STATE OF MINNESOTA
BOARD OF PUBLIC DEFENSE

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August 26, 2010

Mr. Fred Grittner
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

RE: Attorney Registration Fee Increase

Dear Mr. Grittner:

At a meeting earlier today the Board of Public Defense authorized the its staff to petition the Minnesota State Supreme Court to continue the $75 increase in the attorney registration fee that is dedicated to the Board of Public Defense.

Enclosed please find an original and twelve copies of the petition and supporting documents.

We of course stand ready to answer any questions, provide testimony, or provide any other information the Court may find useful as it considers this petition.

If you have any questions please do not hesitate to contact our office.

Sincerely,

Kevin Kajer
Chief Administrator
Enclosures

No.

STATE OF MINNESOTA
IN SUPREME COURT

In re:

Petition to Continue the Attorney Registration Fee
to Provide Funding for Public Defense

PETITION OF BOARD OF PUBLIC DEFENSE

Board of Public Defense
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Attorney for Petitioner

Board of Public Defense
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No. _____

STATE OF MINNESOTA
IN SUPREME COURT

In re:

Proposed Amendment of Minnesota Rules
on Lawyer Registration

PETITION OF MINNESOTA BOARD OF PUBLIC DEFENSE

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota Board of Public Defense ("BOPD") respectfully submits this petition asking this Honorable Court to continue the $75 attorney registration fee charged to Minnesota lawyers and judges for an indefinite period and to allocate that additional money to the BOPD. This proposed change is intended to permit the BOPD to fund quality constitutionally mandated services to its clients. This change is proposed in response to this Honorable Court's Order C1-81-1206.

In support of this petition, the BOPD would show that this Honorable Court has the exclusive power to regulate the legal profession, including the imposition of a Registration Fee on lawyers and judges; that the funding of the Board of Public Defense is an appropriate use of the revenue from this fee; and that the creation of a "public defender fund" with the revenue from the Registration Fee increase is necessary to the proper and efficient administration of justice.

I. The Supreme Court is Empowered to Impose an Attorney Registration Fee to Provide for the Proper Administration of Justice.

1. This Honorable Court has exercised its exclusive and inherent power to regulate the legal profession in the interest of the public good and the efficient administration of justice. The Minnesota Legislature has expressly recognized this power. See Minn. Stat. §§ 480.05, 481.01 (2006).
2. This Honorable Court has recognized and exercised this authority. In its order C1-81-1206 imposing the fee, it was noted that the authority derives from the Court's inherent authority to regulate the practice of law. In 1961, the Court imposed a registration fee on lawyers to defray costs of the administration of the attorney licensure system. In subsequent years the fee has been increased, including increases directed toward civil legal services and public defense.
3. In the exercise of that power, this Court requires the annual payment of a Registration Fee by all licensed attorneys and judges in Minnesota. See Rules of the Supreme Court on Lawyer Registration 2 (A).
4. The Court has designated that a portion of the Registration Fee under C1-81-1206, in this case $75, be placed in a special fund in the state treasury to be appropriated annually to the BOPD. See Attachment A.

II. The Board of Public Defense is an Appropriate Recipient of Attorney Registration Fee Revenue.

1. The Minnesota Board of Public Defense was created by statute to implement the constitutional right to counsel enunciated in *Gideon v. Wainwright, 372 U.S. 335 (1963)* and its progeny. See Minn. Stat. 611.215.

2. The mission of the Board of Public Defense is to provide quality criminal defense services to indigent defendants and juvenile respondents, in every county of Minnesota. See Minn. Stat. 611.14.
3. Public defenders employed by the BOPD represent indigent clients in approximately 170,000 cases each year. It is estimated that public defenders represent about 85% of persons accused of felonies in Minnesota, and about 95% of juveniles accused of acts of delinquency, among their other cases.
4. A public defender may not reject a case, but must accept all the clients assigned to her or him *Dziubak v. Mott, 503 N.W.2nd 771 (Minn.1993.)* This means that neither the BOPD, its Chief Public Defenders, nor the staff attorneys can control their caseloads.
5. A consequence of uncontrollable public defender caseloads is that frequently courtrooms- each with a presiding judge, court staff, prosecutors, probation officers, victim/witness assistants, victims, witnesses, family members and the public- are unable to conduct business in a timely manner because the public defenders needed for the resolution of cases are tied up elsewhere.

III. The Continuation of Revenue from a $75 Attorney Registration Fee Increase Is Necessary to the Administration of Justice.

As this Court noted in its original order on the public defender fee, fees like these are sometimes "necessary to maintain the integrity and efficiency of the judicial system," and that the fees are "fully consistent with the heightened obligations of lawyers, both to our justice system and to assist this court with the effective administration of justice." See

generally, *In re Petition of the Wis. Trust Account Found.*, No. 04-05 at 5 (Wis. Mar. 24, 2005), *available at* http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=1101

We understand that when the court imposed the public defender fee that it did so reluctantly and for a limited duration. We recognize that the imposition of a fee on the attorneys of this state to fund a constitutionally mandated service is not an ideal situation. We agree with Justice Anderson, Paul H., in his concurrence on C1-81-1206 that by "underfunding public defenders and leaving it up to our court to procure financial support from lawyers, the Governor and Legislature have failed to meet one of their fundamental responsibilities". However, in its order establishing the fee Chief Justice Magnuson writing for the court noted that "We make this temporary fee increase reluctantly, in response to the exceptional financial circumstances currently facing the courts and the state in general". Justice Anderson further noted in his concurrence that "Extraordinary circumstances have led to an under-resourced public-defense system that hinders the administration of justice, and these circumstances prompt us to act today within our inherent power." We would argue that those circumstances have not changed and in fact have gotten worse. Since the implementation of the fee, the budget for the BOPD has been further reduced. In the 2010 legislative session the budget for BOPD was reduced by $591,000 in fiscal year 2010, and $1,302,000 in fiscal year 2011. Overall, the number of full-time equivalent public defenders has been reduced 15% from 2007 levels.

The Board of Public Defense has set caseload standards, in compliance with Min. Stat. 611.215, subd. 2 (c) (2). Following a weighted caseload study in 1991, the Board

determined to adhere to caseload standards recognized by the A.B.A. since 1975, attempting to limit one year's work for an attorney to:

- 150 felony cases, or
- 275 gross misdemeanor cases, or
- 400 misdemeanor cases, or
- 175 juvenile delinquency cases, or
- 80 CHIPS/TPR cases, or
- 200 other cases, or
- some proportional combined number of cases of these types.

To achieve proportionality the Board designated a misdemeanor as a "case unit" so that, for example, a felony would count as 2 and 2/3 "units." Thus the Board/A.B.A. Standard would be 400 "units" of mixed caseload.

1. In FY 09, the budget shortfall led to the loss of 53 public defender positions statewide 12% of the attorney staff. (50 from Districts, 3 appellate.)
2. In FY 09 the average caseload was 715 units, as of June 2010 the individual public defender average caseload is 758 units.
3. In FY10 the budget shortfall has led to the loss of an additional 15 public defender positions from May of 2009.
4. For the last two years Assistant Public Defender positions lost through layoff, retirements, or separations have not been able to be replaced. Cases assigned to these attorneys remain pending while new cases continue to be charged.

5. Chief District Public Defenders report that due to insufficient resources in approximately one-half of the counties in Minnesota clients go unrepresented at first appearance in out-of-custody misdemeanor cases.
6. Chief District Public Defenders report that due to insufficient resources in just under one-half of the counties in Minnesota clients are not represented by public defenders at first appearance.
7. Part-time assistant public defenders are required to work a set numbers of hours in order to qualify for state-funded benefits. In FY 09 the part-time assistant public defenders worked over and above these required numbers, 40,000 hours for which they were not compensated.
8. If the $75 Registration Fee increase is not continued, this cut would necessitate a staff reduction of roughly 20-25 lawyers.
9. Besides the obvious detriment to indigent accused Minnesotans, and the obvious distress to public defender staff, there are several predictable hardships to the administration of justice which would result if the BOPD were required to take the full $1.3 million cut and reduce staff accordingly:
    - exacerbation of courtroom delays;
    - inability to handle certain case types in anything like a timely manner;
    - aggravation of jail overcrowding, which was reported as a statewide aggregate of 105% of capacity a year ago;
    - postponement of trial settings, which are already far enough out to impinge on the right to a speedy trial;

- deterioration in the quality of fact-finding, as witnesses become unavailable; and
- increased strain on all the other participants in the justice system.

IV. Failure to Extend the Public Defender Fee Will Have Dire Consequences on the Quality of Representation and the Continued Operation of the Criminal Justice System.

In February of 2010 the Office of the Legislative Auditor (OLA) released a program evaluation of the public defense system in Minnesota. Among the OLA's findings:

- High public defender workloads have created significant challenges for Minnesota's criminal justice system;
- Heavy workloads have hurt public defenders' ability to represent clients and court efficiency;
- 67% of public defenders responding to the OLA survey disagreed or strongly disagreed with the statement that they had "sufficient time with clients". Spending time with clients builds trust. Client trust is essential in providing quality representation and ensuring efficient resolution of cases. In the OLA surveys public defenders and judges said that when clients trust their attorneys, they can trust the attorney' advice to resolve the case, thereby leading to a more efficient disposition of the case.
- 60% of judges responding to the OLA survey disagreed or strongly disagreed with the statement that public defenders spent enough time with their clients.

- 42% of public defenders responding to the OLA survey disagreed or strongly disagreed that they were well prepared for each of their cases".
- 50% of district judges responding to the OLA survey indicated that criminal cases in their courtrooms progressed too slowly or much too slowly toward disposition Judges and court administrators responding to the survey reported that "problems with scheduling public defenders for hearings and trials" was the most significant cause of delays.
- 72% of the judges responding to the survey cited difficulty in scheduling public defenders for hearings and trials as a moderate or significant cause of delays.
- During their site visits, OLA staff observed that due to time pressures public defenders often had about 10 minutes to meet each client for the first time to evaluate the case, explain the client's options and the consequences of a conviction or plea, discuss a possible deal with the prosecuting attorney, and allow the client to make a decision on how to proceed.

Conclusion

To assist the Court in its consideration of this Petition, the BOPD submits with the Petition the following documents:

a. A copy of State of Minnesota Supreme Court Order C1-81-1206.

b. A copy of the BOPD biennial budget proposal.

c. A copy of the 2010-2011 Activities Assessment Letter to Governor Pawlenty and Finance Commissioner Tom Hanson.

d. A copy of the 2010 Legislative Audit Report-Public Defense System.

Petitioner BOPD therefore respectfully requests that this Honorable Court grant its petition, to continue the increase in the Attorney Registration Fee of $75.00, and to allocate the additional $75.00 to the BOPD. The BOPD stands ready to address any comments or questions the Court may have concerning the proposal in whatever forum may be most convenient to the Court.

Dated: August 26, 2010

Respectfully submitted,
BOARD OF PUBLIC DEFENSE

BY _____

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And

BY _____

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STATE OF MINNESOTA

IN SUPREME COURT

C1-81-1206

ORDER TEMPORARILY INCREASING LAWYER REGISTRATION FEES

The Board of Public Defense and the Legal Services Planning Committee have filed petitions with this court seeking an increase in the annual lawyer registration fee. The Board of Public Defense requests the court to increase the annual lawyer registration fee by $75.00 per year and allocate this money to the Board to provide additional funding for legal representation of its clients. The Legal Services Planning Committee requests the court to increase the amount of the annual lawyer registration fee allocated to the Legal Services Advisory Committee by $25.00 per year, the additional funds to be distributed by the Legal Services Advisory Committee for civil legal services for low-income and disadvantaged Minnesotans. In an order filed on June 11, 2009, the court invited written comments on the proposed amendments. The comment period has now expired.

The court has reviewed the petitions and the comments received and is advised in the premises.

Pursuant to the inherent authority of the court,

IT IS HEREBY ORDERED THAT:

1. The petitions are granted effective for annual registration fees due and payable by October 1, 2009 and expiring with annual registration fees due and payable by

July 1, 2011. Effective commencing with fees due and payable by October 1, 2009 and expiring with fees due and payable by July 1, 2011, the annual lawyer registration fee shall be $317 or such lesser sum as is set forth below:

Active Status – Income Less than $25,000	$280.50
Active Status – Lawyers on Full-Time Military Duty	$172.00
Active Status – Lawyers on Full-Time Military Duty – Income Less than $25,000	$136.00
Active Status – Lawyers Admitted Fewer Than Three Years	$140.00
Active Status – Lawyers Admitted Fewer Than Three Years – Income Less Than $25,000	$122.00
Inactive Status – Out-of-State	$260.00
Inactive Status – Out-of-State – Income Less Than $25,000	$223.50
Inactive Status – Minnesota	$260.00
Inactive Status – Minnesota – Income Less Than $25,000	$223.50
Inactive Status – Retired	Exempt
Inactive Status – Permanent Disability	Exempt

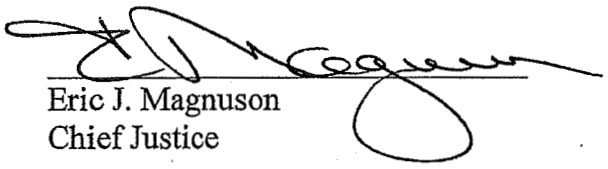
While this order is in effect, these annual registration fees are in lieu of the fees set forth in Rule 2 of the Rules of the Supreme Court on Lawyer Registration. The fee increase is temporary only, and upon the expiration of this fee increase, the annual registration fee shall revert to the amounts set forth in Rule 2.

2. For registration fees due and payable by October 1, 2009, payment of the temporary fee increase imposed by this order is deferred and the increase shall be payable along with the registration fees due and payable by October 1, 2010.

3. Seventy-five percent of the additional funds generated by this temporary fee increase shall be allocated to the Board of Public Defense; the remaining twenty-five percent of the additional funds generated by this temporary fee increase shall be allocated to the Legal Services Advisory Committee.

Dated: November 4, 2009

BY THE COURT:



Eric J. Magnuson
Chief Justice

STATE OF MINNESOTA
IN SUPREME COURT
C1-81-1206

MEMORANDUM

Magnuson, C.J.

We make this temporary fee increase reluctantly, in response to the exceptional financial circumstances currently facing the courts and the state in general, and in hopes that these circumstances will not continue indefinitely. Accordingly, we have expressly limited the duration of the fee increase, which will expire by the terms of our order at the end of the current biennium.

We have carefully considered the source of our authority to take this action, and are confident that this fee increase falls within our inherent authority to regulate the practice of law. In 1961, we imposed a registration fee on lawyers to defray costs of the administration of the attorney licensure system, citing "the inherent power of this court to regulate the practice of law in this state." Order (Minn. Oct. 5, 1961) at 1, *available at* http://mncourts.gov/filebrowse/?folderpath=AdministrationFiles (follow link to Lawyer Registration and locate by date). We subsequently increased the registration fee and allocated the increase to fund civil legal services, again acting solely based on that inherent authority. *See Promulgation of Amendments to the Rules of the Supreme Court for Registration of Attorneys*, No. C9-81-1206 (Minn. Feb. 6, 1997) at 1-2, *available at* http://mncourts.gov/filebrowse/?folderpath=AdministrationFiles (follow link to Lawyer Registration and locate by date). Not only did we believe we had the inherent authority

to impose that fee, we concluded that it was appropriate to require lawyers to pay that fee as a part of the price of licensure. There is no reason today to reach any different conclusion, and in fact, there is probably greater justification.

We agree with the Wisconsin Supreme Court that fees like these are sometimes "necessary to maintain the integrity and efficiency of the judicial system," and that the fees are "fully consistent with the heightened obligations of lawyers, both to our justice system and to assist this court with the effective administration of justice." *In re Petition of the Wis. Trust Account Found.*, No. 04-05 at 5 (Wis. Mar. 24, 2005), *available at* http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=1101. Rule 6.1 of the Minnesota Rules of Professional Conduct says that "every lawyer has a professional responsibility to provide legal services to those unable to pay." The same rule says that lawyers should "voluntarily contribute financial support to organizations that provide legal services to persons of limited means." *Id.* The comment to that rule recognizes that "because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services." Minn. R. Prof. Conduct 6.1 cmt. "Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible." *Id.* Although the comment notes that failure to meet that professional obligation will not subject a lawyer to discipline ("The responsibility set forth in this rule is not intended to be enforced through disciplinary process"), we have already decided that we may condition licensure on payment of fees

for expenses that we deem to be necessary not only for the court, but for the justice system.

The dissent concludes that we lack authority to act on either of these petitions, but does not assert that we acted beyond our authority when we imposed such fees in the past. We see no reason to retreat from our prior actions, and thus, having concluded that we can impose additional fees, we now focus our attention the question of whether we should take that action.

With regard to both the civil legal services fee and the public defender fee, for reasons similar to those articulated by the Wisconsin Supreme Court, the present circumstances warrant granting the petitions. No one quarrels with the notion that civil legal services and the public defender system are dramatically underfunded, and that as a result, our court system as a whole is suffering. With the support of the Minnesota State Bar Association, we now turn to the practicing bar in this time of need.

CONCURRENCE

ANDERSON, Paul H., Justice (concurring).

> ". . . one Nation under God,
> indivisible, with liberty and
> justice for all."
>
> Pledge of Allegiance

I concur with our court's decision to temporarily increase the annual lawyer registration fee by $75 and allocate this revenue increase to provide additional funding for public defenders. I write separately to chronicle the extraordinary circumstances that compel us to issue this order, to express my reluctance to fund a constitutional mandate in this manner, and to express my disappointment that the Governor and Legislature have failed to adequately fund a constitutional mandate by appropriate means.

Today our court places a significant part of the responsibility for funding the legal representation of indigent persons on the shoulders of lawyers and judges who are licensed to practice law in the State of Minnesota. We do so by raising the lawyer registration fee—a fee each lawyer and judge pays annually to practice law in Minnesota. The Legislature authorized this increase during its 2009 legislative session. *See* Minn. Stat. § 481.22 (2008). Importantly, we do not increase the fee pursuant to the Legislature's authorization, but do so under our exclusive and inherent power to regulate the legal profession and to ensure the fair administration of justice.

Extraordinary circumstances have led to an under-resourced public-defense system that hinders the administration of justice, and these circumstances prompt us to act today within our inherent power. I believe that even though this approach is legal, it is the

wrong approach and therefore should not be permitted to continue beyond the life of this particular order. As the dissent points out, our decision blurs the lines that separate the branches of government by placing a general revenue obligation on a discrete part of society.

The Scope of the Problem

The United States Constitution, Minnesota Constitution, and Minnesota law guarantee representation for an indigent person charged with a misdemeanor or more serious crime. *See* U.S. Const. amend. VI; Minn. Const. art. 1, § 6; *State v. Borst*, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967); Minn. Stat. § 611.14 (2008). These mandates require that the State provide criminal representation to indigents. It is not only the lawyers of this State who have an obligation to ensure that these mandates are met.[1] It is everyone's responsibility, and the funds should come from the citizens of the State as a whole. By underfunding public defenders and leaving it up to our court to procure financial support from lawyers, the Governor and Legislature have failed to meet one of their fundamental responsibilities. The crisis faced by public defenders and the resulting need to impose fees on a specific professional group are the result of an unfortunate

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[1] Minnesota lawyers already do much to make sure that those without financial means get legal help. Many lawyers do pro bono work. According to a Minnesota State Bar Association report, lawyers in large law firms alone completed thousands of pro bono hours. Minnesota State Bar Association, *Report on Pro Bono Legal Service* 4 (2007), *available at* http://www.projusticemn.org/library/attachment.148259. Lawyers also provide financial support for legal service agencies, which represent indigent clients in civil matters, either by voluntary contributions or through the lawyer registration fee. Since 1997, $50 of each lawyer registration fee has gone to fund legal service agencies. Today, we also increase this amount by $25—from $50 to $75.

impasse which affects how the citizens of Minnesota create and maintain a civilized society.

In Minnesota, the public-defender system is the mechanism that carries out the aforementioned constitutional mandates. It is no small task. Public defenders must "represent, without charge, a defendant charged with a felony, a gross misdemeanor, or misdemeanor . . . [and] a minor ten years of age or older in the juvenile court . . . ." Minn. Stat. § 611.26, subd. 6 (2008). Public defenders also represent the indigent in appeals, post-conviction proceedings, sex offender community notification and review hearings, and supervised release and parole revocation proceedings. Public Defense Board, *2010-11 Biennial Budget* 1 (2008), *available at* http://www.leg.state.mn.us/docs/2008/other/081000/public_defense.pdf. Public defenders have little or no control over whom they serve: if a judge determines that a defendant is indigent and therefore unable to hire a private attorney, a public defender must represent that defendant. *See* Minn. Stat. § 611.26, subd. 6; Minn. R. Crim. P. 5.02.

In its petition, the State of Minnesota Board of Public Defense estimates that over 95 percent of all juveniles accused of acts of delinquency and 85 percent of those charged with a felony are represented by a public defender. Moreover, the petition explains that public defenders provide representation in over 170,000 cases per year, and a single defender handles an average of over 700 case units a year, almost twice the American Bar Association's standard of 400 case units per year. *See also* Public Defense Board, *2010-11*, *supra*, at 1, 8.

High caseloads are the direct result of underfunding. The Legislature originally assigned to the Board of Public Defense $134 million from the State General Fund to operate during the fiscal years of 2008 and 2009. *See* Public Defense Board, *2010-11*, *supra*, at 1. Even though the allotment was an increase over the previous biennial budget, the Board faced a $2.3 million deficit caused by several factors. *See* Associated Press, *MN to Lose 72 Public Defenders to Budget Cuts*, Jun. 5, 2008, http://wcco.com/local/public.defenders.cut.2.741382.html. Unanticipated labor-cost increases, a lower than expected attrition rate, a greater than expected salary increase, rising health-insurance costs, and increases in retirement benefits all contributed to this deficit. As with caseloads, the Board has little control over many of these variable expenses. Health insurance for its employees, for example, is negotiated by the State; the Board is then required to pay the costs. Like many agencies that spend a majority of their funds on personnel, a significant increase in health-insurance costs is a heavy burden.

The funding situation worsened for public defenders in the spring of 2008. The Legislature cut $1.5 million from their budget to address the State's budget deficit. Associated Press, *supra*. As the Board of Public Defense explains in its petition, it faced a $3.8 million deficit after this reduction and was forced to cut 53 full-time equivalent positions—a greater than 12 percent decrease in its staff. *See also* Associated Press, *supra*. In an effort to adjust to these costs, the Board decided that it would not represent parents in CHIPS (Child in Need of Protection) or TPR (Termination of Parental Rights) matters. Elizabeth Stawicki, *Public Defenders to Stop Representing Poor Parents in Child Protection Cases*, MPR News Q, July 3, 2008,

http://minnesota.publicradio.org/display/web/2008/07/03/who_will_pay/. The Board took this action even though a Minnesota Statute, passed by the Legislature and signed by the Governor, provides that a "parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court." Minn. Stat. § 260C.163, subd. 3(a) (2008). There is disagreement regarding who is obligated to pay for representation when a parent is indigent, but the Board asserts public defenders are not statutorily required to represent indigent parents. *See* Stawicki, *supra*. As a non-mandated service that consumed many resources, parent representation became a low priority for the Board.[2] *See id.* Accordingly, public defenders stopped representing indigent parents.

During the 2009 legislative session, the Legislature reduced the public defense budget by another $2 million. Rather than cut another 35 attorneys, which would leave remaining attorneys with a caseload of over 800 case units per year, the Board of Public Defense has petitioned our court to increase the annual lawyer registration fee by $75. The Board anticipates that this fee increase will soften the blow of the most recent budget reduction but acknowledges that it still may need to cut an additional 10 attorney positions.

A failure to fully fund public defenders has dire consequences. Cases are delayed, often to the point where they might be dismissed; certain crimes may no longer be

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[2] Public defenders went from representing 4,055 parents in 1995 to over 9,000 parents in 2006. *See* Public Defense Board, *2008-09 Biennial Budget* 18 (2007), *available at* http://www.mmb.state.mn.us/doc/budget/bud-op/op09/final-op-oz.pdf. CHIPS and TPR cases often require the appointment of more than one public defender, as each parent may require separate representation as well as the child. *Id.*

prosecuted, parents may be irrevocably separated from their children without the assistance of an attorney, or counties may decide not to litigate CHIPS cases because the public-defender system cannot afford to provide an attorney to parents in those cases. Recognizing the current crisis and that the public-defender system cannot afford to lose another 35 attorneys, our court has reluctantly authorized this fee increase.

A recent newspaper article placed a human face on this issue. Nolan Rosenkrans, writing for the *Winona Daily News* said:

> Karin Sonneman is overwhelmed.
>
> The voice mailbox of Winona County's only full-time public defender was full Friday, clogged with messages from clients. Each day, it seems, she's assigned a new felony case to defend.
>
> Her client list hovers at 250, most of them felonies, and has become so overwhelming, she says it affects her ability to prepare proper defenses. "We have just about enough time to triage cases," she said. "I like to give every case the full measure of my time. It's just become crazy."
>
> Winona's public defenders say they are so understaffed and overworked they plan to ask judges to delay non-violent misdemeanor cases until Minnesota's Third Judicial District can find a way to lighten caseloads. The plan could give them more time to prepare defenses in serious cases and spend more face-time with clients, but it also leaves the smaller cases up in the air.
>
> "That's the kind of stuff that keeps me up at night," said Karen Duncan, chief public defender for Minnesota's Third Judicial District. "I recognize how important these are for people, but the truth is we aren't able to prepare for these cases."

Nolan Rosenkrans, *Public Defender's Office Overloaded*, Winona Daily News, Oct. 18, 2009, http://www.winonadailynews.com/news/local/crime-and-courts/article_80752cb0-bb9b-11de-ae76-001cc4c03286.html.

Possible Solutions

Public defenders do not expect that their problems will abate in the near future; they only expect the problems to get worse. State funding is not expected to increase any time soon, and large budget deficits are expected to continue. Some people, both at the national and state level, are so bold as to welcome this turn of events by clearly articulating their goal to shrink government down to a size so small that it can be drowned in a bathtub. The problem with this approach is that when you continuously put the government's head underwater, it is not the government that drowns—real people drown. Floodwaters breach levies and people drown. Bridges collapse and people drown. I have little tolerance for this anti-government rhetoric given the adverse consequences that result to people, especially the least advantaged among us, when this myopic approach to governing actually gets translated into policy. I believe that government does have a proper, even an essential role to play in creating and preserving a civilized society. Meeting constitutional mandates is part of that role.

Some people suggest that the problem we face can be solved by making fundamental changes to the judicial/legal system. I agree that changes can be and need to be made, but the changes must be viable. One well-intentioned legislator states that "We need to be more judicious in the cases we prosecute" and suggests that aggressive prosecution of some animal abuse cases, minor drug crimes, and drunken driving violations clogs up the courts. Rosenkrans, *supra*. This proposed solution is not without controversy and needs the cooperation of prosecutors to be successful. Others suggest that the Board of Public Defense must conduct an audit of how it performs its duties, so it

can become more efficient. This is also an approach that I support even though I know the results will not completely solve the extraordinary problems public defenders face. One conclusion is inevitable; the Governor and Legislature must pursue more basic solutions.

More than 80 years ago the distinguished United States Supreme Court Justice Oliver Wendell Homes wrote, "Taxes are what we pay for civilized society . . . ." *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). I believe that most, if not all, of the citizens of Minnesota want to be part of a civilized society. In fact, I believe that we want to be a notch or two above the rest. But, how do we determine or measure what a civilized society is? One measure of a civilized society is how it treats its weakest members. To understand how this concept plays out in the legal system, it is helpful to look to the words of the late United States Supreme Court Justice William J. Brennan, Jr., who said,

> But it has been well said that there is no better test of a society than how it treats those accused of transgressing against it. Indeed, it is because we recognize that incarceration strips a man of his dignity that we demand strict adherence to fair procedure and proof of guilt beyond a reasonable doubt before taking such a drastic step.

William J. Brennan, Jr., Associate Justice of the United States Supreme Court, Address to the Text and Teaching Symposium at Georgetown University (October 12, 1985).

I believe that when we Minnesotans recite the Pledge of Allegiance and say the words, "and justice for all" we mean them. And as Justice Brennan's words indicate, justice includes a guarantee of fair procedures and proof of guilt beyond a reasonable doubt for anyone accused of a crime. In *Gideon v. Wainwright*, the United States

Supreme Court wisely recognized that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U.S. 335, 344 (1963).

Those who know me well know that I am no fan of big government—never have been and it is unlikely I ever will be. But those who know me well also know that I understand that a government properly supported by the resources of its people has an essential role in guaranteeing that we live in a civilized society. Support for essential legal services is a mandate of both of the constitutions under which we live. Our constitutions do not assign to lawyers the obligation to fulfill the mandates contained therein. Rather, they provide that these mandates are an obligation to be borne by the whole of society—in this case by all of the citizens of Minnesota.

In conclusion, I must acknowledge that I am sympathetic with many of the constitutional issues raised by the dissent and am very concerned about the nature of the action we take today. I am concerned that our action tends to blur the distinctions between the three branches of government. Despite my concerns, I agree with the majority that under our inherent powers we do have authority to impose a fee increase on lawyers to support public defenders. But the fact that we have this authority does not mean it is the right thing to do.[3]

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[3] Another reason I vote for the fee increase at this time is that I am acutely aware of the daunting challenge the Governor and Legislature face in balancing the budget. These are tough economic times and many Minnesotans are in severe financial straits as a result of the current economic downturn. I in no way intend to minimize the challenges the Governor and Legislature face; rather, I urge them to do the right thing for all citizens and consider all available options as they face this challenge.

That said, I must say that one key reason I vote for the increase is that it is only temporary—for two years. Here I am inclined to paraphrase the words of Chief Joseph of the Nez Perce by saying, I will vote to grant such a fee increase no more forever. But I refrain from making such an unequivocal statement because I, like most lawyers, know that a person speaking about the future is generally ill-advised in making a statement or pledge that contains an absolute. Nevertheless, it is unlikely that in the future I will support this method of funding the constitutional mandate to adequately fund the public-defender system. It is my hope that at the end of this two-year period, the Governor and Legislature will thoughtfully reexamine their respective positions, consider what it means to live in a civilized society and reflect upon the meaning behind the words "and justice for all" in the Pledge of Allegiance. If they do such a reexamination, I hope they will, with the support of the people of Minnesota, provide adequate funding for Minnesota's public defenders.

DISSENT

PAGE, Justice.

I respectfully dissent.

First, a "fee" imposed solely to raise revenue to fund an obligation of the state is a tax, plain and simple. *See, e.g.*, *Marigold Foods, Inc. v. Redalen*, 809 F. Supp. 714, 719 (D. Minn. 1992) ("Premiums imposed primarily for revenue-raising purposes are considered taxes."). The Minnesota Supreme Court has no authority, inherent or otherwise, to levy taxes. *Reed v. Bjornson*, 191 Minn. 254, 257-58, 253 N.W. 102, 104 (Minn. 1934) ("Power of taxation reposes in the Legislature except as limited by state or national Constitution."); *see also Meriwether v. Garrett*, 102 U.S. 472, 501, 12 Otto 472 (1880) ("The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."). The court attempts to justify the purported "fee" increase here under our inherent authority to regulate the practice of law and compares it to the imposition of a fee to defray the costs of administering the attorney licensure system. Here, the $75 "fee" increase has no regulatory purpose; it is not intended to alter the behavior of those who are otherwise required to pay it. Its only purpose is to raise revenue in order to provide funding for the State Public Defender's Office. Nor does the "fee" increase in any way assist the court in regulating the practice of law, as the attorney licensure system does, beyond providing justification for suspending the license of any lawyer who fails to pay it. Therefore, we should label it the tax that it is.

Because it is a tax, we may not impose it. By doing so, we violate Articles III, VI, and X of the Minnesota Constitution. In the process, we have also enlarged the scope of what constitutes a regulatory fee to the point that it will be difficult, if not impossible, in any future case for the court to find that any assessment by a government agency constitutes a tax. Further, the fact that the Wisconsin Supreme Court authorized the Wisconsin State Bar to assess Wisconsin lawyers a "fee" for the support of civil legal services does not alter the fact that this "fee," used to fund the public defense system, is nothing more than a tax on a discrete population of Minnesota citizens—lawyers.

Second, even if we ignore its revenue-raising purpose and pretend that the increase serves some regulatory purpose sufficient to characterize it as a fee and not a tax, the court's decision to impose it is bad judicial policy. The Sixth Amendment to the United States Constitution and Article I, Section 6, of the Minnesota Constitution give criminal defendants the right to counsel. As a result, the obligation to fund the public defense system belongs to the State of Minnesota—the entire state, not just a limited group of its citizens. In raising lawyer registration fees to provide funds for the public defense system, the court cites our "inherent authority." The court surely has the inherent authority to impose fees to fund those entities, such as the Board of Law Examiners and the Lawyers Professional Responsibility Board, that assist the court in regulating the profession. But the court has no more "inherent authority" to require lawyers to fund the

public defense system than it does to require lawyers to provide general funding for the judicial branch of state government.[1]

Third, the court has de facto acceded to the legislature's demand that the court impose the requested fee. The legislature has no authority to require the court to do so, an issue that should have been settled by *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973).

Fourth, by becoming part of the funding mechanism for the public defense system, the court has made itself part of a problem it may one day be called upon to address. On more than one occasion, a criminal defendant has come before us claiming that he received ineffective assistance of counsel because the state public defense system is chronically and severely underfunded. When a future criminal defendant challenges the quality of his representation by the public defender's office because the system is underfunded, the court will be faced with trying to justify its role in that funding. When that happens, there will be no way for us to resolve the conflict of interest and still maintain our status as a neutral arbiter, which is the foundation of our moral authority and the source of our public respect.

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[1] Applying the court's reasoning, it would seem to be at least as appropriate for the court to increase lawyer registration "fees" to provide funding for judicial vacancies that have not been filled across the state as a result of the state's fiscal crisis or to rehire laid-off court staff to assist the public, including lawyers. Having judges to hear and decide cases and staffing to meet the needs of the public is at least as important to the administration of justice as funding for the public defense system.

To be clear, the state's public defense system is chronically and critically underfunded.[2] The additional funds provided by the increase in lawyer registration fees will not change that fact. If the legislature will not adequately fund public defense, the judicial branch must do what it constitutionally can to alleviate the problem. If defendants cannot be promptly tried because no public defender is available, the courts can dismiss the charges. If defendants do not receive fair trials because their public defenders cannot hire experts or investigators or devote sufficient time to adequately prepare for trial, the courts can overturn the convictions. If defendants' appeals are delayed because no public defender is available to pursue the appeal, the courts can order the defendants released on bail until their appeals can be heard. But the judicial branch cannot exceed its constitutional authority, and that is what the court has done here.

I therefore dissent.

MEYER, J. (dissenting).

I join in the dissent of Justice Page.

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[2] By its order, the court, no doubt, intends to alleviate this underfunding problem. Sadly, it will have the opposite effect. The increased "fee" does not come close to addressing the public defense system's chronic underfunding. And now that the executive and legislative branches of state government can rely on the judicial branch to tax lawyers in order to fund a portion of the public defense system's needs, the executive and legislative branches have even less incentive to provide adequate funding.

DISSENT

GILDEA, Justice (dissenting).

I join in the dissent of Justice Page to the extent that he concludes that the court lacks the authority to grant the petition of the Board of Public Defense. The same analysis compels the conclusion that the court lacks the authority to grant the petition of the Legal Services Planning Committee. I therefore dissent.

6

MINNESOTA Management & Budget

January 27, 2009

To the 2009 Legislature:

I respectfully submit for your consideration the Governor's FY 2010-11 budget proposals for the judicial branch agencies, including the Supreme Court, the Court of Appeals, the Trial Courts, the Legal Professions Boards, and the Board of Public Defense. The Governor respects the separation of powers and the desire of constitutional officers and officials in the judicial and legislative branches to independently present their budget requests directly to the legislature without specific recommendations for the Governor. However, since the Governor is required by law to submit a balanced budget to the legislature, it is necessary to identify funding for those offices as part of preparing a complete budget.

The Governor's general recommendations for the judicial and legislative branches and other constitutional officers reflect his concern with the magnitude of the projected budget shortfall and the desire to protect core government functions. As with the executive branch, the Governor suggests that these offices and institutions individually redesign their operations to increase efficiencies while minimizing the disruption of public services as much as possible.

For the Supreme Court, Court of Appeals, Trial Courts, and the Board of Public Defense, the Governor recommends a general 5% reduction in appropriations for the FY 2010-11 biennium. For the Trial Courts, the Governor also recommends $5.586 million for increased costs for mandated services. The Legal Profession Boards are fully funded by fees collected under court rules, so no further actions are required on their budgets. The Governor makes no other recommendation regarding specific initiatives put forward by these agencies.

Sincerely,

Tom J. Hanson

Tom J. Hanson
Commissioner

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Agency Purpose
The Board of Public Defense is a judicial branch agency whose purpose is to provide quality criminal defense services to indigent defendants in the state of Minnesota through a cost-effective and efficient public defender system. Throughout its history the Board has established goals and principles to aid the agency to carry out its mission. Overall the Board is committed to five major goals: client centered representation, creative advocacy, continual training for all staff, recruitment and retention of excellent staff, and being a full partner in the justice system.

At A Glance

Two Year State Budget:
- $134 million - General Fund

Annual Caseloads
- 179,000 District Public Defense Cases
- 3,356 Parole Revocation Hearings
- 841 Appellate Files Opened
- 709 Community Notification Hearings

The public defense system is the largest customer of the courts, and public defenders provide service in every courthouse in Minnesota, handling over 179,000 cases per year.

Core Functions
The Judicial District Public Defender Offices provide quality trial court criminal defense services to indigent clients charged with crimes in felony, gross misdemeanor, misdemeanor, and juvenile cases. The Appellate Office provides services to indigent clients who appeal their convictions; post conviction proceedings; individuals subject to supervised release/parole revocations; and individuals subject to community notification hearings.

Operations
The ten Judicial District Public Defender Offices provide quality criminal defense services to indigent persons in felonies, gross misdemeanors, misdemeanors, juvenile delinquency, and children over ten years of age in Children In Need of Protective Services (CHIPS) cases. This is accomplished through a system that relies heavily on part-time attorneys (50%). During FY 2007 the districts provided service for 179,000 cases. This program also includes partial funding for four nonprofit public defense corporations. The corporations provide high quality, independent criminal, and juvenile defense services primarily to minority indigents, who otherwise would need public defense services. The four corporations are the Neighborhood Justice Corporation (St. Paul); Legal Rights Center (Minneapolis), Duluth Indian Legal, and the Regional Native Public Defense Corporation which serves the communities of Leech Lake and White Earth Reservations.

The Appellate Office provides services to indigent clients in state prisons who appeal their criminal cases to the Minnesota Court of Appeals and Supreme Court; or who pursue post conviction proceedings in the District Courts throughout the state; defendants in supervised release/parole revocation proceedings, and individuals subject to community notification.

Budget
During FY 2008-2009 the agency budget totals $134 million. The entire agency is funded through the General Fund.

Contact

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Dollars in Thousands

	Current		Governor Recomm.		Biennium
	FY2008	FY2009	FY2010	FY2011	2010-11
Direct Appropriations by Fund					
General					
Current Appropriation	66,348	68,028	68,028	68,028	136,056
Recommended	**66,348**	**68,028**	**64,627**	**64,627**	**129,254**
Change		0	(3,401)	(3,401)	(6,802)
% Biennial Change from 2008-09					-3.8%
Expenditures by Fund					
Carry Forward					
Miscellaneous Special Revenue	47	0	0	0	0
Direct Appropriations					
General	66,061	68,315	64,627	64,627	129,254
Statutory Appropriations					
General	600	565	450	450	900
Gift	167	221	180	180	360
Total	**66,875**	**69,101**	**65,257**	**65,257**	**130,514**
Expenditures by Category					
Total Compensation	47,884	45,305	42,540	42,515	85,055
Other Operating Expenses	5,890	10,353	9,893	9,918	19,811
Local Assistance	13,101	13,443	12,824	12,824	25,648
Total	**66,875**	**69,101**	**65,257**	**65,257**	**130,514**
Expenditures by Program					
Appellate Office	4,528	4,627	4,373	4,373	8,746
Administrative Services Office	1,639	2,071	1,950	1,950	3,900
District Public Defense	60,708	62,403	58,934	58,934	117,868
Total	**66,875**	**69,101**	**65,257**	**65,257**	**130,514**
Full-Time Equivalents (FTE)	**640.1**	**527.5**	**501.5**	**487.3**	

PUBLIC DEFENSE BOARD

Change Summary

Dollars in Thousands

	FY2009	Governor's Recomm. FY2010	Governor's Recomm. FY2011	Biennium 2010-11
Fund: GENERAL				
FY 2009 Appropriations	**68,028**	**68,028**	**68,028**	**136,056**
Subtotal - Forecast Base	**68,028**	**68,028**	**68,028**	**136,056**
Change Items				
Operating and Grants Reduction	0	(3,401)	(3,401)	(6,802)
Total Governor's Recommendations	**68,028**	**64,627**	**64,627**	**129,254**
Fund: GENERAL				
Planned Statutory Spending	**565**	**450**	**450**	**900**
Total Governor's Recommendations	**565**	**450**	**450**	**900**
Fund: GIFT				
Planned Statutory Spending	**221**	**180**	**180**	**360**
Total Governor's Recommendations	**221**	**180**	**180**	**360**

PUBLIC DEFENSE BOARD

Change Item: Operating and Grants Reduction

Fiscal Impact ($000s)	FY 2010	FY 2011	FY 2012	FY 2013
General Fund				
Expenditures	$(3,401)	$(3,401)	$(3,401)	$(3,401)
Revenues	0	0	0	0
Other Fund				
Expenditures	0	0	0	0
Revenues	0	0	0	0
Net Fiscal Impact	$(3,401)	$(3,401)	$(3,401)	$(3,401)

Recommendation

The Governor recommends a 5% reduction in the agency's base budget, to be distributed proportionately between operating costs and grants. The Governor makes no specific recommendations on the agency's change request.

Background

The Governor respects the separation of powers and the desire of officials in the judicial and legislative branches and other constitutional officers to independently present their budget requests directly to the legislature without specific recommendations from the Governor. However, since the Governor is required by law to submit a balanced budget to the legislature, it is necessary to identify funding for those offices as part of preparing a complete and balanced budget.

The Governor's general recommendations for the judicial and legislative branches and other constitutional officers reflect his concern with the magnitude of the projected budget shortfall and the desire to protect core government functions. As with the executive branch, the Governor suggests that these offices and institutions individually redesign their operations to increase efficiencies while minimizing the disruption to public services as much as possible.

Relationship to Base Budget

This reduction represents 5% of the base funding for the FY 2010-11 biennium.

Statutory Change: Not Applicable

Program Description

The Appellate Office provides services to indigent clients in criminal appeals, post conviction proceedings in the District Courts, sex offender community notification and review hearings, and supervised release/parole revocation proceedings.

Program at a Glance

- 948 Appellate cases opened in FY 2007
- 3,356 Parole revocation hearings FY 2007
- 709 Sex offender notification hearings

Population Served

In recent years, there has been a major legislative effort to increase penalties for existing crimes. In addition, new statutory penalties have been enacted to deal with specific populations or issues. Increased penalties and stronger enforcement have resulted in a significant increase in the population of the state's prisons and jails. The Minnesota Department of Corrections (DOC) records indicate that as of 1-1-08 there were 9,270 inmates in the state's correctional facilities, a 22% increase in the last four years. This population is the client base for the Appellate Office.

Parole revocations have increased more than 10% in one year, and 22% in the last three years. After years of double digit growth, the number of appellate files opened has returned to 2004 levels.

In 1996, the legislature enacted the community notification law for sex offenders. The law requires a review process for classifying sex offenders. Indigent offenders have the right to representation by the Appellate Office. Caseloads in this area grew 80% between FY 2004 and FY 2008. During the same time, appeals of these decisions increased by 78%.

Services Provided

The Appellate Office provides services to indigent prisoners who appeal their criminal cases to the Minnesota Court of Appeals and Supreme Court; or who pursue post conviction proceedings in the District Courts throughout the state; to defendants in supervised release/parole revocation proceedings and to individuals subject to community notification.

Historical Perspective

There is a constitutional right to counsel at public expense for indigent prisoners' appeals and parole revocation hearings. As sentence lengths increase, prisoners have more motivation to go through the appellate process, which takes about a year. They also have longer periods of supervised release, leading to more parole revocation hearings.

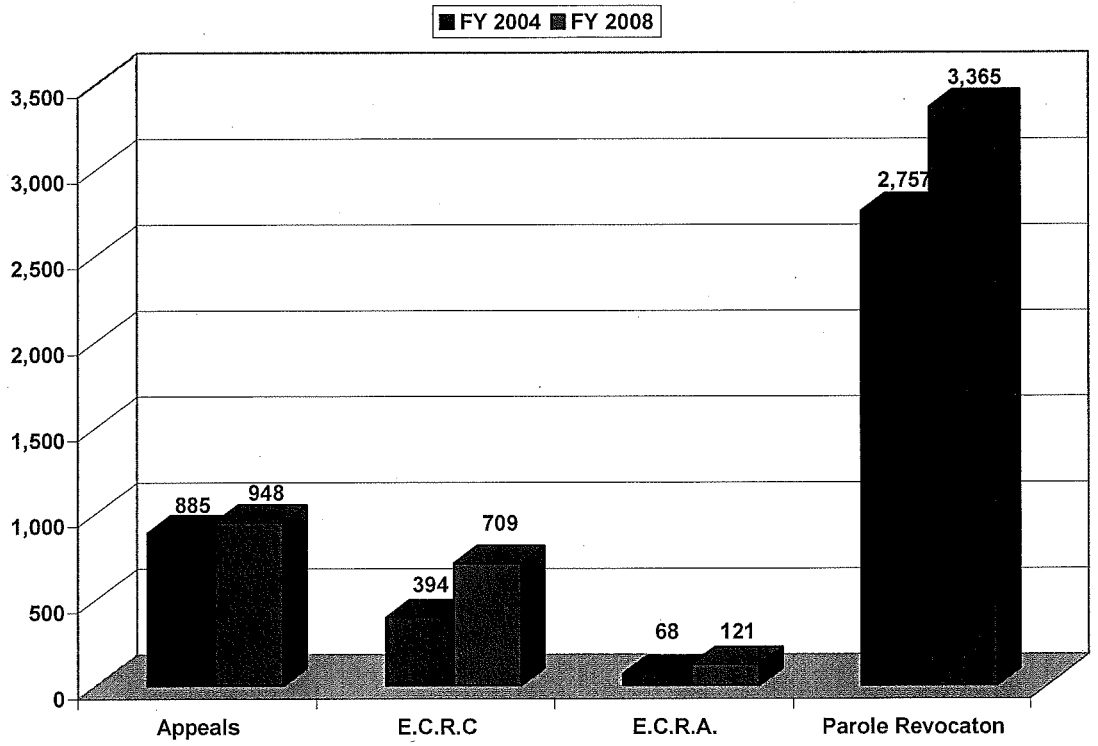
Faced with a $3.8 million deficit for 2008/2009, the Board adopted a budget plan that included a reduction of three FTE attorneys from the Appellate Office.

This will mean that in fiscal year 2009, as many as 42 appeals in tried cases will not be assigned to a lawyer but will be placed on a waiting list. This is roughly 11% of these cases. The average time that appellate court(s) will have to wait until counsel is assigned will be approximately six months.

Delays will also occur in the post-conviction unit. This group handles all appeals in cases that were not tried (guilty plea withdrawal, sentencing, conditional release), all the parole/supervised release hearings in the state, and all the community notification cases for sex offenders.

Finally, in the past the office has staffed ECRC (End of Confinement Review Committee) hearings on behalf of sexual offenders facing placement on the community notification scale as a level 2 or 3. Due to reduced staffing, the office has shifted remaining resources from appearing at the ECRC level to providing statutorily-required representation of individuals who seek review of an ECRC decision if the individual wishes to challenge being ranked as a level 2 or 3 sex offender.

Board of Public Defense Appellate Office Cases FY 2004 & 2008



Key Program Goals

Overall the Board is committed to five major goals: client centered representation, creative advocacy, continual training for all staff, recruitment and retention of excellent staff, and partnership in the justice system. For the Appellate Office, this includes:

- Providing excellent representation to clients in criminal appeals, post conviction proceedings in the District Courts, sex offender community notification and review hearings, and supervised release/parole revocation proceedings, and;
- Meeting court imposed deadlines for filing of appeals and other case matters.

Key Program Measures

- Community notification hearings are estimated to increase 80% from FY 2004 to CY 2008.
- Parole revocation hearings increased 22% from FY 2005 to FY 2007.

Program Funding

The Appellate Office has attempted to keep up with the ever-increasing caseload within its limited resources. The office has a budget of approximately $4.6 million, $300,000 of which is used to pay for the cost of trial transcripts. The increasing caseloads continue to make it difficult for the office to provide constitutionally mandated services, and to meet court-imposed deadlines for appellate matters.

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PUBLIC DEFENSE BOARD

Program: APPELLATE OFFICE

Program Summary

Dollars in Thousands

	Current		Governor Recomm.		Biennium
	FY2008	FY2009	FY2010	FY2011	2010-11
Direct Appropriations by Fund					
General					
Current Appropriation	4,352	4,603	4,603	4,603	9,206
Subtotal - Forecast Base	4,352	4,603	4,603	4,603	9,206
Governor's Recommendations					
Operating and Grants Reduction		0	(230)	(230)	(460)
Total	**4,352**	**4,603**	**4,373**	**4,373**	**8,746**
Expenditures by Fund					
Direct Appropriations					
General	4,528	4,627	4,373	4,373	8,746
Total	**4,528**	**4,627**	**4,373**	**4,373**	**8,746**
Expenditures by Category					
Total Compensation	3,581	3,420	3,044	2,976	6,020
Other Operating Expenses	947	1,207	1,329	1,397	2,726
Total	**4,528**	**4,627**	**4,373**	**4,373**	**8,746**
Expenditures by Activity					
State Public Defender	4,528	4,627	4,373	4,373	8,746
Total	**4,528**	**4,627**	**4,373**	**4,373**	**8,746**
Full-Time Equivalents (FTE)	**44.0**	**38.0**	**36.8**	**36.8**	

Program Description
The Board's Administrative Services Office under the direction of the State Public Defender and Chief Administrator provides policy implementation for the agency's programs, and overall management of its activities.

Population Served
The Administrative Services Office provides staff support to all public defender units.

Services Provided
The Administrative Services Office provides staff support to all public defender units, and implements the Board's policies. In addition, it is responsible for management of the agency systems related to caseloads, budget, personnel, and information systems. It accomplishes this with a small administrative staff. The Administrative Services Office operates on 3% of the agency's budget.

Program at a Glance

- Budget, information systems, policy and human resources work for 500+ state employees and 200 county employees.
- Sets standards and policies for provision of public defense services statewide.
- Information system support for 29 regional offices around the state.
- Budget support for 10 district offices, appellate office and four public defense corporations.

The Board has developed and implemented policies covering personnel, compensation, budgeting, training, conflict cases, and management information systems. Caseload standards have also been adopted. The Board has also completed work on a strategic plan, a training plan, an information systems plan, and revision of personnel and office policies and is going about the task of implementing these plans. The Board is also implementing a change in the status of personnel in the Second and Fourth Judicial District Public Defender Offices. All new hires in these Judicial Districts as of January 1, 1999, are state employees.

The Information Systems (IS) Office designs, implements, and maintains systems in 12 main offices and 16 satellite offices. They are currently accomplishing this with six staff people. Significant time and effort is dedicated to maintaining and enhancing existing systems. Currently, most of the IS team's time is spent replacing the Board's time and case management system which is 12 years old and runs on software no longer supported by the developer. This updated system will also integrate with the Minnesota Court Information System (MNCIS).

Key Program Goals
Throughout its history the Board has established goals and principles to aid the agency in carrying out its mission. Overall the Board is committed to five major goals: client centered representation, creative advocacy, continual training for all staff, recruitment and retention of excellent staff, and being a full partner in the justice system.

The Board's Administrative Services Office provides the district public defenders and appellate defenders with the resources they need to provide high quality legal assistance to indigent Minnesotans.

Key Measures
- 12 main offices and 16 regional offices supported by six Information Technology (IT) staff.
- A staff of 12 and 3% of the budget supports the public defender system.

Program Funding
The Board is accomplishing its mission and supporting district and appellate public defender programs with a minimal staff. Currently, 3% of the agency's budget is expended on central administration and information systems.

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PUBLIC DEFENSE BOARD

Program: ADMINISTRATIVE SERVICES OFFICE

Program Summary

Dollars in Thousands

	Current		Governor Recomm.		Biennium
	FY2008	FY2009	FY2010	FY2011	2010-11
Direct Appropriations by Fund					
General					
Current Appropriation	2,142	2,052	2,052	2,052	4,104
Subtotal - Forecast Base	2,142	2,052	2,052	2,052	4,104
Governor's Recommendations					
Operating and Grants Reduction		0	(102)	(102)	(204)
Total	**2,142**	**2,052**	**1,950**	**1,950**	**3,900**
Expenditures by Fund					
Direct Appropriations					
General	1,639	2,071	1,950	1,950	3,900
Total	**1,639**	**2,071**	**1,950**	**1,950**	**3,900**
Expenditures by Category					
Total Compensation	1,248	1,325	1,216	1,219	2,435
Other Operating Expenses	391	746	734	731	1,465
Total	**1,639**	**2,071**	**1,950**	**1,950**	**3,900**
Expenditures by Activity					
Public Defense Board	1,639	2,071	1,950	1,950	3,900
Total	**1,639**	**2,071**	**1,950**	**1,950**	**3,900**
Full-Time Equivalents (FTE)	**12.0**	**12.0**	**11.4**	**11.4**	

Program Description

The ten Judicial District Public Defender Offices provide quality criminal defense services to indigent persons in felony, gross misdemeanor, misdemeanor, juvenile delinquency, and Children in Need of Protective Services (CHIPS) cases. Under Minnesota law, all individuals accused of a felony, gross misdemeanor, misdemeanor or juvenile crime are entitled to be represented by an attorney. If an individual who is accused in one of the above proceedings cannot afford the services of a private attorney, the court will appoint a public defender to represent that individual. This is accomplished through a system that relies on a mix of full-time and part-time attorneys (50 %), as well as support staff. During fiscal year 2007, the districts provided service in 179,000 cases.

Program at a Glance

- 179,000 cases opened in 2007
- Largest user of the court system
- Caseloads nearly double American Bar Association Standards.
- 40,000 uncompensated part-time public defender hours

Population Served

Trial level public defense serves the attorney needs of indigent Minnesotans.

Services Provided

The public defender system provides trial level representation in criminal defense cases. This includes investigation, expert witnesses, and support services. This program also includes part of the cost of four nonprofit public defense corporations. The corporations provide high quality, independent criminal and juvenile defense services primarily to minority indigent defendants, who otherwise would need public defense services.

Historical Perspective

Over the last several years increased enforcement of complicated felony cases, the implementation of the Children's Justice Initiative statutory changes, and changes in court proceedings have all combined to push the public defender system in an unsustainable direction. Without action by the Board to reduce non-mandatory services, caseloads would have exceeded 810 case units per FTE defender. (A case unit is approximately equal to a misdemeanor). This is more than double the A.B.A. and Board standards. Annually over the last several years part-time defenders have provided approximately 40,000 uncompensated hours in order to handle the increased number and complexity of cases and to keep the court system operating.

The 2007 Public Safety Finance Bill mandated that most of the new funding provided to the Board be allocated to the hiring of new staff. The Board in an attempt to comply with this language began hiring in the Judicial Districts with the highest caseloads. With this funding tied to new positions, in order to fund the projected deficit the Board was facing at the beginning of 2008/2009 and the increased personnel costs for 2008/2009, savings would need to be generated through attrition and salary savings. Higher than expected salary settlements and lower than expected savings from salary savings and attrition contributed to a $3.8 million deficit for 2008/2009.

In order to address the deficit, the Board adopted a budget for fiscal year 2009 that included an estimated reduction of fifty (50) FTE attorney positions on the district level. This is approximately 100,000 hours of attorney time. The reduction in positions was achieved through attrition, a series of voluntary separation policies, and finally layoffs.

Faced with these challenges, the Board implemented a service plan based on a set of principles which it adopted in 2003 and service delivery priorities it adopted in 2005. On the trial level these service principles include:

- Prioritize service to clients in custody;
- Evaluate the staffing of specialty courts; and
- Eliminate representation in non- mandatory cases.

The Board's service delivery priorities include:

- Constitutionally mandated criminal defense services for in-custody clients;
- Statutorily mandated criminal defense services for in-custody clients;
- Constitutionally mandated criminal defense services for out-of-custody clients;

- Statutorily mandated criminal defense services for out-of-custody clients;
- Other statutorily mandated services; and
- Other services as approved by the Board of Public Defense.

Following these principles and priorities, the Board voted to eliminate non-mandated services, namely representation of parents in child protection cases (CHIPS), and appearances at post-adjudication drug courts.

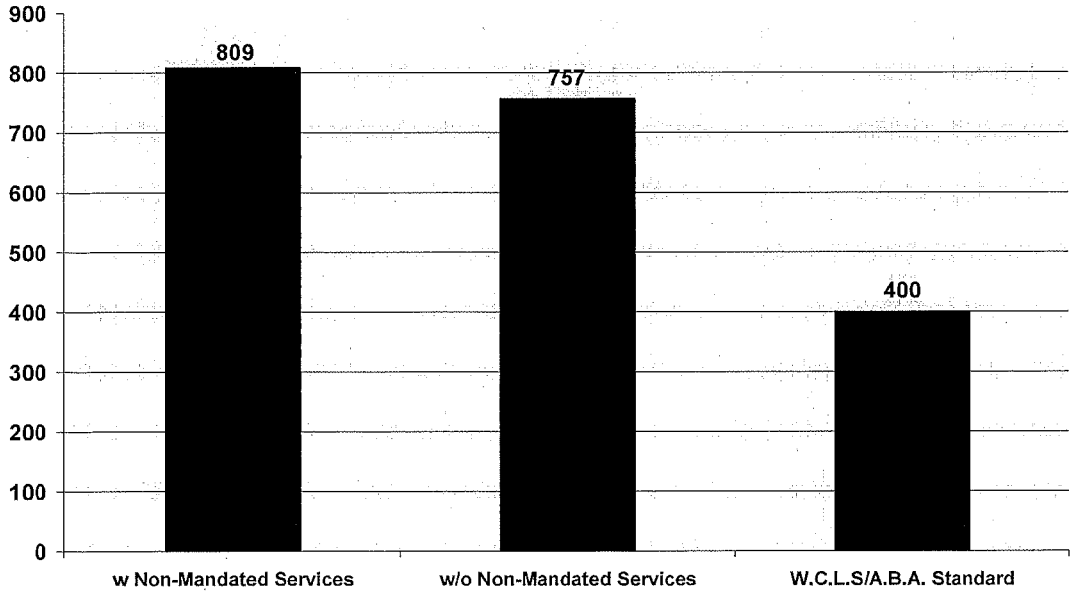
The representation of parents in child protection cases is not a mandated service for public defenders, although this service has been provided in the past. Representation of parents is statutorily a county function (M.S. 260C.331 Subdivision 3(d)). Public defenders continue to represent children over ten years of age in these proceedings. (M.S. 611.14).

There are 33 drug courts operating around the state. Drug courts include initial intensive treatment services with ongoing monitoring and continuing care for a year or more. This results in extensive time commitments for all those involved in drug court including public defenders. Participant contacts with the public defenders are frequent and on-going and occur at each status hearing. The establishment of drug court and the requirements of the court dictate that staff be assigned specifically to that court. This places a burden on the public defender system since a defender is taken out of the regular court, thereby reducing the "economy of scale" in the regular court and putting an extra burden on the remaining defenders.

Except for probation revocation, appeal, and release (parole) revocation cases, the constitutional right to counsel ends when the sentencing hearing ends. Thus "post-adjudication" services in the trial courts, with the exceptions noted are not mandated services. Clients in these "post-adjudication" courts are in the same status as clients who have been convicted and sentenced to probation: they have a right to counsel if they are accused of a violation, but not the constant attention of counsel while probation is going smoothly.

Even with the elimination of non-mandated cases the average caseload is expected to increase to approximately 760 case units per FTE attorney. This again assumes no increase in the overall caseload.

STATE OF MINNESOTA BOARD OF PUBLIC DEFENSE
CASE UNITS PER F.T.E. ATTORNEY w CY 2007 CASELOADS



Over the past ten years, 26 new judgeships have been created. With each of these judgeships comes another calendar (court room) where public defenders must appear. These new judgeships were created without a corresponding increase in public defender staff.

The board is the largest user of the state court system. Caseload increases, changes in court procedures, calendaring of cases, statutory changes, and changes in prosecution directly impact the board's ability to provide quality legal services to its clients. The efficiency and integrity of the judicial system are dependent on the public defender system's ability to provide quality legal services. If it cannot provide these services, court cases are continued, jails sit filled, and appeals and complaints rise. In short, the criminal justice system stops.

The public defender system does not and cannot control its client intake or workload. These important variables are controlled by external circumstances, such as: local government decisions that increase police and prosecution, new constitutional mandates, Supreme Court Rules, sentencing guideline changes, statutory changes, and judicial calendaring changes. Among the new challenges are the increased emphasis on prosecution of sex offenders, methamphetamine, and child protection cases.

Key Program Goals

Throughout its history the Board has established goals and principles to aid the agency to carry out its mission. Overall the Board is committed to five major goals:

- Client centered representation
- Creative advocacy
- Continual training for all staff
- Recruitment and retention of excellent staff
- Full partner in the justice system

Key Measures

- 179,000 cases were opened in FY 2007.
- Countless resources are lost as judges, court staff, prosecutors, victims and witnesses wait due to a lack of public defenders.
- 33 drug courts are operating statewide.
- District public defenders carry caseloads that average nearly twice the recommended standards.
- Prosecutors outnumber defenders by more than 2 to 1 statewide.
- Part time public defenders provided in excess of 40,000 uncompensated hours in FY 2007.

Program Funding

The current appropriation for this program is approximately $55 million annually. Increased personnel costs as well as costs related to insurance and retirement have strained district budgets. A lack of public defenders and increased caseloads and time demands mean that the court system often has to sit idle and wait for public defenders to become available. The result is a weakened court and a criminal justice system which experiences major delays and often must stop the processing of defendants.

Contact

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PUBLIC DEFENSE BOARD

Program: DISTRICT PUBLIC DEFENSE

Program Summary

Dollars in Thousands

	Current		Governor Recomm.		Biennium
	FY2008	FY2009	FY2010	FY2011	2010-11
Direct Appropriations by Fund					
General					
Current Appropriation	59,854	61,373	61,373	61,373	122,746
Subtotal - Forecast Base	59,854	61,373	61,373	61,373	122,746
Governor's Recommendations					
Operating and Grants Reduction		0	(3,069)	(3,069)	(6,138)
Total	**59,854**	**61,373**	**58,304**	**58,304**	**116,608**
Expenditures by Fund					
Carry Forward					
Miscellaneous Special Revenue	47	0	0	0	0
Direct Appropriations					
General	59,894	61,617	58,304	58,304	116,608
Statutory Appropriations					
General	600	565	450	450	900
Gift	167	221	180	180	360
Total	**60,708**	**62,403**	**58,934**	**58,934**	**117,868**
Expenditures by Category					
Total Compensation	43,055	40,560	38,280	38,320	76,600
Other Operating Expenses	4,552	8,400	7,830	7,790	15,620
Local Assistance	13,101	13,443	12,824	12,824	25,648
Total	**60,708**	**62,403**	**58,934**	**58,934**	**117,868**
Expenditures by Activity					
District Public Defense	60,708	62,403	58,934	58,934	117,868
Total	**60,708**	**62,403**	**58,934**	**58,934**	**117,868**
Full-Time Equivalents (FTE)	**584.1**	**477.5**	**453.3**	**439.1**	

PUBLIC DEFENSE BOARD

Agency Revenue Summary

Dollars in Thousands

	Actual FY2008	Budgeted FY2009	Governor's Recomm. FY2010	Governor's Recomm. FY2011	Biennium 2010-11
Non Dedicated Revenue:					
Total Non-Dedicated Receipts	**0**	**0**	**0**	**0**	**0**
Dedicated Receipts:					
Grants:					
Gift	178	178	178	178	356
Other Revenues:					
Gift	2	2	2	2	4
Total Dedicated Receipts	**180**	**180**	**180**	**180**	**360**
Agency Total Revenue	**180**	**180**	**180**	**180**	**360**

STATE OF MINNESOTA
BOARD OF PUBLIC DEFENSE
331 SECOND AVE S. NO. 900
PH. 612-349-2565
FAX 612-349-2568

Memo

To: Governor Pawlenty, Commissioner Tom Hanson

Cc: Jim King, Executive Budget Officer

From: Kevin Kajer, Chief Administrator

Date: 10/6/2008

Re: 2010-2011 Assessment

Background and Mission

In 1961 Clarence Earl Gideon (an innocent man) was charged in a Florida state court with a felony for breaking and entering. He lacked funds and was unable to hire a lawyer to prepare his defense. When he requested the court to appoint an attorney for him, the court refused, stating that it was only obligated to appoint counsel to indigent defendants in capital cases. Gideon defended himself in the trial; he was convicted by a jury and the court sentenced him to five years in a state prison.

In a unanimous opinion, the United States Supreme Court held that Gideon had a right to be represented by a court-appointed attorney. In this case the Court found that the Sixth Amendment's guarantee of counsel was a fundamental right, essential to a fair trial. Justice Black called it an "obvious truth" that a fair trial for a poor defendant could not be guaranteed without the assistance of counsel. Those familiar with the American system of justice, commented Black, recognized that **"lawyers in criminal courts are necessities, not luxuries."**

The mission of the Board of Public Defense is to provide quality criminal defense services to indigent defendants in the state of Minnesota through a cost-effective and efficient public defender system. Throughout its history the Board has established goals and principles to aid the agency to carry out its mission. Overall the Board is committed to five major goals, client centered representation, creative advocacy, continual training for all staff, recruitment and retention of excellent staff, and full partnership in the justice system.

The public defense system is the largest customer of the courts. Public defenders provide service in every courthouse in Minnesota, handling over 179,000 cases per year. It is estimated that public defenders provide service in 85-90% of the serious criminal cases in the state, and over 90% of the juvenile delinquency cases.

The Board does not and cannot control its caseload. The Board must provide the services specified in statute. In addition, the Minnesota State Supreme Court (Dzubiak v Mott) has recognized that a public defender "may not reject a client, but is obligated to represent whoever is assigned to her or him..." At the same time public defenders are held to the same ethical standards as private attorneys in regard to the handling of cases, as they should be.

Strategies

The Board has been committed to a cost effective model of representation, namely a combination of full time and part-time defenders. As opposed to paying by the hour or case, the Board's model is not only cost effective but costs tend to be more stable. The use of part-time defenders provides more flexibility especially where there are conflicts in representation. This has also allowed the Board to limit the number of full-time offices because the part-time defenders cover much of their own overhead.

Over the last several years the Board has implemented an extensive training program for attorneys and support staff. Attorneys are provided with a full range of Continuing Legal Education Credits. A trial school has been developed at one-half the cost of sending employees to a school outside of the agency. Support staff training has included certification of investigators as well as a paralegal institute and sentencing advocacy programs. All of these have been done within the budget and with mostly internal resources.

The Board is committed to keeping administrative costs in check. Approximately 97% of the Board's budget is direct service to clients.

Where funding has allowed the Board has added support staff to provide services in lieu of attorney time. The Board has adopted technology to improve efficiency. It has completed an on line brief bank system where attorneys can share legal research. It is currently retooling its time and case management system to capture data that is already being entered in MNCIS (Minnesota Court Information System). This will eliminate redundant entry of data and save attorney time.

Programs and Priorities

A "perfect storm" of an ongoing deficit, higher than expected personnel cost increases, lower than expected attrition and salary savings rates, and a legislatively imposed budget reduction presented the Board with a significant budget deficit for fiscal year 2009 and threatens to undermine the mission and goals of the Board.

Managing attorney positions have been established but these attorneys have excessive caseloads which take away from supervision, training, and mentoring of younger lawyers. Specialized juvenile divisions have emerged but lack the resources to provide adequate service. Finally, there has been a chronic shortage of support staff positions. As of June of this year there were ten (10) lawyers for every investigator, and eighteen (18) attorneys for every paralegal and sentencing advocate. This is more than double the standards recommended by the American Bar Association.

Faced with a reduction in its attorney staff, caseloads in excess of double ABA standards, and 44,000 uncompensated part-time public defender hours, the Board implemented a service plan based on the principles which it adopted in 2003 and service delivery priorities it adopted in 2005. Following these principles and priorities, the Board voted to eliminate non-mandated services. However, even with the elimination of non-mandated cases the average public defender caseload is expected to increase to more than 750 case units per F.T.E attorney, or approximately 180% of the caseload standards. **This assumes no increase in the overall caseload and no return to providing non-mandated services.**

On the appellate level staff reductions have meant that as many as 11% of the appeals in tried cases will not be assigned to a lawyer. The average time that appellate court(s) will have to wait until counsel is assigned

will be approximately six months. By fiscal year 2010 the wait could reach one year. All of this assumes that case growth remains flat.

In the post conviction unit (appeals in cases that were not tried (guilty plea withdrawal, sentencing, conditional release, parole revocation) delays will also occur. At some point, the delay in appellate services could eventually lead to the courts ordering the release of prisoners who have been on the waiting list too long. In addition, it would also seriously affect the ability of the unit to meet its statewide obligations in parole revocation cases where there is a constitutional right to counsel because it would not be possible to cover all hearings scheduled by the Department of Corrections.

Finally, staff reductions will also reduce the unit's ability to provide statutorily required representation in community notification cases.

In order to meet the priorities or goals of the Board within the base budget further service changes may be necessary. The top priority would be to provide service to persons in custody, accused of felonies. Cases involving misdemeanors, less serious felonies and out of custody cases would be greatly delayed. The speedy trial rights and the courts' timelines for timely case processing would not be met. All of this would adversely impact victims, other justice agencies and the general public.

Trends and Outside Influences

The public defender system does not and cannot control its client intake or workload. These important variables are controlled by external circumstances, such as: local government decisions that increase police and prosecution, new constitutional mandates, Supreme Court Rules, sentencing guideline changes, statutory changes, and judicial calendaring changes.

No one is arguing the merits of these decisions, but they do come with a cost.

Over the past ten years, twenty-six (26) new judgeships have been created. With each of these judgeships comes another calendar (court room) where public defenders must appear.

Counties and cities have increased staffing of prosecutors and police. A recent survey by District Chief Public Defenders indicates that there are twice as many prosecutors across the state as there are public defenders.

There are thirty-three (33) drug courts operating around the state. In addition there are mental health courts, DWI courts, and domestic abuse courts. Drug courts include initial intensive treatment services with ongoing monitoring and continuing care for a year or more. This results in extensive time commitments for all those involved in drug court including public defenders. These courts are beneficial to society, but also very labor intensive.

Since 2000 the Supreme Court has implemented the Children's' Justice Initiative (CJI). The "CJI," emphasizes the urgency of responding to child welfare cases much more quickly, and with much better standards of practice. It includes a best practices guide for child protection (CHIPS) cases. The challenge for the Board has been to find the resources to provide the services that the CJI requires.

Over the last several years several changes have been made in the criminal justice system. While many of these have changes have resulted in efficiencies and savings to parts of the judicial system, some have increased the costs for other judicial system partners. The elimination of mandatory transcripts by the Supreme Court saved the court over $1 million. However, this change added costs to the public defender system. What was a matter of pulling a transcript out of the court file is now a request for a transcript that must be produced by a court reporter and paid for.

The establishment of regional jails has decreased costs and travel times for local units of government. However, it has increased the time commitments and travel costs of the public defender system when attorneys and staff must travel greater distances to meet with clients.

In the area of technology the use of interactive television (ITV) and electronic discovery are two areas which while providing some efficiencies have the potential to shift costs to the public defender system.

With respect to the use of ITV, Supreme Court Rules mandate that the prosecutor can not be alone in the courtroom with the judge and the defense lawyer must be with the client. In these instances it may be necessary to have a public defender in the courtroom with the prosecutor and the judge, at the same time that there is a public defender in the jail (regional jail?). This also may create logistical problems, for example, if the same lawyer has 3 clients "in person" in the courtroom and 3 more "ITV" clients being broadcast from the jail.

In the area of e-discovery there are hundreds of jurisdictions which all make their own decisions on software. In some instances the discovery includes material from proprietary systems that are outside of government control the codes to which the Board does not have access to. The transmittal of photos and videotapes via e-mail has the potential to shut down the e-mail system. Finally, approximately one-half of public defenders are part-time. The Board does not provide support to or regulate the equipment or internet connections of these defenders. In some parts of the state there is a lack of high speed internet connection. In many instances the volume of the discovery material would overwhelm a part-time defender's ability to receive the data as well as manage it. While the Board is trying to adapt to electronic discovery. To date this has proved difficult due to a shortage of technology resources as well as the issues mentioned above.

Conclusion

Even with the changes mentioned above, it must be noted that they cannot replace the 6th Amendment guarantee of the right to counsel.

Without an adequate number of public defenders the court system must slow down the processing of cases, which creates larger and larger court calendars; this means more time in court for lawyers, judges, court personnel and others, much of which can be idle time waiting for the case to be called. The result of this is an increase in the cost of processing cases, for the state and the counties. In addition, due to the fact that court calendars are overcrowded and time consuming, the court time available for the resolution, by trial or hearing of civil cases may be delayed at a substantial cost to everyone involved.

Often public defenders are scheduled in two different court rooms (many times in two different counties) at the same time. This brings the court system to a halt. In these instances victims, witnesses, law enforcement and court personnel sit idle waiting for public defenders. In some instances public defenders have been threatened with contempt for not appearing in a court room even when they are scheduled and appearing in another court room or county.

In most parts of the state there are not enough public defenders to represent clients at first appearance. This includes making bail arguments. The lack of public defenders increases the costs of incarceration of individuals in the already overcrowded county jails. As of May 2008, county jails were at 105% of capacity. These costs include but are not limited to jail staff and facility expense but also medical and dental expense as well.

Without additional funding the agency will not be able to meet its mission and goals during in the 2010-2011 biennium. In 2003, faced with a significant budget reduction the Board of Public Defense approved a set of budget and service principles to guide any future budget decisions. On the trial level these **budget principles** included:

1. Minimize negative impacts on clients
2. Maintain a statewide public defender system
3. Minimize impact on staff and infrastructure
4. Place a priority on services mandated by statute or constitution

The **service principles** include:

1. Prioritize service to clients in custody,
2. Evaluate the staffing of specialty courts
3. Eliminate representation in non- mandatory cases

Again facing a major budget deficit in FY 2005, the Board developed a service delivery plan based on the 2003 case priorities. The Board's **service delivery priorities** include:

- Constitutionally mandated criminal defense services for in-custody clients
- Statutorily mandated criminal defense services for in-custody clients
- Constitutionally mandated criminal defense services for out-of-custody clients
- Statutorily mandated criminal defense services for out-of-custody clients
- Other statutorily mandated services
- Other services as approved by the Board of Public Defense

The Board's service priorities also include a provision that attorneys will be provided with a reasonable balance of "in-court" and "out-of-court" hours. The Board is cognizant of the needs of the defenders, both full and part time. Out-of-court time is critical to prepare their clients' cases, time to meet and consult with their clients, and in the case of part-time defenders, time to be diligent in the representation of not only their public defender clients but equally so, their private clients. This will result in further limiting public defender availability for in-court hours, and may result in additional prioritization of cases. (In custody) If this occurs the court system will be further impacted and may come to a complete stop in some areas of the state. This will have ramifications not only for the courts, but county jails, law enforcement, prosecutors and the general public.

In short, the Board continues to be committed to its mission; however its reduced staff has already slowed down the entire justice system and required both other justice agencies and the public to wait for our lawyers to provide their mandated services.

PUBLIC DEFENSE BOARD

Change Item: Public Defender Viability

Fiscal Impact ($000s)	FY 2010	FY 2011	FY 2012	FY 2013
General Fund				
Expenditures	$7,818	$11,887	$11,887	$11,887
Revenues	0	0	0	0
Other Fund				
Expenditures				
Revenues	0	0	0	0
Net Fiscal Impact	$7,818	$11,887	$11,887	$11,887

Request

The Board of Public Defense requests $7.818 million in FY 2010 and $11.887 million in FY 2011 in an attempt to put the public defender system on financially solid ground for the biennium. The request would fund: 53 positions lost during FY 2009 and associated support staff, projected cost increases for 2010/2011 that if not funded would serve to reduce staffing, and an adjustment in funding for the public defense corporations which serve thousands of clients that otherwise would be public defender clients. This assumes the Board will not be providing services in non-mandated cases.

Background

The Board does not and cannot control its caseload. The Board must provide the services specified in statute. The Minnesota State Supreme Court in the case (Dzubiak v Mott) has recognized that a public defender "may not reject a client..."

Faced with a "perfect storm" of an ongoing deficit, higher than expected personnel cost increases, lower than expected attrition and salary savings rates, and a budget reduction, the Board was forced to a budget for FY 2009 that included a reduction of fifty-three (53) FTE attorney positions. This was approximately 12% of the attorney staff, and equates to 100,000 hours of attorney time.

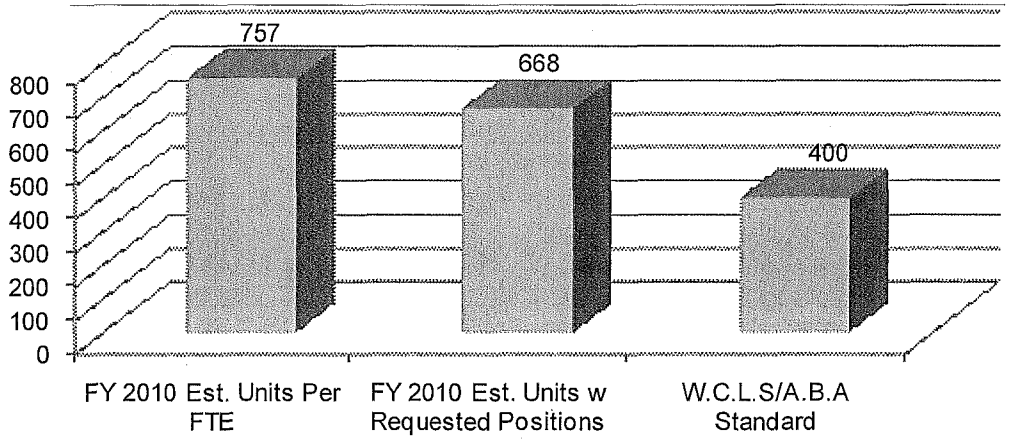
With the staff losses, caseloads in excess of double American Bar Association (ABA) standards, and 44,000 uncompensated part-time public defender hours, the Board implemented a service plan based on principles it adopted in 2003. This plan included the elimination of non-mandated services and district service plans that prioritize services to in-custody clients, and with a reasonable balance of in-court and out of court hours.

Even with the elimination of non-mandated cases the average caseload is expected to increase to 757 case units (a case unit is approximately equal to a misdemeanor) or 180% of the caseload standards. **This assumes no increase in the overall caseload or service in non-mandated cases.** The unpaid hours of part-time public defenders are the equivalent of 24 FTE attorneys. The lack of public defenders has had and will continue to have a major impact on the criminal justice system, delaying the ability of the justice agencies to function in a timely manner, and eroding the public's confidence in the judicial system.

If funding is provided to rehire the positions the average caseload will still be 160% of the caseload standard. This will not address the issue of unpaid part-time public defender hours.

The request would also fund estimated personnel cost increases for the 2010-2011 biennium. This includes mandated costs of a COLA, steps, insurance and retirement contributions. Mandated non-personnel cost increases include the costs of trial transcripts, mileage and rent. Over the last five years expenditures on transcripts have averaged $676,000 per year (budget is $300,000). The request would fund the difference between the budgeted amount and the five year average expenditure. The Internal Revenue Service (IRS) rate for mileage has increased to 58.5 cents per mile. During a typical year public defenders and staff will travel approximately 1.4 million miles. The request would fund the difference between current costs and the estimated cost based on the new IRS rate. Office rents have typically increased 3% per year. If these costs are not funded, it will directly impact the number of attorneys that the Board will have available for the biennium.

Board of Public Defense FY 2010 Estimated Caseloads w Requested Positions
(Assumes no growth in caseloads)



In addition to not being able to control intake, the volume of cases is controlled by external circumstances, such as: local government decisions that increase police and prosecution, sentencing guideline changes, statutory changes, and judicial calendaring changes. No one is arguing the merits of these decisions, but they do come with a cost.

For example, according to the DOC from 1987-2005 the legislature created 86 sentencing enhancements which have imposed mandatory sentences or lengthened penalties. Local units of government have increased prosecution resources. A recent survey by Chief District Public Defenders indicated that there are twice as many prosecutors across the state as public defenders. Over the past ten years, twenty-six (26) new judgeships have been created. With each of these judgeships comes another calendar (court room) where public defenders must appear.

There are thirty-three (33) drug courts operating around the state. These courts are beneficial to society, but also very labor intensive. Drug courts include monitoring and continuing care for a year or more.

Without an adequate number of public defenders the court system must slow down the processing of cases. This creates larger court calendars; this means more time in court for lawyers, judges, court personnel and others, much of which can be idle time waiting for the case to be called. The result of this is an increase in the cost of processing cases, for the state and the counties. In addition, due to the fact that court calendars are overcrowded, civil cases are delayed at a substantial cost to everyone involved.

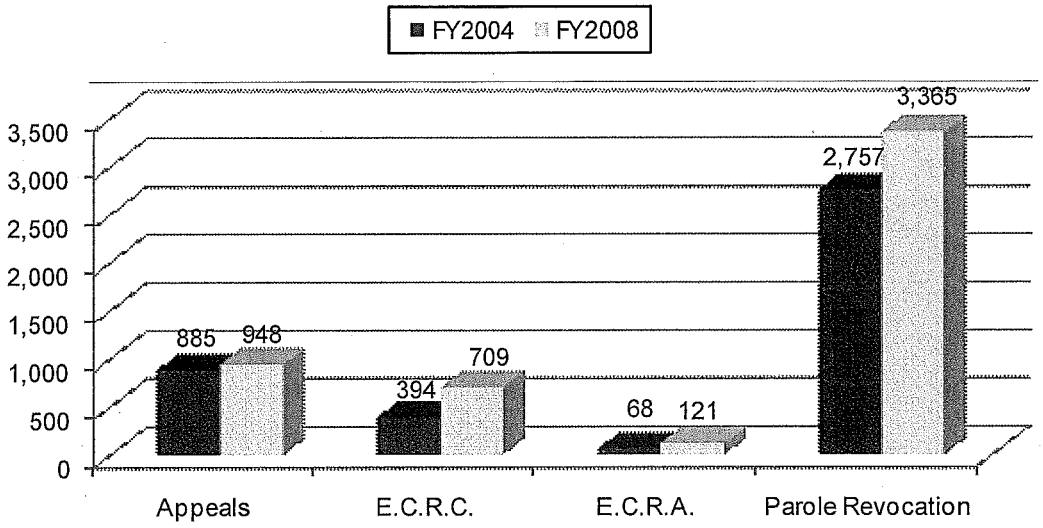
Often public defenders are scheduled in two different court rooms (many times in two different counties) at the same time. This brings the court system to a halt. In these instances victims, witnesses, law enforcement and court personnel sit idle waiting for public defenders. Not only is this not efficient, it is patently unfair to the other people who use the courts. In some instances public defenders have been threatened with contempt for not appearing in a court room even when they are scheduled and appearing in another court room or county.

In most parts of the state there are not enough public defenders to represent clients at first appearance. This includes making bail arguments. This impacts county jail space which as of May 2008 was at 105% of capacity.

On the appellate level staff reductions have meant significant delays in the state's appellate courts. In FY 2009 11% of appeals in tried cases will be placed on a waiting list. For each case the Court of Appeals or Supreme Court will have to stay the appeal timelines until counsel can be assigned. The average time that appellate court(s) will have to wait until counsel is assigned will be approximately six months. By fiscal year 2010 the wait could reach one year. All of this assumes that case growth remains flat.

Delays have also occurred in the post-conviction unit (guilty plea withdrawal, sentencing, conditional release, parole/supervised release hearings and community notification cases). At some point, the delay in appellate services could eventually lead to the courts ordering the release of prisoners who have been on the waiting list too long. The office's ability to staff parole revocation hearings has also been impacted, because it is not possible to cover all hearings scheduled by the Department of Corrections. Cases of this type have increased 22% over the last three years. Staff reductions will also reduce the unit's ability to provide statutorily required representation in community notification cases (ECRC). Cases of this type have increased 80% in the last four years. The office anticipates a significant increase in administrative court cases because they are unable to address issues in the ECRC process. Caseloads in this area have increased 78% in the last four years.

Board of Public Defense Appellate Office Cases FY 2004 & 2008



The four public defense corporations provide cost-effective quality legal defense services primarily to the state's minority communities. These cases (4,700) would otherwise be public defender cases. The request would provide funding to maintain current staff, by providing an adjustment on the corporations' grant amounts.

Relationship to Base Budget

The base budget for District and Appellate Defense is approximately $66 million. This represents 97% of the Board's budget.

Key Goals and Measures

Throughout its history the Board has established goals and principles to aid the agency to carry out its mission. Overall the Board is committed to five major goals: client centered representation, creative advocacy, continual training for all staff, recruitment and retention of excellent staff, and full partnership in the justice system.

The lack of public defenders has had a negative impact on all of these goals. High caseloads and time commitments often do not allow for client centered representation or creative advocacy. As mentioned there are too few defenders in many parts of the state to be at first appearances. Often time public defenders are meeting clients for the first time in the court room. Overwhelming time commitments means there is often little time for motion practice. A lack of support staff often keeps cases from being investigated, or sentencing alternatives from being presented.

- Criminal justice system delayed or stopped- lack of confidence in the system
- No early entry into cases and in many parts of the state there are no public defenders at first appearance.
- Caseloads almost double Board and ABA standards.
- Loss of 53 FTE attorney positions and more than 100,000 annual attorney hours.
- Part time public defenders providing 44,000 hours of uncompensated time.

Alternatives Considered

Where funding has allowed, the Board has added support staff to provide services in lieu of attorney time. The Board has adopted technology to improve efficiency. It is currently retooling its time and case management system to capture data that is already being entered in the Minnesota Court Information System (MNCIS). This will eliminate redundant entry of data and save attorney time. The Board is also trying to adapt to electronic discovery. To date this has proved difficult due to a shortage of technology resources. Even with these changes, it must be noted that they cannot replace the 6th Amendment guarantee of the right to counsel.

Statutory Change: Not Applicable.

STATE OF MINNESOTA

IN SUPREME COURT

C1-81-1206

ORDER TEMPORARILY INCREASING LAWYER REGISTRATION FEES

The Board of Public Defense and the Legal Services Planning Committee have filed petitions with this court seeking an increase in the annual lawyer registration fee. The Board of Public Defense requests the court to increase the annual lawyer registration fee by $75.00 per year and allocate this money to the Board to provide additional funding for legal representation of its clients. The Legal Services Planning Committee requests the court to increase the amount of the annual lawyer registration fee allocated to the Legal Services Advisory Committee by $25.00 per year, the additional funds to be distributed by the Legal Services Advisory Committee for civil legal services for low-income and disadvantaged Minnesotans. In an order filed on June 11, 2009, the court invited written comments on the proposed amendments. The comment period has now expired.

The court has reviewed the petitions and the comments received and is advised in the premises.

Pursuant to the inherent authority of the court,

IT IS HEREBY ORDERED THAT:

1. The petitions are granted effective for annual registration fees due and payable by October 1, 2009 and expiring with annual registration fees due and payable by

July 1, 2011. Effective commencing with fees due and payable by October 1, 2009 and expiring with fees due and payable by July 1, 2011, the annual lawyer registration fee shall be $317 or such lesser sum as is set forth below:

Active Status – Income Less than $25,000	$280.50
Active Status – Lawyers on Full-Time Military Duty	$172.00
Active Status – Lawyers on Full-Time Military Duty – Income Less than $25,000	$136.00
Active Status – Lawyers Admitted Fewer Than Three Years	$140.00
Active Status – Lawyers Admitted Fewer Than Three Years – Income Less Than $25,000	$122.00
Inactive Status – Out-of-State	$260.00
Inactive Status – Out-of-State – Income Less Than $25,000	$223.50
Inactive Status – Minnesota	$260.00
Inactive Status – Minnesota – Income Less Than $25,000	$223.50
Inactive Status – Retired	Exempt
Inactive Status – Permanent Disability	Exempt

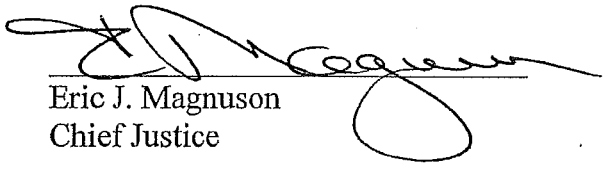
While this order is in effect, these annual registration fees are in lieu of the fees set forth in Rule 2 of the Rules of the Supreme Court on Lawyer Registration. The fee increase is temporary only, and upon the expiration of this fee increase, the annual registration fee shall revert to the amounts set forth in Rule 2.

2. For registration fees due and payable by October 1, 2009, payment of the temporary fee increase imposed by this order is deferred and the increase shall be payable along with the registration fees due and payable by October 1, 2010.

3. Seventy-five percent of the additional funds generated by this temporary fee increase shall be allocated to the Board of Public Defense; the remaining twenty-five percent of the additional funds generated by this temporary fee increase shall be allocated to the Legal Services Advisory Committee.

Dated: November 4, 2009

BY THE COURT:



Eric J. Magnuson
Chief Justice

STATE OF MINNESOTA
IN SUPREME COURT
C1-81-1206

MEMORANDUM

Magnuson, C.J.

We make this temporary fee increase reluctantly, in response to the exceptional financial circumstances currently facing the courts and the state in general, and in hopes that these circumstances will not continue indefinitely. Accordingly, we have expressly limited the duration of the fee increase, which will expire by the terms of our order at the end of the current biennium.

We have carefully considered the source of our authority to take this action, and are confident that this fee increase falls within our inherent authority to regulate the practice of law. In 1961, we imposed a registration fee on lawyers to defray costs of the administration of the attorney licensure system, citing "the inherent power of this court to regulate the practice of law in this state." Order (Minn. Oct. 5, 1961) at 1, *available at* http://mncourts.gov/filebrowse/?folderpath=AdministrationFiles (follow link to Lawyer Registration and locate by date). We subsequently increased the registration fee and allocated the increase to fund civil legal services, again acting solely based on that inherent authority. *See Promulgation of Amendments to the Rules of the Supreme Court for Registration of Attorneys*, No. C9-81-1206 (Minn. Feb. 6, 1997) at 1-2, *available at* http://mncourts.gov/filebrowse/?folderpath=AdministrationFiles (follow link to Lawyer Registration and locate by date). Not only did we believe we had the inherent authority

to impose that fee, we concluded that it was appropriate to require lawyers to pay that fee as a part of the price of licensure. There is no reason today to reach any different conclusion, and in fact, there is probably greater justification.

We agree with the Wisconsin Supreme Court that fees like these are sometimes "necessary to maintain the integrity and efficiency of the judicial system," and that the fees are "fully consistent with the heightened obligations of lawyers, both to our justice system and to assist this court with the effective administration of justice." *In re Petition of the Wis. Trust Account Found.*, No. 04-05 at 5 (Wis. Mar. 24, 2005), *available at* http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=1101. Rule 6.1 of the Minnesota Rules of Professional Conduct says that "every lawyer has a professional responsibility to provide legal services to those unable to pay." The same rule says that lawyers should "voluntarily contribute financial support to organizations that provide legal services to persons of limited means." *Id.* The comment to that rule recognizes that "because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services." Minn. R. Prof. Conduct 6.1 cmt. "Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible." *Id.* Although the comment notes that failure to meet that professional obligation will not subject a lawyer to discipline ("The responsibility set forth in this rule is not intended to be enforced through disciplinary process"), we have already decided that we may condition licensure on payment of fees

for expenses that we deem to be necessary not only for the court, but for the justice system.

The dissent concludes that we lack authority to act on either of these petitions, but does not assert that we acted beyond our authority when we imposed such fees in the past. We see no reason to retreat from our prior actions, and thus, having concluded that we can impose additional fees, we now focus our attention the question of whether we should take that action.

With regard to both the civil legal services fee and the public defender fee, for reasons similar to those articulated by the Wisconsin Supreme Court, the present circumstances warrant granting the petitions. No one quarrels with the notion that civil legal services and the public defender system are dramatically underfunded, and that as a result, our court system as a whole is suffering. With the support of the Minnesota State Bar Association, we now turn to the practicing bar in this time of need.

CONCURRENCE

ANDERSON, Paul H., Justice (concurring).

> ". . . one Nation under God,
> indivisible, with liberty and
> justice for all."
>
> Pledge of Allegiance

I concur with our court's decision to temporarily increase the annual lawyer registration fee by $75 and allocate this revenue increase to provide additional funding for public defenders. I write separately to chronicle the extraordinary circumstances that compel us to issue this order, to express my reluctance to fund a constitutional mandate in this manner, and to express my disappointment that the Governor and Legislature have failed to adequately fund a constitutional mandate by appropriate means.

Today our court places a significant part of the responsibility for funding the legal representation of indigent persons on the shoulders of lawyers and judges who are licensed to practice law in the State of Minnesota. We do so by raising the lawyer registration fee—a fee each lawyer and judge pays annually to practice law in Minnesota. The Legislature authorized this increase during its 2009 legislative session. *See* Minn. Stat. § 481.22 (2008). Importantly, we do not increase the fee pursuant to the Legislature's authorization, but do so under our exclusive and inherent power to regulate the legal profession and to ensure the fair administration of justice.

Extraordinary circumstances have led to an under-resourced public-defense system that hinders the administration of justice, and these circumstances prompt us to act today within our inherent power. I believe that even though this approach is legal, it is the

wrong approach and therefore should not be permitted to continue beyond the life of this particular order. As the dissent points out, our decision blurs the lines that separate the branches of government by placing a general revenue obligation on a discrete part of society.

The Scope of the Problem

The United States Constitution, Minnesota Constitution, and Minnesota law guarantee representation for an indigent person charged with a misdemeanor or more serious crime. *See* U.S. Const. amend. VI; Minn. Const. art. 1, § 6; *State v. Borst*, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967); Minn. Stat. § 611.14 (2008). These mandates require that the State provide criminal representation to indigents. It is not only the lawyers of this State who have an obligation to ensure that these mandates are met.[1] It is everyone's responsibility, and the funds should come from the citizens of the State as a whole. By underfunding public defenders and leaving it up to our court to procure financial support from lawyers, the Governor and Legislature have failed to meet one of their fundamental responsibilities. The crisis faced by public defenders and the resulting need to impose fees on a specific professional group are the result of an unfortunate

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[1] Minnesota lawyers already do much to make sure that those without financial means get legal help. Many lawyers do pro bono work. According to a Minnesota State Bar Association report, lawyers in large law firms alone completed thousands of pro bono hours. Minnesota State Bar Association, *Report on Pro Bono Legal Service* 4 (2007), *available at* http://www.projusticemn.org/library/attachment.148259. Lawyers also provide financial support for legal service agencies, which represent indigent clients in civil matters, either by voluntary contributions or through the lawyer registration fee. Since 1997, $50 of each lawyer registration fee has gone to fund legal service agencies. Today, we also increase this amount by $25—from $50 to $75.

impasse which affects how the citizens of Minnesota create and maintain a civilized society.

In Minnesota, the public-defender system is the mechanism that carries out the aforementioned constitutional mandates. It is no small task. Public defenders must "represent, without charge, a defendant charged with a felony, a gross misdemeanor, or misdemeanor . . . [and] a minor ten years of age or older in the juvenile court . . . ." Minn. Stat. § 611.26, subd. 6 (2008). Public defenders also represent the indigent in appeals, post-conviction proceedings, sex offender community notification and review hearings, and supervised release and parole revocation proceedings. Public Defense Board, *2010-11 Biennial Budget* 1 (2008), *available at* http://www.leg.state.mn.us/docs/2008/other/081000/public_defense.pdf. Public defenders have little or no control over whom they serve: if a judge determines that a defendant is indigent and therefore unable to hire a private attorney, a public defender must represent that defendant. *See* Minn. Stat. § 611.26, subd. 6; Minn. R. Crim. P. 5.02.

In its petition, the State of Minnesota Board of Public Defense estimates that over 95 percent of all juveniles accused of acts of delinquency and 85 percent of those charged with a felony are represented by a public defender. Moreover, the petition explains that public defenders provide representation in over 170,000 cases per year, and a single defender handles an average of over 700 case units a year, almost twice the American Bar Association's standard of 400 case units per year. *See also* Public Defense Board, *2010-11*, *supra*, at 1, 8.

High caseloads are the direct result of underfunding. The Legislature originally assigned to the Board of Public Defense $134 million from the State General Fund to operate during the fiscal years of 2008 and 2009. *See* Public Defense Board, *2010-11*, *supra*, at 1. Even though the allotment was an increase over the previous biennial budget, the Board faced a $2.3 million deficit caused by several factors. *See* Associated Press, *MN to Lose 72 Public Defenders to Budget Cuts*, Jun. 5, 2008, http://wcco.com/local/public.defenders.cut.2.741382.html. Unanticipated labor-cost increases, a lower than expected attrition rate, a greater than expected salary increase, rising health-insurance costs, and increases in retirement benefits all contributed to this deficit. As with caseloads, the Board has little control over many of these variable expenses. Health insurance for its employees, for example, is negotiated by the State; the Board is then required to pay the costs. Like many agencies that spend a majority of their funds on personnel, a significant increase in health-insurance costs is a heavy burden.

The funding situation worsened for public defenders in the spring of 2008. The Legislature cut $1.5 million from their budget to address the State's budget deficit. Associated Press, *supra*. As the Board of Public Defense explains in its petition, it faced a $3.8 million deficit after this reduction and was forced to cut 53 full-time equivalent positions—a greater than 12 percent decrease in its staff. *See also* Associated Press, *supra*. In an effort to adjust to these costs, the Board decided that it would not represent parents in CHIPS (Child in Need of Protection) or TPR (Termination of Parental Rights) matters. Elizabeth Stawicki, *Public Defenders to Stop Representing Poor Parents in Child Protection Cases*, MPR News Q, July 3, 2008,

http://minnesota.publicradio.org/display/web/2008/07/03/who_will_pay/. The Board took this action even though a Minnesota Statute, passed by the Legislature and signed by the Governor, provides that a "parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court." Minn. Stat. § 260C.163, subd. 3(a) (2008). There is disagreement regarding who is obligated to pay for representation when a parent is indigent, but the Board asserts public defenders are not statutorily required to represent indigent parents. *See* Stawicki, *supra*. As a non-mandated service that consumed many resources, parent representation became a low priority for the Board.[2] *See id.* Accordingly, public defenders stopped representing indigent parents.

During the 2009 legislative session, the Legislature reduced the public defense budget by another $2 million. Rather than cut another 35 attorneys, which would leave remaining attorneys with a caseload of over 800 case units per year, the Board of Public Defense has petitioned our court to increase the annual lawyer registration fee by $75. The Board anticipates that this fee increase will soften the blow of the most recent budget reduction but acknowledges that it still may need to cut an additional 10 attorney positions.

A failure to fully fund public defenders has dire consequences. Cases are delayed, often to the point where they might be dismissed; certain crimes may no longer be

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[2] Public defenders went from representing 4,055 parents in 1995 to over 9,000 parents in 2006. *See* Public Defense Board, *2008-09 Biennial Budget* 18 (2007), *available at* http://www.mmb.state.mn.us/doc/budget/bud-op/op09/final-op-oz.pdf. CHIPS and TPR cases often require the appointment of more than one public defender, as each parent may require separate representation as well as the child. *Id.*

prosecuted, parents may be irrevocably separated from their children without the assistance of an attorney, or counties may decide not to litigate CHIPS cases because the public-defender system cannot afford to provide an attorney to parents in those cases. Recognizing the current crisis and that the public-defender system cannot afford to lose another 35 attorneys, our court has reluctantly authorized this fee increase.

A recent newspaper article placed a human face on this issue. Nolan Rosenkrans, writing for the *Winona Daily News* said:

> Karin Sonneman is overwhelmed.
>
> The voice mailbox of Winona County's only full-time public defender was full Friday, clogged with messages from clients. Each day, it seems, she's assigned a new felony case to defend.
>
> Her client list hovers at 250, most of them felonies, and has become so overwhelming, she says it affects her ability to prepare proper defenses. "We have just about enough time to triage cases," she said. "I like to give every case the full measure of my time. It's just become crazy."
>
> Winona's public defenders say they are so understaffed and overworked they plan to ask judges to delay non-violent misdemeanor cases until Minnesota's Third Judicial District can find a way to lighten caseloads. The plan could give them more time to prepare defenses in serious cases and spend more face-time with clients, but it also leaves the smaller cases up in the air.
>
> "That's the kind of stuff that keeps me up at night," said Karen Duncan, chief public defender for Minnesota's Third Judicial District. "I recognize how important these are for people, but the truth is we aren't able to prepare for these cases."

Nolan Rosenkrans, *Public Defender's Office Overloaded,* Winona Daily News, Oct. 18, 2009, http://www.winonadailynews.com/news/local/crime-and-courts/article_80752cb0-bb9b-11de-ae76-001cc4c03286.html.

Possible Solutions

Public defenders do not expect that their problems will abate in the near future; they only expect the problems to get worse. State funding is not expected to increase any time soon, and large budget deficits are expected to continue. Some people, both at the national and state level, are so bold as to welcome this turn of events by clearly articulating their goal to shrink government down to a size so small that it can be drowned in a bathtub. The problem with this approach is that when you continuously put the government's head underwater, it is not the government that drowns—real people drown. Floodwaters breach levies and people drown. Bridges collapse and people drown. I have little tolerance for this anti-government rhetoric given the adverse consequences that result to people, especially the least advantaged among us, when this myopic approach to governing actually gets translated into policy. I believe that government does have a proper, even an essential role to play in creating and preserving a civilized society. Meeting constitutional mandates is part of that role.

Some people suggest that the problem we face can be solved by making fundamental changes to the judicial/legal system. I agree that changes can be and need to be made, but the changes must be viable. One well-intentioned legislator states that "We need to be more judicious in the cases we prosecute" and suggests that aggressive prosecution of some animal abuse cases, minor drug crimes, and drunken driving violations clogs up the courts. Rosenkrans, *supra*. This proposed solution is not without controversy and needs the cooperation of prosecutors to be successful. Others suggest that the Board of Public Defense must conduct an audit of how it performs its duties, so it

can become more efficient. This is also an approach that I support even though I know the results will not completely solve the extraordinary problems public defenders face. One conclusion is inevitable; the Governor and Legislature must pursue more basic solutions.

More than 80 years ago the distinguished United States Supreme Court Justice Oliver Wendell Homes wrote, "Taxes are what we pay for civilized society . . . ." *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). I believe that most, if not all, of the citizens of Minnesota want to be part of a civilized society. In fact, I believe that we want to be a notch or two above the rest. But, how do we determine or measure what a civilized society is? One measure of a civilized society is how it treats its weakest members. To understand how this concept plays out in the legal system, it is helpful to look to the words of the late United States Supreme Court Justice William J. Brennan, Jr., who said,

> But it has been well said that there is no better test of a society than how it treats those accused of transgressing against it. Indeed, it is because we recognize that incarceration strips a man of his dignity that we demand strict adherence to fair procedure and proof of guilt beyond a reasonable doubt before taking such a drastic step.

William J. Brennan, Jr., Associate Justice of the United States Supreme Court, Address to the Text and Teaching Symposium at Georgetown University (October 12, 1985).

I believe that when we Minnesotans recite the Pledge of Allegiance and say the words, "and justice for all" we mean them. And as Justice Brennan's words indicate, justice includes a guarantee of fair procedures and proof of guilt beyond a reasonable doubt for anyone accused of a crime. In *Gideon v. Wainwright*, the United States

Supreme Court wisely recognized that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U.S. 335, 344 (1963).

Those who know me well know that I am no fan of big government—never have been and it is unlikely I ever will be. But those who know me well also know that I understand that a government properly supported by the resources of its people has an essential role in guaranteeing that we live in a civilized society. Support for essential legal services is a mandate of both of the constitutions under which we live. Our constitutions do not assign to lawyers the obligation to fulfill the mandates contained therein. Rather, they provide that these mandates are an obligation to be borne by the whole of society—in this case by all of the citizens of Minnesota.

In conclusion, I must acknowledge that I am sympathetic with many of the constitutional issues raised by the dissent and am very concerned about the nature of the action we take today. I am concerned that our action tends to blur the distinctions between the three branches of government. Despite my concerns, I agree with the majority that under our inherent powers we do have authority to impose a fee increase on lawyers to support public defenders. But the fact that we have this authority does not mean it is the right thing to do.[3]

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[3] Another reason I vote for the fee increase at this time is that I am acutely aware of the daunting challenge the Governor and Legislature face in balancing the budget. These are tough economic times and many Minnesotans are in severe financial straits as a result of the current economic downturn. I in no way intend to minimize the challenges the Governor and Legislature face; rather, I urge them to do the right thing for all citizens and consider all available options as they face this challenge.

That said, I must say that one key reason I vote for the increase is that it is only temporary—for two years. Here I am inclined to paraphrase the words of Chief Joseph of the Nez Perce by saying, I will vote to grant such a fee increase no more forever. But I refrain from making such an unequivocal statement because I, like most lawyers, know that a person speaking about the future is generally ill-advised in making a statement or pledge that contains an absolute. Nevertheless, it is unlikely that in the future I will support this method of funding the constitutional mandate to adequately fund the public-defender system. It is my hope that at the end of this two-year period, the Governor and Legislature will thoughtfully reexamine their respective positions, consider what it means to live in a civilized society and reflect upon the meaning behind the words "and justice for all" in the Pledge of Allegiance. If they do such a reexamination, I hope they will, with the support of the people of Minnesota, provide adequate funding for Minnesota's public defenders.

DISSENT

PAGE, Justice.

I respectfully dissent.

First, a "fee" imposed solely to raise revenue to fund an obligation of the state is a tax, plain and simple. *See, e.g., Marigold Foods, Inc. v. Redalen*, 809 F. Supp. 714, 719 (D. Minn. 1992) ("Premiums imposed primarily for revenue-raising purposes are considered taxes."). The Minnesota Supreme Court has no authority, inherent or otherwise, to levy taxes. *Reed v. Bjornson*, 191 Minn. 254, 257-58, 253 N.W. 102, 104 (Minn. 1934) ("Power of taxation reposes in the Legislature except as limited by state or national Constitution."); *see also Meriwether v. Garrett*, 102 U.S. 472, 501, 12 Otto 472 (1880) ("The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."). The court attempts to justify the purported "fee" increase here under our inherent authority to regulate the practice of law and compares it to the imposition of a fee to defray the costs of administering the attorney licensure system. Here, the $75 "fee" increase has no regulatory purpose; it is not intended to alter the behavior of those who are otherwise required to pay it. Its only purpose is to raise revenue in order to provide funding for the State Public Defender's Office. Nor does the "fee" increase in any way assist the court in regulating the practice of law, as the attorney licensure system does, beyond providing justification for suspending the license of any lawyer who fails to pay it. Therefore, we should label it the tax that it is.

Because it is a tax, we may not impose it. By doing so, we violate Articles III, VI, and X of the Minnesota Constitution. In the process, we have also enlarged the scope of what constitutes a regulatory fee to the point that it will be difficult, if not impossible, in any future case for the court to find that any assessment by a government agency constitutes a tax. Further, the fact that the Wisconsin Supreme Court authorized the Wisconsin State Bar to assess Wisconsin lawyers a "fee" for the support of civil legal services does not alter the fact that this "fee," used to fund the public defense system, is nothing more than a tax on a discrete population of Minnesota citizens—lawyers.

Second, even if we ignore its revenue-raising purpose and pretend that the increase serves some regulatory purpose sufficient to characterize it as a fee and not a tax, the court's decision to impose it is bad judicial policy. The Sixth Amendment to the United States Constitution and Article I, Section 6, of the Minnesota Constitution give criminal defendants the right to counsel. As a result, the obligation to fund the public defense system belongs to the State of Minnesota—the entire state, not just a limited group of its citizens. In raising lawyer registration fees to provide funds for the public defense system, the court cites our "inherent authority." The court surely has the inherent authority to impose fees to fund those entities, such as the Board of Law Examiners and the Lawyers Professional Responsibility Board, that assist the court in regulating the profession. But the court has no more "inherent authority" to require lawyers to fund the

public defense system than it does to require lawyers to provide general funding for the judicial branch of state government.[1]

Third, the court has de facto acceded to the legislature's demand that the court impose the requested fee. The legislature has no authority to require the court to do so, an issue that should have been settled by *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973).

Fourth, by becoming part of the funding mechanism for the public defense system, the court has made itself part of a problem it may one day be called upon to address. On more than one occasion, a criminal defendant has come before us claiming that he received ineffective assistance of counsel because the state public defense system is chronically and severely underfunded. When a future criminal defendant challenges the quality of his representation by the public defender's office because the system is underfunded, the court will be faced with trying to justify its role in that funding. When that happens, there will be no way for us to resolve the conflict of interest and still maintain our status as a neutral arbiter, which is the foundation of our moral authority and the source of our public respect.

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[1] Applying the court's reasoning, it would seem to be at least as appropriate for the court to increase lawyer registration "fees" to provide funding for judicial vacancies that have not been filled across the state as a result of the state's fiscal crisis or to rehire laid-off court staff to assist the public, including lawyers. Having judges to hear and decide cases and staffing to meet the needs of the public is at least as important to the administration of justice as funding for the public defense system.

To be clear, the state's public defense system is chronically and critically underfunded.[2] The additional funds provided by the increase in lawyer registration fees will not change that fact. If the legislature will not adequately fund public defense, the judicial branch must do what it constitutionally can to alleviate the problem. If defendants cannot be promptly tried because no public defender is available, the courts can dismiss the charges. If defendants do not receive fair trials because their public defenders cannot hire experts or investigators or devote sufficient time to adequately prepare for trial, the courts can overturn the convictions. If defendants' appeals are delayed because no public defender is available to pursue the appeal, the courts can order the defendants released on bail until their appeals can be heard. But the judicial branch cannot exceed its constitutional authority, and that is what the court has done here.

I therefore dissent.

MEYER, J. (dissenting).

I join in the dissent of Justice Page.

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[2] By its order, the court, no doubt, intends to alleviate this underfunding problem. Sadly, it will have the opposite effect. The increased "fee" does not come close to addressing the public defense system's chronic underfunding. And now that the executive and legislative branches of state government can rely on the judicial branch to tax lawyers in order to fund a portion of the public defense system's needs, the executive and legislative branches have even less incentive to provide adequate funding.

DISSENT

GILDEA, Justice (dissenting).

I join in the dissent of Justice Page to the extent that he concludes that the court lacks the authority to grant the petition of the Board of Public Defense. The same analysis compels the conclusion that the court lacks the authority to grant the petition of the Legal Services Planning Committee. I therefore dissent.

C

STATE OF MINNESOTA
BOARD OF PUBLIC DEFENSE
331 SECOND AVE S. NO. 900
PH. 612-349-2565
FAX 612-349-2568

Memo

To: Governor Pawlenty, Commissioner Tom Hanson

Cc: Jim King, Executive Budget Officer

From: Kevin Kajer, Chief Administrator

Date: 10/6/2008

Re: 2010-2011 Assessment

Background and Mission

In 1961 Clarence Earl Gideon (an innocent man) was charged in a Florida state court with a felony for breaking and entering. He lacked funds and was unable to hire a lawyer to prepare his defense. When he requested the court to appoint an attorney for him, the court refused, stating that it was only obligated to appoint counsel to indigent defendants in capital cases. Gideon defended himself in the trial; he was convicted by a jury and the court sentenced him to five years in a state prison.

In a unanimous opinion, the United States Supreme Court held that Gideon had a right to be represented by a court-appointed attorney. In this case the Court found that the Sixth Amendment's guarantee of counsel was a fundamental right, essential to a fair trial. Justice Black called it an "obvious truth" that a fair trial for a poor defendant could not be guaranteed without the assistance of counsel. Those familiar with the American system of justice, commented Black, recognized that **"lawyers in criminal courts are necessities, not luxuries."**

The mission of the Board of Public Defense is to provide quality criminal defense services to indigent defendants in the state of Minnesota through a cost-effective and efficient public defender system. Throughout its history the Board has established goals and principles to aid the agency to carry out its mission. Overall the Board is committed to five major goals, client centered representation, creative advocacy, continual training for all staff, recruitment and retention of excellent staff, and full partnership in the justice system.

The public defense system is the largest customer of the courts. Public defenders provide service in every courthouse in Minnesota, handling over 179,000 cases per year. It is estimated that public defenders provide service in 85-90% of the serious criminal cases in the state, and over 90% of the juvenile delinquency cases.

The Board does not and cannot control its caseload. The Board must provide the services specified in statute. In addition, the Minnesota State Supreme Court (Dzubiak v Mott) has recognized that a public defender "may not reject a client, but is obligated to represent whoever is assigned to her or him..." At the same time public defenders are held to the same ethical standards as private attorneys in regard to the handling of cases, as they should be.

Strategies

The Board has been committed to a cost effective model of representation, namely a combination of full time and part-time defenders. As opposed to paying by the hour or case, the Board's model is not only cost effective but costs tend to be more stable. The use of part-time defenders provides more flexibility especially where there are conflicts in representation. This has also allowed the Board to limit the number of full-time offices because the part-time defenders cover much of their own overhead.

Over the last several years the Board has implemented an extensive training program for attorneys and support staff. Attorneys are provided with a full range of Continuing Legal Education Credits. A trial school has been developed at one-half the cost of sending employees to a school outside of the agency. Support staff training has included certification of investigators as well as a paralegal institute and sentencing advocacy programs. All of these have been done within the budget and with mostly internal resources.

The Board is committed to keeping administrative costs in check. Approximately 97% of the Board's budget is direct service to clients.

Where funding has allowed the Board has added support staff to provide services in lieu of attorney time. The Board has adopted technology to improve efficiency. It has completed an on line brief bank system where attorneys can share legal research. It is currently retooling its time and case management system to capture data that is already being entered in MNCIS (Minnesota Court Information System). This will eliminate redundant entry of data and save attorney time.

Programs and Priorities

A "perfect storm" of an ongoing deficit, higher than expected personnel cost increases, lower than expected attrition and salary savings rates, and a legislatively imposed budget reduction presented the Board with a significant budget deficit for fiscal year 2009 and threatens to undermine the mission and goals of the Board.

Managing attorney positions have been established but these attorneys have excessive caseloads which take away from supervision, training, and mentoring of younger lawyers. Specialized juvenile divisions have emerged but lack the resources to provide adequate service. Finally, there has been a chronic shortage of support staff positions. As of June of this year there were ten (10) lawyers for every investigator, and eighteen (18) attorneys for every paralegal and sentencing advocate. This is more than double the standards recommended by the American Bar Association.

Faced with a reduction in its attorney staff, caseloads in excess of double ABA standards, and 44,000 uncompensated part-time public defender hours, the Board implemented a service plan based on the principles which it adopted in 2003 and service delivery priorities it adopted in 2005. Following these principles and priorities, the Board voted to eliminate non-mandated services. However, even with the elimination of non-mandated cases the average public defender caseload is expected to increase to more than 750 case units per F.T.E attorney, or approximately 180% of the caseload standards. **This assumes no increase in the overall caseload and no return to providing non-mandated services.**

On the appellate level staff reductions have meant that as many as 11% of the appeals in tried cases will not be assigned to a lawyer. The average time that appellate court(s) will have to wait until counsel is assigned will be approximately six months. By fiscal year 2010 the wait could reach one year. All of this assumes that case growth remains flat.

In the post conviction unit (appeals in cases that were not tried (guilty plea withdrawal, sentencing, conditional release, parole revocation) delays will also occur. At some point, the delay in appellate services could eventually lead to the courts ordering the release of prisoners who have been on the waiting list too long. In addition, it would also seriously affect the ability of the unit to meet its statewide obligations in parole revocation cases where there is a constitutional right to counsel because it would not be possible to cover all hearings scheduled by the Department of Corrections.

Finally, staff reductions will also reduce the unit's ability to provide statutorily required representation in community notification cases.

In order to meet the priorities or goals of the Board within the base budget further service changes may be necessary. The top priority would be to provide service to persons in custody, accused of felonies. Cases involving misdemeanors, less serious felonies and out of custody cases would be greatly delayed. The speedy trial rights and the courts' timelines for timely case processing would not be met. All of this would adversely impact victims, other justice agencies and the general public.

Trends and Outside Influences

The public defender system does not and cannot control its client intake or workload. These important variables are controlled by external circumstances, such as: local government decisions that increase police and prosecution, new constitutional mandates, Supreme Court Rules, sentencing guideline changes, statutory changes, and judicial calendaring changes.

No one is arguing the merits of these decisions, but they do come with a cost.

Over the past ten years, twenty-six (26) new judgeships have been created. With each of these judgeships comes another calendar (court room) where public defenders must appear.

Counties and cities have increased staffing of prosecutors and police. A recent survey by District Chief Public Defenders indicates that there are twice as many prosecutors across the state as there are public defenders.

There are thirty-three (33) drug courts operating around the state. In addition there are mental health courts, DWI courts, and domestic abuse courts. Drug courts include initial intensive treatment services with ongoing monitoring and continuing care for a year or more. This results in extensive time commitments for all those involved in drug court including public defenders. These courts are beneficial to society, but also very labor intensive.

Since 2000 the Supreme Court has implemented the Children's' Justice Initiative (CJI). The "CJI," emphasizes the urgency of responding to child welfare cases much more quickly, and with much better standards of practice. It includes a best practices guide for child protection (CHIPS) cases. The challenge for the Board has been to find the resources to provide the services that the CJI requires.

Over the last several years several changes have been made in the criminal justice system. While many of these have changes have resulted in efficiencies and savings to parts of the judicial system, some have increased the costs for other judicial system partners. The elimination of mandatory transcripts by the Supreme Court saved the court over $1 million. However, this change added costs to the public defender system. What was a matter of pulling a transcript out of the court file is now a request for a transcript that must be produced by a court reporter and paid for.

The establishment of regional jails has decreased costs and travel times for local units of government. However, it has increased the time commitments and travel costs of the public defender system when attorneys and staff must travel greater distances to meet with clients.

In the area of technology the use of interactive television (ITV) and electronic discovery are two areas which while providing some efficiencies have the potential to shift costs to the public defender system.

With respect to the use of ITV, Supreme Court Rules mandate that the prosecutor can not be alone in the courtroom with the judge and the defense lawyer must be with the client. In these instances it may be necessary to have a public defender in the courtroom with the prosecutor and the judge, at the same time that there is a public defender in the jail (regional jail?). This also may create logistical problems, for example, if the same lawyer has 3 clients "in person" in the courtroom and 3 more "ITV" clients being broadcast from the jail.

In the area of e-discovery there are hundreds of jurisdictions which all make their own decisions on software. In some instances the discovery includes material from proprietary systems that are outside of government control the codes to which the Board does not have access to. The transmittal of photos and videotapes via e-mail has the potential to shut down the e-mail system. Finally, approximately one-half of public defenders are part-time. The Board does not provide support to or regulate the equipment or internet connections of these defenders. In some parts of the state there is a lack of high speed internet connection. In many instances the volume of the discovery material would overwhelm a part-time defender's ability to receive the data as well as manage it. While the Board is trying to adapt to electronic discovery. To date this has proved difficult due to a shortage of technology resources as well as the issues mentioned above.

Conclusion

Even with the changes mentioned above, it must be noted that they cannot replace the 6th Amendment guarantee of the right to counsel.

Without an adequate number of public defenders the court system must slow down the processing of cases, which creates larger and larger court calendars; this means more time in court for lawyers, judges, court personnel and others, much of which can be idle time waiting for the case to be called. The result of this is an increase in the cost of processing cases, for the state and the counties. In addition, due to the fact that court calendars are overcrowded and time consuming, the court time available for the resolution, by trial or hearing of civil cases may be delayed at a substantial cost to everyone involved.

Often public defenders are scheduled in two different court rooms (many times in two different counties) at the same time. This brings the court system to a halt. In these instances victims, witnesses, law enforcement and court personnel sit idle waiting for public defenders. In some instances public defenders have been threatened with contempt for not appearing in a court room even when they are scheduled and appearing in another court room or county.

In most parts of the state there are not enough public defenders to represent clients at first appearance. This includes making bail arguments. The lack of public defenders increases the costs of incarceration of individuals in the already overcrowded county jails. As of May 2008, county jails were at 105% of capacity. These costs include but are not limited to jail staff and facility expense but also medical and dental expense as well.

Without additional funding the agency will not be able to meet its mission and goals during in the 2010-2011 biennium. In 2003, faced with a significant budget reduction the Board of Public Defense approved a set of budget and service principles to guide any future budget decisions. On the trial level these **budget principles** included:

1. Minimize negative impacts on clients
2. Maintain a statewide public defender system
3. Minimize impact on staff and infrastructure
4. Place a priority on services mandated by statute or constitution

The **service principles** include:

1. Prioritize service to clients in custody,
2. Evaluate the staffing of specialty courts
3. Eliminate representation in non- mandatory cases

Again facing a major budget deficit in FY 2005, the Board developed a service delivery plan based on the 2003 case priorities. The Board's **service delivery priorities** include:

- Constitutionally mandated criminal defense services for in-custody clients
- Statutorily mandated criminal defense services for in-custody clients
- Constitutionally mandated criminal defense services for out-of-custody clients

- Statutorily mandated criminal defense services for out-of-custody clients
- Other statutorily mandated services
- Other services as approved by the Board of Public Defense

The Board's service priorities also include a provision that attorneys will be provided with a reasonable balance of "in-court" and "out-of-court" hours. The Board is cognizant of the needs of the defenders, both full and part time. Out-of-court time is critical to prepare their clients' cases, time to meet and consult with their clients, and in the case of part-time defenders, time to be diligent in the representation of not only their public defender clients but equally so, their private clients. This will result in further limiting public defender availability for in-court hours, and may result in additional prioritization of cases. (In custody) If this occurs the court system will be further impacted and may come to a complete stop in some areas of the state. This will have ramifications not only for the courts, but county jails, law enforcement, prosecutors and the general public.

In short, the Board continues to be committed to its mission; however its reduced staff has already slowed down the entire justice system and required both other justice agencies and the public to wait for our lawyers to provide their mandated services.

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This document contains NOT PUBLIC DATA. It is unlawful to disclose.

Public Defender System

Final Draft

January 29, 2010

Notice:

Under *Minnesota Statutes* 2009, 3.979, subd. 4, it is unlawful to disclose any part of this draft report to a person not authorized by the Legislative Auditor to review it.

State of Minnesota
Office of the Legislative Auditor
Program Evaluation Division

651-296-4708

OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA

EVALUATION REPORT

Public Defender System

FEBRUARY 2010

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Summary

High public defender workloads have created significant challenges for Minnesota's criminal justice system.

Major Findings:

- Public defender workloads are too high, resulting in public defenders spending limited time with clients, difficulties preparing cases, and scheduling problems that hinder the efficient operation of criminal courts. (pp. 35-49)
- Staff reductions in 2008 are the most immediate cause of high workloads, but case complexity and other factors add to the time required per case. (pp.38-40)
- Minnesota's heavy reliance on part-time public defenders presents risks that need to be addressed, but the public defender's office has few staff resources available for planning, research, and policy-development activities. (pp. 24-28)
- The Minnesota Board of Public Defense has strengthened accountability in the state's public defender system but could do more to measure and supervise the quality of public defender services. (pp. 18-23)
- Standards for determining eligibility for a public defender are not clearly defined in state law, and district court judges reported wide differences in how they weigh eligibility factors. (pp. 51-54)
- District court judges reported having little confidence in the accuracy of information they use to assess defendants' financial circumstances, but it appears that the vast majority of applicants cannot afford a private attorney. (pp. 60-63)
- State law requires defendants with some financial means to reimburse the state for a portion of their public defender costs, but these reimbursements are inconsistently ordered and collected. (pp. 64-68)

Recommendations:

- The Board of Public Defense should improve management practices for the supervision of public defenders and for measuring performance of the public defender system as a whole. (p. 23)
- The Board of Public Defense should study long-range staffing needs, the proper balance of full-time and part-time public defenders, and the merits of establishing additional full-time offices. (p. 27)
- The Legislature should enact set income standards for public defender eligibility and define circumstances warranting a judicial waiver of the standards. (p. 59)
- The Legislature should enact a single standard governing when and how much clients should contribute toward the cost of their public defenders. (p. 69)
- The Legislature should strengthen statutory procedures granting recipients of public assistance automatic eligibility for a public defender. (p. 63)

Caseloads of supervisors limit the time they can spend monitoring the performance of assistant public defenders.

Report Summary

In 1963, the U.S. Supreme Court ruled that the assistance of counsel in criminal prosecutions was essential to fair trials and a fundamental right under the Constitution. Minnesota state government employs attorneys, called public defenders, to represent persons unable to afford an attorney.

The Minnesota Board of Public Defense (the board) oversees the public defender system. The system is administered by the state public defender, district chiefs in each of the state's ten judicial districts, a chief appellate public defender, and a chief administrator. About 450 full- and part-time assistant public defenders represent clients.

Resources for the public defender system have fluctuated along with the state's fiscal condition.

Public defender system expenditures totaled $136 million in the fiscal year 2008-09 biennium, with staffing of about 528 full-time-equivalent staff. About 95 percent of the office's fiscal year 2009 budget went to personnel, lease, and other mandatory costs.

Budget deficits resulted in staff reductions affecting fiscal years 2003 through 2005. The Legislature provided funding for additional staff in fiscal years 2006 and 2007, but budget challenges again resulted in staff reductions in the next biennium.

The Board of Public Defense has taken important steps to improve accountability.

About 20 years ago, Minnesota state government assumed responsibility for public defender services, shifting from a patchwork of local public defense systems. Since then, the Board of Public Defense has established a clear chain of accountability from assistant public defenders in the field to the board, and it has adopted systemwide policies, procedures, and compensation systems. The state public defender has established training programs for public defenders and procedures for assessing their performance.

The supervision of public defenders needs to be strengthened.

We found weaknesses in day-to-day supervision of assistant public defenders. For example, 43 percent of public defenders responding to our survey said their supervisors in the past year had not reviewed any of their cases in the context of assessing performance. Several district chiefs told us they were seriously concerned about the performance of some part-time public defenders, particularly those that often work alone and with limited supervision.

One problem is that supervisors also represent individual clients. Officials from around the state told us that supervisors' caseloads limit the time they can spend monitoring and coaching assistant public defenders. This also hinders their ability to handle performance problems before they become serious. Public defense officials said they want to increase the ratio of supervisors to assistant public defenders, but have been stymied by budget constraints.

Minnesota may need to reconsider its heavy reliance on part-time public defenders.

As of July 2009, about half of the state's 450 public defenders (and 65 percent of public defenders outside the Twin Cities) worked on a part-time basis. Many of them worked

High workloads limit the time public defenders have to meet with clients and prepare cases.

without the benefit of a local public defender office housing support staff and district managers. District chief public defenders said that without access to a public defender office, part-time defenders may not request investigative or support services when needed. They also have less opportunity to interact with other public defenders in brainstorming sessions, mentoring, and support.

The public defender's office has had problems accurately quantifying public defender workloads.

Minnesota has a system for measuring caseloads that weights cases based on the level of defense effort required. However, the methodology used to develop the weighting system in 1991 was flawed. Weighting standards do not reflect regional differences affecting the time needed to defend cases. For example, in sparsely populated but geographically large districts, public defenders spend much more time driving to see clients or attend court.

Lack of preparation by public defenders can affect court efficiency.

The weighting standards also do not reflect the changes in criminal law and procedure that have taken place over the past 20 years. For example, cases involving sex crimes are now more time-intensive.

Public defender workloads are high, exceeding state and national standards.

State and national standards call for public defenders to carry no more than 400 case units per year. In 2009, Minnesota public defenders carried an average weighted caseload of 779 case units.

During our site visits, we observed public defenders working under severe time pressures. Roughly 60 percent of public defenders, public defender staff, and district court judges responding to our surveys reported that public defenders' workloads were much higher in 2009 than 2002.

Heavy workloads have hurt public defenders' ability to represent clients and court efficiency.

Those we interviewed and surveyed agreed that public defenders were, on the whole, excellent criminal defense attorneys. However, stakeholders also reported that workloads were having a noticeable impact on public defenders' ability to adequately and ethically represent their clients.

Public defenders responding to our survey felt strongly that they were not spending enough time with clients. This has made it difficult for them to build trust, explain the system and charges, and make decisions with their clients regarding their defense.

Time pressures have made it more difficult for public defenders to prepare their cases. In order to effectively represent their clients, attorneys need sufficient time to interview clients and witnesses, perform legal research, draft motions, request investigative and expert services, and otherwise prepare for hearings and trials.

About 50 percent of district judges responding to our survey said that criminal cases in their courtrooms progressed too slowly or much too slowly toward disposition. Judges and court administrators responding to our surveys reported that problems scheduling public defenders for hearings and trials was the most significant cause of delays relative to other factors, such as a general

District court judges told us they determine eligibility to be represented by a public defender very quickly and without sufficient evidence.

increase in the number of criminal cases or availability of prosecutors.

Judges' considerations when appointing a public defender vary widely.

State law establishes two general standards controlling eligibility for a public defender. Recipients of means-tested public assistance should be automatically granted eligibility. However, we found that this did not always happen.

The second standard for eligibility is a judge's determination that the defendant cannot afford private counsel. When evaluating an applicant's financial circumstances, judges are to consider income, assets, and debts.

District court judges weigh these eligibility factors differently. In our survey, 63 percent of judges responding said they adjusted income based on household expenses; 28 percent did not. When considering assets, 27 percent of judges said they placed little or no weight on ownership of a primary residence. And contrary to requirements in state law, 24 percent of district judges reported that they did not consider the local cost of private counsel.

Absent good information on applicants' financial circumstances, judges often rely on "gut instinct."

We asked district court judges how confident they were in the accuracy of the information they use to determine eligibility. Only half of judges responding to our survey thought they had an accurate picture of applicants' earned income. Judges felt even less confident in the accuracy of information on unearned income or the availability of assets that could be converted to cash or used to secure a loan.

Judges stated they must make eligibility decisions very quickly and without sufficient evidence. In practice, judges told us they rely on their "gut feelings" and a belief that most applicants would not ask for a public defender if they could afford a private attorney.

We reviewed about 100 public defender applications, comparing information provided by applicants with state public assistance and unemployment data. We also asked public defenders about their opinions of their clients' ability to afford counsel. While the evidence is limited, it appears that the vast majority of applicants are very low income and likely cannot afford an attorney.

Not all clients who can pay something toward the cost of their public defender are asked to do so.

By law, judges must order reimbursements from employed defendants and others who can afford to make partial payment toward the cost of their defense. These reimbursements are inconsistently ordered. In our survey, 29 percent of judges responding said they rarely if ever order defendants to make any reimbursement. Data for fiscal years 2007 to 2009 from the state court information system confirm that judges in some districts were far more likely to order reimbursements from defendants than their peers in other districts.

Introduction

In 1963, the U.S. Supreme Court ruled that the assistance of counsel in criminal prosecutions was essential to fair trials and a fundamental right under the Sixth Amendment of the Constitution. Accordingly, Minnesota state government employs attorneys, called public defenders, to represent persons who are charged with a crime in Minnesota, but are unable to afford an attorney. Minnesota has a broad eligibility standard meant to assure that those who cannot afford a private attorney have access to one. Responsibility for appointing a public defender rests solely with district court judges.

In Minnesota, the Board of Public Defense oversees the public defender system. It appoints the State Public Defender and chief public defenders for each of the state's ten judicial districts and the appellate office. The board also determines how state funds are allocated to the districts and appellate office.

The Legislative Audit Commission directed the Office of the Legislative Auditor to evaluate Minnesota's public defender system in April 2009. Legislators' concerns centered around the following questions, which we used to structure the evaluation:

- **How well are the resources of Minnesota's public defender system being managed?**

- **To what extent do the resources and administrative structure of the public defender system support adequate representation of clients and efficient operation of the criminal justice system?**

- **Does Minnesota have reasonable criteria and procedures for determining eligibility, and are they applied consistently?**

To understand Minnesota's public defender system and how it is managed, we interviewed staff and managers in the public defender's office, directors of Minnesota's four public defense corporations, officials from the State Court Administrator's Office, district court judges, and local prosecutors. We also reviewed Minnesota statutes, public defender's office policies and publications, state budget submissions, and other documents. In addition, we attended two meetings of the Board of Public Defense.

To help put Minnesota's public defender system and issues in context, we reviewed national literature on public defense standards and national efforts to evaluate and improve public defender systems around the country. We also identified 18 states with public defense systems similar to Minnesota's. For each state, we obtained documents and conducted interviews to collect comparative information on public defender eligibility and reimbursement standards.

We obtained and analyzed data from two main sources. The state court administrator's office provided summary-level trend data on criminal case filings, cases pending, and case dispositions for all criminal cases. The public defender's office provided historical and current data on public defender cases, case management, budget, and staffing.

It is possible that data related to a specific crime was recorded differently in the two systems. For example, cases in the state court information system may count one criminal complaint with five defendants and five public defenders as a single case. In the public defender case management system, it would be recorded as five separate cases. Because of these differences, we used the statewide data from the courts primarily for background. All analyses specific to the public defender system was derived from the public defender case management system data.

We conducted site visits in four of the state's ten judicial districts to learn in detail how the public defender system operates in metropolitan, suburban, and rural areas of the state. We selected districts that provided diversity in caseloads, staffing levels, geographic size, and location. The four districts were the first district (Dakota and six surrounding counties), the fourth district (Hennepin County only), the sixth district (St. Louis and three other northeastern counties), and the eighth district (Meeker and 12 counties extending west). We focused on two counties each in the first, sixth, and eighth districts: (1) the county where the main public defender office is located and (2) a county among the smallest in population. We visited both juvenile and adult court in Hennepin County.

In each of the four selected districts, we interviewed the chief district public defender and a supervising attorney. In each county (seven in total), we interviewed assistant public defenders, the county court administrator, and a district court judge. In each district, we interviewed a lead prosecutor from a county attorney's office. We also spent half-days observing several public defenders and observed the eligibility determination process in several counties. After completing the site visits, we conducted extended interviews with the chief district public defenders in the remaining six districts and the interim chief appellate public defender.

We conducted six separate surveys to learn how the public defender system works from various stakeholders' points of view. One was directed at all assistant public defenders, supervising public defenders, and district chief public defenders in Minnesota. The second survey went to nonattorney staff in public defender offices, including investigators, sentencing advisors, paralegals, legal secretaries, and office administrators. The third survey was directed to all district and appellate court judges and Supreme Court justices. The fourth survey went to all court administrators. The fifth survey went to the county attorney and a lead prosecutor for criminal cases in each county.

Most questions in each of these five surveys were tailored to the survey's target population, but each contained three common sets of questions about Minnesota's public defender system. We administered the surveys online in September 2009 and sent reminders to nonrespondents in October. Response rates were: 277 of 532 public defenders (52 percent); 107 of 182 nonattorney

staff (59 percent); 206 of 305 judges (68 percent); 57 of 69 court administrators (83 percent); and 104 of 173 prosecutors (60 percent).

Our sixth survey went to public defender clients. Because of logistical and privacy-related barriers, we were not able select a statistically representative sample of public defender clients. Instead, we created a short, paper survey that could be given to and collected from public defender clients who had just concluded their cases in a courthouse or were visiting their probation officers.[1] The survey included six questions related to the client's satisfaction with his or her public defender.

To administer the client survey, we enlisted the aid of probation officers in Dakota, Hennepin, McLeod, Olmsted, and Sibley counties (encompassing 14 probation office locations). The probation officers handled a range of clients with felony, gross misdemeanor, and misdemeanor convictions. Parole officers or administrators in each office handed a survey to visiting clients who said they had been represented by a public defender. Clients completed and immediately returned the survey. In addition, a member of our evaluation team visited three courthouses and approached public defender clients who had just completed a settlement conference in which they were sentenced or the case was dismissed. In total, we obtained completed surveys from 317 former clients.

We also reviewed public defender applications collected during one week in each of our site visit counties (including both juvenile and adult courts in Hennepin County). Of these, we judgmentally selected 127 to review in more detail. We obtained information on public assistance status from the Department of Human Services for 84 applicants. From the Department of Employment and Economic Development, we obtained for 102 applicants any information on unemployment benefits received in the month the applicant applied for a public defender and wages reported by employers in the previous quarter.

[1] To respect the boundaries of attorney-client privilege, we did not contact clients in open public defender cases.

1 Background

In 1963, the United States Supreme Court ruled in *Gideon v. Wainwright* that the assistance of counsel in criminal prosecutions was essential to fair trials and a fundamental right under the Sixth Amendment of the U.S. Constitution. The Court also held that the right to counsel was obligatory on states by virtue of the due process of law provision in the Fourteenth Amendment.[1] Accordingly, Minnesota state government employs attorneys, called public defenders, to represent persons charged with a crime in Minnesota, but are unable to afford an attorney.

Our evaluation focused on management of Minnesota's public defender system, eligibility determination, public defender workloads, and the quality of representation provided. As background, this chapter provides an overview of who can qualify for a public defender in Minnesota; federal and state standards governing public defenders; the organization and funding of Minnesota's public defender system; and data on the type and number of criminal cases in Minnesota's judicial system.

APPOINTMENT OF A PUBLIC DEFENDER

Public defenders are obligated to represent all clients assigned to them by a judge.

The right to have an attorney in criminal prosecutions applies to crimes established in federal, state, and local laws. The federal government provides public defenders to people charged with a crime under federal law. Minnesota's public defender system applies to those charged with crime under state or local law. In Minnesota, district court judges have sole authority to appoint public defenders.[2] Public defenders are obligated to represent any clients assigned to them, regardless of caseloads or difficulty of the case.[3]

The Bill of Rights in Minnesota's Constitution directly addresses the rights of the accused in criminal prosecutions. The Constitution says:

> The accused shall enjoy the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses

[1] The scope of the *Gideon* decision was limited to felony prosecutions, but the right to counsel has since been expanded. In 1967, the U.S. Supreme Court extended the right to counsel to children charged with juvenile delinquency and in 1972 to any case in which the defendant could be sentenced to imprisonment. In 2002, the Court found that defendants must receive counsel if they received a suspended jail sentence or were placed on probation, and later, the probation was revoked and imprisonment imposed. Defendants also have a right to counsel in their first direct appeal of a verdict and in appeals following a guilty plea.

[2] Public defenders may also, at their discretion or upon request, represent individuals prior to a court appearance if it appears that the individual is financially unable to obtain counsel. For example, a public defender may represent an arrested individual during a police interrogation. *Minnesota Statutes* 2009, 611.18.

[3] Dzubiak v. Mott, 503 N.W.2d 771, 775 (Minn. 1993).

> against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense.[4]

Minnesota courts have interpreted this language as guaranteeing the assistance of counsel in "any criminal matter in which the accused [stands] a substantial chance of facing incarceration."[5]

Public defenders are appointed to defendants unable to afford private counsel.

Within this constitutional framework, Minnesota statute requires a public defender to be appointed to persons who are financially unable to obtain counsel and fit into one of the following categories:

- Persons charged with a felony, gross misdemeanor, or misdemeanor (see Table 1.1);
- Persons appealing a conviction of a felony or gross misdemeanor, or pursuing a post-conviction proceeding prior to having a direct appeal of the conviction;
- Convicted persons who face revocation of probation or supervised release;
- Minors ten years of age or older who are (a) charged with a juvenile offense (other than a petty offense or habitual truancy) or (b) a child in need of protection or services (CHIPS).[6]

Minnesota statutes elaborate on the meaning of "financially unable to obtain counsel," but the criteria leave room for judicial discretion. The law states that

> "a defendant is financially unable to obtain counsel if: (1) the defendant, or any dependent of the defendant who resides in the same household as the defendant, receives means-tested governmental benefits; or (2) the defendant, through any combination of liquid assets and current income, would be unable to pay the reasonable costs charged by private counsel in that judicial district for a defense of the same matter."[7]

The first category of eligibility, receipt of means-tested government benefits, sets a relatively straight-forward eligibility standard. The second category, however, allows substantial discretion in evaluating applicants' financial circumstances. We discuss the implications of this level of discretion in Chapter 4.

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[4] Minnesota Constitution, art. I, sec. 6.

[5] State v. Dumas, 587 N.W.2d 299, 301 (Minn. Ct. App. 1998), citing State v. Borst, 154 N.W.2d 888, 894 (Minn. 1967).

[6] *Minnesota Statutes* 2009, 611.14. In addition, Minnesota law requires public defenders to represent predatory offenders subject to community notification hearings. *Minnesota Statutes* 2009, 244.052, subd. 6(b). There is no statutory requirement that public defenders represent those facing revocation of supervised release. However, these individuals do have a constitutional right to representation which has traditionally been fulfilled by the Appellate Office.

[7] *Ibid.* Programs that provide means-tested benefits include food stamps, Medical Assistance, and the Minnesota Family Investment Program.

Table 1.1: Levels of Offenses in Minnesota

Offense	Description	Eligibility for a Public Defender
Felony	A criminal offense punishable by more than one year in prison. It usually also involves the possibility of a fine of more than $3,000. Examples include murder, manslaughter, and most criminal sexual misconduct crimes.	Yes
Gross Misdemeanor	A criminal offense punishable by imprisonment of more than 90 days but not more than one year. It may also involve a fine of more than $1,000 but not more than $3,000. Examples include a second domestic assault in ten years and contributing to a child's habitual truancy.	Yes
Misdemeanor	A criminal offense punishable by up to 90 days imprisonment and/or a fine of up to $1,000. Examples include disorderly conduct or first-time driving while impaired.	Yes
Petty Misdemeanor	An offense punishable only by a fine of up to $300. Examples include most traffic violations and other minor violations.	No[a]

[a] Because it carries no possibility of imprisonment, a petty misdemeanor is not a crime under state law. As a result, persons charged with a petty misdemeanor are not eligible for a public defender.

SOURCES: Minnesota House of Representatives Research Department, *The Minnesota Judiciary: A Guide for Legislators* (St. Paul, 2008); Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary* (St. Paul, 2009); and *Minnesota Statutes* 2009, 169.89, subd.1, 169A.27, 609.20, 609.2242, subd.2, 609.26, subd.1(7), 609.72, subd.1,and 611.14.

District court judges appoint public defenders, and state law requires each judicial district to screen requests for representation by a public defender and make "appropriate inquiry into the financial circumstances of the applicant."[8] Application and screening procedures vary by judicial district, but applicants for a public defender are required to submit a financial statement under oath.[9] Persons appointed a public defender also have a continuing duty to disclose any changes in their financial circumstances.[10]

State law requires individuals appointed a public defender to share in the cost of these services. Public defender clients must make a $75 copayment for public defender services unless the copayment has been waived by a judge.[11]

[8] *Minnesota Statutes* 2009, 611.17(a) and (b).

[9] *Minnesota Statutes* 2009, 611.17(b).

[10] Ibid.

[11] *Minnesota Statutes* 2009, 611.17(c). *Laws of Minnesota* 2009, chapter 83, art. 2, sec. 47, raised the co-pay from $28 to $75.

Copayment receipts are deposited in the state's general fund. In addition, judges may order defendants who are employed or otherwise able to pay to reimburse the state in some amount for the cost of the public defender.[12] Receipts from these reimbursement payments are allocated to the Minnesota Board of Public Defense.[13]

STANDARDS FOR PUBLIC DEFENSE

State standards require public defenders to provide prompt, competent, and diligent representation.

Various types of federal, state, and professional standards apply to public defenders in Minnesota. At the highest level, the U.S. Supreme Court has ruled that defendants have a constitutional right to the "effective assistance of counsel."[14] The U.S. Supreme Court has also held that indigent defendants must have access to the "raw materials integral to the building of an effective defense."[15] The Minnesota Court of Appeals (among other courts) has stated that this means that a defendant has a constitutional right to adequate investigative and expert services.[16]

The Minnesota Supreme Court has authorized rules of professional conduct for attorneys, including public defenders.[17] The rules require attorneys to provide prompt, competent, and diligent representation. Among other things, the rules require attorneys to (1) possess necessary legal knowledge, skill, thoroughness, and preparation; and (2) communicate promptly with clients to keep the client informed about the case and respond to requests for information. Lawyers' workloads must be controlled so that each matter in the case can be handled competently. Breach of these rules can result in disciplinary action up to disbarment.

Although not binding on states, the American Bar Association in 2002 issued guidance that set forth principles of a public defense delivery system. It was intended to be a practical guide for policymakers and others to design efficient, effective, and ethical public defense delivery systems. As shown in Table 1.2, the principles address the organizational structure of a public defense system and effective working conditions for public defenders, among other things.

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[12] *Minnesota Statutes* 2009, 611.20, subd. 2 and subd. 4.

[13] *Minnesota Statutes* 2009, 611.20, subd. 3 and 4, allocates reimbursements from employed defendants to "the state" and reimbursements from those with an ability to make partial payments to part-time public defenders to offset their overhead costs. In practice, however, all reimbursements are paid to part-time defenders.

[14] Strickland v. Washington, 466 U.S. 668 (1984). In this case, the Supreme Court said that the public defender's conduct must have "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." In addition, the defendant must show that, but for the attorneys' conduct, the result of the proceeding would have been different. This two-pronged test has made the ineffectiveness standard hard to meet. In past cases, defense attorneys who have slept through the trial, used illegal drugs during the trial, or said they were not prepared were *not* deemed "ineffective." Thus, a finding of ineffectiveness is more a measure of egregious dysfunction than a useful measure of quality.

[15] Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

[16] In Re the Application of Charles Ray Wilson for Payment of Services, 509 N.W.2d 568, 571 (Minn. Ct. App. 1993).

[17] *Minnesota Rules of Professional Conduct* (2007), http://www.courts.state.mn.us/lprb/mrpc.html, accessed May 8, 2009.

Table 1.2: American Bar Association's Principles of a Public Defense Delivery System, 2002

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources, and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

SOURCE: American Bar Association, *Ten Principles of a Public Defense Delivery System* (2002).

MINNESOTA'S PUBLIC DEFENDER SYSTEM

Minnesota's public defender system is part of the state's judicial branch but not under judicial administrative control.

The organization of Minnesota's public defender system has evolved over time. Historically, the public defense system consisted of part-time attorneys working for and funded by counties. The Minnesota Legislature created the State Board of Public Defense in 1981 to oversee the public defense system.[18] In establishing the board, the Legislature made it part of the judicial branch of state government but not under judicial administrative control. The state began assuming financial responsibility for public defense in 1989, phasing in full state control over several years.[19]

Minnesota's transition to state control of the public defender system was part of a national trend. Researchers had found that county-based systems were more likely than state systems to have excessive caseloads, judicial interference, and

[18] *Laws of Minnesota* 1981, chapter 356, sec. 360, subd. 1 and 2.

[19] *Laws of Minnesota* 1989, chapter 355, art. 1, sec. 7.

insufficient training for public defenders.[20] Further, locally-funded systems more often led to inequitable representation because local caseloads and revenue varied. Minnesota has sought to promote uniformity in the access to public defender services across the state and is now one of about 20 states with a centrally funded and managed system.

Organization

The current organization of Minnesota's public defender system is illustrated in Figure 1.1. By law, the State Board of Public Defense consists of seven members, including four attorneys appointed by the Supreme Court and three public members appointed by the governor.[21] The Board is charged with appointing a state public defender, chief district public defenders in each judicial district, a chief appellate public defender, and (with the advice of the state public defender) a chief administrator.[22] The State Board of Public Defense must also recommend a budget to the Legislature and establish procedures for distribution of state funding.[23] Members are reimbursed for expenses and a per diem of $55 per day of board activities.[24]

The Minnesota Board of Public Defense oversees the public defender system.

The state public defender and chief administrator have primary administrative responsibility for the public defender system. The state public defender establishes (1) standards regarding qualifications, training, size of legal staff, caseloads, and eligibility; and (2) policies and procedures to administer the district public defense system.[25] The chief administrator serves at the pleasure of the board and is the head of the Administrative Services Office, which operates the budget, accounting, human resources, and information technology functions. The chief administrator also has direct responsibilities to the board, including enforcing board rules, regulations, and orders; managing research and planning; assisting the board with its financial duties, and making recommendations to improve the efficient operation of the public defense system.[26]

Responsibility for providing public defense services is divided among ten public defense districts that align with the court system's ten judicial districts and an appellate office. Each district has one administrative office and may have satellite offices as well. An appointed chief public defender leads each district and is responsible for managing the budget allocated to the district, hiring and supervising personnel, and managing case assignments. Chief public defenders

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[20] National Legal Aid & Defender Association, A Race to the Bottom: Trial-Level Indigent Defense Systems in Michigan (Washington, DC, 2008); National Legal Aid & Defender Association, Justice Impaired: The Impact of the State of New York's Failure to Effectively Implement the Right to Counsel (Washington, DC, 2007).

[21] *Minnesota Statutes* 2009, 611.215, subd. 1(a).

[22] *Minnesota Statutes* 2009, 611.215, subd. 2(a); 611.23; 611.24(a); and 611.26, subd. 2.

[23] *Minnesota Statutes* 2009, 611.215, subd. 2(a) and subd. 2(b).

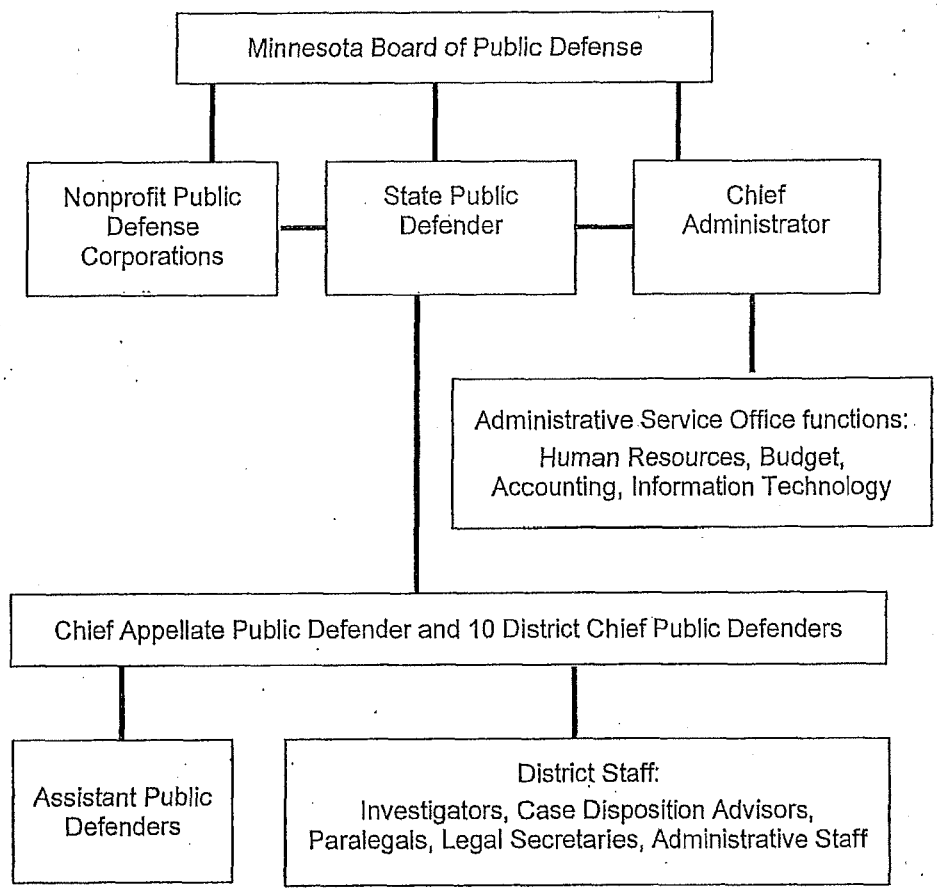
[24] *Minnesota Statutes* 2009, 611.215 subd. 1(b) and 15.0575, subd. 3.

[25] *Minnesota Statutes* 2009, 611.215, subd. 2(c) and 611.25, subd. 3.

[26] *Minnesota Statutes* 2009, 611.215, subd 1a.

may also carry caseloads. The chief appellate public defender represents defendants appealing felony or gross misdemeanor convictions, those pursuing other post-conviction proceedings, and children appealing a delinquency adjudication.

Figure 1.1: Organization of the Minnesota Public Defender System, 2010



SOURCE: Office of the Legislative Auditor, analysis of *Minnesota Statutes* 2009, chapter 611.

The staff attorneys representing clients on a daily basis are called "assistant public defenders," and they are supervised by "managing attorneys." As shown in Table 1.3, Minnesota employs a mix of full-time and part-time public defenders.[27] Part-time public defenders usually maintain a private practices in

[27] As a carryover from the county-based system, some public defenders in Hennepin and Ramsey counties are still county employees. Their numbers are dwindling through attrition as all new hires must be state employees.

addition to representing public defender clients. All public defender offices are staffed with investigators, paralegals, legal secretaries, case disposition advisors, and support staff.

Table 1.3: Public Defender Staffing, July 2009

District	Number of Full-Time Attorneys	Number of Part-Time Attorneys	Total Full-Time-Equivalent (FTE) Attorneys
First	15	26	34
Second	26[a]	22	39
Third	16	16	27
Fourth	88[b]	15	97
Fifth	11	12	19
Sixth	5	22	20
Seventh	9	31	32
Eighth	1	16	12
Ninth	16	19	30
Tenth	22	36	47
Appellate	23	4	25
Total	232	219	381

[a] As a carryover from the county-based system, 23 public defenders in the second district are still Ramsey County employees.

[b] 61 public defenders in the fourth district are Hennepin County employees.

SOURCE: Public Defender Administrative Services Office.

In addition to distributing state funds to the district public defenders and the Appellate Office, the Board of Public Defense may appropriate money to nonprofit criminal and juvenile defense corporations that serve low-income clients.[28] These public defense corporations may accept felony, gross misdemeanor, misdemeanor and juvenile cases where defendants meet financial eligibility standards. In order to receive state funds, the public defense corporations are required to provide matching funds. The Board of Public Defense currently funds four public defense corporations that primarily serve minorities who would otherwise need public defender services.[29]

[28] *Minnesota Statutes* 2009, 611.216, subd. 1.

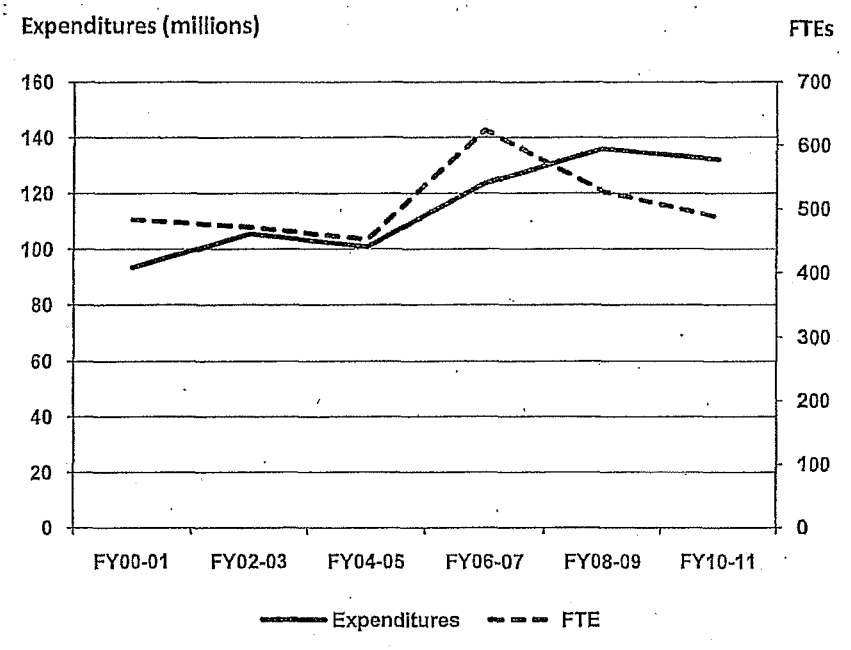
[29] The four public defense corporations are the Neighborhood Justice Center (St. Paul), the Legal Rights Center (Minneapolis), Duluth Indian Legal, and the Regional Native Public Defense Corporation (serving the communities of the Leech Lake and White Earth Reservations).

Resources

Budget reductions resulted in two rounds of layoffs in 2003 and 2008.

Public defender system expenditures totaled $136 million in the fiscal year 2008-2009 biennium, with staffing of about 528 full-time-equivalent staff.[30] About 91 percent of these expenditures and staff were allocated to the ten public defender districts. The appellate office accounted for 7 percent of spending, and administrative office expenditures accounted for the remainder. As shown in Figure 1.2, expenditures and staffing for the public defender system have fluctuated. Budget deficits resulted in staff reductions affecting fiscal years 2003 through 2005. The Legislature provided funding for additional staff in fiscal years 2006 and 2007, but budget challenges again resulted in staff reductions in the 2008-09 biennium.

Figure 1.2: Board of Public Defense Budget Data by Biennium, Fiscal Years 2000 to 2011



NOTES: FTE is full-time-equivalent staff. Fiscal year 2010-11 expenditures are as budgeted; all other years are actual expenditures except for fiscal year 2003 where we used the budgeted amount because actual amount was not available. Data are not indexed for inflation. FTE data are imprecise. According to the public defender's office, FTE counts compiled for biennial budget documents did not consistently account for public defenders in Hennepin and Ramsey counties who are county, not state, employees. FTE counts may also include open positions that the state public defender did not intend to fill. The Public Defender's Office does not maintain historical staffing data; thus, we relied on the information in state budget documents.

SOURCE: Office of the Legislative Auditor, analysis of Minnesota Board of Public Defense biennial budget documents, fiscal years 2000 to 2011.

[30] Full-time-equivalent staff counts include assistant public defenders in Hennepin and Ramsey counties who remain county employees.

In fiscal years 2008-09, roughly 95 percent of the office's budget was dedicated to personnel costs, mandatory expenditures (such as mileage reimbursement), and lease costs. Important among remaining expenditures are funds set aside for services other than counsel, including expert witnesses, interpreters, grand jury transcripts, and short-term lawyer help for complex cases.

CRIMINAL CASE STATISTICS

The number of felony cases in Minnesota's criminal justice system grew by 37 percent between 1999 and 2008.

According to the state public defender's office, public defenders are quite likely to be appointed in felony and gross misdemeanor cases. In 2008, the courts recorded filing of about 29,000 felony cases and 32,000 gross misdemeanor cases, as shown in Table 1.4.[31] Compared to filings in 1999, this represents a 37 percent increase in felony cases and a 12 percent increase in gross misdemeanor cases. As we discuss more in Chapter 3, the increase in felony and gross

Table 1.4: Criminal Cases Filed for Case Types Likely to Involve an Public Defender, 1999 to 2008

	Felony	Gross Misdemeanor	Misdemeanor[a]	Juvenile Delinquency[b]	Total
1999	21,420	28,579	244,060	25,030	319,089
2000	22,262	29,121	246,566	24,740	322,689
2001	24,448	30,127	229,722	24,020	308,317
2002	28,239	29,574	246,315	23,493	327,621
2003	29,119	28,566	264,580	22,388	344,653
2004	30,075	30,737	263,344	20,916	345,072
2005	31,749	32,004	248,148	20,511	332,412
2006	32,607	34,029	258,152	22,577	347,365
2007	31,268	33,984	234,595	22,094	321,941
2008	29,287	32,043	214,612	20,144	296,086
Percentage Change, 1999-2008	36.7%	12.1%	-12.1%	-19.5%	-7.2%

NOTE: The data include all criminal cases filed. Public defenders may or may not have been assigned.

[a] Filing counts include three misdemeanor types: fifth degree assault, misdemeanor DWI, and other nontraffic misdemeanors. The counts exclude parking, juvenile traffic, and other traffic-related misdemeanors.

[b] Filing counts include felony, gross misdemeanor, and misdemeanor juvenile delinquency cases. Public defenders could be appointed in other types of juvenile cases, but according to the public defender's office, they are most likely to be involved in delinquency cases.

SOURCE: Office of the Legislative Auditor, analysis of Minnesota court information system data.

[31] Counting criminal cases is actually quite complicated because a crime can involve multiple charges, defendants, and court events. Thus, case counts can vary depending on which element is the focus of analysis.

misdemeanor cases tracks with a general legislative trend of recategorizing offenses to higher levels (for example, reclassifying misdemeanors as gross misdemeanors and gross misdemeanors as felonies).

The vast majority of criminal cases are resolved without a trial.

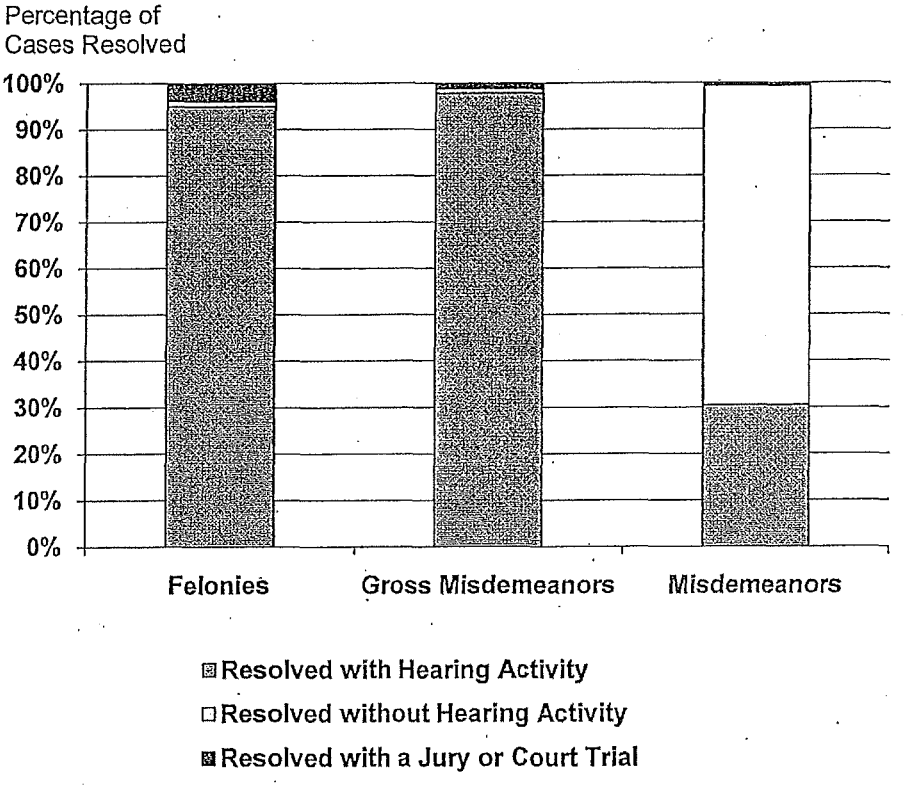
In misdemeanor cases, public defenders are more likely to be appointed when the offense is more likely to result in jail time, for instance in charges of fifth degree assault or driving while under the influence of drugs or alcohol. Table 1.4 shows the number of misdemeanor cases filed for case types likely to involve a public defender.[32] As shown, the number of misdemeanor cases in these categories declined by about 12 percent from 1999 to 2008.

Public defenders also represent juveniles, commonly in cases with charges of felony, gross misdemeanor, or misdemeanor juvenile delinquency. As shown in Table 1.4, juvenile delinquency case filings declined by almost 20 percent between 1999 and 2008.

The vast majority of criminal cases were closed without a trial in 2008, as shown in Figure 1.3. About 95 percent of felony cases and 98 percent of gross misdemeanor cases were closed at a hearing, often through a plea agreement (an agreement between the prosecutor and defense attorney in which a defendant pleads guilty as part of a bargained-for resolution of the case). Among misdemeanor cases, about 30 percent of cases were resolved at a hearing, and 69 percent were resolved outside of a hearing or trial. For example, many misdemeanors (such as traffic violations) are settled with payment of a fine. Court data for 1999 through 2007 show very similar resolution patterns.

[32] As agreed with the public defender's office, we included three misdemeanor case types as categorized in the state court information system: fifth degree assault, misdemeanor driving while under the influence, and "other nontraffic.' Including all misdemeanor case types, there were 1.5 million misdemeanor cases filed in 2008.

Figure 1.3: Means of Case Resolution by Level of Offense, 2008



NOTE: Jury trials are heard by a panel of citizens, while court trials are heard by a judge but no jury. Cases resolved without a hearing could be settled with a plea bargain, payment of a fine or dismissal of the case by the prosecutor. Cases resolved with a hearing generally refers to cases in which the defendant agrees to a plea bargain with prosecutors in order to avoid a trial. It may also refer to cases where the judge dismisses a case, or where the defendant pleads guilty as charged.

SOURCE: Office of the Legislative Auditor, analysis of Minnesota court information system data.

2 Management

About 20 years ago, the Minnesota Legislature determined that the public defense system was properly the state's responsibility and began shifting control of public defender services from counties to the state. In 1992, the Office of the Legislative Auditor (OLA) evaluated the adequacy of the public defender system's organizational structure and administration. We found numerous management challenges stemming from limited progress at the time in moving from a county-financed system to a statewide system, as shown in Table 2.1.

In this evaluation, we again assessed how well the public defense system is managed by the Board of Public Defense and its management team. Specifically, we evaluated the uniformity of the public defender system across the state, performance assessment and accountability, reliance on part-time public defenders, strategic planning and budgeting, and management of recent resource reductions.

Table 2.1: Findings from the Office of the Legislative Auditor's 1992 Evaluation of the Public Defender System

- Eight of ten districts did not have full-time public defender offices.
- State funds for public defenders were being spent by counties without adequate reporting and review of expenditures.
- District chiefs provided limited supervision of assistant public defenders, particularly those based in other communities.
- District chiefs lacked sufficient training in administration, personnel, and financial management.
- Compensation for part-time public defenders was inequitable.
- Goals for the state public defender system were not clearly articulated and defined.
- The board and administrative staff had not done enough systematic, long-range planning.
- The board and its administrative staff had established few written, uniform management policies and procedures.
- The board allocated money to districts based on historical tradition, not assessments of need.

SOURCE: Office of the Legislative Auditor, *Public Defender System* (St. Paul, 1992).

STATEWIDE ADMINISTRATION

We assessed the extent to which the public defender system has uniformity in its administrative control over staff, compensation practices, public defense policies, and information systems. We found that:

- **The administration of the public defender system has become more uniform following the state's assumption of responsibility for it.**

Minnesota now has a centrally managed public defender system. Financial authority, policy setting, and other administrative control is centralized with the Board of Public Defense, chief public defender, and chief administrator. In addition, each of the ten districts are staffed with at least one full-time public defender and at least one office, as shown in Figure 2.1. With the exception of Hennepin County, counties do not provide funds for public defender services that are by law the responsibility of the state.[1] The board allocates funds to district chiefs who manage each district's budget and staffing.

The Board of Public Defense has addressed many of the problems identified in our 1992 evaluation of the public defender system.

For the most part, the public defender system operates under a unified compensation structure. Assistant public defenders have been represented by a union since 2000, and their contract with the Board of Public Defense sets forth the terms of compensation and benefits. Nonattorney staff, including investigators and paralegals, are also covered by a union contract.

Certain assistant public defenders in Hennepin and Ramsey counties are county employees paid under county compensation systems. At the time the state assumed responsibility for public defense, only Hennepin and Ramsey counties employed full-time public defenders. These attorneys were allowed to remain county employees; newly hired public defenders were (and still are) state employees.

Pay disparities exist among assistant public defenders employed by the state and those who are still employed by Hennepin and Ramsey counties. Both counties' pay scales are higher than the state's, allowing county-employed public defenders to be paid more than state-employed public defenders with comparable years of experience. Absent other changes to the system, attrition among the county-employed attorneys will eventually eliminate these differences.

The Board of Public Defense has adopted systemwide policies and procedures. Several of the statewide policies respond to issues raised in our 1992 report. For example, the board has established statewide standards for caseloads, public defender qualifications, staffing of public defender offices, and conflicts of interest. The Board has also adopted standard procedures for personnel matters and handling client complaints.

The public defender's office has struggled with creating a useful case management system since the state assumed responsibility for public defense. In 1992, we reported that the Board of Public Defense needed to establish a uniform management information system for monitoring cases and hours across districts. The board developed a case information management system, and all districts were using online case reporting as of January 2002. The system is outdated, however, and the office plans to implement a new case management information

[1] Hennepin County pays for the office space used by the District 4 public defender's office, an expense paid in all other districts by the state. Also, Hennepin County pays the cost of having the public defender's office provide certain services that are the responsibility of counties, including appeals of misdemeanor convictions and representation of adults in child protection cases.

Figure 2.1: Minnesota Public Defender Districts, 2010

District 9
17 counties
23 judgeships
16 full-time attorneys
19 part-time attorneys
Offices in Bemidji, Brainerd, Crookston, Grand Rapids, Thief River Falls, Walker

District 6
4 counties
17 judgeships
5 full-time attorneys
22 part-time attorneys
Office in Duluth

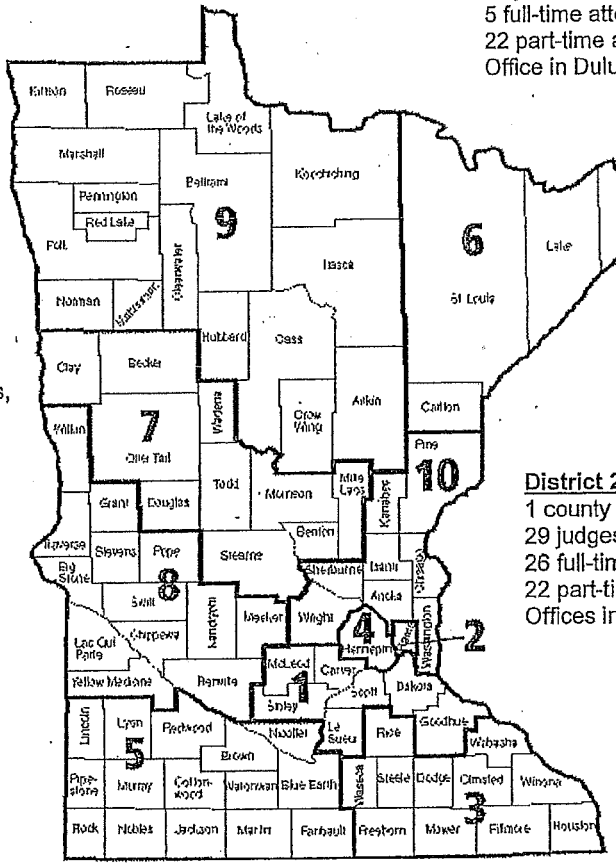
District 7
10 counties
28 judgeships
9 full-time attorneys
31 part-time attorneys
Offices in Fergus Falls, Moorhead, and St. Cloud

District 10
8 counties
42 judgeships
22 full-time attorneys
36 part-time attorneys
Offices in Anoka, Buffalo, Cambridge, Elk River, and Stillwater

District 8
13 counties
11 judgeships
1 full-time attorney
16 part time attorneys
Office in Willmar

District 2
1 county
29 judgeships
26 full-time attorneys
22 part-time attorneys
Offices in Maplewood and St. Paul

District 4
1 county
63 judgeships
88 full-time attorneys
15 part-time attorneys
Offices in Minneapolis



District 5
15 counties
18 judgeships
11 full-time attorneys
12 part-time attorneys
Offices in Fairmont, Mankato, Marshall, and Worthington

District 1
7 counties
35 judgeships
15 full-time attorneys
26 part-time attorneys
Offices in Chaska, Glencoe, and Hastings

District 3
11 counties
23 judgeships
16 full-time attorneys
16 part-time attorneys
Offices in Owatonna and Rochester

SOURCE: Office of the Legislative Auditor, compilation of information from the office of the public defender and state court administrator's office.

system in 2010. The new system will pull case data directly from the court information system (making it more accurate) and is expected to support better tracking of cases.

ACCOUNTABILITY FOR PERFORMANCE

In addition to weaknesses in uniform administration of public defender services in Minnesota, we also found in 1992 that the public defender system lacked a clear chain of command leading to the board, defined goals, and adequate training and supervision of assistant public defenders. In this evaluation, we found that:

- **The Board of Public Defense and state public defender have taken important steps to improve accountability, but they could do more to measure and supervise the quality of public defender services.**

Performance Goals and Accountability

There is now a clear chain of accountability from assistant public defenders in the field to the Board of Public Defense.

The Board of Public Defense has established five performance goals to guide the public defender system. They are listed in Table 2.2. The state public defender makes annual work plans structured around these goals and submits annual reports to the board on his success in meeting his plan. Several years ago, the state public defender began requiring district chiefs to submit annual work plans as well. The board's personnel committee reviews and approves these plans.

Table 2.2: Board-Established Goals for the Public Defender System in Minnesota, 2009

- Ensure that the statewide system of public defense is a fully involved partner in the criminal justice system.
- Encourage excellent, creative, collaborative advocacy.
- Provide client-centered representation at both the trial and appellate level.
- Pay continual attention to training, skills-development, and mentoring for all staff.
- Demonstrate a commitment to recruiting and retaining a highly dedicated, well trained, and diverse workforce.

NOTE: The Board of Public Defense originally adopted performance goals in December 2006. The goals presented in this table reflect wording revisions adopted by the board in August 2009.

SOURCE: Minnesota Board of Public Defense policy document, August 2009.

The chain of accountability from assistant public defenders in the field to the Board of Public Defense is organizationally clear, and the state public defender uses a variety of mechanisms to ensure communication up and down the chain. The Board of Public Defense meets regularly with the state public defender, chief administrator, and district chiefs. On a rotating schedule, chiefs make presentations on their districts to the board.

Based on our attendance at several Board of Public Defense meetings and a review of board agendas, minutes, and information packets for the past year, we think the board stays well informed on the status of its budget and the general activities of the state public defender and districts (training provided, district caseloads, staffing levels, meetings held, etc.). However, the district work plans varied in breadth and specificity, and some are less useful than others as tools for assuring accountability. In addition, district chiefs' presentations to the board focused on descriptive characteristics of their districts and caseloads. They were not written or used as a way to assess how well the district chiefs are doing their jobs. The board also did not use the presentations as platforms to discuss with the district chiefs solutions to specific district challenges.

The Board of Public Defense recently implemented new procedures to strengthen supervision of district chief public defenders.

The Board recently concluded that the process used to assess the performance of district chief public defenders needed to be changed to provide more involvement by the state public defender and the Board of Public Defense. In August 2009, the board adopted a revised policy that added several components to the performance review process. For instance, the state public defender will annually prepare a written evaluation of the chief public defender's performance in managing the district and implementing his or her work plan. These evaluations and any written response from the chief will be submitted to the Board's Personnel Committee for review.

The Board of Public Defense and state public defender have emphasized quality representation of clients as the office's top priority. However, they have not developed measures of outcomes related to the quality of representation provided to clients. In October 2009, the state public defender asked for and received the board's approval to begin developing criteria of quality representation. Lack of such criteria make it harder to objectively measure the performance of individuals and districts. It also makes it harder for the board to demonstrate to the Legislature and others the impact of budget and staff cuts.

Training and Performance Appraisal

The state public defender has established training programs for public defenders and procedures for assessing their performance. The state public defender said the office tries to provide enough in-house training to meet continuing professional education requirements for attorneys. Some training is statewide, while other sessions are district-specific. The office also has a mandatory training curriculum for new public defenders.

Annually, district chiefs and managing attorneys are to formally assess assistant public defenders' performance. The major appraisal elements are case administration, pre-trial preparation, advocacy, client communication, office communication, and professional development. The performance review process is also to include progress toward individual goals established the previous year and setting of goals for the coming year.

Public defenders responding to our survey were generally satisfied with their access to training and the quality of it, as shown in Table 2.3. About 94 percent of respondents reported that they were able to meet their most recent continuing legal education obligations on time. Still, 25 percent of survey respondents

disagreed or strongly disagreed that they had sufficient access to professional training. During our site visits, several public defenders noted that recent budget cuts had resulted in the loss of several important training opportunities, namely an annual, statewide meeting of public defenders and access to outside criminal defense training.

Table 2.3: Public Defenders' Opinions of Training and Performance Appraisal, 2009

	Percentage of Respondents		
	Agree or Strongly Agree	Disagree or Strongly Disagree	No Opinion
I had sufficient access to professional training.	72%	25%	1%
The training I received was timely and useful.	79	15	2
I received a formal performance review that included goal setting.	82	12	3
My supervisor provided useful feedback and coaching.	74	17	5
My good work was recognized and celebrated in some way.	65	23	9

NOTES: Percentages are based on 277 survey responses. Percentages may not sum to 100 because of rounding and because we did not include in the table the small percentage of respondents who did not answer the question.

SOURCE: Office of the Legislative Auditor, analysis of public defender survey results, 2009.

About three-quarters of respondents agreed that they received an annual performance appraisal and useful feedback and coaching from their supervisors, as shown in Table 2.3. Most of these performance reviews seem to have been done on time. Seventy-eight percent of public defenders responding to the survey said they had received their most recent review on time or within a few months. However, 11 percent said their last review was over six months late or still had not been provided.

We found weaknesses in the day-to-day supervision of assistant public defenders.

Although training and performance appraisal procedures are in place, we found evidence of weaknesses in day-to-day supervision of assistant public defenders. For example, we asked assistant public defenders in our survey how often in the past year their supervisors had reviewed one or more of their cases in the context of assessing performance. Forty-three percent reported "not at all."[2] Managers and chiefs told us they rely extensively on complaints from clients and others to judge whether a public defender is doing an acceptable job.

The extent of day-to-day supervision is limited partly by the fact that supervisors (called managing attorneys) also represent public defender clients. Officials around the state interviewed for our site visits said supervisors' caseloads limit

[2] About 22 percent of assistant public defenders responding to our survey said their supervisors had reviewed a case once or twice; another 23 percent said three or more times.

The state public defender said he needs additional resources to increase the amount of time managers have available for supervisory duties.

the time they can spend monitoring and coaching assistant public defenders. Limited supervisory time also undermines managing attorneys' ability to handle problems before they become serious. Recognizing this, the Board of Public Defense established a policy that by July 2008 managing attorneys would carry caseloads not greater than three-quarters time and, by January 2009, no greater than half time. According to the public defender's office, lack of resources has hindered the office's progress in reducing managing attorney caseloads.

Judges we interviewed and surveyed had mixed opinions of public defenders' performance and the extent to which they are supervised. During our site visits, some judges reported that public defenders were poorly managed and supervised and that the Board of Public Defense and state public defender were not sufficiently aware of or responsive to problems in the districts. In our survey, 43 percent of responding district court judges responding said that any problems with public defenders' performance were promptly and adequately addressed by their supervisors. However, 33 percent said this was not the case. Among this group of respondents, one district judge commented that, "there really is no supervision of the more senior public defenders, so problem behaviors are not addressed."

RECOMMENDATIONS

The Board of Public Defense should ensure that district chief public defenders' presentations to the Board focus more on district performance and challenges rather than descriptive characteristics of the district.

The state public defender should establish stricter criteria for the structure and content of district chiefs' work plans.

The Board of Public Defense and state public defender should establish standards for and measures of quality representation of clients.

The Board of Public Defense and state public defender should improve management practices that ensure active supervision of full- and part-time assistant public defenders to monitor their performance representing clients and litigating in court.

The Board of Public Defense has made important progress establishing a uniform, accountable public defender system throughout the state. Nevertheless, we identified several areas that need attention. To improve accountability, the board and state public defender need to establish higher expectations for the quality of district chief work plans and presentations to the board. In turn, board members need to do more to engage district chiefs in meaningful discussions of district performance and policy. The board's changes to the process for assessing district chief public defenders' performance are a good starting point.

The board has stated its intent to better define and measure what it means to provide quality legal representation for public defender clients. Development of

such measures will be another important step in improving the accountability of Minnesota's public defender system.

Supervision of assistant public defenders is an issue we raise in different contexts in this report. Here, we recommend that the Board of Public Defense improve procedures and expectations surrounding the supervision and appraisal of assistant public defenders' performance. The purpose is to ensure more active supervision and observation of how public defenders represent their clients. In discussing this recommendation, the chief administrator said that a shortage of resources may be a barrier to implementing it. For example, increasing the amount of time managers have available for supervisory duties would require an infusion of resources to lessen their case loads.

RELIANCE ON PART-TIME PUBLIC DEFENDERS

In 1996, the state public defender concluded that using full-time public defenders had important advantages over retaining part-time attorneys.

Minnesota depends heavily on part-time attorneys to provide public defense services around the state. In the early 1990s when the Minnesota Board of Public Defense was leading the transition to a statewide system, national public defender standards called for public defender organizations to be staffed with full-time attorneys. However, the board felt that the existing pool of part-time public defenders in the state were a talented and committed group. Thus, the board chose to proceed using offices staffed with full-time attorneys as well as a network of part-time public defenders assigned to one or more counties, "so as to get the best of both worlds."[3] In addition, the American Bar Association standards for public defender systems (see Table 1.2) call for active participation of the private bar. According to the public defender's office, this takes different forms in different states; in Minnesota, it is implemented through part-time public defenders.

In 1996, the state public defender's office formally assessed the pros and cons of full-time and part-time public defense arrangements.[4] It concluded that establishing full-time public defender offices had several key advantages over, and was more cost effective than, retaining part-time attorneys to do the same work. As shown in Table 2.4, the office concluded that full-time offices can connect otherwise isolated public defenders to training opportunities and support staff services as well as improve accountability.

Today, the state public defender, chief administrator, and others in the public defense management team continue to believe there are important advantages to using a mix of full-time and part-time public defenders. They assert that retaining part-time public defenders is more cost-effective than using all full-time attorneys, provides a flexible way to assign public defenders when another attorney has a conflict of interest in a case, and allows the state to attract and retain very experienced lawyers who would otherwise not be public defenders.

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[3] Stuart, John, *Branch Offices For Public Defenders in Greater Minnesota: An Evaluation for the State Board of Public Defense* (St. Paul, 1996), 1.

[4] *Ibid.* The evaluation was conducted about 16 months after new public defender offices had been established in Greater Minnesota. The evaluation focused on 6 of the 11 new offices.

Table 2.4: State Public Defender's Conclusions Regarding the Benefits and Risks of Using Full-Time Public Defender Offices, 1996

Advantages of Full-Time Public Defender Offices	
More accessible to clients	Provide identified "public defender" offices open during regular hours
	Have staff specialized in criminal and juvenile court work
Uniform delivery of support services and specialized resources	Access to training, investigation, legal research, and other services
	Access to social work support for planning alternative sentences
Improved interactions with the court system	Greater participation as a partner in the criminal justice system
	Quick coverage of cases when needed
Improved administrative structure and accountability	Facilitate regional balance of case assignments
	Serve as communication hubs for public defense staff, the courts, and outside organizations
More cost-effective	Among six full-time offices and three methods of estimating costs, full-time offices were more cost-effective than retaining part-time attorneys to do the same work.
Risks associated with Full-Time Offices[a]	
Reallocates resources	Adding full-time offices may reduce resources for part-time public defenders
Makes the handling of conflict cases more difficult	Over-investment in full-time offices may make it hard to pay qualified attorneys to handle conflict cases
Possible loss of expertise	Full-time public defenders may have less experience that part-time attorneys in a particular county

[a] The report notes that "none of these [risks] seems to be an active problem at the moment, but they remain items to keep in mind when planning for the future."

SOURCE: Stuart, John. *Branch Offices For Public Defenders in Greater Minnesota: An Evaluation for the State Board of Public Defense* (St. Paul, 1996), 13-22.

In districts outside of the Twin Cities, about 65 percent of public defenders in 2009 were part time.

We assessed the risks and advantages of the continued reliance on part-time public defenders and found that:

- **The Board of Public Defense has not fully addressed long-standing risks presented by heavy reliance on part-time defenders.**

In our 1992 report, we said that supervision of assistant public defenders needed to be strengthened because it was difficult for district chiefs to supervise and hold accountable public defenders working in different communities. The eight non-metro districts were staffed at the time almost exclusively by part-time defenders, and we recommended that the board establish full-time positions and offices in

those districts.[5] By 1995, the public defender system included 10 main district offices and 13 satellite offices. Yet as of July 2009, about 65 percent of assistant public defenders in districts outside of the Twin Cities were part-time.

Part-time defenders are typically assigned to work in one or more specific counties, and many of those residing in non-metro districts work without the benefit of a public defender office located in their immediate vicinities. Main district offices and satellite offices house support staff and the districts' managers. District chiefs interviewed during our site visits were concerned that without ready access to a public defender office, part-time public defenders do not request investigative or support services when needed and appropriate. They also have less opportunity to interact with other public defenders for brainstorming sessions, mentoring, and support. District supervisors may also not be aware of the workloads, performance problems, or other challenges faced by part-time defenders.

Many part-time public defenders in rural areas of the state work without the benefit of support from a nearby public defender office.

Several district chiefs told us they were seriously concerned about the performance of certain part-time public defenders, particularly those that often work alone and with limited supervision. According to the district chiefs, there is a danger that these part-time attorneys' skills have become stale and their litigation techniques outdated. One chief also said that part-time attorneys were reluctant to challenge judges during their public defense work for fear that doing so would damage their private practices.

In addition, the public defender's office and Board of Public Defense have anticipated a wave of retirements among long-term assistant public defenders, many of whom are part-time. The board has begun to address this issue. In a 2007 memorandum to the board, the chief administrator reported that the office had 116 public defenders over age 50 (and among them, 70 over age 55). Of those over age 50, 70 percent were part time, and of those over age 55, 74 percent were part time. He added that chief district public defenders were finding it difficult to recruit and retain part-time public defenders in certain parts of the state. For example, a part-time defender opening in the ninth district drew three applicants. Another part-time opening in northeastern Minnesota did not draw any qualified applicants. The chief administrator told the board, "with a significant number of employees over 50 years of age, the problem of recruiting and retaining defenders will only get worse."

In response to these concerns, the board approved two separate measures to attract and retain public defenders and in particular part-time defenders. The first was a 2008 legislative proposal that would have granted the Board of Public Defense the authority to establish a law school loan repayment assistance plan for public defenders (full and part time) not eligible for similar federal programs.[6] Bills introduced in the House and Senate did not pass.

[5] Only two districts (serving Hennepin and Ramsey counties) had offices staffed with full-time defenders.

[6] HF 3876, introduced in 2008.

The board also approved a proposal to offer pay incentives to new hires who agreed to provide public defense services in counties where it was particularly difficult to attract attorneys. The board introduced the proposal in labor negotiations for the public defender contract for fiscal years 2008-09. According to the chief administrator, the union bargaining committee opposed the measure, and it was not included in the final contract.

The board has considered alternate models of representation in some areas of the state. For example, in some less populated areas, the board discussed capping caseloads for some part-time public defenders to ensure that their public defense work did not overrun their private practices. The board has also discussed the possibility of arranging for new part-time public defenders to share offices or expenses with local private firms.

RECOMMENDATION

The Board of Public Defense and state public defender should complete long-range planning efforts to:

- ***estimate future staffing needs in light of anticipated retirements among long time public defenders;***
- ***evaluate the proper balance of full-time and part-time public defenders needed in the future;***
- ***study the costs associated with establishing additional public defender satellite offices; and***
- ***consider other options to recruit and retain public defenders.***

The Board of Public Defense needs to implement strategies that address the concerns related to Minnesota's heavy reliance on part-time public defenders. This could include reintroducing the loan forgiveness program or acting on other options to recruit and retain public defenders. We also think the board needs to consider increasing the proportion of full-time to part-time public defenders and establishing additional satellite offices. To this point, court staff and judges said that distances and scheduling complexities in rural Minnesota, which support the use of part-time public defenders, must be part of this consideration.

The state public defender's office told us that it has established a long range planning committee to study a number of issues regarding the structure and operation of the public defender system. Two of the issues will be location of full time offices and the ratio of managing attorneys to assistant public defenders. When considering new satellite offices, the chief public defender said it will be important to consider associated costs, including rent, support staff, communications, and equipment.

STRATEGIC PLANNING AND BUDGETING

While we recommend that the public defender's office undertake a long-range planning effort related to staffing and location of offices, we also realize that the office faces resource challenges in doing so. We found that:

- **The public defender's office has few staff resources available for needed planning, research, and policy development activities.**

Administrative staffing for the public defender system is very lean.

The administrative services office is responsible for staffing the Board of Public Defense and day-to-day administration of the public defender organization. Excluding the state public defender and chief administrator, the office currently has 12 staff working out of the central office in Minneapolis. Of the central staff, five are directors of human resources, information services, training, fiscal services, and government relations. Reporting to these five directors are three information technology staff and an accounting officer. The remaining three staff are temporary: a project manager for the new public defender information system and three contract programmers. According to the chief administrator, the office in recent years eliminated five support staff positions in the central office through layoffs and leaving positions unfilled.

With this lean administrative structure, the board and state public defender have few staff available to support strategic planning and policy development activities. District chiefs have in-district management duties and some carry caseloads as well. This, along with the time it takes to drive to the Twin Cities area for policy committees, limits the ability of district chiefs to effectively contribute to policy development and planning activities.

In addition to having staff time available for planning and analysis, the public defender's office also needs good information. We assessed current procedures for determining caseloads and allocating the public defender budget and found that:

- **The public defender's office has had problems accurately quantifying public defender workloads.**

Not all public defender cases are alike. As discussed in Chapter 1, individuals have the right to a public defender in a variety of circumstances, ranging from misdemeanors to felonies and probation revocations. The amount of time required to prepare and defend a case is generally proportional to the severity of the case, with misdemeanors requiring fewer resources than felonies.

To quantify the levels of effort associated with different types of cases, Minnesota conducted a "weighted caseload study" and adopted a system of weighting cases based on the study in 1991.[7] This system is still in use today. In it, one "case unit" equals the defense service that goes into the average

[7] The Spangenberg Group, *Weighted Caseload Study for the State of Minnesota Board of Public Defense* (Newton, MA, January 1991).

misdemeanor case.[8] Gross misdemeanors, felonies, and other types of cases are awarded a higher number of case units. Table 2.5 shows case units opened by district for fiscal years 2003-09.

Table 2.5: Weighted Case Units by District, Fiscal Years 2003 to 2009

	Weighted Case Units for Cases Opened (in thousands)						
	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
First	28.3	24.4	26.7	28.0	28.8	27.5	25.1
Second	36.6	31.2	34.9	36.4	35.1	31.7	30.5
Third	19.8	19.8	20.0	21.6	21.8	20.7	19.2
Fourth	86.2	86.1	83.5	87.8	87.3	71.9	92.4
Fifth	16.2	14.2	15.6	16.0	16.5	15.3	13.5
Sixth	15.9	13.7	14.4	15.7	15.4	15.3	13.3
Seventh	28.0	25.4	26.8	27.9	27.3	25.6	22.0
Eighth	9.3	8.6	9.1	9.7	9.2	9.2	9.0
Ninth	26.0	25.1	28.0	28.3	29.4	28.2	25.1
Tenth	40.5	39.9	41.6	45.9	45.4	41.4	36.9
Total	306.9	288.5	300.6	317.3	316.1	287.0[a]	287.3

[a] In 2008, the public defender's office stopped representing parents in child protection and termination of parental rights cases.

SOURCE: Office of the Legislative Auditor, analysis of public defenders' office case data.

Current caseload measures do not accurately reflect differences in public defenders' day-to-day workloads.

Case unit counts, however, do not accurately reflect public defenders' day-to-day workloads. In our 1992 evaluation report, we found that the weighted caseload study underlying Minnesota's standards was flawed. The study assessed how the annual caseload of the average public defender in Minnesota deviates from an ideal caseload size. The study did not provide district-level data on caseloads even while the authors acknowledged that the time for similar cases varied among districts. The standards do not reflect regional differences affecting the time needed to defend cases, nor do they reflect the complexity of criminal defense work today.

For example, driving time is a factor that significantly affects a public defender's workload. In sparsely populated but geographically large districts, public defenders spend much more time driving to see clients or attend court. One district chief pointed out that a fifteen minute hearing in a remote county can require two hours to complete. Public defenders who cover more than one county, or who cover conflicts in several counties, have workloads that are especially affected by high travel times. During one site visit, a public defender travelled six hours roundtrip to cover fewer than five court cases. As a result, the

[8] The caseload standards for full time attorneys per year are: 100-150 felonies; or 250-300 gross misdemeanors; or 400 misdemeanors; or 80 child welfare cases; or 175 other juvenile cases; or 200 other cases. To calculate how many case units each type of case represents, the misdemeanor caseload standard is divided by the standard for the type of case. For example, a felony case is 400/150=2.67 case units.

average time expended for the same case could vary considerably in metropolitan and rural areas.

Public defenders' workloads are affected by driving distances, prosecutors' charging practices, and other characteristics of local criminal justice systems.

Local caseloads are also influenced by local prosecutors' charging practices and whether they use pre-trial diversion programs.[9] While the public defender and court systems are statewide, prosecution is still locally controlled by counties and cities and prosecutors' practices vary. For example, the individual decisions of city and county prosecutors regarding how much evidence they need to charge a case greatly affects how many cases are filed. In addition, pre-trial diversion should reduce caseload burdens on district courts and the criminal justice system. However, diversion programs are not used by prosecutors in some parts of the state.

The levels of effort codified in the 1991 caseload measures do not reflect changes in criminal law and procedure that have taken place over the past 20 years. As we discuss in more detail in Chapter 3, changes to Minnesota's criminal statutes and the consequences associated with crimes have changed the nature of public defender workloads. More complex cases and serious consequences mean public defenders need to expend more time and effort to represent their clients. For example, Minnesota laws defining sex crimes and their associated criminal and civil consequences have changed considerably since 1991. According to the public defenders we interviewed, cases involving sex crimes are particularly time-intensive. Minnesota's caseload standards do not reflect this reality. One public defender summarized his views on the causes of high workloads this way:

> When I arrived here twenty years ago, I was amazed at the low volume and the number of "low level felonies." Over the years I have seen an incredible increase in both the numbers and seriousness of the felonies we are seeing. Criminal sexual conduct and armed robberies, violent assaults, etc. have increased exponentially. At the same time, we have less money for experts and investigation, and are required to be in multiple "boutique" courts. All the while, the Legislature is increasing the penalties for most crimes and giving prosecutors less flexibility to negotiate settlements. Have I said enough!!?

In addition, we found that:

- **The process used by the Board of Public Defense to allocate resources among districts is outdated.**

The board's budget and staffing allocation procedure continues to rely predominantly on the 1991 caseload study. The current budget allocation process begins with a division of funds proportional to prior year weighted caseloads. These allocations are then roughly adjusted to account for factors such as geography, differences in practice, and the availability of resources such as law

[9] "Pretrial diversion" means the decision of a prosecutor to refer an offender to a diversion program on condition that the criminal charges against the offender will be dismissed after a specified period of time, or the case will not be charged, if the offender successfully completes the program. *Minnesota Statutes* 2009, 401.065, subd. 1(2).

clerks and diversion programs. The rough adjustments to caseloads are based on the number of excess hours logged by part-time public defenders in districts outside of the Twin Cities metropolitan area. The chief administrator acknowledged that this not a perfect measure, but he believes the method provides some relief to districts where travel, scheduling, and lack of support resources are issues.

We think the budget allocation process should be updated. At its core, the process is based on flawed and outdated caseload weighting done in 1991. The current process of adjusting staff allocations based on excess hours reported by part-time public defenders is questionable as well. The state public defender and chief administrator are not confident that part-time public defenders accurately report the excess hours they work, so use of excess hours as a proxy for regional workload differences is suspect.

Although caseload measures are flawed, it is important that the public defender's office be able to have a relative measure of workloads per public defender. Comparison of workloads per attorney over time and among districts is key to internal decisions on resource allocation and policy discussions with the Legislature. However, we found that:

- **Lack of consistent data on staffing levels limits the ability to analyze public defender caseloads over time.**

Our efforts to analyze trends in caseloads per attorney were stymied because of incomplete data on public defender staffing. As we noted in Chapter 1, the data on full-time-equivalent (FTE) staffing included in Board of Public Defense budget submissions are imprecise. According to the public defender's office, FTE counts compiled for the biennial budget documents do not consistently account for public defenders in Hennepin and Ramsey counties who are county employees. FTE counts may also include open positions that the state public defender did not intend to fill.

Independent of the budget process, the public defender's office does not maintain detailed staffing data by position type in its information systems. For example, we asked the public defender's office for the number of attorneys and attorney FTEs employed at the beginning of each year for fiscal years 2003 to 2009. The office could not readily produce these data. Instead, the chief administrator reviewed documents prepared for various Board of Public Defense meetings and provided snapshot data from the documents on the number of public defender FTEs for 2007 through 2009. The chief administrator said that a staffing component had been planned when the office implemented its management information systems, but the staffing functions were eliminated to reduce costs.

RECOMMENDATIONS

The Board of Public Defense should seek the resources necessary to fund a planning and analysis position in the administrative services office.

When funding becomes available, the Board of Public Defense should conduct a caseload study that includes methods sufficient to develop separate caseload standards for metropolitan area, suburban, and rural public defender districts.

The State Public Defender should ensure that the office collects and records staff counts by position at regular intervals during the fiscal year.

Minnesota's public defender system faces many short- and long-term challenges. As we said earlier, it is imperative that these challenges be addressed with analytical and strategic planning. Valid and reliable data are essential to the process. We think it is important that, when resources become available, the Board of Public Defense conduct a new caseload study and devote more administrative staff time to strategic analysis and planning. In the meantime, the public defender's office can establish a procedure for capturing and recording detailed staffing data at standard intervals.

MANAGEMENT OF RESOURCE REDUCTIONS

We found that as a result of both legislative action and rising agency costs:

- **The Board of Public Defense has experienced a series of budget shortfalls since 2002 and taken reasonable actions to reduce costs.**

The state's appropriation for public defense services was reduced in the 2008-09 and 2010-11 biennia.

In fiscal year 2003, the legislature cancelled $3.4 million of the agency's $54.7 million appropriation. The Legislature appropriated funding for the fiscal year 2006-07 biennium sufficient to allow the board to fill an additional 30 attorney positions. In June 2008, the board closed a $4 million projected deficit for fiscal year 2009. This amount included the 2008 Legislature's $1.5 million reduction to the board's appropriation and shortfalls caused primarily by rising personnel and insurance costs.

The public defense appropriation for fiscal years 2010-11 signed by the Governor called for a $4 million reduction in the board's budget over the two years. But the bill also included a request that the Supreme Court implement a $75 increase in the attorney registration fee, with the funds to be dedicated to public defense.[10] At the time, legislative staff estimated that the fee increase would result in revenues of about $2.7 million for fiscal years 2010 and 2011. The Supreme Court enacted the fee increase in November 2009, leaving a net reduction to the board's budget of approximately $1.3 million. However, the fee increase is

[10] *Laws of Minnesota* 2009, chapter 83, art. 2, sec. 49.

temporary (expiring July 1, 2011). Thus, it does not provide a long-term solution to public defense funding problems.

Over 90 percent of the board's budget is related to personnel or contract obligations, leaving little room to achieve significant cost savings without affecting current personnel. Beginning in 2003, the board used several methods to reduce personnel costs short of layoffs. These included a hiring freeze and hiring delays; voluntary separation and early retirement incentives; and a voluntary salary savings leave program. The board has continued to use these measures as needed in the years since. As of May 2009, for example, 22 individuals had taken advantage of the most recent round of voluntary separation, early retirement, and salary savings options. In addition, the board and Teamsters Union representing public defenders agreed to a fiscal year 2010-11 contract with no cost of living adjustments and a two-year freeze on step increases.

Voluntary personnel actions and layoffs in 2008 resulted in a reduction of 53 full-time-equivalent public defender positions.

When voluntary staff reductions were not sufficient, the board laid off staff in 2003 and 2008. In total, voluntary measures and layoffs resulted in a 2003 staff reduction of 20 FTEs. In fiscal years 2006-07, the board had sufficient funds to regain 30 positions. Then, the 2008 personnel actions resulted in a reduction of 50 attorney FTEs in the districts and 3 attorney positions in the appellate division. The 2008 reductions accounted for a 12 percent loss in attorney staff. The board chose not to lay off any nonattorney staff in 2008 because it thought support staffing was already at a minimal level.

The Board of Public Defense authorized other budget-saving actions in June 2008, as shown in Table 2.6. These included the elimination of nonmandated services, cutbacks in public defender participation in specialty courts, reductions in the time public defenders were available for court appearances, and prioritization of felony and gross misdemeanor cases over misdemeanors. Counties protested the decision that public defenders not represent parents in child protection cases. But the Minnesota Court of Appeals ruled in September 2009 that counties commencing child protection cases are obligated under state law to pay reasonable compensation to attorneys appointed to represent indigent parents.[11]

District chiefs developed district-specific plans for controlling public defenders' time in court and prioritizing assignment of cases. For example, the First District stopped sending public defenders to misdemeanor arraignment[12] hearings. The district also stopped covering extra court schedules.[13] The Fifth District created a waiting list for certain misdemeanor cases and reduced the number of staff available for certain courts. The Seventh District also declined to appear at

[11] In the Matter of the Welfare of the Child of: S.L.J., Parent, 772 N.W.2d 833 (Minn. Ct. App. 2009). The state law requiring counties to appoint counsel for parents is *Minnesota Statutes* 2009, 260C.331, subd. 3(4).

[12] An arraignment hearing is a hearing before a judge during which the judge reads the charges to the defendant and the defendant pleads guilty or not guilty.

[13] District courts generally have a set schedule or "calendar" establishing when certain types of cases are heard. A court may add extra cases if there are an unusually large number of cases on a given day, an extra judge is available, or there is a case backlog.

arraignment hearings and extended timeframes for scheduling certain court appearances. The district also established protocols for making case assignments that placed highest priority on clients being held in custody or with demands for speedy trials, followed by certain felony cases. Driving under the influence, drug, and property offenses received lower priority, and misdemeanors were assigned the lowest priority.

Table 2.6: Changes to Public Defender Services Resulting from Budget Actions of 2008

Eliminated nonmandated services	Effective with new cases after July 8, 2008, public defenders stopped representing parents in child protection and termination of parental rights cases. As a result, responsibility for these cases shifted to counties.[a]
	Public defenders were appointed to represent parents in about 5,600 child protection cases in 2007. This accounted for about 3 percent of cases (or 9 percent of weighted case units).
Reduced participation in specialty courts	Public defenders stopped representing clients in post-adjudication specialty courts, such as drug courts, effective July 8, 2008.
	Public defenders are required to represent clients through sentencing. After sentencing, public defenders are required to be involved only if the client violates the terms of the sentence. Thus, defendants sentenced to participation in specialty court programs do not have a right to counsel while participation in the program is going smoothly.
Implemented scheduling controls	Districts implemented scheduling limitations to control the time public defenders spend in and out of court.
Prioritized case assignments	Districts implemented steps to prioritize services to in-custody criminal defense clients.

[a] Hennepin County is the exception; it continued to provide supplemental funding to the Fourth District public defender's office to pay for public defender representation of parents in child protection cases.

SOURCE: Minnesota Board of Public Defense budget reports and meeting minutes, 2008.

We think the board's cost reduction actions were reasonable. The board's actions were guided by an appropriate set of budget reduction principles and service priorities. They also took into account the necessary balancing of attorney and support staff levels.

3 Delivery of Public Defender Services

Because of its legal mandate, the public defender system has no control over the volume of cases it must handle. Caseload size is determined by external factors, such as the level of crime; state sentencing policies; and the practices of judges, prosecutors, and police. On a day-to-day basis then, workloads for public defenders are controlled largely by the number of defenders and support staff available. With this in mind, we evaluated the size and nature of public defenders' current workloads and the impact of workloads on the way public defenders do their work, case outcomes, and court efficiency.

PUBLIC DEFENDER WORKLOADS

Although we identified numerous flaws in the public defender's office weighted caseload data, a quantified measure of attorney caseloads is essential to the discussion of public defender workloads on a day-to-day basis. Consistent trend data on public defender staffing levels were not available for a long term analysis, but we used what data the public defender's office could provide to calculate workloads per attorney FTE, as shown in Table 3.1.

Based on these data, survey results, site visit observations, and the many interviews conducted as part of our site visits, we found that:

- **Public defender workloads are high and exceed state and national standards.**

State and national standards call for public defenders to carry no more than 400 case units per year. As shown in Table 3.1, Minnesota's weighted caseloads per attorney far exceed that standard. For example, the statewide average weighted caseload per public defender FTE was 779 at the end of fiscal year 2009. Weighted caseloads in the districts ranged from a low of 688 in the seventh district (10 counties in central Minnesota) to 860 in the ninth district (17 counties in the northwest).

When caseloads exceed these national and state standards, it is more difficult for public defenders to adequately prepare their cases. In order to effectively represent their clients, attorneys need sufficient time to interview clients and witnesses, perform legal research, draft motions, request investigative and expert services, and otherwise prepare for hearings and trials. Public defenders and others described the current environment as one of practicing triage, moving from crisis to crisis rather than thoughtfully managing cases. Insufficient case preparation can result in mistakes. In one district, a public defender's inattention led to a client charged with a misdemeanor spending 60 days (the entire sentence

Table 3.1: Number of Full Time Equivalent Attorneys and Case Units per Attorney, 2007 to 2009

	Number of Full Time Equivalent (FTE) Attorneys and Weighted Case Units Per FTE					
	2007		2008		2009	
District	FTE	Case Units per FTE	FTE	Case Units per FTE	FTE	Case Units per FTE
First	40	688	40	732	35	739
Second	48	761	49	691	42	755
Third	31	689	31	691	27	745
Fourth	118	789	107	721	104	819
Fifth	24	652	24	682	20	717
Sixth	24	643	24	654	20	712
Seventh	38	752	39	674	35	688
Eighth	14	661	14	656	12	786
Ninth	37	779	35	834	32	860
Tenth	56	811	60	724	49	823
Total	429	748	422	714	376	779

NOTES: FTE counts are snapshots as of May 2007, May 2008, and May 2009. FTE data for earlier years were not available. Case units per FTE were calculated using weighted case units for the previous calendar year. District FTEs may not sum to total due to rounding.

SOURCE: Office of the Legislative Auditor, analysis of public defender case management data.

if found guilty of the crime) in jail waiting for trial. Smaller errors are more common, such as a public defender or client failing to appear in court after a re-scheduling.

We observed public defenders working under intense time pressures.

Criminal court stakeholders we surveyed reported that public defender workloads have increased since 2002, as shown in Table 3.2. Roughly 60 percent of public defenders, public defender staff, and district court judges responding to our surveys reported that public defenders' workloads were much higher in 2009 than 2002. County court administrators and county prosecutors also reported in our surveys that public defender workloads had increased, but to a lesser extent. One court administrator commented:

> I think the public defenders that we have work very hard and do the best they can with the excessive volume of cases per attorney. However, this does not always translate into quality representation because the PD's office is grossly understaffed. The long-term impact of being in triage mode could have tragic results.

During our site visits, we observed public defenders under such time pressures that they often had about 10 minutes to meet each client for the first time, evaluate the case, explain the client's options and the consequences of a conviction or plea, discuss a possible deal with the prosecuting attorney, and allow the client to make a decision on how to proceed. One public defender showed us her schedule, which had a criminal sexual conduct trial on the same

Table 3.2: Opinions of the Change in Public Defender Workloads from 2002 to 2009

Change in Public Defender Workloads Since 2002	Public Defenders (N=225)	Public Defender Staff[a] (N=76)	District Court Judges (N=145)	County Court Administrators (N=54)	County Prosecutors (N=100)
Workload is much lower	0%	0%	0%	0%	4%
Workload is somewhat lower	3	0	2	6	8
Workload has not changed	8	3	10	11	8
Workload is somewhat higher	28	26	24	39	62
Workload is much higher	59	66	61	35	15
Don't know	2	5	2	9	3

NOTE: Only respondents who reported working with public defenders since 2002 answered this question.

[a] Nonattorney staff include investigators, paralegals, legal secretaries, dispositional (sentencing) advisors, and office managers.

SOURCE: Office of the Legislative Auditor, analysis of survey responses from public defenders, public defender's office staff, district court judges, county court administrators, and county prosecutors, 2009.

day she was scheduled to staff an arraignment calendar to pick up new cases. Another public defender was not available to cover the arraignment calendar for her. She anticipated having to ask the trial judge to adjust the trial proceedings so that she could handle arraignments for a half a day. She also told us she was so overbooked that she routinely scheduled up to five trials in a day, anticipating that most would settle. One judge commented that such over-booking is extremely stressful and that he could not imagine having to prepare for several trials at once. Another judge commented on our survey:

> I get repeated complaints [from defendants] that the public defenders don't return calls and the pre-trial is the first time they have met with the public defender. Although some of the clients would complain no matter how good the services were, the complaints are legitimate. The returned calls don't occur because [public defenders] are over worked, not because they don't work hard.

A court administrator shared this example in her survey response:

> There are myriad of continuance requests. An example: [We have] a two-hour omnibus hearing this Monday. A public

> defender's request [to continue] came in at 3:45 today, Friday. There are 16 officers subpoenaed to testify. The defendant is in custody. The public defender has not been able to get prepared.

Many public defenders and judges are concerned about increased stress and declining morale among public defenders due to high workloads. Public defenders we interviewed reported that, in order to provide competent representation, they donated their personal time to visit clients in jail, return phone calls, and otherwise prepare their cases.[1] They described feeling "underwater," "bruised," "beat up," and being treated as "the help." Separately, managers described instances in which they found public defenders showing signs of great emotional stress.

One public defender commented on our survey:

> There aren't enough attorneys, there's not enough time to meet with my clients. My schedule is so crazy with three counties that my clients end up waiting forever. I'm not notified when I've got in-custody clients waiting for a long time for a hearing because MY schedule is a problem. I often don't have time to prepare for important hearings, so I'm constantly requesting continuances and then the clients' cases get dragged on and on.

We also found that:

- **Many factors influence public defender workloads.**

Staffing cuts sustained in 2008 were the most immediate cause of high public defender workloads.

The most immediate cause of high public defender workloads is staffing cuts sustained in 2008. However, other factors such as the severity of the consequences of crimes and challenging clients affect the amount of attorney time required per case.

State legislation in recent years has increased the severity of consequences for certain crimes. When the consequences for a crime are more severe, clients are less likely to settle, and it becomes more essential for public defenders to provide zealous advocacy to have charges dropped or to avoid conviction. As illustrated in Table 3.3, these legislative policy changes have taken various forms. For example, revised sentencing guidelines have increased presumptive sentences for many crimes. The Legislature has recategorized some minor crimes to higher level offenses, and created "enhanceable" offenses. These are offenses for which additional convictions for the same offense carry a higher penalty. For example, successive domestic assaults are treated more seriously than the first incident, so public defenders should spend more time fighting the first conviction, even when the initial sentence is minimal.

[1] Part time public defenders reported consistently working more than their contracted hours, and full-time public defenders told us they were working uncompensated overtime as well. The chief administrator reported that excess hours among part-time staff rose from 28,000 hours in fiscal year 2000 to 44,000 in fiscal year 2008. We did not attempt to verify that information. The chief administrator said the office did not track uncompensated time among full-time public defenders.

Statutory changes increasing the severity of consequences attached to certain crimes have also contributed to high workloads.

Table 3.3: Increased Severity of Consequences Associated with Crimes in Minnesota

Type of Policy Change	Description
Recategorized crimes	Changes of offense severity level from misdemeanor to gross misdemeanor or gross misdemeanor to felony.
	Example: Purchasers of tickets to dogfights are now guilty of a gross misdemeanor rather than a misdemeanor.
Increased sentences	Legislation that increases penalties for specific offenses.
	Example: Mandatory life sentences for certain first time sex offenders were added in 2005.
Sentencing guidelines revisions	Changes to the sentencing guidelines grid that adjust the range or duration of presumptive sentences, alter the way criminal history score points are considered, or change whether an offense is a presumptive prison commitment or a presumptive stayed sentence.
	Example: In 2005, guidelines ranges were increased to allow for greater sentences without a departure.
Enhanceable crimes	Additional convictions for the same offense carry a higher penalty.
	Example: First time driving while impaired offenses (without other aggravating factors) are misdemeanors, but successive offenses are gross misdemeanors and felonies.
Creation of new crimes	Broader scope of actions or circumstances that define a crime.
	Examples: Broadening the definition of electronic solicitation of children and creation of domestic abuse by strangulation as a separate, more serious, offense than domestic abuse.
Collateral (civil) consequences	Legal or social consequences incurred when charged with or convicted of a crime.
	Examples: Banning access to professional licenses in certain professions, requiring sex offender registration, or encountering difficulties gaining housing or employment.

SOURCE: Office of the Legislative Auditor compilation.

Criminal charges or convictions in Minnesota are also more likely to have civil consequences attached. These consequences (often referred to as "collateral consequences") include denied access to public assistance or student loans; prohibition from owning a gun; requirements to register as a sex offender; and loss of immigration status, jobs, or housing. Public defenders stated that collateral consequences were big impediments to resolving cases because the consequences of pleading guilty or otherwise settling the case can be so high. In addition, many civil consequences attach upon being charged with a crime (not convicted). In such cases, public defenders may choose to litigate whether there is probable cause for the charge.

Other factors mentioned by public defenders as influencing their workload included additional hearings required by new legal requirements (such as pre-sentence investigations and extended juvenile jurisdiction) and increased use of problem-solving courts (such as drug and mental health courts), which require far more court appearances than traditional courts.[2]

Representing clients with special challenges also add to the time needed to represent clients. Public defenders told us that more so today than in the past, they have clients who do not speak English and may not understand American legal concepts. Translating the language and ideas of a criminal case can be time consuming. In addition, these clients often cannot take plea deals because of the immigration consequences of criminal charges or convictions.

Public defenders also stated that they see more clients with mental illness and chemical dependency than they did previously. During our site visits, we met clients who had undergone shock treatment and suffered memory loss, sold their psychiatric medicine for money to survive, suffered from co-occurring mental illness and chemical dependency, and some who simply could not understand legal ideas or processes. Public defenders may need to spend far more time explaining the process to clients in these circumstances.

QUALITY OF REPRESENTATION

Given widespread concern over public defender workloads, we assessed the impact workloads have on public defenders' ability to represent their clients. Those we interviewed generally agreed that public defenders were, on the whole, excellent criminal defense attorneys. However, we found that:

- **Public defenders reported that they are spending limited time meeting with clients and preparing cases.**

Time pressures make it more difficult for public defenders to build trust with clients and make decisions about their defense.

Public defenders reported that high workloads made it difficult for them to have enough time with their clients to build trust, explain the system and charges, and make decisions with their clients regarding their defense. Many public defenders identified client trust as essential to providing quality representation and ensuring the efficient resolution of cases. Attorneys build trust by spending time with their clients and being accountable to them. Some public defenders and judges said that when clients trust their attorneys, they can trust the attorneys' advice on how to resolve the case, thereby leading to more efficient disposition of the case. One chief public defender pointed out that clients' trust in the fairness of the judicial system is linked to their decisions to abide by the law in the future.

Public defenders responding to our survey felt strongly that they were not spending enough time with clients, as shown in Table 3.4. For example, 1 percent of responding public defenders strongly agreed that they spent enough time with clients; 21 percent strongly disagreed. Public defenders were also

[2] Minnesota currently has 37 problem-solving courts. In 2008, the Board chose to stop providing representation in post-sentencing problem-solving courts in order to save public defender staff time. However, public defenders continue to staff pre-sentencing problem-solving courts.

Table 3.4: Public Defenders' Opinions of their Ability to Represent Clients, 2009

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
I had sufficient time with clients.	21%	46%	27%	1%	0%
I regularly visited clients in jail.	1	14	56	18	2
I returned phone calls from clients within one working day.	7	30	50	9	1
When I entered the courtroom, I felt well-prepared for each case I had on the calendar.	7	35	40	11	1
I provided constitutionally adequate representation for all my clients.	4	14	47	28	4
I ran into potential ethical issues surrounding my obligation to provide competent and diligent representation.	7	40	34	11	4

NOTES: The full question read, "Think about your service with the public defender's office in the past year, then indicate the extent to which you agree with the following statements." Percentages are based on 277 assistant public defenders, managing attorneys, and district chiefs responding to our survey. Percentages may not sum to 100 because a small percentage of respondents on each item reported that it was not applicable or left it blank. The percentage of blank/not applicable responses ranged from 2 percent to 8 percent

SOURCE: Office of the Legislative Auditor, analysis of public defender survey data, 2009.

concerned about other indicators of timely client interactions. About 15 percent of respondents strongly disagreed or disagreed that they regularly visited clients in jail; 37 percent strongly disagreed or disagreed that they returned client phone calls within a day.

Public defenders' responses to our survey also indicate their concern over the quality of representation they provide. For example, 42 percent of public defenders responding to the survey disagreed or strongly disagreed that they were well prepared for each of their cases in the past year. Most (75 percent) felt they had provided constitutionally adequate representation in the past year, but 45 percent also agreed or strongly agreed that they had run into potential ethical issues surrounding their ability to provide competent and diligent representation.[3]

We surveyed groups of public defender clients to understand how they felt about the quality of representation provided by their public defenders.[4] Relative to other aspects of their public defenders' performance, clients responding to our

[3] As discussed in Chapter 1, the fact that representation is constitutionally adequate does not show that the representation meets standards of quality. Rather, a finding of constitutionally inadequate representation would show extreme dysfunction.

[4] The survey included six questions related to the client's satisfaction with his or her public defender. To distribute the survey, we enlisted the aid of probation officers in Dakota, Hennepin, McLeod, Olmsted, and Sibley counties (encompassing 14 probation office locations). Parole officers or administrators in each office handed a survey to visiting clients who said they had been represented by a public defender. In addition, a member of our evaluation team visited two courthouses and approached public defender clients who had just completed a settlement conference in which they were sentenced or the case dismissed. In total, we obtained completed surveys from 317 former clients.

Most public defender clients we surveyed were generally satisfied with their public defenders, but a significant number of district court judges said that high workloads were harming the quality of representation.

survey were less satisfied with the amount of time spent with their public defenders and the timeliness with which public defenders returned their phone calls. As shown in Table 3.5, over 80 percent or more of the clients we surveyed reported that their public defenders treated them with respect, listened to them, and explained things in an understandable way. A smaller proportion, yet still a majority, said their public defenders spent enough time with them, returned phone calls in a reasonable amount of time, and did a good job representing them.

Table 3.5: Public Defender Client Survey Results, 2009

	Percentage of Respondents		
	Yes	No	Don't Know or Did Not Respond
My public defender listened to me.	82%	12%	6%
My public defender treated me with respect.	84	10	6
My public defender explained things so I could understand.	83	15	2
My public defender spent enough time with me.	61	33	6
My public defender returned my phone calls in a reasonable amount of time.[a]	55	27	19
My public defender did a good job representing me.	67	23	11

NOTES: Percentages are based on 317 survey responses. Percentages may not sum to 100 because of rounding.

a There are a variety of circumstances in which a public defender may not need or be able to call a client, for example, when a case is heard and resolved at the first appearance in court or if the defendant were homeless. This likely explains the higher rate of respondents who either skipped this question or replied "don't know."

SOURCE: Office of the Legislative Auditor, analysis of public defender client survey results, 2009.

District judges we interviewed and surveyed are also concerned that public defenders' workloads are having a negative impact on the quality of representation. Only one-third of district judges responding to our survey said the public defenders they interacted with spent enough time with clients, as shown in Table 3.6. Nearly a quarter of the district judges responding were concerned that public defenders did not have sufficient knowledge of their cases or were not thoroughly prepared for court. Like the public defenders we surveyed, most district judges (90 percent) felt that defenders were providing constitutionally adequate representation, but many (37 percent) also agreed said that public defenders appearing in their courtrooms had run into potential ethical

Table 3.6: District Judges' Opinions of the Representation Provided by Public Defenders, 2009

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
Public defenders I know spend enough time with their clients.	52%	8%	27%	6%	6%
At hearings, public defenders in my courtroom displayed thorough knowledge of their cases.	0	25	60	13	2
At trials, the public defenders appearing before me were fully prepared.	1	22	55	17	4
Public defenders appearing in my courtroom provided constitutionally adequate representation for all of their clients.	1	10	57	33	0
Public defenders ran into potential ethical issues surrounding their obligation to provide competent and diligent representation.	6	45	31	6	11

NOTE: The full question read, "Please think about your interactions with public defenders in the past year, then indicate the extent to which you agree with the following statements." Percentages are based on 191 district judges responding to our survey. Row percentages may not sum to 100 because some respondents did not answer the question.

SOURCE: Office of the Legislative Auditor, analysis of district judge survey data, 2009.

issues with regard to competent and diligent representation. One judge commented on our survey:

> While the defense provided has met constitutional and ethical standards, the increasing caseload, complexity of cases, and the difficulty of scheduling has resulted in lower quality of service. It is at a point where it will soon be that the services of the public defender will not meet these requirements.

CASE OUTCOMES

Although public defenders are struggling with daily representation of their clients that does not necessarily mean that case outcomes are less favorable. We investigated this issue and found that:

- **It is difficult to empirically establish the actual impact of public defender workloads on the outcome of cases.**

The difference between good and poor representation may not be reflected in whether clients are found guilty or innocent. Rather, it is in the quality of the plea agreements that public defenders obtain. We were not able to assess the quality of plea agreements. An empirical study in the quality of plea agreements would require detailed information about individual cases, an ability to compare cases with different defendants and facts, and detailed disposition data over time.

Most public defender cases are settled with a plea agreement, but it is difficult to assess the impact of high workloads on the quality of these agreements.

Public defenders told us that high workloads have increased pressure to settle cases rather than proceeding to trial or moving to dismiss charges. Increases in the number of settlements and decreases in the number of trials and cases dismissed may be evidence of less zealous representation by public defenders. We analyzed data on the disposition of public defender cases to look for patterns in plea agreements, motions to dismiss, and trial rates.[5]

Our analysis did not reveal a clear pattern of change in case outcomes statewide. Statewide, case disposition trends varied little from fiscal year 2004 to fiscal year 2009, as shown in Table 3.7. For example, trial rates remained at just over one percent during the six-year period. The percentage of cases dismissed declined slightly, then rose in fiscal year 2009, and the percentage of cases settled with a plea agreement ranged from 80 percent to 82 percent. However, looking only at statewide trends can mask differences among districts and among counties. In addition, the aggregated dismissal data does not distinguish between dismissals initiated by the prosecution and defense (the latter being a more direct indicator of public defenders' behavior). As a result, we conducted a more detailed analysis.

Table 3.7: Disposition of Public Defenders' Felony, Gross Misdemeanor, and Misdemeanor Cases, Fiscal Years 2004 to 2009

	Number of Cases					
	FY04	FY05	FY06	FY07	FY08	FY09
Total	78,116	77,174	86,600	91,334	86,906	86,391
	Percentage of Cases					
Disposition	FY04	FY05	FY06	FY07	FY08	FY09
Plea Agreement	80.4%	80.4%	81.4%	82.1%	82.0%	80.5%
Dismissal[a]	18.4	18.5	17.4	16.8	16.9	18.4
Trial	1.2	1.1	1.2	1.1	1.1	1.1

NOTE: The analysis excluded child protection and juvenile cases.

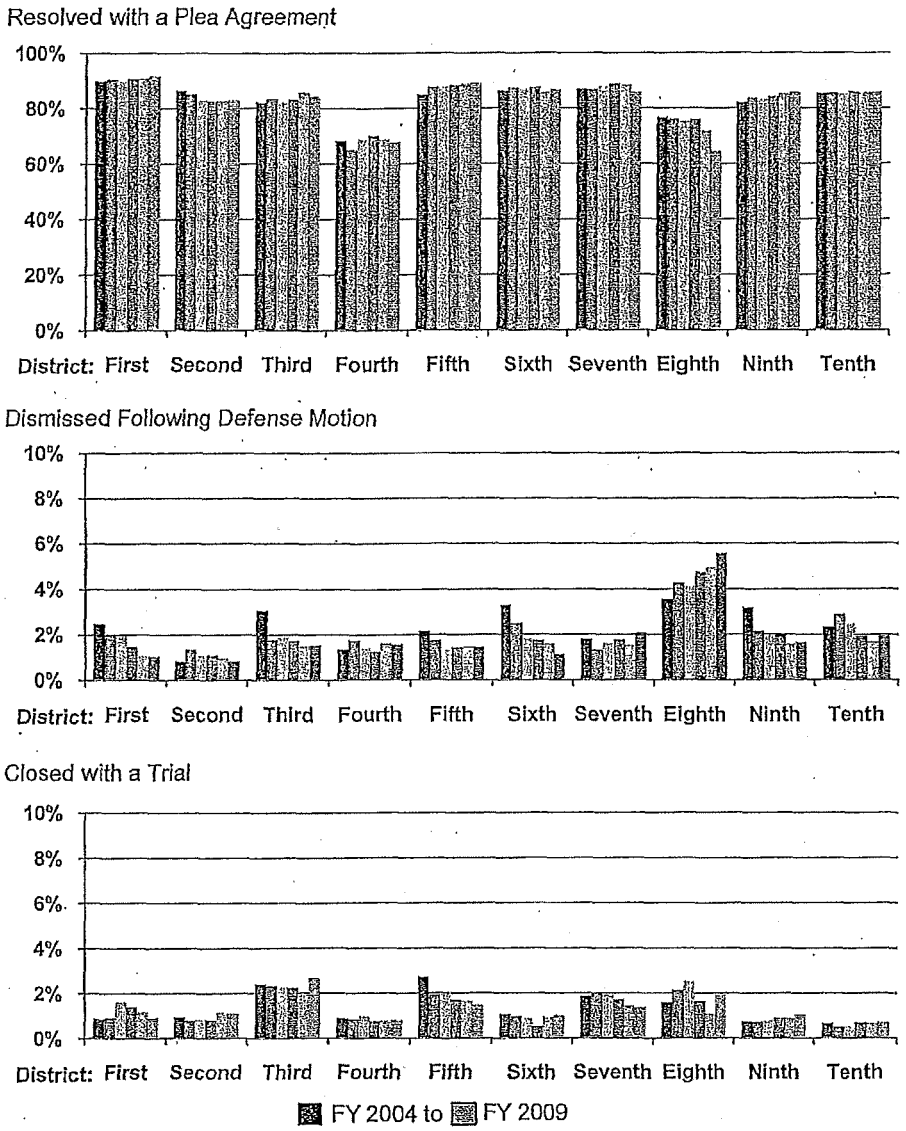
[a] Includes dismissals initiated by prosecution motion, defense motion, or the bench and cases dismissed before indictment.

SOURCE: Office of the Legislative Auditor, analysis of public defender case management data.

Our more detailed analysis by district also did not clearly demonstrate a link between workloads and case outcomes. As shown in Figure 3.1, districts differ in the percentage of cases dismissed by defense motion, settled with plea agreements, and closed with a trial. The first year of data available on dispositions by case type was for fiscal year 2004 and our analysis period began there. But public defender staffing levels in 2004 and 2005 were similar to those of 2008 and 2009. Both periods experienced a reduction of public defenders

[5] The first set of consistent data on case dispositions was available from the public defenders' case management system for fiscal year 2004; thus, we analyzed trends for fiscal years 2004 to 2009.

Figure 3.1: Felony, Gross Misdemeanor, and Misdemeanor Case Dispositions by District, Fiscal Years 2004 to 2009



NOTE: The analysis excludes child protection and juvenile cases. Percentages are based on the total number of felony, gross misdemeanor, and misdemeanor case dispositions.

SOURCE: Office of the Legislative Auditor, analysis of public defender case management data.

because of budget shortfalls. Relatively speaking, staffing was more robust in 2006 and 2007 following an appropriation increase to restore attorney positions. Thus, we looked for a difference in case disposition patterns in 2006 and 2007 compared to the prior and following years, but consistent trends over time were

not readily apparent. Only one of the ten districts (the first) showed evidence of an increase in the number of settlements in conjunction with fewer dispositions by trial and defense motion to dismiss.[6]

The interim chief of the appellate office told us that her office has not seen a change in the nature of appeal claims in recent years as they relate to behavior by public defenders.[7] The interim chief reported that her office does receive complaints of poor representation by specific attorneys, but does not often see public defender behavior that would reach the standard required to show ineffective assistance by counsel.

Absent an independent, parallel investigation of the case by a third party, it is not possible to objectively confirm whether the time a public defender spent on a case was sufficient. How much time was spent on a case and whether a case was investigated will affect the evidence an attorney has available to negotiate a favorable plea agreement or gain a dismissal. One judge stated that the quality of representation by public defenders generally looked adequate, but he also said it was impossible for him to tell what a case might be missing or if the public defender had done an appropriate investigation.

Managers largely rely on complaints from clients and others to determine whether public defenders are doing an adequate job.

Chiefs and managing attorneys rely on complaints from clients and others to determine whether attorneys are doing an adequate job, but this system may fail to catch problems having a negative impact on case outcomes. One chief reported that only after a public defender voluntarily terminated his employment did the chief begin to hear complaints from justice partners about the public defender's performance. Another chief pointed out that some clients do not complain, even when there are problems.

Judgment of public defender services based on client complaints relies on clients' perception of their representation, rather than objective criteria regarding the quality of lawyering. Lawyers that are good with people may receive few client complaints, even if they are poor advocates. Conversely, very good lawyers with poor people skills may receive many clients complaints.

IMPACT ON THE CRIMINAL COURT SYSTEM

Public defense is an integral part of Minnesota's entire criminal justice system. As a result, staffing and workload challenges in the public defender's office can affect other parts of the criminal court system. We found that:

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[6] Chiefs and managers we interviewed about this data stated that it is hard to tell what, if anything, the data show. Some suggested that the data are flawed because attorneys do not consistently record dispositions in the case management system. For example, some cases are charged with multiple counts on one complaint. If a defendant pleads guilty to some counts and wins dismissal for others, an attorney may code that case as either a dismissal or a plea. Several chiefs also noted that it is impossible to tell from the data available whether public defenders are making fewer motions to dismiss or winning these motions less often.

[7] Common issues related to poor representation include lack of investigation by the public defender and failure to object to prosecutorial misconduct.

- **Judges and court staff reported that strain on the public defender system has had a detrimental effect on the efficient administration of criminal courts.**

In particular, availability of public defenders affects the scheduling of court hearings and trials and the length of time it takes to resolve cases.

Many judges and court administrators are troubled by the slow pace of criminal cases through the judicial system.[8] About 50 percent of district judges responding to our survey said that criminal cases in their courtrooms progressed too slowly toward disposition. Another 39 percent described the pace of cases as adequate, and 8 percent described the flow of criminal cases as prompt or very prompt. Responses from court administrators were similar, with 35 percent reporting that the progress of criminal cases was too slow and 47 percent finding the progress of cases to be adequate.[9]

Many judges and court administrators said difficulty scheduling public defenders for hearings and trials was a significant cause of court delays.

Judges and court administrators responding to our surveys reported that problems scheduling public defenders for hearings and trials was the most significant cause of delays. As shown in Table 3.8, survey respondents found scheduling of prosecutors and judges to be a much less significant problem. Among judges and court administrators, other influential factors underlying court delays were the number of crimes being charged and the increased severity of consequences associated with crimes.

Availability of public defenders affects court efficiency in several ways. Due to the high number of cases they handle, public defenders are routinely scheduled for several trials in one day; they count on the assumption that most cases will be settled before a trial actually occurs. When cases do not settle, public defenders find themselves booked for multiple trials, which means that some cases must be continued for trial at a later date. Judges and court staff were not overly concerned about the practice of scheduling multiple trials in a day. They said most cases are in fact disposed with a plea agreement, and only a small percentage of cases actually go to trial.[10]

Some public defenders stated that their schedules are often so tight that, if anything goes wrong (such as not receiving an offer ahead of time, a client being late, or a hearing taking longer than anticipated), it has a cascading effect on the court calendar that results in having to reschedule cases. Court administrators also discussed the difficulty of scheduling public defender cases in rural counties

[8] State law directs the courts to adopt rules and procedures to ensure that judges meet timing objectives for the disposition of criminal cases. The timing objects set in law say that 90 percent of all criminal cases be disposed within 120 days, 97 percent within 180 days, and 99 percent within 365 days.

[9] We could not independently confirm the trends asserted by district judges. We obtained data from the court information system showing average time to disposition for criminal cases closed in 2008, but trend data were not readily available. The statewide average time to disposition for in 2008 was 198 days for felonies and 124 days for gross misdemeanors. Comparing districts, the time to disposition for felonies ranged from 135 days in the fourth district (Hennepin County) to 272 days in the third district (southeast Minnesota).

[10] 2008 data from the court information system show that 3.9 percent of felony cases, 1.3 percent of gross misdemeanor cases, and 0.7 percent of misdemeanor cases were disposed with a trial.

Table 3.8: Opinions of Factors Causing Delays in the Progress of Criminal Cases Through the Courts, 2009

District Judges	Not at All a Cause of Delays	A Minor Cause of Delays	A Moderate Cause of Delays	A Significant Cause of Delays	No Opinion/ No Answer
Difficulty scheduling public defenders for hearings and trials	1%	17%	29%	44%	9%
Difficulty scheduling prosecutors for hearings and trials	17	42	25	6	9
Difficulty scheduling judges for hearings and trials	15	45	22	8	10
Insufficient availability of translators	26	41	16	3	14
The number of defendants representing themselves	21	41	20	7	10
General increase in the number of criminal cases being charged	18	17	31	19	15
Increase in the severity of consequences attached to criminal conviction	13	19	35	19	14
Court Administrators					
Difficulty scheduling public defenders for hearings and trials	5%	16%	28%	32%	19%
Difficulty scheduling prosecutors for hearings and trials	26	35	14	5	19
Difficulty scheduling judges for hearings and trials	28	30	16	7	19
Insufficient availability of translators	54	23	5	0	18
The number of defendants representing themselves	33	30	12	4	21
General increase in the number of criminal cases being charged	18	21	32	9	21
Increase in the severity of consequences attached to criminal conviction	12	25	25	5	33

NOTE: Percentages are based on 191 district court judges and 57 court administrators responding to our surveys. Row percentages may not sum to 100 due to rounding.

SOURCE: Office of the Legislative Auditor, analysis of survey responses from district court judges and court administrators, 2009.

that share public defenders. When these shared public defenders are not present when cases come up, the cases need to be continued.

In response to staffing cuts, chief public defenders in several districts stopped having public defenders present at some arraignments.[11] Under these circumstances, a defendant who is appointed a public defender at arraignment is given the name of his or her public defender and scheduled for another appearance in court. This practice is less efficient because many misdemeanor

[11] Arraignment is the hearing before a judge during which the judge reads the charges to the defendant and the defendant pleads guilty or not guilty.

cases have historically been settled at the arraignment hearing with the assistance of a public defender. By not having representation at their first appearance, clients must appear at successive hearings, thereby slowing down the court process.

OPTIONS

By various measures public defender workloads are too high, resulting in hurried and perhaps less thorough criminal defense. Unfortunately, there are no easy options to reduce stress on the public defender system.

There are no easy options to reduce stress on the public defender system.

Although we think adding more public defenders to the system would address the concerns we have identified, the likelihood of substantial funding increases in the state's current fiscal environment is small. An alternative would be to carefully evaluate the state's policies regarding crime and punishment.

Stakeholder groups past and present have suggested reforms intended to relieve pressure on Minnesota's criminal justice system. Table 3.9 summarizes some of the more recent initiatives and their recommendations. The reforms suggested by these groups seek to reduce burden by decriminalizing certain lower level offenses, making greater use of diversion programs, removing or lessening the civil consequences associated with crimes, changing court procedures to reduce the number of hearings per case, modifying criminal sanctions, and altering the probation delivery system, among others.

In 2009, the Legislature considered a bill that would have allowed the courts to handle unpaid misdemeanor citations on the payables list as guilty pleas, sending them to collections.[12] Because the citation would automatically be treated as a petty misdemeanor with the imposition of a fine, rather than jail, the defendant would no longer have a right to a public defender. The provision was dropped in conference committee.

The State of Wisconsin established a maximum caseload threshold beyond which public defenders could take no more cases. If the maximum caseload is reached, Wisconsin diverts public defender cases to private-sector, contract attorneys. In our opinion, however, this approach has several drawbacks. Diverting cases to contracted attorneys when the maximum threshold is met could be very expensive for the state. Diverting cases to counties could result in significant cost-shifting from state to local governments. Both options run counter to Minnesota's commitment to a uniform, statewide public defender system.

Another option would be to amend or repeal Minnesota's case flow statute. If public defenders and the courts were not bumping up against statutory time limits, it might be possible to provide short-term relief by allowing public defenders more time per case. With the permission of the Minnesota Court of Appeals, the public defender's appellate office has adopted this strategy.

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[12] *Minnesota Statutes* 2009, 609.101 subd.4, grants Minnesota's Judicial Council authority to establish a uniform fine schedule, known as the payables list, which allows individuals to pay a fine in lieu of a court appearance for certain listed offenses.

Nonetheless, we do not see easing of case flow standards to be a long term solution because victims and defendants both deserve timely resolution of their cases. Judges and other state court system officials believe that easing of case flow standards is a poor option both in the short and long term. They said that extending statutory time standards would not provide short-term relief because delayed cases take more lawyer time than timely disposed cases.

Table 3.9: Recommendations to Reform Minnesota's Criminal Justice System, 1997 to 2009

Year	Source	Recommendations
1997	Nonfelony Enforcement Advisory Committee (NEAC)	Among other things, recommended removing the threat of jail time for many first time offenses (including driving after suspension and low level theft and worthless check cases).
2003	Working Group on Criminal Justice System Efficiency	Identified seven themes for improving criminal justice efficiency, including: - mandated diversion; - new procedures for processing nonviolent misdemeanors; - developing alternatives to prison and jail; and - examining civil consequences.
2007	Minnesota Department of Public Safety	Recommended serious review and reconsideration of the imposition of collateral consequences.
2008	Access and Service Delivery Committee	Recommended a serious reconsideration of NEAC recommendations and committed to educate the legislature that no proof of insurance, registration, and driver's license crimes are best handled by the Department of Vehicle Services.
2008-present	Criminal Justice Forum	In 2008, identified seven issues to pursue, including changing venue where judges can hear a case and handling no proof of insurance through an administrative process. Going forward, the group intends to pursue issues such as: -combining some hearings and eliminating meaningless hearings; - determining if pre-sentence investigations are necessary; - expanding pre-charge diversion and designing and implementing graduated sanctions of probation violations; and -examining changes to the probation delivery systems.

SOURCES: Minnesota Supreme Court, Nonfelony Enforcement Advisory Committee Final Report (St. Paul, January 15, 1997); Minnesota departments of Corrections and Public Safety, Working Group on Criminal Justice System Efficiency 2003 Report to the Legislature (St. Paul, January 2003), 2-3; Minnesota Department of Public Safety, Collateral Consequences Report to the Legislature (St. Paul, January 2007), 6-7; Minnesota Supreme Court, Access and Service Delivery Committee Report to the Minnesota Judicial Council (St. Paul, July 17, 2008), 10; and meeting minutes from the Criminal Justice Forum, 2008 and 2009.

4 Eligibility and Reimbursements

Minnesota's eligibility standard for public defender services is broad in order to assure that those who cannot afford an attorney have access to one. Judges may order some individuals who are appointed a public defender to reimburse the state to the extent they can.

In this chapter, we discuss practices of determining eligibility and ordering reimbursements. Specifically, we assessed the statutory framework for determining eligibility; the application of statutory eligibility criteria by judges and court staff; the procedures for determining eligibility; the accuracy of eligibility determinations; and the ordering, collection, and distribution of reimbursements.

STATUTORY STANDARDS

State law establishes two general standards controlling eligibility for appointment of a public defender in criminal cases. A defendant is defined as financially unable to obtain counsel if: (1) the defendant (or a dependant of the defendant who resides in the same household) receives means-tested government assistance or (2) "through any combination of liquid assets and current income" the defendant would not be able to pay the "reasonable costs charged by private counsel."[1]

We examined this standard and found that:

- **Imprecise wording in Minnesota law and other incentives encourage the appointment of public defenders.**

The Minnesota law that establishes eligibility criteria for public defense services is vague. Eligibility standards that are too rigid could result in an unconstitutional denial of counsel to persons unable to afford an attorney. Simply using an income-based cut-off without further inquiry can be a violation of Minnesota statute. In 2009, the Supreme Court held that the district court has a duty to make a "broad inquiry" and "must consider all available information about the defendant's financial circumstances" in order to determine eligibility.[2]

The vague standard in Minnesota statutes provides limited guidance to eligibility decision makers about who should be eligible for a public defender and who should not. The law does not clearly define the income or asset criteria that

[1] *Minnesota Statutes* 2009, 611.17(a).

[2] *State v Jones*, 772 N.W.2d 496, 503 (Minn. 2009).

judges should consider when determining eligibility. Nor does the law elaborate on the process or criteria for determining the reasonable cost of private counsel. As a result, judges have a great deal of discretion in determining eligibility for a public defender.

State law gives judges considerable discretion in deciding who is eligible for a public defender.

In addition to appointing public defenders in order to protect constitutional rights, judges have various other incentives to appoint a public defender. Not appointing a public defender to an unrepresented defendant can result in a significant slowing of the court process. According to state court officials, there is a natural inclination for overloaded courts to appoint public defenders to move cases along. We discuss the implications of the vague eligibility standard in conjunction with courts' incentive to appoint public defenders throughout the rest of this chapter.

APPLICATION OF ELIGIBILITY CRITERIA

Although the law allows leeway, state statutes require judges to consider several factors when making eligibility decisions. The factors include: earned and unearned income; the value and encumbrances on any real property; the liquidity of real estate assets or other assets; and the value of all property transfers occurring on or after the date of the offense.[3] (Transfers of assets after the crime was committed can be voided.)

Consideration of Eligibility Factors

We used surveys and interviews to learn how judges apply these factors when making public defender eligibility decisions. We found that:

- **Judges weigh eligibility factors differently, with some judges paying little or no attention to considerations spelled out in statute.**

Inquiry about an applicant's income is required by law, but some judges used a more expansive view of income than others. As shown in Table 4.1, 75 percent of judges responding to our survey said they place great weight on an applicant's income relative to federal poverty guidelines. However, some judges also take household expenses into consideration, making it easier for applicants to qualify for a public defender. About 63 percent of judges placed great or moderate weight on the amount of an applicant's household expenses while 28 percent placed little or no weight on this factor.

Use of income standards varies among districts. Many district courts compare applicants' self-reported income to the federal poverty guidelines, but they may use different cut-off points to establish eligibility. The most restrictive standard we saw granted a public defender to applicants with income below 125 percent of the federal poverty guidelines (about $27,600 for a family of four in 2009). One district court we visited used 150 percent of the guidelines as a minimum standard (about $33,100 for a family of four in 2009).

[3] *Minnesota Statutes* 2009, 611.17(b).

Table 4.1: How Judges Weigh Various Factors When Considering Appointment of a Public Defender, 2009

	Great Weight	Moderate Weight	Little Weight	No Weight	Don't Know
Income relative to federal poverty guidelines	75%	13%	6%	0%	4%
Ownership of a second residence	74	5	4	4	11
Hourly wage	53	34	5	2	4
Ownership of other property (cars, boats, etc.)	34	41	15	3	5
Ownership of a primary residence	31	36	22	5	4
Severity of the criminal charge	30	35	17	11	4
Proportion of income going to necessary household expenses	16	47	23	5	5
Impact of NOT appointing a public defender on the progress of the case through the courts	15	35	28	16	4
Defendant's previous attempts to retain an attorney	9	35	35	11	8

NOTES: Percentages are based on 191 district court judges responding to the survey. The question was, "How much weight do you place on each of the following factors when weighing your decision to appoint a public defender?" Row percentages in the table do not sum to 100 because some respondents did not answer the question.

SOURCE: Office of the Legislative Auditor, analysis of district court judge survey results, 2009.

Judges vary considerably in how they weigh information on income, assets, and local costs for retaining private counsel.

Consideration of assets is also inconsistent. About 30 percent of judges responding to our survey said they do not consider at all whether the applicant transferred assets to others on or after the date of the alleged offense. Twenty-seven percent said they place little or no weight on the applicant's ownership of a primary residence. Both of these asset inquiries are specifically required by statute.

Contrary to requirements in state law, 24 percent of district judges reported that they did not consider the costs of private counsel at all when determining public defender eligibility. Some judges we interviewed said they had a rough idea of what local private attorneys charge for misdemeanors, gross misdemeanors, and felonies. However, a survey to determine actual costs of representation for specific crimes was done in only two counties we visited (both in the metro area).

In other jurisdictions, stakeholders told us the high cost of private counsel is a factor considered in public defender appointments. Most criminal defense attorneys require payment for their services in advance. Many defendants do not have savings sufficient to pay this fee, even if they have a job or some money to contribute toward their defense. In such cases, judges will sometimes appoint a

public defender to a person with relatively high income but also order a reimbursement.[4]

Respondents to our surveys and many of the officials we interviewed during our site visits said that. For example, only 8 percent of judges responding to the survey agreed that the working poor had affordable options. One judge working in very rural counties pointed out that, because very few of the counties he worked in had private attorneys who could represent a defendant in a serious case, he was more likely to overlook some income or assets in such cases.

Judges also differed in the extent to which they consider how the courts will be affected if they do not appoint a public defender and the defendant represents himself or herself (a person who represents himself or herself is called a "*pro se*" defendant). This factor is not mentioned at all in state law, but judges have an incentive to appoint public defenders because *pro se* defendants significantly slow down the court process. Half of district judges reported placing great or moderate weight on the implications for the courts of not appointing a public defender; 44 percent put little or no weight on this factor.

Individual Attitudes Affecting Eligibility Determinations

We observed eligibility determinations during site visits across the state and found that:

- **The absence of strict statutory criteria in Minnesota has resulted in eligibility determinations driven in part by individual attitudes of judges and court personnel.**

Absence of specific statutory standards has given leeway to those determining eligibility, not just in the factors they consider, but also in how their personal opinions and perspectives affect eligibility determinations. For example, we observed one judge deny a public defender to a defendant with three children earning $20,000, even though his income fell below the district's income standard. The judge reviewed the application, very briefly, in chambers without any contact with the applicant. The judge told us that the charge (a first time driving while intoxicated offense) was not serious enough to merit appointment of a public defender.

One judge described himself as "proactive and aggressive" in assuring defendants had counsel. While reviewing the application of a person residing on an Indian reservation, the judge commented that he generally assumed that those living on reservations were very poor. However, he also pointed out that he did not know whether this particular applicant received monies from the tribe. He

[4] Some communities have established panels of private attorneys who will represent the working poor at reduced rates. For such panels to work, they need support from the bench, a sufficient number of clients able to make some payment for their defense, and a sufficient number of attorneys willing to work for lower rates. These conditions do not exist in all Minnesota communities, especially in rural areas.

approved the application in chambers without questioning the applicant about her means of support.

A screener in another county failed to ask whether an unemployed man's newborn baby and his unemployed girlfriend (both living with him) received needs based assistance such as Medical Assistance. Receipt of such benefits would have made him automatically eligible for a public defender. When we asked the screener about this later, she incorrectly said the law only granted public defenders to those who themselves were on needs-based assistance. She also expressed the opinion that many male public defender applicants living with their children and partners on assistance are not reporting themselves as living in the household and are therefore committing welfare fraud.

People working in the criminal justice system did not uniformly support establishing stricter standards for obtaining a public defender in Minnesota.

While it is apparent that absence of firm standards has resulted in a lack of uniformity in the eligibility determination process, judges we interviewed did not uniformly support establishing a fixed income standard, or more generally, being too stringent in eligibility determinations. These judges said a certain amount of judicial discretion in public defender eligibility decisions is necessary in order to meet constitutional requirements to provide counsel.

Many public defenders, on the other hand, said Minnesota should have more definitive eligibility standards set in law. Such standards would sufficiently protect defendants' constitutional rights as long as judges retained the ability to waive the standard for those in exceptional circumstances.

In Dakota County, judges and public defenders worked together to develop set income standards, linked to the severity of the charge, to help determine public defender eligibility. Under the standards, those charged with more serious offenses can make up to $20 per hour, while those charged with the least serious offenses can make a maximum of $12 per hour. To help guide decision making, Dakota County has documented its standards in a grid. While screeners in Dakota County make recommendations based on this grid, judges make the final eligibility determination and may waive the standard. Dakota County's eligibility grid is reproduced in the Appendix, where we have also included a similar instrument developed by the Colorado Supreme Court.

Eligibility Standards in Other States

Other states have also struggled with balancing the constitutional right to counsel with objective criteria and uniform eligibility determinations. We identified 18 states with statewide public defense systems in which trial-level representation is provided by salaried staff public defenders paid from state funds.[5] We found that:

- **Several states have chosen to establish set eligibility standards in law or policy but have allowed for judicial discretion in waiving those standards.**

[5] The states we included in our comparison were: Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maryland, Missouri, Montana, New Jersey, New Mexico, North Dakota, Rhode Island, Vermont, Wisconsin, and Wyoming.

Half of the 18 other states we reviewed had eligibility standards for a public defender but also allowed for judicial waivers.

Of the 18 states we reviewed, 9 gave eligibility decision makers set standards for determining eligibility. For example, Colorado finds all persons with household incomes under 125% of the federal poverty guidelines eligible. For those making over 125% of the poverty guidelines, public defenders use a scoring instrument which weighs income, assets, expenses and the charge in determining whether applicants should be found eligible. (The scoring instrument is in the Appendix.) The other nine states gave eligibility decision makers more discretion in making their determinations. For example, in Wyoming the court determines whether an applicant is a "needy person." In Missouri, the public defender's office determines eligibility based on all circumstances affecting defendants' ability to retain counsel.

Judicial waiver provisions allow states to use set standards while remaining flexible enough to meet constitutional requirements. For example, Colorado uses an eligibility scoring instrument that factors in a defendant's income, expenses, assets and the most severe charge the defendant faces. If the defendant does not meet the minimum eligibility score but still cannot afford counsel, an exception may be granted by a judge. Wisconsin has established a firm but very low income-based cut-off for state-funded public defense services. However, judges must appoint a county-funded attorney when the defendant's income exceeds the state standard and the defendant still cannot afford an attorney. It is important to note that implementing the Wisconsin model in Minnesota could undermine one purpose of having a statewide public defender system—uniformity and consistency in representation.

PROCEDURES FOR DETERMINING ELIGIBILITY

There are few requirements in Minnesota law defining how defendants apply for a public defender and how courts assess the applications. State statute requires the court to make an "appropriate inquiry" regarding the financial circumstances of the applicant.[6] The statute also requires the state public defender to furnish an application form for use by the courts in collecting financial information.[7]

Application Steps

We assessed public defender application practices in district courts around Minnesota. We found that:

- **The process of applying for a public defender varies widely around the state.**

As shown in Table 4.2, only 30 percent of court administrators responding to our survey reported that the standard form issued by the state public defender was often or always used in their county's courts. About 60 percent said that a

[6] *Minnesota Statutes* 2009, 611.17(b).

[7] *Ibid.*

county- or district-specific application form was often or always used in their counties.

Table 4.2: Public Defender Application Practices in Minnesota District Courts as Reported by District Court Administrators, 2009

	Never	Sometimes	About Half the Time	Often	Always	Don't Know
Use of the standard application form created by the Office of the State Public Defender	39%	5%	0%	4%	26%	19%
Use of an application form unique to the county or district	23	4	0	4	56	9
Face-to-face screening interview with applicants in custody (before the application goes to the judge)	49	23	0	9	11	4
Face-to-face screening interview with applicants applying when not in custody (before the application goes to the judge)	42	21	5	12	12	2
Use of a structured decision-making framework, such as a grid relating net income to severity of the charge	33	5	0	12	19	23
Recommendation from an application reviewer that the judge appoint or not appoint a public defender	47	4	2	11	26	5
Recommendation to the judge from an application reviewer on the amount of reimbursement the defendant should be ordered to pay	65	0	2	11	11	9
Discussion regarding eligibility between the judge and defendant	16	53	5	5	11	7
Application screening performed by staff assigned specifically to this role	54	7	2	16	14	2
Requiring the applicant to provide evidence to verify income (tax returns, pay stubs, etc.)	30	49	2	4	2	11
Requiring the applicant to provide verifications for non-income aspects of their applications (assets, expenses, etc.)	37	46	2	2	2	9
Use of a credit check at the time of application	84	2	0	0	0	11
Check of Driver and Vehicle Services records to verify information provided by the applicant	72	11	0	0	0	14
Check of property records to verify property ownership	72	12	0	0	0	12

NOTE: The question read, "Think about the procedures currently used in your jurisdiction for determining a defendant's eligibility for a public defender. How often are the following activities used as part of the process?" Percentages are based on 57 district court administrators responding to our survey. Row percentages in the table do not sum to 100 because some respondents did not answer the question.

SOURCE: Office of the Legislative Auditor, analysis of district court administrator survey responses, 2009.

Other aspects of the application process vary as well. For example, 20 percent of court administrators responding to the survey said a face-to-face screening interview was often or always a part of the application process for in-custody

applicants. Thirty-one percent of court administrators responding to the survey reported that their jurisdictions use a structured framework to evaluate applications (such as those shown in the Appendix). One court administrator observed: "Because there are no established criteria or even forms, everyone is doing this differently and that should not be the case."

We interviewed and surveyed stakeholders regarding best practices for determining eligibility and found that:

- **District judges and court administrators agreed on a number of steps that should be standard practice when determining eligibility for a public defender.**

Over half of court administrators responding to our survey said that standard practices should include: (1) use of a structured decision-making framework (like a grid relating net income to severity of the charge) to evaluate the application; (2) review of the application by court staff resulting in a recommendation to the judge that a public defender be appointed or not appointed; and (3) an additional recommendation from the application reviewer on the amount of reimbursement the defendant should be ordered to pay. The majority of judges responding to our survey also felt that court staff should review the application and make recommendations on appointment and reimbursement. However, judges and state court officials also told us that making this review a standard practice was problematic because of resource constraints.

Screening and Verification Steps

Judges and, in some counties, court staff are currently responsible for reviewing public defender applications and determining whether the applicant can afford to pay for an attorney. We assessed the extent to which judges and court administrators screened applicants and verified applicant statements. We found that:

- **Practices for confirming the information defendants report on their applications vary widely, from virtually no scrutiny to routine screening interviews.**

In some Minnesota courts, applications to be represented by a public defender are essentially rubberstamped.

"Screening" of an application can be as simple as asking applicants reporting zero income how they pay for food or gas. But some courts did not apply even this level of inquiry. In some cases, public defender applications were reviewed in chambers without any contact with the applicant. In many cases, applicants' declarations of income and assets are essentially rubberstamped. For example, one court administrator reported:

> [We need] better screening. There are defendants that give false or incomplete information, and there is no one to confirm eligibility. The court relies upon the application, which is signed supposedly under oath.

But other courts have staff specifically responsible for conducting brief screening interviews with defendants seeking a public defender.

Some courts have staff specifically responsible for conducting brief, face-to-face screening interviews with defendants seeking a public defender. In those counties we visited that screen applicants, judges, court administrators, and public defenders were generally strong advocates of the practice, believing that even a short (one to two minute) interview resulted in more accurate information about the applicant's financial circumstances. We observed face-to-face screening sessions in two jurisdictions and found them to be a quick and effective means of obtaining information, largely because the screeners were adept at asking probing questions. Although many stakeholders agreed that face-to-face screening would be a useful tool, the cost of dedicating staff to the task is a barrier to more widespread implementation.[8]

The courts rarely verify with third party sources the information defendants provide on their public defender applications. No county we visited does regular verification of applicants' statements. Among respondents to our survey, 30 percent of court administrators said applicants were never required to provide evidence verifying income; 49 percent said that verification was sometimes required. Thirty-nine percent of judges said that they had never required verification and fifty percent of judges said they sometimes required verification.

Even with sufficient time and staffing, third-party verification is difficult to do. The Minnesota Department of Employment and Economic Development (DEED) maintains records of wages reported by employers each quarter, but such information is not available until well after eligibility needs to be determined. A call to a current employer could show how much an applicant makes, but is not a useful check for the many people reporting being unemployed. The Minnesota Department of Human Services (DHS) maintains records of persons receiving need-based public assistance. The courts could verify application information with DHS or DEED, but the courts and the departments do not currently exchange information in a way that would allow application information to be easily verified.

RECOMMENDATIONS

The Legislature should amend state statutes to (1) establish set income standards for public defender eligibility and (2) describe the exceptional circumstances that would warrant judicial waiver of the standards. The standards should reflect the cost of private representation across the state.

The Legislature should establish eligibility procedures in statute that require use of a uniform public defender application form and in-person screening by court staff or the judge.

While the available evidence indicates that most applicants for a public defender are very poor and unlikely to be able to afford a private attorney (discussed in

[8] *Minnesota Statutes* 2009, 357.021, subd. 1a(b) allows *counties* that employ screener-collectors to be reimbursed for the cost of screener-collector salaries from the county's court fee revenues. However, now that the state has assumed control of the court system, screeners are court employees, not county employees. Hence, the statute is obsolete and no longer provides an incentive for district courts to employ screener-collectors.

more detail below), it is still important for Minnesota to have a reasonably uniform standard for obtaining a public defender. To meet constitutional and other requirements, the law must allow judges some flexibility. But we think some guidance is needed as to the nature of circumstances warranting a waiver.

We also think defendants should be subject to uniform application and screening procedures when requesting a public defender in Minnesota. Our work showed that brief, face-to-face screening interviews helped establish a clearer picture of applicants' circumstances. District judges and court administrators agreed that such screening and use of a common application form should be standard practice. They also said that the courts currently do not have the resources available to conduct in-person screening. However, as we stated earlier, "screening" of an application can be as simple as asking applicants reporting zero income how they pay for food or gas.

ACCURACY OF ELIGIBILITY DETERMINATIONS

In addition to assessing the uniformity of application practices among districts, we looked in more detail at the extent to which judges are actually using accurate information about applicants' financial circumstances when they rule on requests for a public defender. Further, public defenders are required by law to advise the court if their clients become able to afford an attorney, and we evaluated the extent to which this occurs.

Accuracy of Information About Defendants' Financial Circumstances

We assessed how decisionmakers felt about the accuracy of information on public defender applications. We found that:

- **Judges have little confidence in the accuracy of the information they use when assessing applicants' financial circumstances, often relying on "gut instinct" regarding an applicant's eligibility.**

In our survey, we asked judges how confident they were in the accuracy of the information they use to determine eligibility. As shown in Table 4.3, only 47 percent of judges responding thought they had an accurate picture of applicants' income from employment. Judges felt even less confident in the accuracy of information on income from non-employment sources or the availability of assets that could be converted to cash or used to secure a loan.

In our site visit interviews, judges stated they must make eligibility decisions very quickly and without sufficient evidence. One judge pointed out that judges must determine in a matter of seconds whether a person can hire an attorney without sacrificing food and shelter for his or her family. Some judges stated that defendants who are "savvy" know how to fill out the application so that they are approved. One judge described the eligibility determination process as "guesswork at best." In practice, they rely on their "gut feelings" and a belief

that most applicants would not ask for a public defender if they could afford a private attorney.

Table 4.3: Judges' Views on the Accuracy of Information Used to Determine Eligibility for a Public Defender

	Not at All Accurate	Somewhat Accurate	Mostly Accurate	Very Accurate	Factor Not Considered
Income from employment	4%	43%	41%	6%	2%
Income from other sources	28	44	18	3	3
Assets that could be converted to cash or used to secure a loan	39	30	18	4	4
Value of assets transferred to others on or after the date of the alleged offense	35	18	10	3	30
Applicants' household expenses	15	44	20	3	13
Cost of retaining a private attorney in the area	9	22	32	7	24

NOTES: Percentages are based on 191 district court judges responding to the survey. The question directed respondents to think about eligibility determinations made in the past year, then asked: "In general, how accurate do you feel your picture of applicants' financial circumstances was, with respect to the following factors?" Row percentages in the table do not sum to 100 because some respondents did not answer the question.

SOURCE: Office of the Legislative Auditor, analysis of district court judge survey responses, 2009.

In addition to surveys and site visits, we collected public defender applications completed during one week in October 2009 in the counties we visited. We then judgmentally selected a range of applications to review, focusing on applicant's reports of (1) income and unemployment benefits and (2) public assistance status. We reviewed 127 applications in total.

We compared 102 applications with wage and unemployment insurance benefit information we received from DEED. We found that:

- **Although some discrepancies existed between applicants' reported income and income reported to DEED, most applicants still appeared to be very low income.**

DEED records showed that 8 of the 102 applicants included in our review received unemployment income in the month they applied for a public defender. Only four of the eight applicants had actually reported receiving unemployment benefits on their applications. Among the other applications reviewed, defendants correctly reported that they received unemployment income, although

in some cases the amount of benefits differed slightly from the benefit amounts recorded by DEED.

Based on our review of public defender applications, it appears that most applicants have very low income.

We could not directly compare earned income as reported by applicants to earned income recorded in DEED's system because wage data for October 2009 were not yet available. Instead, we looked at income three ways. We obtained applicants' self-reports of income from their application forms. We asked DEED to provide the amount of wages reported by employers, if any, for DEED's most recent quarter of available data. If DEED reported that an applicant received unemployment benefits in October 2009, we annualized that amount.

Among the applications we reviewed, it appears that the vast majority of applicants were very low income, whether income was measured by self-report, wage income reported to DEED for the previous quarter, or annualized unemployment insurance income. Among 121 applications with income information reported by the applicant, 85 percent reported income amounts that we estimated to be below 125 percent of the federal poverty guidelines.[9] For 31 of our applicants, DEED had employer-reported data on Minnesota wages earned the previous quarter. Among the 31, we estimated that 81 percent had annualized income under 125 percent of the poverty guidelines. For all seven applicants who, according to DEED, received unemployment benefits in October 2009, the annualized amount of those benefits was below 125 percent of federal poverty guidelines. While this evidence is anecdotal, it does appear that the vast majority of applicants are very low income and likely cannot afford an attorney.

Receipt of public assistance serves as a set standard to determine if a public defender applicant has low enough income to merit automatic appointment of a public defender. We compared information from 81 applications we collected from site visit counties with DHS records. We found that:

- **Recipients of public assistance were not always automatically granted a public defender as they should have been.**

Public defender applicants under-reported their public assistance status. Nineteen of 81 applicants (23 percent) stated on their applications that they and their household members were *not* on public assistance, but DHS records showed that they were in fact active for public assistance in the month they applied for a public defender. Two of 81 applicants (2 percent) reporting receiving public assistance (and who, in fact received public assistance according to DHS) were denied a public defender.

District public defender applications were poorly written for the purpose of identifying applicants receiving public assistance. Application forms do not contain a complete list of public assistance benefits that would qualify an applicant. Some applications ask about income from assistance, rather than simply asking about assistance status. Further, in both observing screening of applicants and in reviews of applications, we noted that some applicants were

[9] Poverty guidelines vary by household size. We estimated household size using information reported on the applications. We excluded from the analysis six applications on which the applicant reported no income information (all six reported receiving public assistance).

questioned regarding their income and assets even after it was clear that they were eligible due to their public assistance status. When we asked screeners why further inquiry was needed, they stated that public assistance recipients may be assessed a reimbursement based on their income, including income received from government assistance programs. Considering the income levels of those receiving public assistance benefits, this additional screening seems unnecessary.

Public Defenders' Duty to Advise the Court

Minnesota statute requires public defenders to advise the court if they become aware that a defendant can afford to pay for private counsel or can make a partial payment for his or her defense. We asked public defenders and judges how often this happens. We found that:

- **Public defenders rarely inform judges when their clients' financial circumstances improve.**

Public defenders said they were reluctant to challenge a client's eligibility once a case has been opened.

In our survey, 53 percent of public defenders responding said that they frequently or occasionally became aware of information that may make a client ineligible for their services. Among these respondents, 35 percent stated that they never took information regarding a client's potential ineligibility to the judge and 28 percent said they never took such information to their district chief public defender. Thirty-one percent of judges responding to our survey said that a public defender had never informed him or her of a change in a defendant's circumstances resulting in a greater ability to pay.

Public defenders we interviewed stated that they were willing to challenge eligibility at the outset when they believed that a client was ineligible, but were reluctant to do so after a case was opened. Some chiefs stated that they did not have access to their clients' original public defender applications, making it difficult to assess whether their clients' financial circumstances had changed. Some public defenders said that updating the court about a client's eligibility could interfere with the attorney's relationship with the client and potentially violate ethical duties of confidentiality.

RECOMMENDATIONS

The Legislature should amend Minnesota Statutes, 611.17, to (1) require that public defender application forms, or a document shown to applicants during the eligibility determination process, clearly list the public assistance programs that automatically qualify an applicant for a public defender; and (2) prohibit further screening of applicants found to be public assistance recipients.

The Legislature should amend Minnesota Statutes, 611.20, subdivision 1, to make public defender clients' original applications available to public defender offices to assist them in evaluating whether clients have experienced a change in financial circumstances.

A more specific and simplified process for screening and approving public assistance applicants will decrease both error in eligibility determinations for this population and minimize screening time. Making public defender applications available to public defender offices will assist public defenders in determining whether a client's circumstances have changed and will encourage bringing this change in circumstances to judges' attention. However, the public defender's office noted that public defenders may not have time to review applications because they are already over-worked. We are not recommending that public defenders do more eligibility screening than is required under current law. We anticipate that having clients' applications available to review, as needed, will allow public defenders to challenge appointments when they suspect a client should be found ineligible for their services.

REIMBURSEMENTS

Judges can order clients with some financial means to reimburse the state for a portion of public defense costs.

Minnesota's broad eligibility standard is accompanied in statute by cost-sharing requirements. All defendants are required to pay a $75 copay, although it can be waived by the judge.[10] In addition, judges must order reimbursements from employed defendants and others who can afford to make partial payment toward the cost of their defense. Reimbursements are then distributed to each judicial district's part-time public defenders to offset their overhead costs. In this section, we assess when, from whom, and how much reimbursement is ordered and whether it is collected. We also discuss how reimbursement monies are distributed.

Order and Collection of Reimbursements

The eligibility standard and reimbursement requirements should work together to assure that those with some means are appointed a public defender yet pay for all or part of the cost. However, we found that:

- **While state law requires defendants with financial means to reimburse the state for a portion of their public defender costs, these reimbursements are inconsistently ordered and collected.**

Reimbursements were almost always ordered in some courts, and they were almost never ordered in others. In our survey, about 30 percent of judges said they *do not* order employed defendants to make any reimbursement in 90 to 100 percent of their cases. At the other end of the spectrum, about 15 percent of judges said they never allow employed defendants to pay no reimbursement. Data that could directly verify judges' reported practices were not readily available from the state court information system, so we asked the courts to extract data on reimbursement orders and payments for cases disposed in fiscal years 2007 to 2009.

[10] Copay revenue goes to the general fund. We did not assess the order, collection, or distribution of copays in this report except to the extent that we assessed stakeholders' philosophies regarding cost-sharing.

Judges in some districts were far more likely to order these reimbursements.

Data from the state court information system confirm that the practice of ordering reimbursements from public defender clients varies widely among districts. As shown in Table 4.4, judges in the first, fifth, and eighth districts were far more likely to order reimbursements from defendants than their peers in other districts.[11] Judges in the second district (Ramsey County) and fourth district (Hennepin County) rarely ordered reimbursements. These data are consistent with what we heard from those we interviewed, namely that reimbursements are almost never ordered in the state's two largest counties (Hennepin and Ramsey).

Table 4.4: Reimbursement Amounts Ordered by District, Fiscal Years 2007 to 2009

District	Reimbursements Ordered, FY 2007-09	Public Defender Cases Opened, FY 2007-09[a]	Reimbursements Ordered per Case
First	$ 424,832	45,526	$9.33
Second	2,600	58,835	0.04
Third	105,510	33,466	3.15
Fourth	7,227	148,529	0.05
Fifth	321,412	26,340	12.20
Sixth	21,760	25,569	0.85
Seventh	410,148	44,316	9.26
Eighth	160,222	15,341	10.44
Ninth	62,549	47,788	1.31
Tenth	78,154	70,363	1.11
Total	$1,594,414	516,073	$3.09

NOTE: Data on the amount of reimbursements ordered and case counts are from separate data systems. The amount of reimbursements ordered per case should be considered a rough estimate as the purpose of the analysis was to identify variation in reimbursement practices among districts.

[a] Case counts are unweighted.

SOURCE: Office of the Legislative Auditor, analysis of reimbursement data from the state court information system and case data from the public defender case management system.

Lack of clarity in Minnesota law allows inconsistency in reimbursement practices. Minnesota statutes do not clearly set forth who should contribute to the cost of a public defender or how much they should pay. Prior to its repeal in 2007, state law set a forty dollar per hour reimbursement rate for public defender services. State law currently includes a suggested reimbursement schedule for a percentage of net income that should be paid each month, with the percentage varying by income level and number of dependents. However, the total amount that should be paid is not specified. In our survey, 35 percent of judges who responded said they never followed the suggested reimbursement schedule set forth in statute, while 14 percent of judges said they always or usually did.

The current statute is also unclear regarding who should pay a reimbursement. The law differentiates between defendants who can afford to make a partial payment for their public defender and those who are employed. However, in our

[11] Dakota County's eligibility determination grid, shown in the Appendix, sets a reimbursement amount of $50 to $400 based on hourly income.

Table 4.5: Court Fees Applicable to Public Defender Clients in Dakota County, 2009

Fee	Assessing Agency	Amount	Can be Waived?
Criminal Surcharge	District Court	$80	No
Fine (punishment)	Court/City	Varies	Yes
Restitution	Court and Victim	Varies	Maybe
Court Collector Fee[a]	District Court	$50	No
Collection Agency Fee[b]	Collection Agency	23.5%	No
Booking Fee (Felonies and Gross Misdemeanors)	Sheriff	$15	No
Warrant Fees	District Court	$50	Yes
Jail Fees (Pay to Stay)	Sheriff	$20/day	No
Public Defender Copay	District Court	$75	Yes
Probation Fees	Corrections	$251-$328	No
Drug Laboratory Testing	Drug Task Force	$75	Discretionary
Urinanalysis	Corrections	$15/test	Sliding Scale[c]
Driver's License Reinstatement Fee[d]	Public Safety	$680	No
Chemical Dependency Evaluation Fee	Court/Corrections	$125	$25 only
Drug Court Fee	Corrections	$300	No
Diversion Program Fee	County Attorney	$480	No[e]
Alco-Sensor Pretrial Release	Corrections	$14/day	Sliding Scale
Electronic Home Monitoring	Corrections	$15/day	Sliding Scale
Domestic Abuse Class	Corrections	$25/session[f]	Sliding Scale
Anger Management Class	Corrections	Varies	Sliding Scale
Mothers Against Drunk Driving Impact Panel	Corrections	$35	Sliding Scale
Alcohol Education Class	Corrections	Varies	Sliding Scale
Safe Streets First[c]	Corrections	$825	Sliding Scale

NOTE: The list is illustrative and may not include every criminal case-related fee authorized in Dakota County. Fee types and amounts may be different in other counties.

[a] Applies to payment plans established with the court.

[b] Dakota County courts attempt to collect amounts not paid in full within 30 days. If they are unsuccessful, these amounts are sent to an outside collections agency. The defendant is charged an additional 23.5% of the amount sent to collections as a collections fee.

[c] Amount due may be reduced based on a sliding scale of income relative to federal poverty guidelines.

[d] Applies to driving under the influence offenders.

[e] Community service may be substituted for the fee.

[f] Each class includes 15 to 25 sessions.

SOURCE: Office of the Legislative Auditor, compilation of information from Dakota County court administration, Dakota County probation, and first district public defender offices.

survey, only 7 percent of judges stated that they treated the ordering of reimbursements from employed defendants differently than from those they have determined can make a partial payment. While the law mandates full reimbursement from employed defendants and partial reimbursement from others who can make payment, this distinction serves no practical purpose.

Some judges are reluctant to order reimbursements because defendants are already subject to many other court fees.

Stakeholders we interviewed and surveyed are divided on the value of requiring any type of cost-sharing by persons assigned a public defender. In our surveys, 77 percent of court administrators, 63 percent of judges, and 54 percent of public defenders responding agreed or strongly agreed that "all but the truly indigent should pay something toward the cost of their public defender." However, some public defenders and judges we interviewed felt that most public defender clients are either indigent or too poor to pay anything toward the cost of their public defender (either as reimbursements or a copay) and stated that many judges are reluctant to order a public defender reimbursement and/or copay because defendants are already burdened with so many other fees. As shown in Table 4.5, these fees are significant and many cannot be waived by the judge.

We also examined whether reimbursements that were ordered were actually paid. Some judges and court administrators we interviewed believed that reimbursements, along with other types of court fees, were not being fully collected. One judge told us that because of collection problems, he does not order reimbursements as frequently as he otherwise would.

As shown in Table 4.6, state court data show that total reimbursements collected in fiscal years 2007 through 2009 were roughly 60 percent of reimbursements ordered in the same years. This should be considered a rough estimate due to the

Table 4.6: Reimbursement Receipts and Reimbursements Ordered by District, Fiscal Years 2007 to 2009

District	Reimbursement Receipts, FY 2007-09[a]	Reimbursements Ordered, FY 2007-09	Receipts as a Percentage of Reimbursements Ordered
First	$234,648	$ 424,832	55%
Second	450	2,600	17
Third	45,502	105,510	43
Fourth	1,067	7,227	15
Fifth	228,886	321,412	71
Sixth	13,471	21,760	62
Seventh	221,453	410,148	54
Eighth	105,090	160,222	66
Ninth	40,680	62,549	65
Tenth	36,800	78,154	47
Total	$928,047	$1,594,414	58%

[a] These reflect the amount of reimbursement payments from defendants disbursed from the courts to the State of Minnesota.

SOURCE: Office of the Legislative Auditor, analysis of reimbursement data from the state court information system.

difficulty of extracting data on reimbursement orders and payments from the state court information system. Currently, if a person does not abide by a payment plan, the fine goes to a private collection agency without further collection efforts by the court. The courts have recently begun automating and centralizing collections, which they anticipate will help in the collections of all fees, including public defender reimbursements and copays.

We reviewed the policies of 18 other states and found that reimbursement requirements varied considerably. Rhode Island, Arkansas, and Delaware do not collect reimbursements, but may require a flat-rate copyament. New Jersey and Iowa require all defendants to pay the full cost of public defender services provided. Some states require certain defendants (for example, those over 125% of the federal poverty guidelines or those with an ability to make a partial payment) to make payment based on a schedule of fees or other set rate. For example, Wisconsin's board of public defense sets a fee schedule for each type of case based on the average cost of providing representation for the type of case. In New Mexico, defendants found ineligible for a public defender but who still cannot afford a private attorney can pay set fees to retain the services of a public defender. Other states, such as Hawaii and Colorado, have reimbursement policies similar to Minnesota's; state laws authorize reimbursements but allow judges to determine any amount to be paid.

Distribution of Reimbursements

By law, receipts from client reimbursement payments are distributed among part-time public defenders.

Minnesota statute requires reimbursements to be distributed to part-time defenders to offset their overhead costs. In fiscal year 2009, reimbursements distributed among part-time public defenders totaled about $480,000. Each district receives the amount of the payments received from reimbursements ordered in the district. Within a district, the funds are disbursed to individual part-time public defenders based on the hours worked (75-, 50-, or 25-percent time). Due to the district-based reimbursement scheme, we found that:

- **The amount of reimbursements receipts part-time defenders receive varies substantially among districts.**

The statute allocates reimbursements from employed defendants to "the state" and reimbursements from those with an ability to make partial payments to part-time public defenders to offset their overhead costs. In practice, however, all reimbursements are paid to part-time defenders.

Because judges' reimbursement practices vary widely, the total amount of reimbursement receipts available for distribution to part-time defenders varies by district. That, coupled with the fact that the number of part-time public defenders varies among districts, means that the payment per defender can vary widely. As shown in Table 4.7, in fiscal year 2009, defenders working 75-percent time in the second district received $24 each while 75-percent time defenders in the fifth district received $9,235 each.

Table 4.7: Distribution of Reimbursement Receipts to Part-Time Public Defenders, Fiscal Year 2009

	Payment per Part-Time Public Defender		
District	75% Time Defender	50% Time Defender	25% Time Defender
First	$4,445	$2,965	$ 0
Second	24	16	0
Third	2,096	1,397	0
Fourth	0	0	0
Fifth	9,235	6,160	0
Sixth	391	261	0
Seventh	3,128	0	0
Eighth	3,179	2,121	0
Ninth	882	588	0
Tenth	612	408	204

SOURCE: State of Minnesota Board of Public Defense Report on Public Defender Reimbursements FY 2009

RECOMMENDATIONS

The Legislature should amend Minnesota Statutes, chapter 611.20 to: (1) establish a single standard for governing when and how much public defender clients should contribute toward the cost of a public defender and (2) prohibit judges from ordering reimbursements from public assistance recipients.

The Legislature should amend Minnesota Statutes, 611.20, subd. 3, to eliminate the requirement that reimbursement funds be distributed among part-time public defenders and instead give the Board of Public Defense authority to use the funds as they see fit.

We think the Board of Public Defense should be allowed to use reimbursement receipts as they see fit.

Clear standards for when and how much public defender clients should contribute toward the cost of their defense promote fairness and uniformity across the state. Based on their automatic eligibility for a public defender, we think public assistance recipients should be automatically excluded from paying reimbursements.

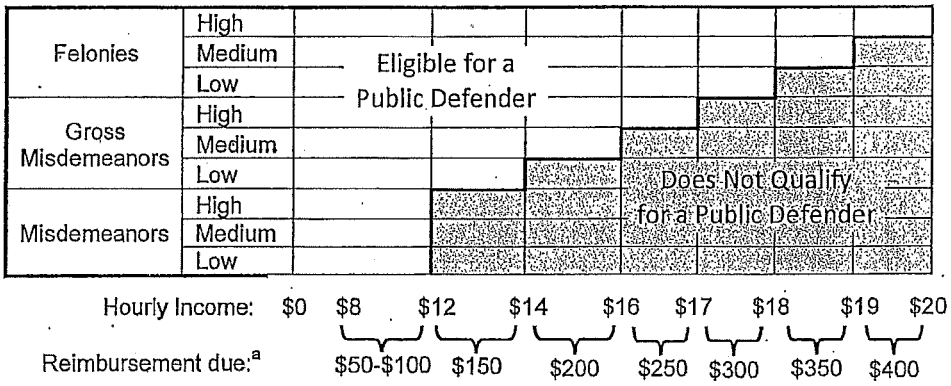
The rationale for distributing reimbursement receipts to part-time public defenders was the belief that part-timers should be compensated for overhead costs associated with the public defense portions of their practices. However, part-time public defenders receive compensation for overhead costs under terms established in their union contract. As implemented, the policy has highly inequitable results. We think the reimbursement funds should continue to be appropriated to the Board of Public Defense, but use of the funds should be left up to the board. Part-time defenders may choose to negotiate, through their union, for additional compensation for their overhead costs.

Judges and court officials said that judges have an incentive to order reimbursements when reimbursement receipts go to district public defender programs. If the Legislature enacts our recommendation, the board should consider allocating reimbursement receipts to purposes that benefit public defenders in all districts, such as training.

Samples of Eligibility Determination Guides

APPENDIX

Dakota County Public Defender Eligibility Grid



Offense levels

Felonies	High	Murder, kidnapping, criminal sexual conduct, 1st and 2nd degree controlled substance
	Medium	Identity theft, burglary, terroristic threats, DWI, aggravated forgery, 3rd and 4th degree controlled substance
	Low	5th degree controlled substance, welfare fraud, financial card fraud
Gross Misdemeanors	High	Domestic and other assault, 2nd and 3rd degree DWI, forgery, criminal vehicular operation, 5th degree criminal sex
	Medium	Theft, property damage, serving alcohol to minors, offering a forged check
	Low	Driving after suspension/revocation, intent to escape tax, school bus stop arm, prostitution, shoplifting
Misdemeanors	High	4th degree DWI, domestic assault, 5th degree assault
	Medium	Bad check, theft, careless driving, driving after license revocation/cancellation
	Low	Loud party, housing code violations, driving after suspension, minor consumption

[a] Depending on their income and the criminal charge, defendants found eligible for a public defender pay a reimbursement to the state to offset the cost of their defense. Defendants with hourly incomes between $8 and $12 pay a reimbursement of $50 in misdemeanor cases or $100 in felony and gross misdemeanor cases.

Source: Dakota County District Court, Public Defender Qualification Grid, February 2007.

Colorado Supreme Court: Fiscal Standards Eligibility Scoring Instrument

Attachment A
Chief Justice Directive 04-04

Applicant Name _____ Court _____

Case Number _____ Case Name _____

FISCAL STANDARDS - ELIGIBILITY SCORING INSTRUMENT

Use information from Form JDF208 and information provided by applicant during screening interview. Circle the points in the category that applies and transfer to the "Points" column. Total at end.

Factor				Points
1. Income Guidelines Gross income from all members of the household who contribute monetarily to the common support of the household. Income categories include: *wages, including tips, salaries, commissions, payments received as an independent contractor for labor or services, bonuses, dividends, severance pay, pensions, retirement benefits, royalties, interest/investment earnings, trust income, annuities, capital gains, Social Security Disability (SSD), Social Security Supplemental Income (SSI), Workmen's Compensation Benefits, Unemployment Benefits, and alimony.* Gross income shall not include income from TANF payments, food stamps, subsidized housing assistance, veteran's benefits earned from a disability, child support payments or other public assistance programs. NOTE: Income from roommates should not be considered if such income is not commingled in accounts or otherwise combined with the Applicant's income in a fashion which would allow the applicant proprietary rights to *the roommate's income.)*	At or below guidelines	Up to 10% above guidelines	11% to 75% above guidelines (Not eligible if income is *more than* 75% above guidelines.)	
	150	100	0	
2. Expenses vs. Income (Expenses for nonessential items such as cable television, club memberships, entertainment, dining out, alcohol, cigarettes, etc., shall not be included.)	Monthly expenses exceed income by over $100	Monthly expenses are within $100 of income	Monthly income exceeds expenses by over $100	
	50	25	0	
3. Charge (most severe) vs. Assets which could be used to pay defense costs (Assets to include cash on hand or in accounts, stocks, bonds, certificates of deposit, equity, and personal property or investments which could readily be converted into cash without *jeopardizing the applicant's ability to maintain home and employment.)*	Class 1 – Class 3 *Felony or* Habitual Offender related	Class 4 - Class 6 Felony	Class 1 - Class 3 Misdemeanor or Jailable Traffic	
Assets $0 - $750	150	125	50	
Assets $751 - $1,500	125	100	25	
Assets $1,501 - $2,500	100	75	0	
Assets $2,501 - $5,000	75	50	0	
Assets $5,001 - $7,500	50	25	0	
Assets $7,501 - $10,000	25	0	0	
Assets over $10,000	0	0	0	
TOTAL POINTS				

150 or greater	Less than 150
☐ Indigent - Eligible for Public Defender (Note: Reimbursement of costs of representation may by ordered by the court pursuant to Section 21-1-106, C.R.S.)	☐ Not Eligible for State-Funded Counsel

☐ EXCEPTION REQUESTED TO [ALLOW / DISALLOW] APPOINTMENT OF [PUBLIC DEFENDER / ALTERNATE DEFENSE COUNSEL (if PD conflict)] NOTWITHSTANDING THE ABOVE SCORE. (Documentation justifying request is attached.)

Evaluated by _____ _____ _____
Print/Type Name Evaluator Signature Date

NOTE: Colorado's income guideline is set at 125 percent of federal poverty guidelines.

Source: Supreme Court of Colorado, *Appointment of State-Funded Counsel in Criminal and Juvenile Delinquency Cases and for Contempt of Court* (Chief Justice Directive 04-04, Amended July 2008), Attachments A and B.