended June 30, 2010. We reviewed 190 of these cases on Case.net, Missouri Judiciary's portal of public case information, noting at least 116 cases had been disposed as of June 13, 2011 (public information was not available on Case.net for 60 of these cases). Case.net contained lien information totaling approximately \$14,800 for only 36 of the 116 disposed cases. MSPD officials indicated MSPD records lacked disposition and lien information because contract attorneys often fail to report this information to the MSPD.

MSPD engagement letters require contract attorneys to file a lien upon case disposition, submit a copy of the lien to the MSPD, and inform the MSPD of the case disposition or outcome. The MSPD transfer attorney enters information received into the conflict and contract system which is subsequently uploaded to the Lien and Recoupment system. Without



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ensuring disposition and lien information is received from contract attorneys and entered into the conflict and contract system, there is less assurance MSPD systems contain complete and accurate information, and engagement letter terms and compliance with MSPD collection procedures cannot be monitored.

## 6.2 Selection process

The MSPD did not maintain adequate documentation of the selection of contract attorneys. Of seven contracts reviewed, no documentation of the selection process was maintained for six contracts. For the remaining contract, MSPD officials located an email sent to several private attorneys; however, additional documentation of the selection process, including responses received and reasons for selecting the contract attorney, was not maintained. Although MSPD Contract Case Procedures Policy 50-60-10-5, outlines procedures for selecting contract attorneys, alternative procedures have been followed in recent years and the policy has not been updated.

MSPD officials indicated they often have difficulty locating private attorneys willing to provide representation at the MSPD established fees. As a result, various processes for selecting contract attorneys have been used during recent years. During fiscal years 2008 and 2009, when the MSPD received increased appropriations to contract with private attorneys for caseload relief, the MSPD solicited private attorneys through Missouri Bar publications. Multiple-case contracts were awarded to interested attorneys in the districts in need of caseload relief. An official indicated the MSPD generally contracted with all interested attorneys as the need exceeded the interest. Beginning in 2010, private attorneys were generally solicited by sending an email to previous contract attorneys in applicable districts, and selecting the first attorney to respond to the email. Additionally, some private attorneys were selected to represent certain cases without conducting a selection process because MSPD officials believed they were the most qualified attorneys in the applicable area. In August 2011, the MSPD contracted with five regional contract coordinators to select and monitor contract attorneys in their area. Under this new process, regional coordinators solicit private attorneys for inclusion on a panel of attorneys available to represent cases in each district and assign cases to panel attorneys on a rotating basis.

Adequate documentation of contract attorney selection processes is necessary to demonstrate sufficient procedures were performed and support decisions made. Such documentation should include a list of attorneys solicited for services, responses received, and the reasons the attorney was selected. Since contract attorney selection procedures have been assigned to regional coordinators, procedures should be established to ensure the coordinators maintain adequate documentation. The policy regarding contract attorney selection should be revised to reflect these procedures.



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## Recommendations

The MSPD:

- 6.1 Establish procedures to track and monitor dispositions of cases handled by contract attorneys. Such procedures should ensure contract attorneys fulfill engagement terms including filing liens.
- 6.2 Establish procedures to ensure adequate documentation supporting the selection of contract attorneys is maintained, and update the contract attorney selection policy as needed.

## Auditee's Response

- 6.1 *This has already been changed, as part of the revamping of MSPD's contracting system in 2011. A case disposition form is now required from each contract attorney at the close of a case, along with a copy of the signed lien form. Final disbursement of expense costs is not made until these items are received. Additionally, each month contracting staff checks contracted cases older than 6 months against Case.net to verify they have not yet been disposed. If the case does turn out to have been closed, the panel attorney is contacted to get the case disposition and lien forms. Those who repeatedly fail to submit these items are removed from the Panel Attorney list.*
- 6.2 *MSPD has changed the way it selects contract counsel since the period of this audit (fiscal years 2008-2010). We now have a list of panel attorneys who have applied to take certain types of cases within a particular circuit, who go on a rotation list. Using our contract attorney database, a regional contract coordinator seeking counsel for a case will select the county in which the case is located and pull up a list of attorneys residing in that county who have agreed to take that particular type of case. The database automatically tracks who has received cases and rotates the list so that the first name on the list is the next one 'up' in the rotation. That attorney will normally receive the case assignment. There are exceptions – e.g. where the case is especially complex and requires a particular expertise, the contract coordinator may skip over the next attorney 'up' and select one with the needed expertise. Where the usual rotation is not followed, we are instituting the expectation that contract coordinators document their reasons for making an alternate selection.*

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## 7. Professional Consultants

The MSPD needs to strengthen procedures for selecting and monitoring professional consultants to ensure payments to consultants are reasonable.

The MSPD engages various professional consultants for the defense of some cases. These consultants provide various services including recording of depositions, mental health evaluations, and forensic testing. During the 3 years ended June 30, 2010, the MSPD made payments to professional



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consultants in over 6,000 cases. Expenditures for these services totaled approximately \$2.4 million, \$2.6 million, and \$2.3 million during the years ended June 30, 2010, 2009, and 2008, respectively.

## 7.1 Selection procedures

MSPD attorneys did not always solicit bids or use state contracts for court reporting services or maintain documentation supporting the selection of other professional consultants.

### Court reporters

Bids were not always obtained or state contracts used for court reporting services when the vendor was paid in excess of \$1,000 during the applicable fiscal year. Annual payments per vendor ranged from less than \$100 to \$127,000 during the 3 years ended June 30, 2010.

Our review of seven court reporter engagements totaling \$29,359, noted no documentation of the selection process was maintained for five engagements. For three of these engagements where there was a state contract in the applicable area, the MSPD paid the vendors in excess of state contract rates as noted below:

- For one engagement, the MSPD paid a vendor \$1,558 during May and June 2010 for four deposition transcripts. The MSPD paid the vendor \$4.25 and \$5.75 per page which exceeded the \$3.50 state contract rate in the applicable area. An MSPD official indicated the higher \$5.75 rate was paid for one transcript because the transcript was needed on an expedited basis; however, this reason was not documented.
- For two other engagements, vendors were paid \$4.25 to \$5.90 per page for normal deliveries and \$5.50 per page for expedited deliveries. The applicable state contract rate was \$3.50 per page for normal deliveries and \$4.90 per page for expedited deliveries. The District Defender in the office which represented one of these cases provided us copies of January 2008 email communications with another District Defender regarding the need to negotiate lower rates with the existing vendor and/or use the state contract vendor. Although we noted reductions in the rates charged by the vendor subsequent to those emails, the lower rates still exceeded the state contract rates.

MSPD officials stated court reporters are generally selected based on location, availability, rates, and previous work experience with the MSPD. They also indicated vendors sometimes offer the MSPD discounted rates which are lower than state contract rates. The state contract for court reporting services, effective May 2009 to April 2012, included 7 vendors covering 41 counties and the city of St. Louis. The state contract rate for transcripts of deposition with normal delivery ranged from \$3.25 to \$3.60 per page. Previously, the state contract included 4 vendors and covered 34 counties and the city of St. Louis.



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MSPD Purchasing Policy, Section 50-40-20-50, requires items or services costing more than \$1,000 be bid or state contracts used. When soliciting bids, the policy requires that three potential vendors be contacted, bids be obtained and documented, and the reasons for selecting a particular vendor be documented. Competitive bidding and/or use of state contracts helps ensure the MSPD receives fair value by contracting with the lowest and best bidders and also ensures all interested parties are given an equal opportunity to participate in state business. If other than the lowest bid or state contract is selected, the reasons should be adequately documented.

## Experts

The MSPD did not always prepare and retain documentation supporting the selection of various experts, such as expert witnesses and other litigation consultants. We reviewed 16 expert engagements with payments totaling \$180,416. For 10 of the 16 engagements reviewed, MSPD did not maintain documentation of the selection process, such as the method/criteria used, other experts considered, and the reasons for selecting a particular expert. Payments for these 10 engagements totaled \$94,229, ranging from \$1,000 to \$19,725 per expert.

MSPD policies and procedures do not require attorneys to maintain documentation supporting the selection of experts. The MSPD should revise the Professional Expense Request form to contain a field for attorneys to document the selection of experts, including method/criteria used, other experts considered, and the reasons for selecting a particular expert.

## 7.2 Monitoring procedures

The MSPD lacks sufficient procedures to monitor payments to professional consultants. Agreed-upon payment terms were not always adequately documented in expert retention letters and/or encumbrance requests. As a result, contractor payments could not be properly monitored. In addition, the expert database lacks sufficient data needed to ensure payments to professional service consultants are reasonable.

Based on past experience with professional consultants, MSPD attorneys negotiate rates and determine a maximum payment amount for each engagement. This amount, along with other engagement information including the type of service, expert name, specialty, any previous service on the case, and reason for the services, is to be documented on an encumbrance request form in the Case Management System. The encumbrance request form is reviewed and approved by the District Defender, and encumbrance requests for litigation expenses exceeding \$500 are also approved by the Division Director. Once approved, the attorney is to prepare and submit a retention letter to the consultant outlining the terms of the agreement and the maximum payment amount. MSPD Professional Expense Request Policy, Section 50-20-20-20, provides that professional consultants cannot begin work until the encumbrance request is approved, and payments to consultants cannot exceed the encumbrance amount without additional approval. A supplemental encumbrance request may be



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prepared and approved when it is determined actual expenditures will exceed the original encumbrance amount. Professional consultant invoices are reviewed and approved by the attorney and District Defender and processed for payment by support staff in the MSPD central office. Our review of expert retention letters, encumbrance requests, and the expert database, noted the following:

- An expert retention letter was not prepared for 1 of 16 expert engagements reviewed. MSPD Case Management Policy, Chapter 1, Title 271, requires an expert retention letter be used each time an attorney contracts with an expert or other vendor, except court reporters. An expert retention letter template is available on the Case Management System. In addition, while expert retention letters were prepared for 15 engagements reviewed; a new or revised retention letter was not prepared for 5 of the 9 engagements which exceeded the maximum approved payment amount. Although supplemental encumbrance requests, authorizing additional maximum payment amounts, were prepared for these engagements, the additional maximum payment amounts were not documented in any correspondence to the expert.
- Eight of the 15 expert retention letters prepared did not contain the agreed-upon hourly rate and number of hours the expert would bill for services. The expert retention letter template which requires inclusion of the agreed-upon hourly rate was not used, and the payment requirements included in these letters were generally limited to maximum payment amounts, which ranged from \$1,000 to \$15,000, and travel expense reimbursement rates. In addition, related encumbrance requests, which listed the same maximum payment amounts, lacked the hourly rate and expected number of hours for six of these engagements. These experts were paid from \$125 to \$300 per hour. In March 2008, MSPD directors sent a memo to District Defenders requiring that encumbrance requests include the agreed-upon hourly rates; however, three of the six encumbrance requests lacking this documentation were prepared and approved after this date.
- Deposition request letters were not prepared for any of the seven court reporter engagements reviewed and related encumbrance requests lacked agreed-upon rates. A deposition request letter template for these engagements is available on the Case Management System; however, the letter does not require inclusion of the agreed-upon rates and was not prepared for the engagements reviewed. In addition, MSPD policies and directives do not require that court reporter encumbrance requests include the agreed-upon rates.
- Professional service consultant rates are not recorded and tracked on the MSPD expert database. To assist attorneys in consultant selection, the



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MSPD maintains an expert database containing information regarding nearly 700 professional consultants.

Without preparing and maintaining sufficient documentation supporting professional service engagements and monitoring those engagements, the MSPD cannot ensure all payments to professional service consultants are reasonable and proper. Sufficiently detailed retention letters are necessary to ensure all parties are aware of their duties and to clarify all compensation allowed. Sufficiently detailed encumbrance requests are necessary to provide MSPD supervisors the information needed to review and approve encumbrance requests and ensure consultants are engaged at reasonable rates. The MSPD should develop procedures to ensure retention letters and encumbrance requests which include agreed-upon rates and expected hours are prepared for all professional service consultant engagements and that payments are in accordance with these letters and encumbrances. If payments are not in accordance with the retention letter and encumbrance request, written documentation explaining the differences should be prepared and retained. In addition, the MSPD should consider enhancing the expert database by documenting and tracking professional consultant rates and utilizing this rate information when negotiating rates for engagements.

## Recommendations

The MSPD:

- 7.1 Solicit bids or use state contracts for court reporting services and document the reasons for selecting the vendor. In addition, the MSPD should maintain documentation supporting the selection of other experts.
- 7.2 Ensure retention letters and encumbrance requests, which include agreed-upon rates, are prepared for all professional service consultant engagements and that payments are in accordance with these letters and encumbrances. In addition, the MSPD should consider enhancing the expert database by documenting and tracking professional consultant rates and utilize this information during engagement negotiations.

## Auditee's Response

- 7.1 *Court reporters: MSPD has taken steps to comply with this recommendation. On September 3, 2012, MSPD provided a copy of the state contract for court reporting services to the head of each district office and established the expectation that the rates therein should not be exceeded except in special circumstances (e.g. unavailability of a reporter at that rate or need for an expedited transcript), in which case the details of those circumstances should be documented in a memo to file and attached to the bill when it arrives. The topic was also added to the agenda for a support staff training program scheduled for September 13, 2012, since they are*



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*generally the ones who make the arrangements for the court reporters.*

*Other experts: MSPD will need to explore the most efficient way to do this. Generally, the Division Directors reviewing requests for funds for experts will ask why a particular expert is needed if the cost of that expert exceeds the norm for the type of service being provided, and those are easily recorded in the encumbrance database. However, the request for approval of funds to hire an expert frequently comes before a particular expert is selected because the attorney needs to ensure they can hire an expert before they go contacting one. Once that encumbrance request is approved, the submitting attorney can no longer edit it to provide information about the particular expert that is chosen, so MSPD will need to explore the best way to address this recommendation – whether it should be through a programming change to the encumbrance database or expectations that this be recorded in a memo to the electronic case file or some other manner. We will certainly look into it.*

7.2 *MSPD agrees that expert retention letters need to include agreed-upon rates and that payments should not exceed the terms of the agreement. We will explore ways to reinforce that expectation with attorneys. Requiring rates to be recorded in the encumbrance database may prove more problematic due to the reasons stated above. While encumbrance request approvals set a cap on expenditures based on what a particular service typically can be expected to cost, the attorney may not yet have selected a particular expert at the time the request is submitted; and once the encumbrance request is approved, the submitting attorney can no longer edit it. As indicated above, we will look into what changes would be needed to make that workable and determine the best course for implementing the goal of adequate documentation.*

*MSPD agrees that making information available concerning contract rates of various experts for frequently-used services to assist attorneys in their fee negotiations is an excellent idea. We will explore the most efficient way to make that information available, whether that is through the expert database or some other method.*

## 8. Transcripts on Appeal

State law requiring the MSPD pay for transcripts on cases under appeal may result in excessive and unnecessary costs to the state.

Transcripts of court proceedings are normally prepared only when a case is appealed. For appealed cases in which the court determines the defendant is unable to pay for the transcript of the circuit court proceedings, Section 488.2250, RSMo, requires the state (MSPD) to pay the court reporter to



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prepare and make three copies of the transcript. The statute provides that, upon approval by the court, the court reporter, a salaried court employee paid by the state, be paid \$2 per page for the transcript, and 20 cents per page for copies of the transcript. During the years ended June 30, 2010, 2009, and 2008, the MSPD opened approximately 930, 900, and 720 appeals cases, respectively. During this time period, court reporters were paid approximately \$600,000, \$515,000, and \$350,000, respectively, for transcripts on appeal. Approximately 600 court reporters were paid from \$12 to \$18,200 for these services during fiscal year 2010.

We reviewed payments totaling \$9,554 to two court reporters for transcripts on appeal for six cases. For three of these cases, three defendants who had been tried together in the circuit court, appealed their case. The MSPD paid the court reporter \$2,814 for the original transcript and \$3,095 for 11 copies. For the other three cases reviewed, the court reporter was paid \$2,804 for three original transcripts and \$841 for three copies of each transcript.

MSPD officials indicated the original transcript is filed with the appellate court and copies are typically provided to the circuit court, the applicable MSPD appellate attorney, and prosecutor. MSPD officials indicated an electronic copy of the transcript is also typically received and any additional copies are made by MSPD employees. An MSPD official indicated the appellate courts are beginning to accept electronic transcript filings, eliminating the need for the appellate court copy; and that the MSPD could likely make copies of the transcripts at a lower cost than they are required to pay the court reporters.

While Section 600.096, RSMo, requires that any office or political subdivision of the state shall furnish copies of any reports, documents, statements or transcripts prepared by the state or political subdivision concerning a person represented by the MSPD without charge; Section 488.2250, RSMo, appears to conflict with this statute and provides compensation to court reporters, who are employees of the state.

Due to the significant costs associated with transcripts on appealed cases, an evaluation of these costs and the statute that requires the costs appears necessary. Such evaluation should determine the extent the state is paying court reporters in addition to their state salaries and whether these additional payments are reasonable and necessary.

## Recommendation

The MSPD work with the General Assembly to evaluate costs associated with transcripts on appeal and the statute that requires the state incur these costs.

## Auditee's Response

*MSPD has begun this conversation and will continue to work toward a more cost-effective arrangement.*



## 9. Employee Travel Costs

Improvements are needed to ensure employee travel time and costs are minimized.

MSPD employees, primarily attorneys and investigators, travel for court appearances, consultations with defendants, interviews with witnesses, other case activities, and to attend periodic MSPD workshops and training. Employees often make their own travel arrangements and utilize their personal vehicles. Mileage, meals, and certain other travel costs are typically paid by employees and reimbursed by the MSPD on a monthly basis, and lodging costs are typically paid directly to vendors. Travel expenditures (including contract attorney and other professional consultant travel costs estimated at \$100,000 annually) totaled approximately \$1.7 million, \$1.7 million, and \$1.6 million during the years ended June 30, 2010, 2009, and 2008, respectively. Mileage reimbursements, which exceed \$1 million each year, account for most travel costs. These amounts do not include the costs associated with employee time spent traveling.

### 9.1 Travel time

A comprehensive analysis of employee time spent traveling has not been performed to identify ways to reduce travel costs and increase employee productivity.

MSPD attorneys and investigators spend a significant amount of time traveling. Such travel time is expensive and impacts the amount of employee time available to work on cases. While the MSPD tracks employee mileage reimbursements and uses that information to estimate employee travel time for caseload protocol calculations, the MSPD has not analyzed the data to identify inefficiencies and ways to increase productivity. In addition, because MSPD does not require employees to track time worked, the actual time and costs associated with employee travel is unknown (see MAR finding number 1).

#### Travel related to representing cases

According to MSPD records, MSPD staff drove over 2 million miles in fiscal year 2010. Based on mileage data and MSPD caseload protocol assumptions, MSPD Trial and Appellate Division attorneys spent an estimated 8 hours per month traveling. The estimated average travel hours per attorney varies greatly between district offices, ranging from 1 to 25 hours per month per attorney.

Employees in those offices with the largest geographic size and Trial Division employees assigned to conflict cases in other district offices generally spend the most time traveling.

- The geographical size of Trial Division districts ranges from 1 to 11 counties, with 3 to 5 counties being the average. Most Trial Division districts with the lowest estimated attorney travel time cover only 1 large county or city circuit court, while the Trial Division District 43 (Chillicothe) office with an estimated 25 hours of travel time per month



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per attorney covers 11 counties. The location and jurisdiction of each district office is established by the Public Defender Commission. MSPD officials indicated a comprehensive review of district areas has not been performed in recent years, but they evaluate these areas individually as office leases expire. MSPD officials indicated changes to district areas is challenging for various reasons including lease periods which vary by district, the impact on county finances, and relocation of staff.

- Capital Division office employees often spend significant amounts of time traveling because there are only three Capital Division offices (St. Louis, Columbia, and Kansas City); capital cases are not always assigned to the nearest office; and representation on capital cases often takes more than 1 year. We noted 8 of the 39 trial death penalty cases opened by the Capital Division during the 3 years ended June 30, 2010, were not assigned to the nearest Capital Division office. An MSPD official indicated capital cases are not always assigned to the closest Capital Division office due to caseload or conflict issues and attorney experience.
- The three Civil Commitment Defense Unit (CDU) attorneys defend sexually violent predator civil commitment cases statewide. These attorneys, who are located in district offices in Kansas City and St. Louis, travel extensively.
- Approximately 3,000 conflict cases are transferred to another district office each year. Attorneys handling these conflict cases must travel to the originating district, incurring additional costs than had the case been handled by the originating district (see MAR finding number 5).
- MSPD Guidelines for Representation Policy, Section 10-10-20-60, requires trial attorneys to maintain at least monthly contact with each defendant. Often these contacts are by personal visit to defendants held in county jails or state correctional facilities since confidential communications by telephone are generally not available for those defendants. Some of those defendants are held in correctional facilities outside the district because they were relocated by the Department of Corrections. As a result, attorneys sometimes spend significant amounts of time traveling to meet with those defendants.

MSPD officials indicated some courts now allow MSPD to meet with defendants via videoconference; however, they indicated there is some concern regarding the security and confidentiality of information shared in this manner. In addition, they indicated some courts now conduct some hearings via videoconference, reducing costs associated with transporting defendants from correctional facilities to courts. Since MSPD attorneys accompany defendants at all court hearings, the MSPD does not always



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incur a savings and sometimes incurs more travel costs when the correctional facility is farther away than the court.

**Travel to monthly meetings** Certain employees are required to travel to monthly MSPD meetings. For example, Division Directors from offices in Kansas City, Columbia, and St. Louis, travel to monthly Director meetings and CDU attorneys travel to monthly unit meetings. MSPD officials indicated they have recently begun exploring alternative methods of conducting certain meetings such as conference calls or videoconferences.

**Travel analysis** A comprehensive analysis of employee travel time would help identify inefficiencies and facilitate further analyses of ways to reduce travel costs. Potential means of reducing employee travel time include videoconferences, telephone interviews, and other uses of technology. The MSPD should work with correctional facilities and courts to identify acceptable methods of communication with defendants that do not require extensive MSPD employee travel.

**9.2 Travel expenditures** Improvement to MSPD travel policies and procedures are needed. Although the MSPD has established meal reimbursement limits which are generally more restrictive than state per diem rates, similar procedures have not been established to minimize other travel costs including mileage and lodging.

**Method of travel** Guidelines for determining and using the most cost effective mode of travel have not been established. MSPD staff primarily travel in personal vehicles and receive reimbursements at the rate allowed by the Office of Administration. During the audit period through the present time, mileage reimbursement rates have ranged from 50 cents (fiscal year 2010) to 37 cents (fiscal year 2012) per mile.

Although often a more cost effective mode of travel, MSPD staff seldom use rental vehicles. Our review of expense reimbursements totaling \$27,750 for 18 employees noted at least 8 trips in which employee mileage reimbursements significantly exceeded the cost of renting vehicles. For each of these trips, state contracted rental vehicle vendors had several locations within the city of departure. The extra costs incurred for these 8 trips, not considering other factors such as employee time associated with renting the vehicle, ranged from approximately \$120 to \$300 per trip. For example, a St. Louis Capital Division investigator was reimbursed \$330 for 660 miles traveled on a 1-day trip in October 2009 while the estimated cost of renting a vehicle on state contract was \$130 (a savings of approximately \$200). An MSPD official indicated rental vehicles are not utilized because the MSPD lacks sufficient staff to administer a vehicle rental program and rental vehicle businesses are not always located in cities where MSPD offices are located. However, our review noted state contracted vehicle rental businesses are located in 20 of the 33 cities where MSPD offices are located.



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The statewide vehicular travel policy (SP-12) provides that state "employees must utilize the most cost effective travel option when traveling on state business. All relevant factors such as the: urgency; nature of travel required; type of vehicle required for the number of passengers, tool or equipment load; employee time and effort; official domicile; proximity to rental or state vehicles; and other administrative costs should be considered when selecting the most cost effective travel option." The policy explains that "in most circumstances, state vehicles or rental vehicles are more cost effective than personal mileage reimbursement." Furthermore, the policy provides that "state agencies are expected to establish sufficient controls to ensure travel expenses are minimized to the fullest extent possible." In an effort to reduce travel costs and ensure compliance with statewide policies, guidelines for determining the most cost effective and reasonable mode of travel should be established and followed.

### Lodging

Employees often make lodging reservations without performing price comparisons or other procedures to ensure lodging costs are reasonable. MSPD Travel Reimbursement Policy, Section 50-10-20-27, simply requires employees to ask for the state government rate when making lodging reservations. Lodging costs (including costs incurred by contract attorneys and other professional consultants) totaled approximately \$278,000, \$285,000, and \$238,000 in fiscal years 2010, 2009, and 2008, respectively.

Some lodging costs reviewed exceeded Continental United States (CONUS) rates (federal employee per diem maximums, established by the U.S. General Services Administration). Nine of the 18 employee expense reimbursements reviewed, contained 32 overnight trips (lodging costs were paid directly to vendors for 30 trips and reimbursed to employees for 2 trips). Lodging costs for 11 of the 32 trips exceeded CONUS rates by \$10 to \$39 per night. For example, lodging costs of \$109 were paid for a 1-night trip to Jefferson City, Missouri, in March 2009 while the CONUS rate was \$70. In addition, our review of some lodging invoices related to one case noted lodging rates exceeded CONUS rates for most nights. We reviewed lodging costs totaling \$7,344 incurred by four St. Louis Capital Division employees who traveled to Kansas City during June 2007 to March 2008. Lodging rates varied from \$70 to \$127 per night for one hotel and \$96 to \$189 per night for another hotel, while the CONUS rate was \$96 and \$103 during this time period. The second hotel billed nine different nightly rates on the invoices reviewed. MSPD officials indicated these hotels were selected based on location and size of meeting and work space; however, documentation of these considerations was not maintained.

In cities where multiple hotels or motels are located, lodging can often be procured at rates less than CONUS rates. The statewide travel policy (SP-6) requires that "in areas where comparable accommodations are available at significantly different prices you should seek prior approval before selecting higher priced lodging and document the reasons for selecting the higher priced lodging. Key issues that determine hotel acceptability to the State



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include accountability, transparency, price, safety, convenience, ease of booking and payment, oversight and issue resolution." The policy also provides that CONUS rates should be used as a benchmark when evaluating lodging costs. Procedures which require performing price comparisons and ensuring rates do not exceed CONUS rates are necessary to demonstrate compliance with statewide policies and ensure lodging costs are reasonable. Documentation should be maintained to support any lodging expenses which exceed CONUS rates.

## Recommendations

The MSPD:

- 9.1 Perform a comprehensive analysis of employee travel time and associated costs and work with the courts and correctional facilities to identify ways to reduce travel costs.
- 9.2 Establish guidelines for determining the most cost effective and reasonable mode of travel, and require employees to perform price comparisons and ensure rates do not exceed CONUS rates when making lodging arrangements. Documentation should be maintained to support any expenses which exceed amounts provided by the guidelines and policies.

## Auditee's Response

- 9.1 *A comprehensive analysis of employee travel time will be performed as part of the revisions to the caseload protocol, which includes travel time as a key category; and MSPD will continue to look for ways to reduce travel costs. We have been successful in pursuing the availability of videoconference client communications for the CDU attorneys who have to travel across the state to meet with their clients in Farmington. In addition, the MSPD Director met with the Director of the Department of Corrections last month to discuss, among other things, the increased costs MSPD incurs when public defenders have to travel to a facility for a video plea/proceeding (because the client is entitled to private consultation with counsel during such proceedings and there is not a simultaneous private and public video link available). The Department of Corrections was sympathetic, but unable to offer any additional solutions. MSPD recognizes that many of these travel costs may simply not be changeable, but will continue to engage both the Department of Corrections and the courts in the ongoing exploration of options.*
- 9.2 *MSPD agrees. Systemic attempts to reduce mileage costs were begun last year when, in September 2011, MSPD entered into a contract with rental vehicle vendor to direct-bill employee travel. At that time, the following was added to the policies and procedures database and circulated to all offices:*



Missouri State Public Defender  
Management Advisory Report - State Auditor's Finding

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*Assuming the average vehicle is able to get about 20 miles per gallon and the cost of gas is \$3.50 – the state break-even mileage is approximately 135 miles in a one day trip or 275 miles in a two day trip. There may be special circumstances where a rental vehicle is appropriate even when the break-even point is not reached. Employees and District Defenders should identify mileage where rental cars may reduce costs.*

*We have seen an increase in the use of rental cars since this change went out, but agree that more could and should be done in this area, taking into account the additional time involved in obtaining and returning rental cars and recognizing that it may not always be feasible for that reason. MSPD will also reinforce the need to comply with CONUS rates where possible and establish expectations requiring the documentation of reasons for expenses incurred in excess of CONUS rates.*

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# Missouri State Public Defender

## Organization and Statistical Information

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The Missouri State Public Defender (MSPD) was created in 1972, under an act of the General Assembly. The MSPD has three legal services divisions: the Trial Division which is responsive to the trial courts in Missouri's 115 jurisdictions, the Capital Division which is responsible for death penalty trial representation, and the Appellate/Post-Conviction Relief (PCR) Division which is responsible for appellate and post-conviction litigation. These divisions are located in 36 district offices, 3 capital sections, and 6 appellate/PCR sections. The capital and appellate/PCR offices are located in Kansas City, Columbia, and St. Louis.

Section 600.042.4, RSMo, requires the MSPD provide legal services to an eligible person:

- (1) Who is detained or charged with a felony, including appeals from a conviction in such a case;
- (2) Who is detained or charged with a misdemeanor which will probably result in confinement in the county jail upon conviction, including appeals from a conviction in such a case;
- (3) Who is detained or charged with a violation of probation or parole;
- (4) Who has been taken into custody pursuant to Section 632.489, RSMo, including appeals from a determination that the person is a sexually violent predator and petitions for release, notwithstanding any provisions of law to the contrary;
- (5) For whom the federal constitution or the state constitution requires the appointment of counsel; and
- (6) For whom, in a case in which he faces a loss or deprivation of liberty, any law of this state requires the appointment of counsel; however, the director and the defenders shall not be required to provide legal services to persons charged with violations of county or municipal ordinances.

The MSPD opened 84,616 new cases during the year ended June 30, 2010.

### History of the MSPD

The Public Defender System was created by authority of Chapter 600, RSMo, enacted by the General Assembly in 1972. The system provided for the establishment of full-time public defender offices in 20 judicial circuits and payment to appointed counsel in the remaining judicial circuits. In 1976, the Public Defender Commission was created to oversee the system. In 1982, the system was again amended with the creation of the MSPD as an independent department of the Judicial Branch of state government. Legislation further outlined the legal services to be provided to eligible persons entitled to counsel, gave the MSPD authority to issue indigence determination guidelines, and provided for the collection of costs associated with defending a person. The MSPD was also allowed to contract with private attorneys to provide defense services in those areas of the state they deemed appropriate, thus eliminating the old system where judges appointed private counsel in those areas of the state where public defenders were not available. By 1987, the MSPD had 23 offices and the remainder of the state was served by contract counsel. In April 1989, the MSPD received funding



Missouri State Public Defender  
Organization and Statistical Information

to reorganize the department and establish additional public defender offices to provide representation in all areas of the state.

**Public Defender Commission** The responsibility of the operation and administration of the MSPD is vested in a seven-member Commission. The members, four of whom must be lawyers, are appointed by the Governor with the advice and consent of the Senate, and serve 6-year terms. The members of the Commission as of June 30, 2010, were as follows:

Appointed Members	Term Expires
Eric Barnhart, Chair	December 30, 2011 (1)
Muriel Brison, Vice-chair	December 31, 2009 (1)
Willie Ellis	December 20, 2009 (2)
Miller Leonard	December 30, 2011 (1)
Nancy Watkins	December 30, 2013
Doug Copeland	April 15, 2014

- (1) Continues to serve until a successor is appointed.
- (2) Willie Ellis passed away in March 2012 and this position remains vacant until a successor is appointed.

Note: The remaining Commission member position was vacant at June 30, 2010, and currently remains vacant.

**Staff** The Public Defender Commission appoints a Director, for a term of 4 years, to administer and coordinate the daily operation of the system. Cathy R. Kelly, has served as Director since March 1, 2011, upon the retirement of J. Marty Robinson, who served as Director for 16 years. As of June 30, 2010, the MSPD employed approximately 570 full-time employees.

**American Recovery and Reinvestment Act 2009 (Federal Stimulus)** During the year ended June 30, 2010, the MSPD spent American Recovery and Reinvestment Act of 2009 monies of \$499,890, appropriated from the Federal Budget Stabilization - Medicaid Reimbursement Fund, for costs associated with contract attorneys for caseload relief.

A summary of MSPD financial activity and MSPD Caseload Crisis Protocol are presented in the following appendixes.

Appendix A

Missouri State Public Defender  
 Comparative Statement of Receipts, Disbursements, and Changes in Cash and Investments  
 Legal Defense and Defender Fund

	Year Ended June 30,		
	2010	2009	2008
<b>RECEIPTS</b>			
Public Defender fees	\$ 1,656,318	1,675,705	1,838,378
Interest	4,184	6,357	12,716
Total Receipts	<u>1,660,502</u>	<u>1,682,062</u>	<u>1,851,094</u>
<b>DISBURSEMENTS</b>			
Personal service	112,871	83,343	64,304
Employee fringe benefits	52,766	33,049	29,630
Expense and equipment	1,227,842	1,602,692	1,667,062
Cost allocation plan	20,306	25,189	19,049
Total Disbursements	<u>1,413,785</u>	<u>1,744,273</u>	<u>1,780,045</u>
RECEIPTS OVER (UNDER) DISBURSEMENTS	246,717	(62,211)	71,049
CASH AND INVESTMENTS, JULY 1,	147,280	209,491	138,442
CASH AND INVESTMENTS, JUNE 30,	<u>\$ 393,997</u>	<u>147,280</u>	<u>209,491</u>

Appendix B

Missouri State Public Defender  
Comparative Statement of Appropriations and Expenditures

	Year Ended June 30,								
	2010			2009			2008		
	Appropriation Authority	Expenditures	Lapsed Balances (2)	Appropriation Authority	Expenditures	Lapsed Balances	Appropriation Authority	Expenditures	Lapsed Balances
<b>GENERAL REVENUE FUND</b>									
Personal Service	\$ 26,712,726	26,712,726	0	26,323,051	26,251,444	71,607	25,345,900	25,345,899	1
Expense and Equipment	4,936,315	4,936,314	1	4,480,262	4,480,114	148	4,088,884	4,088,883	1
Expenses associated with the defense of violent crimes and/or the contracting of criminal representation with entities outside the MSPD	2,558,059	2,558,056	3	3,266,502	3,266,486	16	3,391,502	3,391,500	2
Total General Revenue Fund	<u>34,207,100</u>	<u>34,207,096</u>	<u>4</u>	<u>34,069,815</u>	<u>33,998,044</u>	<u>71,771</u>	<u>32,826,286</u>	<u>32,826,282</u>	<u>4</u>
<b>PUBLIC DEFENDER - FEDERAL AND OTHER FUND</b>									
Grants and contributions from the federal government or from any other source may be deposited in the State Treasury for the use of the MSPD	125,000	0	125,000	125,000	30,906	94,094	125,000	39,000	86,000
Total Public Defender - Federal and Other Fund	<u>125,000</u>	<u>0</u>	<u>125,000</u>	<u>125,000</u>	<u>30,906</u>	<u>94,094</u>	<u>125,000</u>	<u>39,000</u>	<u>86,000</u>
<b>LEGAL DEFENSE AND DEFENDER FUND</b>									
Personal Service	129,507	112,871	16,636	129,507	83,343	46,164	125,735	64,304	61,431
Expense and Equipment	2,850,756	1,227,842	1,622,914	2,850,756	1,602,692	1,248,064	2,850,756	1,667,062	1,183,694
Total Legal Defense and Defender Fund	<u>2,980,263</u>	<u>1,340,713</u>	<u>1,639,550</u>	<u>2,980,263</u>	<u>1,686,035</u>	<u>1,294,228</u>	<u>2,976,491</u>	<u>1,731,366</u>	<u>1,245,125</u>
<b>DEBT OFFSET ESCROW FUND</b>									
Payment of refunds set off against debts (1)	1,350,000	1,110,660	239,340	1,225,000	1,140,587	84,413	1,350,000	1,265,217	84,783
Total Debt Offset Escrow Fund	<u>1,350,000</u>	<u>1,110,660</u>	<u>239,340</u>	<u>1,225,000</u>	<u>1,140,587</u>	<u>84,413</u>	<u>1,350,000</u>	<u>1,265,217</u>	<u>84,783</u>
<b>FEDERAL BUDGET STABILIZATION - MEDICAID REIMBURSEMENT FUND</b>									
Contracting of court representation with entities outside the MSPD	2,000,000	499,890	1,500,110	0	0	0	0	0	0
Total Federal Budget Stabilization - Medicaid Reimbursement Fund	<u>2,000,000</u>	<u>499,890</u>	<u>1,500,110</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
Total All Funds	<u>\$ 40,662,363</u>	<u>37,158,359</u>	<u>3,504,004</u>	<u>38,400,078</u>	<u>36,855,572</u>	<u>1,544,506</u>	<u>37,277,777</u>	<u>35,861,865</u>	<u>1,415,912</u>

(1) Expenditures from the Debt Offset Escrow Fund are primarily transfers of state tax and lottery intercept program collections to the Legal Defense and Defender Fund.

(2) Explanation of lapsed balances:

Public Defender - Federal and Other Fund and Debt Offset Escrow Fund: Expenditures are limited to grants or public defender fees received; and amounts received were significantly less than amounts appropriated.

Federal Budget Stabilization - Medicaid Reimbursement Fund: This was a new biennial appropriation in fiscal year 2010, of which \$1.5 million was withheld at the Governor's request.

Appendix C

Missouri State Public Defender  
Comparative Statement of Expenditures (From Appropriations)

	Year Ended June 30,				
	2010	2009	2008	2007	2006
Personal service	\$ 26,825,597	26,334,787	25,410,203	24,623,330	22,764,573
Travel, in-state	1,571,963	1,553,255	1,415,262	1,404,903	1,223,672
Travel, out-of-state	35,475	93,512	69,655	86,301	92,031
Fuel and utilities	61,071	54,776	55,171	49,032	50,875
Supplies	451,653	382,802	440,728	399,608	411,784
Professional development	152,904	188,000	238,399	151,250	158,350
Communication services and supplies	420,477	523,440	432,941	476,990	367,607
Professional services	4,538,798	4,622,347	4,557,495	3,704,721	2,891,596
Housekeeping and janitorial services	93,864	93,262	82,546	90,571	72,987
Maintenance and repair services	491,613	527,821	403,565	419,216	382,868
Computer equipment	65,334	160,497	315,455	528,357	196,834
Office equipment	231,645	152,688	247,919	122,793	115,367
Other equipment	0	30,572	8,293	22,846	18,398
Real property rentals and leases	926,184	817,041	688,581	713,265	676,855
Equipment rental and leases	19,350	20,988	27,892	19,431	19,700
Miscellaneous expenses	92,920	107,196	162,905	129,844	165,100
Refunds (1)	1,179,511	1,192,588	1,304,855	1,195,550	1,234,058
Total Expenditures	\$ <u>37,158,359</u>	<u>36,855,572</u>	<u>35,861,865</u>	<u>34,138,008</u>	<u>30,842,655</u>

(1) Primarily includes transfers of funds from the Debt Offset Escrow Fund to the Legal Defense and Defender Fund.

MISSOURI STATE  
PUBLIC DEFENDER COMMISSION

CASELOAD CRISIS  
PROTOCOL

Adopted: November 2, 2007

As amended: April 30, 2010

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**FACTORS IMPACTING PUBLIC DEFENDER WORKLOAD**

Factors that determine the number of cases in which an attorney can effectively and ethically provide meaningful representation include:

- The severity and complexity of the cases assigned;
- The experience level of the attorney;
- The travel time an attorney is required to spend seeing clients and making court appearances;
- The availability of support staff to assist the attorney; and
- The amount of time spent on required training, administrative, and supervisory tasks.

## NATIONAL CASELOAD STANDARDS

In May of 2006, the American Bar Association issued an ethical advisory opinion warning against ethical violations caused by excessive defender caseloads and highlighting the professional responsibility of both defenders and courts to take steps to avoid such ethical violations. That opinion cited the National Advisory Counsel caseload standards as providing guidance for defenders and courts in determining when public defenders are carrying excessive caseloads. *See, ABA Formal Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseload Interfere with Competent and Diligent Representation*, May 13, 2006.

The National Advisory Counsel of the U.S. Department of Justice Task Force on the Courts developed maximum recommended caseload standards for public defenders in 1972. Those standards have formed the basis for most public defender caseload standards presently in existence around the country. (*See, Compendium of Standards for Indigent Defense System* compiled by the Institute for Law and Justice under a contract with the Bureau of Justice Assistance, December, 2000.) The NAC caseload standards are set out below, rounded to the nearest whole number:

Non-capital Homicides	12 cases per year or 1 new case per month
Felonies	150 cases per year or 12.5 new cases per month
Misdemeanors	400 cases per year or 33 new cases per month
Juvenile Cases	200 cases per year or 17 new cases per month
Appeals	25 cases per year or 2 new cases per month

The NAC standards did not address post-conviction matters, sexually-violent predator commitment cases, or capital cases. They also did not allot any attorney time for supervisory, administrative, or training tasks, account for travel time in rural vs. urban jurisdictions, or consider the availability or lack of support staff as factors in determining the time lawyers would have available to spend preparing their cases.

The ABA recognized this deficiency in its May, 2006 ethical advisory opinion, pointing out, “**Although [National] standards may be considered, they are not the sole factor in determining if a workload is excessive. Such a determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer’s experience and ability, and the lawyer’s nonrepresentational duties.**” *ABA Formal Opinion 06-441, p 4. [Emphasis added.]*

### MSPD MODIFICATION OF NAC STANDARDS:

The MSPD caseload crisis protocol follows the ABA opinion in using the NAC standard as its foundation, but builds upon it in order to address the omissions described above and the particular circumstances of Missouri Public Defender Offices. These modifications, which are set out below, will be subject to annual review and adjustment as necessary.

### Case Weights = Hours per Case

(1). Measuring case hours, rather than case numbers, allows us to both assign weights to cases and more easily add into the equation attorney hours spent in essential, but non-case-related tasks. The caseload numbers of the NAC standard were therefore converted to hours per case type. The NAC standard assumed a standard 40 hour work week or 2080 attorney hours available over the course of a year. Dividing the total available hours by the maximum number of allowable cases per year, the NAC standard results in the following hours per case type (rounded to the nearest whole number):

Non-capital Homicides	173 hours per case
Felonies	14 hours per case
Misdemeanors	5 hours per case
Juvenile Cases	10 hours per case
Appeals	83 hours per case

(2) The NAC standards do not distinguish between types of felony offenses. However, MSPD's internal workload study did make that distinction. (*See Appendix B re MSPD Internal Workload Study*) Not surprisingly, the results of that study indicated that sex offense cases take significantly more time to prepare and defend than drug and other felony cases under current Missouri law. For that reason, this standard modifies the NAC broad "Felony" offense category by dividing it into subcategories of Sex Offenses and Other Felony Offenses. The MSPD internal workload study showed that MSPD attorneys are currently -- even with existing case overloads -- spending an average of 31 hours per case on sex offense cases, so that number was used in lieu of the 12 hours per case for general felony cases.

Non-capital Homicides	173 hours per case
Sex Offenses	31 hours per case
Other Felony Offenses	14 hours per case
Misdemeanors	5 hours per case
Juvenile Cases	10 hours per case
Appeals	83 hours per case
29.15 Cases	62 hours per case
24.035 Cases	21 hours per case
Probation Violations	5 hours per case

(3) The NAC standards do not address probation violation cases. MSPD deems each of those cases the same as a misdemeanor case for purposes of the protocol, regardless of whether the underlying case was a felony or a misdemeanor.

(4) The NAC standards do not address post-conviction cases. MSPD currently weighs 29.15 motions and appeals as equal to three-fourths of a direct appeal and 24.035 motions and appeals as equal to one-fourth of a direct appeal for purposes of this protocol.

(5) The NAC standards do not address capital or sexually violent predator cases. MSPD limits each of its capital attorneys to no more six open capital cases. This is based upon a Florida study in which attorneys defending death penalty cases in the manner set forth by the ABA death penalty standards tracked their hours per case and determined that an attorney could effectively handle no more than 3 capital cases per year per attorney. Since each of MSPD's capital cases is assigned two attorneys who divide the work on the case between them, MSPD has raised that caseload standard to 6 open capital cases per attorney. Because of the stricter time standards in post-conviction, the caseloads of capital PCR attorneys are kept at around 5 open cases per attorney. Sexually

violent predator caseloads are currently capped at eight open cases per attorney at a time. MSPD usually contracts cases in excess of these limits to private counsel.

### **Non-Case-Related Work Hours:**

As the ABA Ethical Advisory Opinion recognized, every attorney has non-case-related responsibilities that have to be considered when determining whether an attorney's workload has become untenable. MSPD has adjusted for these by adding each of the following categories into the total workload calculation when determining case overload under this protocol.

- (1) **ANNUAL AND HOLIDAY LEAVE:** MSPD is a state agency and required by state law to permit its employees a set amount of annual and holiday leave each year. While a number of its attorneys work those days of their own volition, MSPD cannot require its attorneys to give up these days and therefore must build them into any determination of how many attorney hours are available to handle the caseload. While hours of annual leave increase with seniority, this protocol utilizes the minimum annual leave accrual of ten hours per month or 120 hours per year. In addition, the State of Missouri recognizes 12 state holidays, which translate into 96 holiday hours per year for a total of 216 hours annual and holiday leave, which must be deducted from the total number of available attorney hours.
- (2) **SICK LEAVE:** MSPD is required to allocate to its employees a set amount of sick leave each month, although this leave may not be used without good cause. When sick leave *is* used by employees – particularly for extended periods of time – it reduces the number of attorney hours available to handle cases. To account for this leave without overestimating its impact, this protocol draws upon the experience of the preceding year in anticipating how much sick leave is likely to be utilized. In 2007, 2.2% of total attorney hours was used for sick leave. That same percentage is therefore subtracted from the available attorney hours for handling caseload.

**NON-CASE-RELATED TASKS:** The practice of law inevitably includes time taken up with non-case-related matters, particularly in offices with a shortage of support staff as is the case in most MSPD offices. These hours include a minimum of 15 hours of continuing legal education each year, time spent waiting in court for cases to be called or at the jail waiting for clients to be produced, and time spent doing primarily administrative tasks such as copying discovery, updating court dates, etc.

- (1) The average amount of time spent by MSPD attorneys on these tasks was determined through the MSPD workload study in which employees were required to track their time, by category of task, in fifteen-minute increments. That study revealed that 13.4 % of total available attorney hours were spent on such non-case-related tasks. Those hours must be deducted from the hours available for handling cases.
- (2) **TRAVEL TIME:** The average amount of attorney time spent in travel varies with the location and coverage area of the office. This is estimated by taking the total number of miles traveled by each office during the preceding year and translating that into travel time using an average of 45 miles per hour -- an average of highway, two-lane and busy, urban roadway travel times.
- (3) **MANAGEMENT / SUPERVISORY TIME:** The amount of time needed for management duties within a district office varies with the size of the office and the number of people supervised. MSPD's experience has shown that effective management and supervision within a district office require an average of 1.5 hours per week of supervisor time per employee supervised. E.g., in an office of 3 attorneys and 2 support staff, the District Defender should expect to spend an average of 7.5 hours per week [5 employees x 6.5 hours] on management and supervisory responsibilities. Because most of MSPD's District and Deputy District Defenders also carry caseloads and are included in the 'available attorney hours' equation, the

time they devote to their management / supervisory tasks is deducted from the total attorney hours available within that district office to handle caseload.

**CALCULATION OF DISTRICT OFFICE WORKLOAD:**

**Attorney Hours Available for Case Work:**

For purposes of this protocol, the annual available attorney hours in an office operating within a caseload crisis, is 2340 hours or 45 hours per week per attorney. To determine the number of those hours available for handling cases, deduct the hours used in non-case-related matters as set out above. Averages (rounded to the nearest ½ hour) that apply statewide can be deducted up front, as follows:

2340	ANNUAL AVAILABLE HOURS PER ATTORNEY
-320.5	AVERAGE NON-CASE-RELATED TASKS [13.7% of 2340]
-216	AVERAGE HOLIDAYS & ANNUAL LEAVE
- 51.5	AVERAGE ATTORNEY SICK LEAVE [2.2%]
<u>1752</u>	AVERAGE AVAILABLE HOURS PER ATTORNEY PER YEAR
	OR
438	PER ATTORNEY PER THREE-MONTH INTERVAL

Management and travel time still have to be deducted, but because these vary with the number of employees and geographic size of each district, they must be calculated at the local district level, as follows:

*Management / Supervisory Hours:* To determine the average management / supervisory hours within a given office over a three-month interval utilized in this protocol, multiply the number of employees to be supervised by 19.5 (1.5 hours x 13 weeks). For example, a District Defender who supervised 15 lawyers and 8 support staff, for a total of 23 employees should anticipate 448.5 hours of management time in that three-month interval. [23 x 19.5]. Because all supervision is provided by one or more attorneys serving as the District and/or Deputy District Defender, these hours reduce the available attorney hours to handle cases within that District, as shown in the example below.

*Travel Time:* The average number of attorney miles traveled over a three-month interval is based upon the number of attorney miles traveled in that district during the previous fiscal year. This is divided by 4 to get an average number of miles traveled over a three-month interval. Miles are converted to hours using an average of 45 miles per hour. Assume our sample district traveled 5000 attorney miles last fiscal year. That translates into 1258 miles per three-month interval, which in turn translates into 27.5 attorney hours spent in travel within that district. Those hours are not available for the handling of cases and must be deducted from the district’s available attorney hours, as shown in the example below.

**EXAMPLE:**

6570	Total available attorney hours per three-month interval (438 x 15 lawyers)
- 448.5	Management hours required (15 lawyers + 8 staff = 23 x 19.5)
- 27.5	Average attorney travel hours for district over three-month interval
<u>6094</u>	DISTRICT OFFICE MAXIMUM ALLOWABLE CASELOAD STANDARD

The maximum allowable caseload standard is the maximum number of attorney hours available to handle cases within that district office over a specified interval of not less than one month. In determining if an office exceeds that standard, the director shall compare the number of attorney hours available to handle cases during the specified interval to the average anticipated hours required to handle the assigned caseload, as calculated under this protocol. A district office exceeds the maximum caseload standard when its calculated assigned caseload hours exceed the maximum attorney hours available in the specified interval.

## **Hours Required to Handle Office Caseload**

We determine the number of cases assigned to that office in each category of case type – e.g. how many murders, how many sex cases, how many felony drug cases, etc. during the preceding three-months. The number of cases in each category is then multiplied by the number of hours set forth in the Missouri Modified NAC table above, and then totaled to determine the total number of attorney hours *needed* to handle the caseload assigned to that district for the three-month interval examined.

Note: This protocol calculates attorney hours based upon new cases assigned. It does not count hours being spent now on cases that were assigned four or five months ago that remain open. This is balanced out by counting the total number of hours required to handle each new case assigned as falling entirely within the three-month interval under examination even though, in reality, those hours – like the current open cases -- will be spread over several months to come. The one balances out the other and the result is a reasonably accurate assessment of average actual workload.

## **APPENDIX A**

### **MSPD 2006 WORKLOAD STUDY**

In the fall of 2006, the Missouri State Public Defender System undertook an internal workload study, patterned after public defender workload studies done by the National Center for State Courts and The Spangenberg Group in other state defender organizations. In this study, attorneys and support staff were required to record their time and activities by case type in fifteen-minute increments, as well as the amount of time spent traveling to and from court, time waiting in court for cases to be called, and time spent in training and dealing with administrative and supervisory tasks. Each attorney and support staff member were also required to complete a survey setting forth the various tasks essential to meaningful and ethical defense representation and asking them to indicate the percentage of their cases in which they were able to do each of the those tasks. From this data, the Missouri State Public Defender System was able to determine:

- The amount of time defenders are able to spend on each of the various case types under current caseload conditions;
- The percentage of cases in which tasks considered essential to meaningful representation are not being done because excessive caseload requires attorneys to triage cases and case preparation – which verified that the amount of time recorded was insufficient to provide effective and ethical representation; and,
- The amount of attorney time eaten up by unavoidable non-case-related workload such as driving long distances to and from court or the jail in rural jurisdictions, time spent waiting in court or at the jail, time required for essential management tasks and necessary training, as well as time spent filing and copying, etc. because of a shortage of clerical staff.

It is important to note that this study is still a work in process at this time. Still ongoing is the determination of what is not being done in cases due to case overload that should be done and adding the time necessary to accomplish those additional tasks back into the case hours for each case type.

## **APPENDIX B**

### **CALCULATION OF AVAILABLE ATTORNEY HOURS**

This caseload crisis protocol assumes an average 45 hour attorney work week (2340 hours annually) for the purposes of determining whether a district is sufficiently in crisis to warrant turning cases away. This is to be distinguished from the average 40 hour work week or 2080 annual hours per attorney used to calculate what staffing for each public defender office *should* be. The purpose of the former standard is to identify when an

office is ethically unable to take on more work and so must turn away cases; the goal of the latter is to staff offices sufficiently to avoid reaching this caseload crisis point at all.