



Commonwealth of Massachusetts  
Office of the State Auditor  
Suzanne M. Bump

*Making government work better*

Official Audit Report – Issued December 19, 2011

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Committee for Public Counsel Services  
and the Office of the Commissioner of Probation's  
Administration and Oversight of State-Sponsored  
Legal Services to Indigent Individuals in District Courts  
For the period July 1, 2007 through June 30, 2011



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## **INTRODUCTION AND SUMMARY OF FINDINGS AND RECOMMENDATIONS**

The Committee for Public Counsel Services (CPCS) is a public agency that is charged with providing certain legal services to the poor. This audit examines the indigency verification system used by the CPCS and the Office of the Commissioner of Probation (OCP), which administers certain important aspects of the verification system. The Office of the State Auditor (OSA) audited the period from July 1, 2007 through June 30, 2011. The findings and recommendations of the OSA are set out below.

It is a well-established principle in American law that defendants are entitled to legal counsel, even those who are not able to afford it.<sup>1</sup> The Commonwealth is one of 23 states that administer and fund all legal defense services for the poor at the state level. This is an important value that has been long upheld by the people of Massachusetts.<sup>2</sup> Consequently, the Commonwealth has created the CPCS to provide for the legal representation of indigent persons in criminal and certain civil matters. Both public and private attorneys are utilized by the CPCS to implement its mission. This not only serves the purpose of ensuring that the indigent are not penalized for their poverty, but allows for the fair and efficient execution of justice by making certain that both sides in a trial are represented by competent counsel.

As with any public program, the confidence of citizens is essential to its success and continued support. To maintain public confidence in this program, it must be administered to certify that only those persons who cannot adequately contribute to their own defense receive the assistance of the CPCS and that only legitimate defense costs are covered. The program is designed to support the poor when they need legal services, and it must be administered in a way that ensures this mission is fulfilled. But, there is another practical reason for proper administration of such a direct expenditure program: the Commonwealth has limited resources in its budget to pay for programs like this. This is especially true in our current economic climate in which programs across the board are facing cuts year after year.

This audit was initiated in part due to calls to stem the rise of CPCS costs and questions regarding the CPCS's reliance on private attorneys rather than public defenders. In an effort to provide

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<sup>1</sup> U.S. Const. Amend. VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>2</sup> Ken MacIver & Allan Rodger, "A Brief History of Legal Services in Massachusetts," (2010) *available in* [http://www.masslegalservices.org/system/files/Brief\\_History\\_of\\_Legal\\_Services\\_in\\_Massachusetts.pdf](http://www.masslegalservices.org/system/files/Brief_History_of_Legal_Services_in_Massachusetts.pdf).

information on the program to the public and policy makers, the OSA revisited the effectiveness of CPCS controls over defense billings, a deficiency noted in our prior audit of the CPCS (No. 2006-1104-3A), and examined the OCP's compliance with indigency verification. Although the CPCS is statutorily responsible for providing legal services to indigent individuals in Massachusetts, state law requires the Chief Probation Officer assigned to each court to verify that a person claiming to be indigent meets the definition established by the Supreme Judicial Court. The OSA conducted audit work at the CPCS and 27 of the Commonwealth's 70 district courts<sup>3</sup> for this audit.

Although the OSA's tests of the CPCS's new controls on defense billings showed that they have been successful in weeding out unallowable and questionable charges, the OSA found that the OCP has not established a statewide, standard process to be used in each court and that there is no system in place to monitor the extent to which each court is complying with its indigency verification requirement. In fact, we found a compliance rate of no more than 1.7% with procedures to determine whether a district court defendant is eligible for indigent services. The OSA also found that the Probation Departments of many courts were not retaining various records, including those relative to their determination of indigence, for the time periods required by policies established by the Administrative Office of the Trial Court (AOTC).

### ***Significant Audit Findings***

- From July 1, 2007 through June 30, 2011, the Probation Departments of the 27 district courts reviewed were in near-total noncompliance with indigency verification laws, regulations, and rules.
- There was no assurance that a person receiving a state-sponsored attorney by claiming indigency was actually eligible for the service, making the \$47.9 million spent on state-sponsored legal counsel at these 27 courts by the CPCS unsupported and questionable. Because these significant deficiencies exist at all 27 courts reviewed, it is reasonable to question the entire \$82.3 million expended during fiscal year 2010 to aid indigent clients at all 70 district courts statewide.
- Reviews of a statistical sample of 119 cases of individuals granted state-sponsored legal counsel at 27 district courts across the state revealed that no court performed any verification of the indigency information provided by applicants during their initial screening.

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<sup>3</sup> CPCS provides legal representation for indigent persons in all courts in Massachusetts, including superior court, the appeals court, and the supreme judicial court. This audit considered only district court compliance with the indigency verification law. Legal representation at district courts in fiscal year 2010 was almost 49% of the CPCS's total budget.

- Only 2 of 119 cases (1.7%) contained adequate documentation that court officials had performed the required 60-day reassessment of indigence.
- Just 1 of 119 cases (0.8%) contained evidence that the required six-month reassessments had been conducted.
- Probation Department employees at 18 of the 27 district courts reviewed stated that their courts routinely do not verify any information provided by defendants who claim to be indigent.
- The same officials at these 18 courts indicated that subsequent 60-day and six-month reassessments of indigence status required by state law are not conducted.

### ***Recommendations of the State Auditor<sup>4</sup>***

- The OCP should immediately develop and implement standard policies and procedures to be used by all courts in determining indigency.
- At a minimum, these policies and procedures should include the verification measures to be conducted, the manner in which they are to be documented, and a requirement that appropriate records be retained in accordance with AOTC policies.
- AOTC should train all Probation Department employees in indigency determination procedures, institute a tracking system to monitor verification activities at individual courts, and establish sanctions for noncompliance.
- The OCP should establish a system with agencies such as the Department of Revenue, the Registry of Motor Vehicles, the Department of Transitional Assistance, and the Department of Unemployment Assistance to access and verify information for indigency determinations.
- Income verification may require access to other agencies' data. Accordingly, if legislation is required to access necessary information, the OCP should seek such authority.

### ***Agency Progress***

As a result of OSA audit work, the OCP indicated to the OSA that it has entered into Memorandums of Understanding with the Department of Transitional Assistance and the

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<sup>4</sup> Generally accepted government auditing standards require that organizations be free from organizational impairments to independence with respect to the entities they audit. Prior to the commencement of this audit, State Auditor Suzanne M. Bump notified the State Ethics Commission that, as she has a family member who is a private attorney who receives assignments from the CPCS, she would not participate in the conduct of the audit. This disclosure is made for informational purposes only, and this circumstance did not interfere with our ability to perform our audit work and report the results thereof impartially.

Department of Revenue for the purpose of creating an electronic verification system that will allow probation officers to verify a person's claim of being indigent. The Acting Commissioner of Probation reported that training had been held and a memorandum had been issued for probation officers on indigency verification. The Acting Commissioner also initiated an internal review and study on this issue.

## OVERVIEW OF AUDITED AGENCY

### ***Background***

The Committee for Public Counsel Services (CPCS) was the agency subject to this audit. The CPCS was established by Chapter 673 of the Acts of 1983, which added Chapter 211D to the Massachusetts General Laws. Chapter 211D established the CPCS as the sole state agency responsible for providing criminal and certain non-criminal legal services to indigent persons entitled by law to be represented by legal counsel. Although the CPCS is statutorily responsible for providing legal services to indigent individuals in Massachusetts, Chapter 211D assigns to the Chief Probation Officer assigned to each court the responsibility of verifying that a person claiming to be indigent meets the definition of indigence established by Rule 3:10, Section 1, of the Supreme Judicial Court. Under Chapter 211D, the CPCS is also responsible for the coordination of payment and oversight of the delivery of legal services by both salaried public defenders and private counsel. Chapter 211D also requires the CPCS to establish standards for its Public Defender Division and Private Counsel Division and monitor and evaluate compliance with the standards and performance of counsel to ensure competent representation of defendants in all courts of the Commonwealth. During fiscal year 2010, approximately 3,000 private attorneys and 270 public defenders represented indigent clients on behalf of the CPCS at a combined cost of \$201,245,715.

Section 1 of Chapter 211D mandates that the CPCS will consist of 15 persons from various bar groups who are appointed for a term of three years by the justices of the Supreme Judicial Court. The CPCS meets monthly and at such other times as necessary to carry out its business and elect officers. Members of the CPCS do not receive any compensation, but each member can be reimbursed for actual expenses incurred in attending CPCS meetings. CPCS members select a Chief Counsel and two Deputy Chief Counsels, who establish policies to carry out its mandate. The Chief Counsel acts as the Chief Executive Officer of the CPCS and is responsible for the agency's day-to-day functions.

The CPCS carries out its responsibility of providing and managing indigent counsel services through the following operating divisions:

***Public Defender Division***

Section 6 of Chapter 211D directs that the Public Defender Division's full-time public defenders are to be assigned all felony criminal cases and only those misdemeanors in conjunction with a felony charge. However, since fiscal year 2005, in accordance with the authority granted to it under Chapter 54, Section 5, of the Acts of 2005, the Public Defender Division has also handled many misdemeanors not associated with felonies. According to data obtained from the CPCS, during fiscal year 2010 the Public Defender Division represented a total of 23,511 cases, including 9,573 district court cases, 6,989 superior court cases, 3,251 probation revocation cases, 1,188 juvenile delinquency cases, 54 murder cases, 289 appeals cases, 1,068 care and protection cases, 96 Children in Need of Services (CHINS) cases, 67 Sex Offender Registry Board (SORB) cases, and 936 cases that fall into other categories.

***Private Counsel Division***

In accordance with Chapter 211D, Section 6, of the General Laws, the CPCS is required to supervise and maintain a system for the appointment of private counsel. For the purposes of providing counsel to indigent defendants, the CPCS has the authority to enter into contractual agreements with any state, county, or local bar association or voluntary charitable group, corporation, or association, including bar advocate groups. The Private Counsel Division represents defendants who are accused of misdemeanors and non-criminal offenses, and handles criminal cases in which there is a conflict of interest or in which a CPCS staff attorney has an excessive caseload. The Private Counsel Division provides training to both new and experienced attorneys who do not have specific experience in criminal matters. The division is also responsible for monitoring and evaluating private attorneys compensated at an hourly rate that corresponds with the type of case they provide representation for, ranging from \$50 to \$100 per hour. (Only those attorneys representing clients in murder cases are compensated at a rate of \$100 per hour.) In fiscal year 2010, attorneys from the Private Counsel Division provided representation for 243,516 cases and billed the CPCS for 2,877,395 hours of service totaling \$155,007,821. For the period July 1, 2010 through December 31, 2010, attorneys from the Private Counsel Division provided representation for 144,519 cases and billed the CPCS for 1,154,029 hours of service totaling \$62,161,183.



In order to accomplish its duties, the Private Counsel Division includes the following operating units: (1) Youth Advocacy Division; (2) Mental Health Department; (3) Criminal Appeals Unit; and, (4) Criminal Trial Support.

***Children and Family Law (CAFL) Program***

The CAFL Program provides trial and appellate representation to indigent parents and children in the following matters: care and protection proceedings, CHINS cases, actions to terminate parents' rights, state-agency-sponsored guardianships, and any other proceedings regarding child custody to which the Department of Children and Families (DCF) is a party or where the court is considering granting custody to DCF.

***Audit and Oversight Department***

The CPCS's Audit and Oversight Department (A&O), pursuant to Chapter 211D, Section 12, of the General Laws, is responsible for monitoring the billings of private counsel who accept assignments through the CPCS as well as vendors who provide services to CPCS clients. The A&O performs various audits and reviews of bills during both pre-payment and post-payment for the purposes of identifying any overbillings, ensuring the reasonableness of hours charged and amounts billed, ensuring that attorneys/vendors properly maintain time records, and identifying needed enhancements to be made to the CPCS's billing and payment systems.

## **AUDIT SCOPE, OBJECTIVES, AND METHODOLOGY**

In accordance with Chapter 11, Section 12, of the General Laws, the Office of the State Auditor (OSA) has conducted a performance audit of certain activities of the Committee for Public Counsel Services (CPCS) for the period July 1, 2007 through June 30, 2011. The OSA conducted this audit in accordance with generally accepted government auditing standards (GAGAS), which define performance audits as:

*Engagements that provide assurance or conclusions based on an evaluation of sufficient, appropriate evidence against stated criteria, such as specific requirements, measures, or defined business practices. Performance audits provide objective analysis so that management and those charged with governance and oversight can use the information to improve program performance and operations . . . .*

GAGAS requires that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The objectives of our audit were: to follow up on the issues identified in our prior audit of the CPCS (No. 2006-1104-3A); determine whether the Office of the Commissioner of Probation (OCP), through district court probation departments, is effectively administering state-sponsored legal counsel services to defendants who claim to be indigent in compliance with Chapter 211D of the General Laws as well as other applicable laws, rules, and regulations; and, review various expense and case information maintained by the CPCS and other sources to analyze trends in expenditures for public defender services.

In order to achieve our objectives, we first identified 27 of the 70 district courts in Massachusetts in which to conduct our audit testing (see Appendix II). These 27 courts were selected based on a representative sample of courts across the Commonwealth. We then interviewed CPCS officials, the Acting Commissioner of Probation, and officials in the Probation Departments at each of the 27 district courts we visited. The purpose of these interviews was to obtain an understanding of the control environment that existed during our audit period and the process used by these courts to assess a defendant's ability to pay for legal services.

We then selected a statistical sample of 119<sup>5</sup> of the 144,376 files of defendants who were determined to be indigent by these courts and were provided with state-funded legal counsel during fiscal year 2010. We reviewed the court files of these 119 defendants to determine the extent to which the Probation Departments of these courts were complying with their legal responsibility for verifying that a person claiming to be indigent actually met the indigency criteria established by the Supreme Judicial Court. Our statistical sample was designed to achieve a 95% confidence level in the results of the testing.

We also reviewed the following:

- All applicable laws, regulations, guidelines and other pronouncements relative to the operations of the CPCS and the OCP, particularly as they relate to the provision of public counsel services to defendants claiming to be indigent and the retention of records relative to these services.
- The internal controls established by the CPCS and the OCP relative to the provision of services to defendants claiming to be indigent, and in particular the verification of information provided by these individuals when requesting state-sponsored legal representation.
- Various information relative to attorney caseloads and expenses maintained by the CPCS.
- Various documents and forms used by the courts in assessing a defendant's claim of indigence, including Indigency Determination Forms, Pre-Trial Intake Forms, and Waiver of Access Forms.
- All documentation relative to any actions taken by the CPCS to address the issues in our prior report on the agency, including the CPCS's internal control plan as it relates to its A&O procedures for the review of documentation supporting the payment of invoices submitted by private attorneys. It also included an examination of the CPCS's billing and payment systems to examine and test the controls within the systems and determine the appropriateness of expenses paid by the CPCS for private counsel services.

At the conclusion of our audit, a copy of our draft report was provided to CPCS and OCP officials for their review and comments. We also offered the opportunity for the OCP to obtain comments from officials at the 27 individual courts we visited during our audit. The CPCS chose to provide

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<sup>5</sup> In addition to our statistical sample, at each court we also judgmentally selected a second sample of case files from fiscal year 2010 to review such that the total files reviewed for both samples at each court totaled 10. However, our conclusions relative to any systemic problems that existed relative to the determination of a defendant's claim of indigency were based on our overall statistical sample.

verbal rather than written comments. All comments that were provided were considered in the drafting of this report as well as the separate reports issued to the 27 courts included in our audit.

***Subsequent Event***

On October 31, 2011, subsequent to the end of our audit field work, the OCP informed us that it had entered into Memorandums of Understanding with the Department of Transitional Assistance and the Department of Revenue for the purpose of creating an electronic verification system that will allow the OCP to verify indigency claims.

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## AUDIT RESULTS

### 1. PRIOR AUDIT RESULT RESOLVED - IMPROVEMENTS MADE BY THE CPCS IN INTERNAL CONTROLS OVER THE PROCESSING OF BILLS FROM PRIVATE ATTORNEYS

Our prior audit (No. 2006-1104-3A) of the Committee for Public Counsel Services (CPCS) disclosed that the CPCS needed to improve its internal controls over the monitoring of bills submitted by private attorneys and vendors. In this regard, Chapter 211D, Section 12, of the Massachusetts General Laws requires the CPCS to establish an Audit and Oversight Department (A&O) to monitor billing and private attorney compensation. However, our review of a sample of bills processed by the CPCS during our prior audit period indicated a potential for significant discrepancies in the bills that attorneys submit to the CPCS for payment. As a result, our prior audit recommended that the CPCS (a) quantify the results of audits performed, (b) require timely replies from attorneys when requesting supporting documentation, (c) make an effort to address errors in the attorney billing population, and (d) strengthen its oversight of billing by designing a more comprehensive audit plan and allocate resources as necessary.

In order to assess the effectiveness of the internal controls that the CPCS had implemented over its billing and payment systems, during our current audit, we utilized a replica of the CPCS's billing and payment system and attempted to process dozens of unallowable transactions through this system. In every instance, the system rejected these unallowable transactions. We also reviewed a sample of vendor<sup>6</sup> invoices and the documentation that the CPCS maintained relative to these invoices. In every instance, the vendor invoices reviewed were appropriate and adequately supported by documentation. Our testing in this area concluded that the CPCS has implemented effective internal controls within its attorney billing and payment system.

To determine what measures the CPCS had taken to address our other concerns relative to activities conducted by its A&O Department, we reviewed the CPCS's internal control plan as it relates to the A&O and a sample of audits performed by the A&O during our audit period relative to the billings by private attorneys. Based on our review, we determined that the CPCS had taken measures to implement the recommendations made in our prior audit report relative to various activities performed by the A&O. Specifically, our audit testing determined that (a) the A&O spends more time compiling detailed audit results and quantifying the results of its

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<sup>6</sup> "Vendors" here refers to non-legal experts whose services are required by private counsel and public defenders to provide adequate legal representation, such as investigators, blood specialists, and psychologists.

audits; (b) the CPCS modified its policies and procedures to require attorneys to respond to audit letter requests within 30 days; (c) the A&O presents audit findings to CPCS management and committee members, both of whom may suggest changes to CPCS policies and procedures if they believe a finding is indicative of a systemic problem within the billing system; and, (d) the CPCS's most recent audit plan is more comprehensive in that it includes the performance of seven different types of audits and reviews of attorney and vendor bills.

**2. INADEQUATE INTERNAL CONTROLS AT THE OCP OVER THE INDIGENCE DETERMINATION PROCESS IN DISTRICT COURTS AND IMPROPER MAINTENANCE OF COURT RECORDS BY THESE COURTS HAS RESULTED IN INADEQUATE ASSURANCE THAT APPROXIMATELY \$48 MILLION IN LEGAL SERVICES WERE PROVIDED TO ELIGIBLE DEFENDANTS**

Although the CPCS is statutorily responsible for providing legal services to indigent individuals in Massachusetts, Chapter 211D of the General Laws assigns to the Chief Probation Officer of each court the responsibility of determining whether a person meets the definition of indigency as established by Rule 3:10, Section 1, of the Supreme Judicial Court. We found, however, that the Office of the Commissioner of Probation (OCP) had not established a system-wide standard process to be used by Chief Probation Officers and their staff to effectively determine whether a person seeking state-sponsored legal counsel meets the definition of being indigent.

During our audit, we visited 27 district courts and reviewed a statistical sample of 119 files of individuals provided with state-sponsored legal representation during fiscal year 2010. During this fiscal year, the CPCS paid a total of \$47,974,985 for state-sponsored legal representation to individuals in these 27 courts. Based on our review of the information that the Probation Departments of these courts maintained relative to these 119 cases, we found that, in over 98% of the cases, there was virtually no documentation to substantiate that court officials had performed required procedures to ensure that the accused person was in fact indigent. In fact, Probation Department employees at 18 of the 27 district courts we visited stated that their courts routinely do not verify any information provided by defendants who claim to be indigent or conduct the subsequent 60-day or six-month reassessments of the indigency status of these defendants as required by state law.

We also found that, contrary to policies established by the Administrative Office of the Trial Court (AOTC), many of the district courts in our sample were not retaining various records for the required time periods, including those relative to their determination of indigency. As a

result of these conditions, there is inadequate assurance as to the appropriateness of the \$47,974,985 in expenses that the CPCS incurred during fiscal year 2010 for legal services provided to defendants claiming to be indigent in these 27 courts. Because these significant deficiencies exist at all 27 courts reviewed, it is reasonable to question the entire \$82.3 million expended during fiscal year 2010 to aid indigent clients at all 70 district courts statewide.

As noted in the Introduction section of this report, the CPCS is the sole state agency responsible for providing criminal and certain non-criminal legal services to indigent persons who are entitled by law to be represented by legal counsel. According to Chapter 211D, the CPCS is required to establish and maintain a system for the appointment or assignment of counsel at any stage of criminal or certain non-criminal proceedings. Although the CPCS is responsible for providing legal counsel to indigent persons in accordance with Section 2½ of Chapter 211D, the Chief Probation Officer assigned to each court is responsible for ensuring that a person claiming to be indigent meets the definition of being indigent as established by Rule 3:10, Section 1, of the Supreme Judicial Court. In this regard, Chapter 211D, Section 2½, states, in part:

*It shall be the responsibility of the chief probation officer assigned to each court to ensure that a person claiming to be indigent meets the definition of indigency under section 2. A person seeking the appointment of counsel shall be interviewed by the chief probation officer or his designee before the appointment of counsel. The person conducting the interview shall explain to the person seeking appointment of counsel (1) the definition of indigency, (2) the process used to verify his information with other state agencies, and (3) the consequences of misrepresenting his financial information in applying for the appointment of counsel. The person conducting the interview shall prepare a written indigency intake report that shall record the results of the interview and his recommendation on whether or not the person seeking appointment of counsel is indigent. The person seeking appointment of counsel and the person conducting the interview shall sign the indigency intake report. In signing the report, the person seeking appointment of counsel shall certify under the pains and penalties of perjury that the information contained therein is true and that he has not concealed any information relevant to his financial status. All statements contained in the report shall be deemed material statements. The completed report shall be presented to a judge who may adopt or reject the recommendations in the report, either in whole or in part.*

Rule 3:10, Section 1(f), of the Supreme Judicial Court defines an indigent person as a person who is:

- Receiving one of the following types of public assistance: Aid to Families with Dependent Children (AFDC), Emergency Aid to Elders, Disabled, and Children (EAEDC), poverty-related veterans benefits, food stamps, refugee resettlement benefits, Medicaid, or Supplemental Security Income (SSI);

- Having an annual income, after taxes, one hundred twenty-five percent or less of the then-current poverty threshold;
- Residing in a tuberculosis treatment center or a public or private mental health, mental retardation, or long-term care facility, including the Bridgewater State Hospital and the Treatment Center, or the subject of a proceeding in which admission or commitment to such a center or facility is sought, or who is the subject of a proceeding in which a substituted judgment determination concerning treatment is sought;
- Serving a sentence in a correctional institution and has no available funds;<sup>7</sup> or
- Being held in custody in jail and has no available funds.

Defendants with funds insufficient to retain a private attorney in serious Superior Court felony cases or persons with income between 125% and 250% of the poverty threshold may be determined by the court to be indigent but able to contribute. If such a finding is made by the court, a party must pay a portion of the cost of the assigned counsel, as determined by the court.

Once a person is accused of a crime and requests state-sponsored legal representation, according to court officials, the following process is followed by the probation officers or their designees in each court to process an accused individual's claim of indigence:

1. The defendant must sign a Defendant Waiver of Access form authorizing the Probation Department to obtain tax and other information about the defendant from the Massachusetts Department of Revenue (DOR) and the Registry of Motor Vehicles (RMV).
2. The defendant must complete and sign a Pre-Trial Intake form that details biographical information about the defendant and his or her reasons for claiming to be indigent.
3. Defendants must complete and sign an Affidavit of Indigency in which they assert under pain and penalty of perjury that they are indigent. This form also includes financial information provided by the defendant (e.g., monthly income, expenses).
4. In accordance with Chapter 211D, Section 2½, Subsection (b), of the General Laws, the Chief Probation Officer prepares a written indigency intake report that includes his or her recommendation on whether a person seeking the appointment of counsel is indigent, indigent but able to contribute, or not indigent.
5. If a person is determined by the court to be indigent or indigent but able to contribute, the judge directs the CPCS to provide legal representation. The court notifies the CPCS that it must assign counsel to the defendant in question. Once an attorney is assigned, the

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<sup>7</sup> Available funds, as defined Supreme Judicial Court Rule 3:10, include an individual's liquid assets and disposable net monthly income calculated after a provision is made for the individual's bail obligations.



Clerk of the Court prepares a Notice of Assignment of Counsel (NAC) form and sends a paper or electronic copy to the CPCS.

In addition to making an initial determination as to whether an individual accused of a crime is indigent, the probation officers in each court must also conduct subsequent reassessments of a person's indigency. Specifically, Chapter 211D, Section 2½, of the General Laws states, in part:

*Any appointment of counsel by the court is at all times subject to verification of indigency by the chief probation officer assigned to each court. Not later than 60 days after the appointment of counsel, the chief probation officer or his designee shall complete a re-assessment of the financial circumstances of the person for whom counsel was appointed to ensure that such person continues to meet the definition of indigency.*

Additionally, this statute states:

*Not later than 6 months after the appointment of counsel, and every 6 months thereafter, the chief probation officer or his designee shall conduct a further re-assessment of the financial circumstances of the person for whom counsel was appointed to ensure that he continues to meet the definition of indigency. . . .*

Chapter 211D, Section 2½ specifies that these reassessments consist of “the chief probation officer or his designee accessing wage and tax information in the possession of the Department of Revenue and such other information relevant to the verification of indigence in the possession of the Registry of Motor Vehicles.” Chapter 211D, Section 2½ further requires that:

*Upon completion of his re-assessment, the chief probation officer shall prepare a written report of his findings. The chief probation officer shall sign the report, certifying that the person for whom counsel was appointed either continues to meet or does not continue to meet the definition of indigency.*

During our audit, we determined that although prior to our audit period, the OCP developed standard forms for courts to use in determining whether a defendant is indigent and provided limited training to staff on the completion of these forms, the OCP has not established formal written policies and procedures for each court to use in verifying and documenting that an individual meets the definition of indigency or any policies and procedures relative to how the OCP will monitor each court's compliance with these requirements.

Based on these internal control deficiencies defined during our audit, we designed testing to determine the extent to which the Probation Departments of courts within the Commonwealth were complying with the requirements of Chapter 211D in ensuring that defendants who request state-sponsored legal counsel meet the established definition of indigency. In order to do this,

we selected a statistical sample (designed to achieve a 95% confidence level in our results) of court files involving the appointment of state-funded public counsel at 27 different district courts (see Appendix II). This sample consisted of 119 files of individuals who had been provided court-appointed legal counsel during fiscal year 2010. We then conducted site visits at each court, spoke to court officials, and reviewed the contents of the files we selected.

Our review determined that there was no evidence in any of the files indicating that Probation Department staff had conducted verifications of any of the information that had been provided by defendants during their initial assessment. Further, only two (1.7%) of the 119 files contained evidence that the required 60-day reassessment of indigence had been conducted, and just one (0.8%) of the 119 files contained evidence that the required six-month reassessments had been conducted. Moreover, Probation Department employees at 18 of the 27 district courts we visited stated that their courts routinely do not verify information during the initial assessment or conduct the required the 60-day or six-month reassessments as required by law. These 18 courts maintained 108 of the 119 (91%) files in our statistical sample. Finally, only eight of the 27 district courts we visited had any formal policies and procedures that specifically addressed the process for determining a defendant's indigence. However, based on our file reviews, these eight courts were not following their own policies and procedures in this area.

Officials at the courts we visited provided us with various reasons for not verifying the information provided by defendants seeking state-sponsored legal counsel. Some court officials asserted that they do not have the staff necessary to perform these verifications. Other court officials indicated that they do not have the ability to perform these verifications on-line and would therefore have to submit information to DOR, the Department of Transitional Assistance (DTA), and the RMV to be verified, which could take a long time and delay the adjudication process.

In order to determine the extent to which ineligible defendants may be receiving state-sponsored legal services, during our audit we selected the 34 of the 119 defendants in our sample who had declared that they were indigent by virtue of the fact that they were receiving public assistance at the time they were arrested. The OSA's Bureau of Special Investigations (BSI), which is responsible for investigating fraud within the Commonwealth's public assistance programs, then determined whether information maintained in the DTA's database supported these claims. BSI

reported that, based on its review, 19 of the 34 defendants in our sample assigned public counsel were not actually receiving the public assistance they claimed in their intake forms at the time they requested state-sponsored legal counsel services.

We also identified problems with the retention of records at many of the courts we visited. Specifically, the AOTC has issued a Record Retention Schedule that requires all Probation Department files, including those related to the determination of indigence, to be retained for a period of 10 years. In this regard, according to the AOTC's Record Retention Schedule, Part IV - Case Related Papers, the only Probation Department records that are eligible for destruction are:

*Juvenile/Adult probation case folder information, provided the individual has had no court activity for 10 years.*

However, contrary to this policy, we found that many key documents relative to the determination of a defendant's claim of indigence that should have been contained in the files we reviewed were missing, including Affidavits of Indigency, Pre-Trial Intake Forms, and Defendant Waiver of Access Forms. A summary of the missing documents we identified during our review of the files in our sample follows:

<b>Document</b>	<b>Affidavit of Indigency Form</b>	<b>Pre-Trial Intake Form</b>	<b>Defendant Waiver of Access Form</b>
Number of Documents Retained	57/119	68/119	40/119
Percentage of Documents Retained	47.9%	57.1%	33.6%

As can be seen from the preceding table, only between approximately 34% and 57% of the forms that should have been retained in the defendant files we reviewed, if completed, were actually retained. Court officials offered several reasons explaining why these records were missing. For example, many court officials stated that the OCP handed down a directive to dispose of any materials that contain sensitive DOR or RMV data. According to these court officials, this directive was issued based on the OCP's Interdepartmental Service Agreement (ISA) with DOR, which states, in part:

*The DOR information furnished to the Agency, and any material generated therefrom, such as extra copies, photo impressions, computer printouts, carbon paper, if no longer needed, must be destroyed on site.*

Although the OCP directive was clearly only specific to any materials containing DOR-related information, some court officials stated that they have interpreted this to include any and all indigence determination documentation that contains financial data such as the defendant's income, expenses, or assets. Additionally, officials at some of the courts we visited asserted that due to a lack of storage space they have to dispose of files, including those that contain indigence determination information, once the case is dismissed or otherwise ruled on. However, clearly the disposal or destruction of these records is in direct conflict with the AOTC's Record Retention Schedule and serves to limit each court's ability to document the extent to which it is complying with the requirements of Chapter 211D in making a determination as to whether a defendant who requests publicly funded legal representation is indigent. Moreover, without proper indigence documentation being maintained, there is inadequate assurance that the courts performed the required verification of the information provided by clients who applied for and received state-sponsored legal services.

During our audit, we brought our concerns to the attention of the Acting Commissioner of Probation, who provided us with written comments that are excerpted below:

*In the period between 2004 and early this year, in accordance with a memo issued by prior Commissioner O'Brien in 2004, the probation service conducted discretionary indigence verifications through outside agencies in order to confirm that a defendant requesting a court appointed attorney met the definition of indigency. There was, however, consistent use of the "Pretrial Intake/Indigency Report" at all times.*

*Steps taken in 2011*

*Initially, I asked that a survey be conducted of the Chief Probation Officers to determine the extent to which they were performing their duties with regard to verifications. As a result, it was determined that we needed to insure a more consistent practice. In February, Chief Probation Officers attended a mandatory all-day training regarding the requirements of M.G.L. c. 211D. They were provided with a number of related handouts and a copy of the Department of Revenue CD regarding confidentiality, which they were instructed to share with their staff. We provided them with an updated list of Chief Probation Officers who would have access to their database.*

*Subsequent to the training, we developed a simple check off list identifying the probation requirements under the indigency statute. The OCP Chief Probation Officers and Regional Supervisors were instructed to go to each of the juvenile, district and superior courts and pull a random sample of probation cases to determine if they were in compliance. Depending on the findings, a number of trainings were conducted for the local staff during these visits. A*

*report was submitted to OCP for each court. As of August 17, 91 court visits have been completed. There were some offices that were re-scheduled for a follow-up visit to insure that they were brought into compliance. Eight of these have been completed.*

*Regional Supervisors are required to conduct audits of their courts to determine compliance with the supervision standards of OCP. They have been instructed to add a section to their report to indicate the progress of the office in attaining full compliance with verification of indigency. They have done so routinely over the past few months.*

*Having met with the representatives of the House Post Audit Committee in July, we have been attempting to identify ways to improve our reporting of the statistics they are seeking. We have added a required field to the Monthly Report of Probation Activities (MRPA) in order to collect information regarding the number of income verifications conducted. We have also engaged in some initial discussions with our IT department to consider ways to speed up the process and to create reports through the docketing part of MassCourt's application.*

*On July 28, 2011, Commissioner Corbett issued a memorandum to the field, "New Process and Procedures for Indigency Verifications" to inform the field of the requirements of the new legislation. In it, he identified a "point person" who will respond to questions. This individual will be present at each of the regional Chief Probation Officer meetings that are scheduled for September. He will also be responsible for identifying and conducting a pilot in one court of each of the three court departments to determine an accurate assessment of the effectiveness of the current procedures.*

Subsequently, the Acting Commissioner of Probation provided the following additional comments:

*I wanted to give you a bit more detail on the Indigency Verification Study, which will commence on October 1, 2011 and run through December 31, 2011.*

*Among other steps we are taking to address our responsibilities in this area, I have decided that an in-depth study will get us some good, current, reliable information on the process (as modified in the recent legislation) and the results of that process, when all reasonable steps are taken to investigate the status of the claim of indigency.*

*With the consent of the respective judicial authorities, the following courts will be serving as a laboratory for a three-month study: Middlesex Superior, Worcester and Stoughton District Courts, and Berkshire Juvenile.*

*The preparation of these courts for their participation in the study will occur during September. I will be asking [staff persons] to closely follow these courts during the study period. I expect that, by the end of the study period, we will have reliable answers concerning the extent of inappropriate claims of indigency and a more informed sense of the utility of the tools available to us to investigate claims of indigency.*

*Commencing October 3<sup>rd</sup>, we are undertaking our own statewide audit of current practice. Our plan provides that all courts should be audited by the end of the calendar year and reports written with respect to compliance. I have invited the Administrative Office of the Trial Court to join in that effort, to whatever degree they can, and they have agreed to do so.*

***Recommendation***

Based on the comments provided by the Acting Commissioner of Probation, the OCP is taking measures to address our concerns in this area. However, the OCP should immediately develop and implement standard policies and procedures to be used by the Probation Departments of all courts in determining whether a defendant meets the established definition of indigency. At a minimum, these policies and procedures should detail the verification measures, including matching information provided by defendants to DOR, DTA, and RMV records and to records maintained by other state agencies through which defendants could receive benefits, such as the Department of Unemployment Assistance and the Massachusetts State Lottery Commission, and the manner in which they are to be documented, and require that all records other than those specifically identified by DOR be retained in accordance with the AOTC's Record Retention Schedule for both the initial verification and subsequent reassessments. Further, these policies and procedures should include monitoring activities to ensure that courts are fully meeting their responsibilities in this area and establish penalties for noncompliance. Finally, the OCP should work collaboratively with the DOR, RMV, DTA and any other state agencies it deems necessary in developing a system that would allow the courts to verify certain financial and other information about defendants in a timely manner, and to retain these documents as long as necessary to meet the requirements of the law.

## APPENDIX

### I. Summary of Cost and Caseload Data

In conjunction with our audit, we obtained from the Committee for Public Counsel Services (CPCS) certain cost and attorney caseload information and independently obtained data relative to the costs incurred by other states that provide state-sponsored legal services to indigent clients. Although we did not audit this information, the results of our review appear in the following sections:

**a. Payments to Private Attorneys for Legal Services to Clients Claiming to Be Indigent Have Increased by over 8.1% between Fiscal Years 2008 and 2010**

From July 1, 2007 through December 31, 2010, a total of \$557,654,118 was spent on legal services provided to indigent clients exclusive of salaries and benefits paid to public defenders. Of the total amount spent, 91% represented payments to private attorneys; 8% was for vendor services; and less than 1% was for advertising and other expenses.

Significantly, payments to private attorneys increased approximately 8.1% during this period, as indicated in the following table:

Case-Related Expense	Fiscal Year 2008	Fiscal Year 2009	Fiscal Year 2010	July 1, 2010 through December 31, 2010	Total by Expense Type
(a) Payments to Private Attorneys <sup>1</sup>	\$143,289,888	\$149,980,223	\$155,007,821	\$62,161,183	\$510,439,115
(b) Payments for Vendor Services <sup>2</sup>	13,509,717	13,767,928	13,378,849	6,129,579	46,786,073
(c) Advertising Expenses	83,889	60,015	151,132	122,717	417,753
(d) Other	<u>857</u>	<u>1,816</u>	<u>2,462</u>	<u>6,042</u>	<u>11,177</u>
Total by Fiscal Year	<u>\$156,884,351</u>	<u>\$163,809,982</u>	<u>\$168,540,264</u>	<u>\$68,419,521</u>	<u>\$557,654,118</u>

**<sup>1</sup>Rates Paid to Private Attorneys**

Felony District Court Cases: \$50/hr

Superior Court Non-Homicide Felonies and Youthful Offender Cases: \$60/hr

Murder Cases: \$100/hr

**<sup>2</sup>Examples of Rates Paid to Vendors**

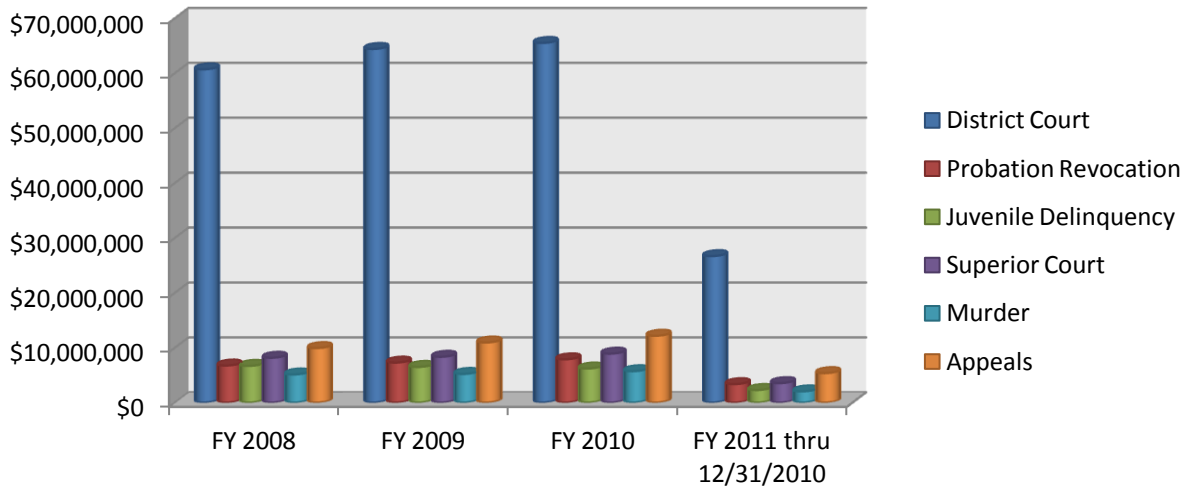
Psychologist: \$100/hr - \$200/hr

Social Services Expert: \$50/hr - \$200 (degree based)

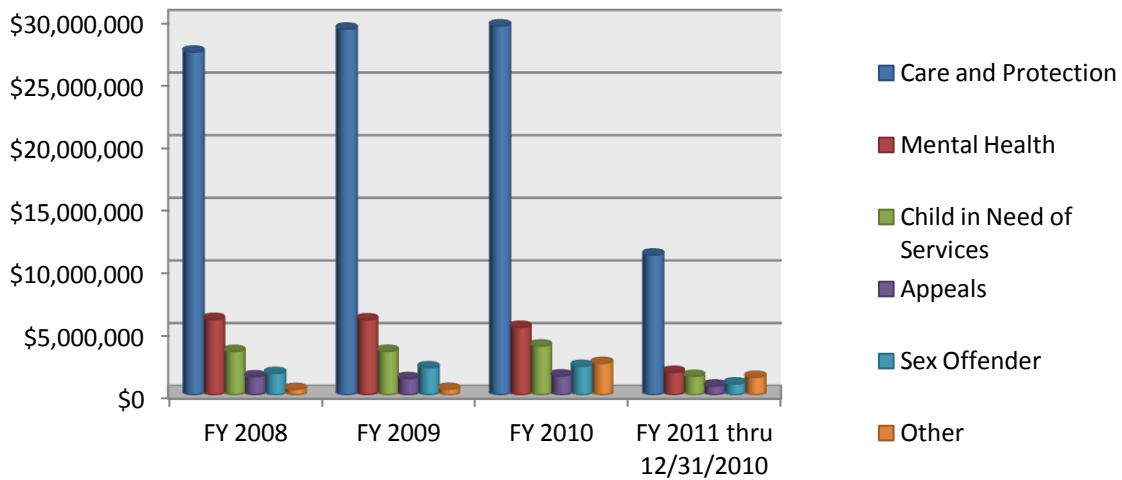
Investigator: \$25/hr - \$50/hr

The following charts show a breakdown of private attorney billings by case type:

**Private Attorney Billing Totals by Criminal Case Type for Fiscal Years 2008, 2009, 2010, and 2011 through 12/31/2010\***



**Private Attorney Billing Totals by Civil Case Type for Fiscal Years 2008, 2009, 2010, and 2011 through 12/31/10\***



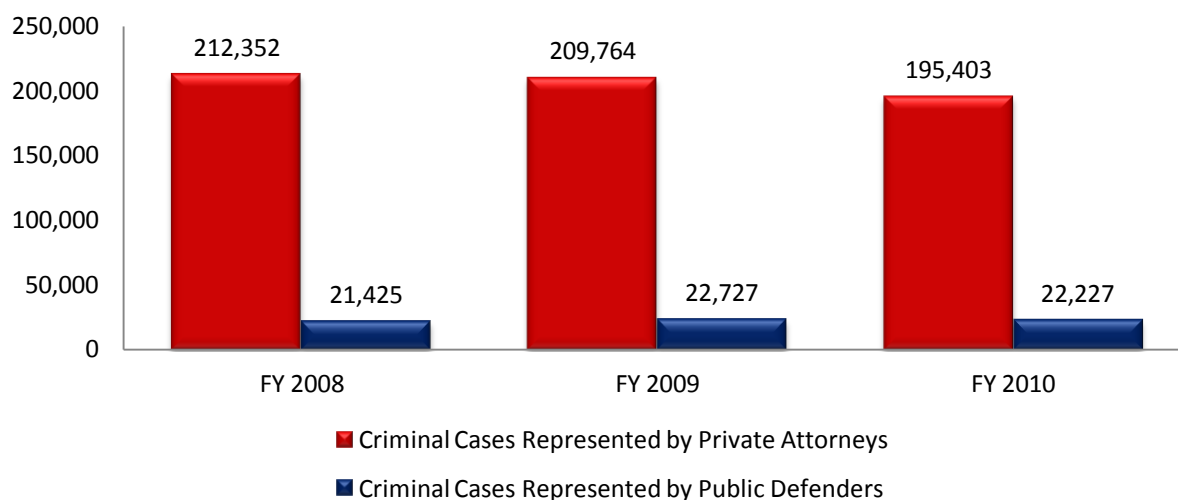
\*Public defenders are not included in the billing totals because they are salaried employees of the CPCS. Therefore, public defenders do not submit bills to the CPCS for each case in which they provided representation to an indigent client.

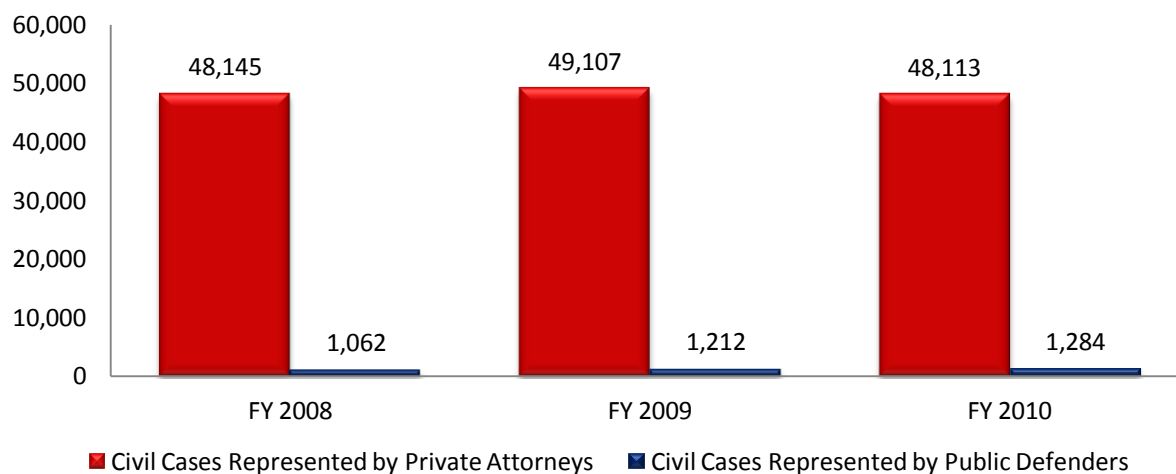


**b. The Number of Criminal Cases Being Handled by Private Attorneys, Who Are Assigned between 89% and 98% of All Cases Involving Indigent Defendants, Has Decreased by Approximately 8% between Fiscal Years 2008 and 2010, While the Number of Civil Cases Handled by Private Attorneys Has Remained Relatively Constant**

During fiscal years 2008 through 2010, private attorneys and public defenders provided representation on a total of 832,821 criminal and civil cases. As indicated in the following charts, public defenders provided representation for approximately 11% of criminal cases, whereas private attorneys provided representation for approximately 89% of criminal cases. Public defenders provided representation for approximately 2% of civil cases, whereas private attorneys provided representation for approximately 98% of civil cases.

As indicated in the following graphs, during this same three-fiscal-year period, the number of criminal cases handled by private attorneys decreased by approximately 8%, whereas the number of civil cases handled by private attorneys remained relatively constant.





**c. The Number of Hours Billed by Private Attorneys for Cases Has Increased by Approximately 8% between Fiscal Years 2008 and 2010**

As detailed in 3(a) and 3(b) above, the data shows that although between fiscal years 2008 and 2010 the number of criminal cases handled by private attorneys decreased by approximately 8% and civil cases handled remained relatively constant, the total payments to private attorneys during this same period increased by 8.1%. The data shows this was caused by an increase in the total number of hours billed by private attorneys and, particularly, in those hours that are billable at higher rates. Specifically, according to CPCS records, between July 1, 2008 and June 30, 2010, private attorneys billed the CPCS for a total of 8,341,534 hours of service that included criminal cases (approximately 70%) and civil cases (approximately 30%). During this period, the total hours billed for all cases increased by approximately 8%, from 2,665,274 hours in fiscal year 2008 to 2,877,396 hours during fiscal year 2010. The number of hours spent on civil cases, billed at a rate of \$50 per hour during this period, increased by approximately 10%, while the number of hours billed for criminal cases, billed at various rates, increased by approximately 8%. However, as shown in the following table, not only did the total number of hours billed by private attorneys increase during our audit period, but there was also an increase in the number of hours for more intricate murder and criminal appeals cases. Specifically, as indicated in the following table, between 2008 and 2010, the number of hours billed by private attorneys for murder cases increased by almost 12%, while the number of hours billed for criminal appeals cases increased by almost 25%.

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<b>Criminal Case Type</b>	<b>Statutory Hourly Rate</b>	<b>FY2008 Hours Billed</b>	<b>FY2008 Billing Total</b>	<b>FY2009 Hours Billed</b>	<b>FY2009 Billing Total</b>	<b>FY2010 Hours Billed</b>	<b>FY2010 Billing Total</b>	<b>Total Percent Increase (Decrease) in Hours Billed</b>
District Court	\$50	1,208,030	\$60,679,286	1,279,969	\$64,386,904	1,295,558	\$65,487,260	7.3%
Probation Revocation	\$50	132,897	\$6,732,512	143,503	\$7,265,942	155,086	\$7,861,673	16.7%
Juvenile Delinquency	\$50	130,287	\$6,666,139	125,757	\$6,478,192	120,302	\$6,192,294	(7.7%)
Superior Court	\$60	140,726	\$8,413,963	139,232	\$8,321,783	148,485	\$8,893,584	5.5%
Murder	\$100	51,237	\$5,107,825	52,173	\$5,202,925	57,197	\$5,699,295	11.7%
Appeals (Criminal)	\$60	148,412	\$9,910,749	166,289	\$10,930,199	185,090	\$12,155,943	24.8%
Other	\$50	43,704	\$5,169,160	33,287	\$4,642,691	27,530	\$3,493,788	(37%)

## II. District and Municipal Courts Selected for Review

Court	Courts That Did Not Verify Information During Initial Assessment or Conduct Required 60-Day or Six-Month Reassessment As a Matter of Policy	Courts That Did Not Have Formal Policies and Procedures for Determining Indigency
1. Boston Municipal Court	X	X
2. Brighton Municipal Court	X	X
3. Brockton District Court	X	
4. Brookline District Court		
5. Cambridge District Court	X	X
6. Charlestown Municipal Court	X	X
7. Chelsea District Court	X	X
8. Dorchester Municipal Court	X	X
9. East Boston Municipal Court	X	
10. Fall River District Court	X	X
11. Gloucester District Court		
12. Greenfield District Court		X
13. Haverhill District Court		X
14. Hingham District Court	X	
15. Holyoke District Court		X
16. Lawrence District Court		X
17. Lynn District Court	X	X
18. New Bedford District Court		X

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<b>Court</b>	<b>Courts That Did Not Verify Information During Initial Assessment or Conduct Required 60-Day or Six-Month Reassessment As a Matter of Policy</b>	<b>Courts That Did Not Have Formal Policies and Procedures for Determining Indigency</b>
19. Newburyport District Court		
20. Peabody District Court	X	X
21. Pittsfield District Court	X	X
22. Quincy District Court	X	
23. Roxbury Municipal Court	X	X
24. Salem District Court		
25. South Boston District Court	X	X
26. Springfield District Court	X	X
27. Westfield District Court	X	X