



# The Commonwealth of Massachusetts

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INDEPENDENT STATE AUDITOR'S REPORT ON  
CERTAIN ACTIVITIES OF THE  
COMMITTEE FOR PUBLIC COUNSEL SERVICES  
JULY 1, 2004 TO JUNE 30, 2005

OFFICIAL AUDIT  
REPORT  
OCTOBER 17, 2007

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### INTRODUCTION

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The Committee for Public Counsel Services (CPCS) was established by Chapter 673 of the Acts of 1983, which added Chapter 211D to the Massachusetts General Laws. Chapter 211D established CPCS as the sole state agency responsible for providing legal services to indigent persons who are entitled by law to be represented by legal counsel. In August 2004, the Legislature passed Chapter 253 (An Act Relative to Private Attorneys Providing Public Counsel Services), which established the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts. The Commission released a report in April 2005 which recommended higher pay for court-appointed attorneys. In response, the Legislature passed Chapter 54 of the Acts of 2005 (An Act Providing Counsel to Indigent Persons). Chapter 54 raised attorney compensation, mandated indigency verifications, allowed certain municipal ordinances, bylaws, and misdemeanors to be treated as civil infractions, and limited attorney billing hours. Total funds available for expenditures in fiscal year 2007 were \$150,457,859. Our audit was conducted to review and analyze CPCS's internal controls over payments to private attorneys and vendors and to follow up on recommendations made in our prior audit report.

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### AUDIT RESULTS

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#### 1. STATUS OF PRIOR AUDIT RESULTS

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Our prior audit of CPCS identified a number of billing deficiencies such as data entry omissions, untimely invoice submissions, and overcharges by a private investigator. The report also revealed deficiencies in verifying the indigency status of clients and the lack of an evaluation process for attorneys representing the indigent.

Our follow-up review found that CPCS has implemented a new Web-based computer system called E-bill, which has enhanced audit checks and interim billing capability. These enhancements should address the type of billing irregularities and timeliness issues discussed in our prior audit. In addition, we determined that CPCS has improved its controls over court costs such as private investigator billings, implemented an evaluation system for all attorneys, and advocated for legislation to amend Chapter 261 of the General Laws.

#### 2. CPCS NEEDS TO IMPROVE THE AUDITING OF ATTORNEY AND VENDOR BILLS

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Chapter 211D, Section 12, of the General Laws required CPCS to establish an Audit and Oversight Department (A&O) to monitor billing and private attorney compensation. Audits are to be conducted in addition to the automated and manual checks currently performed by the CPCS billing office, which is called the Private Attorney Payment Department (PAPD). A&O consists of two attorneys and an accountant. During fiscal year 2005, A&O conducted four major types of audits of attorney billings: random E-bill (every 1,000<sup>th</sup> invoice), complex and/or expensive cases, three-year reviews of attorney billings, and cases referred by the Chief Counsel of CPCS.

In addition, A&O conducted two types of audits of court costs: random audits and reviews of selected providers for the entire fiscal year.

With the assistance of A&O, we tabulated, to the extent possible, discrepancy rates and cost disallowances, first from random audits. The sample of 230 attorney invoices totaling \$86,098 from the E-bill random audits (every 1000<sup>th</sup> invoice) showed that the A&O reduced eight bills by \$860 and withheld payments on the entire billings of \$13,045 to 34 attorneys who did not respond to CPCS documentation request and six attorneys who provided incomplete documentation. The reduced and withheld payments totaling \$13,905 (\$13,045 plus \$860) indicate a sample error rate of 16%. Our review of the CPCS sample of 230 bills indicated a potential for significant discrepancies in the 305,000 bills that attorneys submitted to CPCS for payment during our audit period. CPCS needs to address the potential discrepancies in the attorney billing population. If CPCS cannot satisfy itself that the population error rate is significantly less than 16%, it should consider establishing a fixed fee for each type of case, rather than the present system of paying an hourly rate plus expenses.

In addition we reviewed A&O audits conducted for certain targeted bills which were based on certain criteria. Based on estimates provided by CPCS, of the 64 invoices examined totaling \$2,159,000, there were 17 invoices containing deficiencies totaling \$125,000. These results indicate a 6% error rate in the dollar value of the invoices examined and a 27% error rate in invoices examined.

We recommended that CPCS continue to seek the required documentation from the non- or partially- responding attorneys so that it can better estimate the sample and population error rates. Additionally, we advised CPCS to quantify the results of its future audits to estimate potential cost disallowances. In a written response to our draft report, CPCS indicated that it has implemented our recommendations by adopting new policies which mandate vendors' timely compliance with the Department's audits. CPCS further stated that these follow-up audits have resulted in replies from all but three of the non-responding attorneys whose invoices totaled \$472.50, further reducing the non-response and potential disallowance rates. Finally, we recommended that CPCS should strengthen its oversight of billing by developing a more comprehensive audit plan and allocating additional resources as necessary.

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## INTRODUCTION

### *Background*

The Committee for Public Counsel Services (CPCS) was established by Chapter 673 of the Acts of 1983, which added Chapter 211D to the Massachusetts General Laws. Chapter 211D established CPCS as 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.

The primary responsibility of CPCS, as mandated by Chapter 211D, is to “plan, oversee, and coordinate the delivery of criminal and certain non-criminal legal services by all salaried public counsel, bar advocate<sup>1</sup> and other assigned counsel programs, and private attorneys serving on a per case basis.” Chapter 211D also requires CPCS to establish standards for the Public Defender Division and the Private Counsel Division, and monitor and evaluate compliance with the standards and performance of counsel in its divisions in order to ensure competent representation of defendants in all courts of the Commonwealth.

In August 2004, the Legislature enacted Chapter 253 (An Act Relative to Private Attorneys Providing Public Counsel Services), which established the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts. The Commission released a report in April 2005 which recommended higher pay for court-appointed attorneys. In response, the Legislature passed Chapter 54 of the Acts of 2005 (An Act Providing Counsel to Indigent Persons). Chapter 54 raised the compensation paid to private attorneys accepting assignments through CPCS in all cases, including murder cases; authorized CPCS to hire additional personnel; mandated indigency verifications; allowed certain municipal ordinances, bylaws, and misdemeanors to be treated as civil infractions; and limited attorney billing hours. It also established two commissions: one to study the decriminalizing of certain misdemeanor offenses, and the other to consider measures to raise revenue for legal services to indigents. In addition, Chapter 54 increased the rates paid to court-appointed attorneys (see Appendix II).

CPCS consists of 15 members appointed by the Supreme Judicial Court (SJC) to three-year terms. CPCS members select a Chief Counsel and two Deputy Chief Counsels and establish the policies to carry out its mandate. The Chief Counsel acts as the chief executive officer of CPCS and is

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<sup>1</sup> According to CPCS officials, a Bar Advocate is a private lawyer who accepts assignments through CPCS of criminal cases in the District or Superior courts.

responsible for the Committee's day-to-day functions. CPCS meets monthly and at such other times as necessary to carry out its business, elect its officers annually, and perform its functions through the following operating divisions/units:

#### Public Defender Division

The Public Defender Division consists of the Trial Unit, the Appeals Unit, the Youth Advocacy Project, and the Alternative Commitment Unit. According to Chapter 211D, the Division's full-time public defenders are to be assigned all criminal cases except misdemeanors (unless the misdemeanor is in conjunction with a felony charge). However, in situations in which there is a conflict of interest or a public defender has reached his/her maximum caseload limit, the case may be assigned to the Private Counsel Division. The Trial Unit consists of 107 attorneys and 15 investigators working out of 13 regional offices, and represents clients in serious felony cases. The Alternative Commitment Unit represents clients in sexually dangerous person commitment proceedings. The Appeals Unit handles all cases that the Trial Unit appeals and such other matters as may be assigned by the Chief Counsel. The 12 attorneys in the Appeals Unit review transcripts, submit briefs, and argue cases before the Appeals Court, Supreme Judicial Court (SJC), and the federal courts, when appropriate. The Youth Advocacy Project consists of six attorneys, two part-time psychologists, and two social workers, and represents children in delinquency and youthful offender proceedings.

#### Private Counsel Division

CPCS is required to retain the services of private sector attorneys to represent defendants who are accused of misdemeanors and non-criminal offenses, and to handle criminal cases in which there is a conflict of interest or in which the CPCS staff attorney has an excessive caseload. Private attorneys represent over 90% of the cases referred to CPCS. The Private Counsel Division provides training to both new attorneys and to experienced attorneys who do not have experience in criminal matters. The Division is also responsible for monitoring and evaluating these private attorneys. CPCS contracts with bar associations that have developed advocacy programs. Bar advocate administrators maintain lists of attorneys who have met CPCS qualification standards and schedule them to appear at various district and superior courts each day for assignment by the justices. Non-criminal cases (e.g., Child in Need of Services) are assigned directly to a private attorney by judges, who select the attorneys from lists provided by

CPCS. The Private Counsel Division accomplishes its duties through the following operating units and programs:

- Criminal Trial Support Unit: This unit is responsible for the oversight of 2,300 private attorneys receiving assignments statewide in all criminal trial level cases and Sex Offender Registry Board (SORB) cases. These cases totaled over 177,000 in fiscal year 2005. The unit consists of two attorneys, two full-time members, and one part-time administrative staff member.
- Criminal Appeals Unit: The Criminal Appeals Unit oversees the assignment of all post-conviction matters to the private attorneys who are certified by CPCS for such assignments. CPCS made 500 assignments in fiscal year 2005, the majority being for direct appeal following the defendants' conviction at trial. The unit consists of three attorneys aided by two staff.
- Juvenile Delinquency/Youthful Offender (JD/YO) Unit: This unit consists of a part-time staff counsel. An administrative assistant, who also supports the Children and Family Law (CAFL) panel staff attorneys, provides part-time administrative support.
- Mental Health Litigation Unit: This unit provides trial and appellate representation of indigent persons against whom are filed petitions seeking commitment to public or private psychiatric facilities, judicial authorization to administer or terminate certain types of treatment (e.g., antipsychotic medication, aversive behavior modification, life-support mechanisms), or day-to-life commitment as a sexually dangerous person (SDP). The unit also trains and assists criminal defense attorneys in respect to mental health issues that arise in the criminal justice context (e.g., competency to stand trial, criminal responsibility). The unit consists of a director, two staff attorneys, an administrative assistant, and two assignment clerks. Virtually all representation in the first two categories (referred to as "mental health proceedings") is provided by the approximately 450 private attorneys certified to accept such assignments. Although 340 private attorneys are certified to represent clients in SDP proceedings, only 33 attorneys agreed to accept such assignments in fiscal year 2005.

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

The CAFL program provides trial and appellate representation to indigent parents and children in welfare matters. The cases within the purview of CAFL include care and protection proceedings (child protective cases), child in need of services (CHINS), actions to terminate parents' rights, state agency-sponsored guardianships, and any other proceedings regarding child custody where the Department of Social Services (DSS) is a party or where the court is considering granting custody to DSS.

### Criminal Defense Training Unit

The Criminal Defense Training Unit is responsible for the development and presentation of all training programs, workshops, and seminars throughout the Commonwealth for both Public Defenders and Private Counsel. Among the Unit's responsibilities are planning and presenting the following: two separate training conferences each year, the Zealous Advocacy Course (a week-long certification program for bar advocates) four times each year, certification training for lawyers representing clients in Sex Offender Registration and Notification Act cases and SDP commitment cases, providing six weeks of training for staff attorneys in the Public Defender Division of CPCS, and a week-long Jury Skills course for private and public defenders. Additionally, the unit creates and publishes *The Zealous Advocate* criminal defense training bulletin three to four times each year and is involved in other significant written projects on a regular basis.

### Audit and Oversight Department

The Audit and Oversight Department (A&O) is charged pursuant to Chapter 211D, Section 12, of the General Laws with monitoring the billings of private counsel who accept assignments through the CPCS. A&O reviews bills to ensure that the services billed were provided to the client, that the bills submitted are reasonable in terms of both dollars charged and hours billed, and that the attorney/vendor maintains his or her billing records and files in compliance with CPCS billing and recordkeeping requirements. A&O constantly monitors the billings of vendors and analyzes statistical and financial data. In addition, A&O performs audits of vendors and engages in more than a dozen different types of audits and/or reviews annually.

### Other Units

Other CPCS units include the Office of the Chief Financial Officer; the Accounting Unit, including the Private Attorney Payment Department (PAPD); the Information Technology Unit, Office Leasing and Telecommunications, and Human Resources.

### Indigency and Assignment of Counsel

Trial judges in District, Superior, and other type of courts (e.g., Juvenile) assign CPCS-trained private attorneys to indigent cases. Once an attorney is assigned, the Clerk of the Court prepares a Notice of Assignment of Counsel (NAC) and sends a copy to CPCS. The NAC is essential to

CPCS billing and payment systems. It identifies the appointed attorney, the court, the client, date-of-assignment, and type of case, and authorizes the attorney to bill CPCS for legal services. Without a NAC, CPCS will not pay an attorney's bill. In fiscal year 2005, CPCS approved approximately 305,000 attorney bills with an approximate value of \$95 million for payment by the Commonwealth.

Although CPCS is responsible for providing legal counsel to indigent individuals, it does not determine whether an individual is indigent and entitled to receive CPCS representation. Rule 3:10, Section 1, of the Supreme Judicial Court defines indigency, and the court applies the rule to determine whether or not a person is entitled to counsel. A person is entitled to counsel if he or she is currently receiving some form of public assistance, has net income after taxes of 125% or less of the poverty threshold, is the subject of certain mental health proceedings, or is held in jail or a correctional institution and has no available funds. Parties 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. In addition, there is a standard \$150 fee for persons who are found to be totally indigent. CPCS has indicated that this standard fee is the highest in the country. In fiscal year 2005, the Commonwealth collected \$8,130,758 in counsel fees from persons who received CPCS representation. These funds are collected by the probation offices of the various courts and are deposited into the General Fund. If the court, notwithstanding a finding of indigence or marginal indigence, determines that no term of incarceration will be imposed upon a finding of guilt, the party is not entitled to counsel.

### ***Audit Scope, Objectives, and Methodology***

The scope of our audit was to review and analyze CPCS's internal controls over its billing and payment systems. The objective of our audit was to determine whether proper and adequate controls were in place to ensure the appropriateness and accuracy of bills submitted and payments made to attorneys and vendors.



To achieve our audit objectives we:

- Reviewed and analyzed CPCS's internal control plan and manuals on computer billing and payment systems and reviewed the systems' automatic and visual checks designed to prevent unwarranted billing and billing errors.
- Analyzed the audit results of CPCS's A&O Department fiscal year 2005 audits and reviews to determine how well CPCS monitored private attorney and vendor bills and payments.
- Interviewed key CPCS officials, reviewed and analyzed agency reports, enabling legislation, appropriations, expenditure history, and the "Commission to Study the Provision of Counsel to Indigent Persons" report released in April 2005.
- Conducted a follow-up review of CPCS's actions relative to recommendations in our prior audit report (No. 98-1104-3).

Our audit covered the period July 1, 2004 through June 30, 2005 and was conducted in accordance with applicable generally accepted government auditing standards for performance audits.

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## AUDIT RESULTS

### 1. STATUS OF PRIOR AUDIT RESULTS

Our prior audit (No. 98-1104-3) of the Committee for Public Counsel Services (CPCS) reported various billing problems, including data entry omissions, a lack of interim/timely billing, and overcharges by a private investigator. The report also disclosed the lack of an evaluation process for CPCS in-house counsel, as well as assigned counsel, and the lack of verification for clients claiming indigency status. Our follow-up review noted that the specific attorney billing problems previously cited were effectively resolved by the implementation of a Web-based billing system called E-bill, which has enhanced audit checks and interim billing capability. These enhancements should address the type of billing irregularities and timeliness issues disclosed in our prior audit report. CPCS has also established standards, fees, and procedures for controlling court costs such as private investigator fees, implemented an evaluation system for all attorneys; and advocated for legislation to amend Chapter 261 of the General Laws.

#### a. Bill Verification and Overbilling Issues

Our prior audit report indicated that historical billing errors (hours billed in excess of daily and yearly maximums and excessive court waiting time) had been resolved by (a) the implementation of a telephone-based billing system called Telebill, (b) improved internal computer controls, and (c) the establishment of the Audit and Oversight Department (A&O). However, our prior report also disclosed that in spite of these improvements, a sample of 16 invoices showed an overbilling of 12.5 hours totaling \$625. Our audit also found that Telebill hours were entered into the CPCS computer system in total, rather than by line item, and that the line item hours were not added and compared to the total hours billed.

During our follow-up review, we found that on July 1, 2002, CPCS implemented a Web-based billing system called E-bill. Attorneys bill CPCS through their personal computers and are required to categorize the specific legal services provided to each client and the time billed on each case. The E-bill system then summarizes the data, runs various audit checks (e.g., presence of Notice of Assignment of Counsel, maximum daily and yearly hours, proper hourly rates for type of case), and inputs the data into the Massachusetts Management Accounting and Reporting System (MMARS). Invoices over \$5,000 are also reviewed by the Chief Counsel before payment. In addition, A&O conducts various audits to further ensure that proper

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services were provided, bills are reasonable, and attorneys maintain proper records. Because of these improvements in the billing system, many errors are caught at the prepayment stage, and additional documentation or explanation is required before payment is made. In the event an overpayment is made, attorneys are billed through the Commonwealth's Billing and Accounts Receivable Subsystem (BARS), and interest can be assessed depending on the circumstances.

**b. Attorney Performance Evaluation Issues**

Our prior audit report disclosed that CPCS had made some improvements in conducting performance evaluations for its staff attorneys and private assigned counsel. Specifically, CPCS performed evaluations of its staff attorneys, although it did not perform evaluations for its in-house supervising and managing attorneys. In addition, private attorneys were being evaluated through monthly scheduling and monitoring reports, rather than through formal yearly evaluations. Our follow-up review found that staff attorney and private attorney evaluations are now being prepared.

**c. Client Eligibility Issues**

Prior audits have reported that because defendants' claims of indigency are not always adequately verified, assigned counsel legal costs continue to rise and certain defendants may not have been eligible for the free legal services they received. In accordance with Supreme Judicial Court (SJC) Rule 3:10, a judge makes the determination of indigency by applying the rule's definition of indigency (receiving public assistance, poverty level income, certain health infirmities, or incarcerated without funds), subject to verification by the court's chief probation officer.

Our prior report noted that Section 194 of the Acts of 1998 established an emergency task force on indigency verification within the Administrative Office of the Trial Court (AOTC). The task force included the Chief Counsel of CPCS, the Chief Justice of AOTC, the Chief Justice of the District Court Department, the Commissioner of Probation, and the President of the District Attorney's Association. We recommended that CPCS work with the emergency task force on indigency verification to establish a control system for the provision of legal services. During our follow-up review, CPCS informed us that the changes it had recommended to Chapter 211D concerning the process of indigency have been adopted.

Specifically, a defendant seeking counsel must now execute an affidavit under the pains and penalties of perjury that any information he or she has supplied is true and that any information relevant to his or her financial status has not been concealed. In addition, a person claiming indigency must execute a waiver authorizing the court's chief probation officer to obtain wage and tax information from the Department of Revenue and information from the Registry of Motor Vehicles and Department of Transitional Assistance that the court may find useful in verifying claims of indigency.

We also observed that Chapter 54 of the Acts of 2005 requires reassessment of indigency status 60 days after the appointment of counsel and biennially thereafter. Chapter 54 also provides that a person provided counsel shall be assessed a counsel fee of \$150, which the court may waive only upon determining that the person is unable to pay that amount within 180 days.

CPCS noted that because these changes were made in 2004 and 2005, it is too soon to measure their effectiveness.

**d. CPCS Was Overbilled for Investigations by a Private Investigator Who Was Paid \$374,108**

Our prior audit report disclosed that a private investigator billed CPCS \$651,319 during a three-year period and, after paying the private investigator \$374,108, CPCS initiated an audit that ultimately lead to the conviction of the investigator. The report noted that inadequate controls may have contributed to these overbillings, and that CPCS did not notify the Office of the State Auditor (OSA) as required by Chapter 647 of the Acts of 1989.

The report also indicated that "court costs" such as private investigator costs must first be approved by the court and the related bills and invoices sent to the clerk, who subsequently sends the court order and related invoices to the Office of the Chief Administrative Justice for payment in accordance with Chapter 261, Sections 27A to 27G, of the General Laws.

Our prior report noted that, to address historical weaknesses in the payment of court costs, CPCS required such vendors to sign and attest on the payment document that they have provided the services billed for. Also, in 1997, Section 9i was added to Chapter 211D, requiring CPCS to establish qualifications and payment rates for expert witnesses, investigators, and social service providers.

Our prior audit report recommended that CPCS establish and monitor internal controls over the payment of court costs; comply with Chapter 647 by reporting variances, shortages, and thefts; and lobby to amend Section 27G of Chapter 261 of the General Laws, which requires the Chief Administrative Justice, rather than CPCS, to pay court costs.

During our follow-up review, we determined that CPCS has published a manual, *CPCS Qualifications and Rates for Investigators, Social Services Providers and Expert Witnesses*, that establishes standards and fees for these vendors. CPCS requires that each invoice be accompanied by the court's approved motion and certification by the defendant's attorney that the services have been provided. Also, the Chief Counsel must approve all bills of over \$5,000. Questionable bills may be sent to the A&O Department for further review and investigation. The CPCS Internal Control Manual has been updated to reflect these practices, and the requirement to report losses, variances, and thefts to the OSA has been added.

Lastly, CPCS has advocated for an amendment to Chapter 261, Section 27G, of the General Laws, which currently requires the Chief Administrative Justice, rather than CPCS, to pay court costs. CPCS believes it will ultimately be successful in changing the statute. As a practical matter, annual appropriations bills give CPCS the funds and authority to pay court costs, subject to court approval.

#### **e. Supplemental Funding Needed for Legal Services**

Our prior audit report disclosed that CPCS typically requests supplemental appropriations to pay for assigned counsel and related court costs. The report cited a lack of interim billing by attorneys and late submission of Notice of Assignment of Counsel forms (NACs) by the courts as obstacles faced by CPCS in developing assigned counsel budgets. We observed that the submission of NAC forms by the court was done by mail and took an average of 15 days to reach CPCS. Also, attorneys typically waited until the end of a case before billing CPCS. We recommended that CPCS require the courts to submit NAC forms in a more timely manner and to implement a billing system whereby invoices would be processed more regularly throughout the year. CPCS responded that it has long advocated that the courts submit NACs electronically, although it has no statutory authority to do so. Also, CPCS believes that the implementation of a new electronic billing system would more easily accommodate interim billing.

During our follow-up review, we found that of the 132 courts that assign counsel, only four courts are sending NACs electronically to CPCS, whereas the other 128 courts are still mailing the NAC forms. As a result, the timeliness of NAC submissions has not greatly improved.

In July 2002, CPCS implemented a Web-based billing system called E-Bill, and in fiscal year 2004, CPCS changed its policy to allow interim billing on all assigned cases. Attorneys may now bill quarterly or within 30 days after a case is closed. CPCS imposes a 10% penalty if the attorney submits a bill after the 30-day period.

### ***Auditee's Response***

*As of May 2007, 63 courts are sending NACS electronically to CPCS. When fully implemented, the majority of NACS will be sent to CPCS electronically. This automation should result in a more timely, accurate, efficient, and cost-effective method of obtaining attorney assignment information.*

## **2. CPCS NEEDS TO IMPROVE THE AUDITING OF ATTORNEY AND VENDOR BILLS**

Chapter 211D, Section 12, of the General Laws requires CPCS to establish an Audit and Oversight Department (A&O) to monitor billing and private attorney compensation. The reviews conducted by A&O are in addition to the prepayment checks performed by CPCS's billing office, the Private Attorney Payment Department (PAPD). PAPD utilizes the E-Bill system and Pick software, which conducts automated checks and provides PAPD with information to conduct manual checks. Some of the routine audit checks include:

- Proper CPCS certification for the case assigned to ensure competency in that area.
- Existence of malpractice insurance and valid Board of Bar Overseers Registration.
- Caseload limit check, based on weighted average of case complexity.
- Annual billable limit check (within 1,800 hours).
- Edits for valid PIN numbers, daily court waiting time (one hour), and daily billing limits (10-hours).
- Check for whether billing occurred after case closed (not allowed).
- Flagging of all bills over \$5,000 for review by CPCS Chief Counsel.

In fiscal year 2005, A&O, which is staffed by two attorneys and an accountant, performed six major types of audits, four types of audits of attorney billings and two types of audits of court costs. A&O's description of each type of audit and any results are described below:

1. Random E-Bill Audit

CPCS uses Pick software to extract every 1,000th bill from the E-Bill system on a prepayment basis. The reviews verify that attorneys are maintaining client time records, advise the attorney regarding compliance with CPCS policy, establish CPCS's oversight and presence, and identify candidates for further audit.

For fiscal year 2005, CPCS selected a sample of 232 bills totaling \$86,283 out of the 305,000 invoices submitted during our audit period for review on a prepayment basis. CPCS asked the attorneys to send documentation to support the amounts invoiced. In eight of these bills totaling \$4,027, CPCS reduced the charges by \$860. In 40 cases, attorneys either sent no documentation (34) or inadequate documentation (6), so CPCS withheld the entire amounts billed, which totaled \$13,045. CPCS requested that two bills totaling \$185 be excluded from our analysis because they either were under review by the Private Attorney Payment Department (PAPD) or required a full audit. Therefore, the redefined sample had 230 items totaling \$86,098 (\$86,283 - \$185) with 48 exceptions totaling \$13,905 (\$13,045 plus \$860) and a potential error rate of 16% ( $\$13,905 \div \$86,098$ ). CPCS indicated that the attorneys may not have responded because the bills are relatively small; however, since the average billing of the 34 non-respondents was \$282, versus \$374 for the 230 items in the sample, the difference is probably not significant enough to explain the failure of the attorneys to respond. The bills associated with the non- or partially-responding attorneys were not paid and were placed in a pending file. We recommended that CPCS continue to seek the required documentation from the non- or partially-responding attorneys so that it can better judge the sample and population error rates. (See Auditee's Response for Audit Result No. 2, which discusses follow-up action taken by CPCS.)

2. Fiscal Year Complex and Expensive Open Cases

The most expensive assignments of each case type are reviewed annually to identify cases worthy of inquiry. In fiscal year 2005, CPCS selected 33 assignments for review and requested each

attorney to submit the following: (1) a brief summary and status of the case; (2) a description of services performed, time records, and an estimate of the additional time to be spent on the case; and (3) the names of opposing counsel and parties and copies of the dockets.

CPCS found no problems with 32 billings, but held one bill for further study.

### 3. Attorney Three-Year Review, Open Cases

Three-year audits are utilized on a limited basis when there appears to be an overbilling on assigned cases. Attorneys billing large number of hours when compared to the number and types of cases handled are reviewed to identify questionable or unusual billing practices. Analysis is not limited to the number of hours billed in individual cases, but rather is considered in light of the number of assignments taken, the number of assignments billed, the billing categories utilized, and the types of cases handled. A&O selected three years of bills totaling \$1,209,644 submitted by 17 attorneys for review. CPCS showed that there were discrepancies in the billings of 10 attorneys. CPCS did not fully quantify the dollar value of its findings, but rather reported the results as follows: six attorneys either had to make refunds of payments or have outstanding billings cancelled, one attorney was formally reprimanded, one attorney was awaiting an administrative hearing, one attorney was targeted for further review in fiscal year 2006, and one attorney's geographic assignments were restricted to reduce his billing for travel costs.

### 4. Referred by Chief Counsel

In fiscal year 2005, the CPCS Chief Counsel reviewed 359 bills totaling \$3,114,145 with charges of \$5,000 or more. The Chief Counsel did not report his findings on each bill reviewed, but rather indicated that aggregate payments were reduced by \$44,000. Also, one case was referred to the Attorney General's Office, and one case was referred to A&O for further review. A&O classified the bill as a problem but did not quantify the questioned costs.

### 5. Court Cost Vendor Random Audits

Court costs include charges for investigators, forensic experts, psychiatrists, physicians, and experts in other fields. The audit plan utilizes systematic sampling (every N<sup>th</sup> voucher), and vouchers are reviewed prior to processing by the payment division to confirm that the required information appears on the voucher. Bills are compared to the work performed for



reasonableness. In fiscal year 2005, five bills were reviewed, including one bill referred by the Chief Counsel. Only one of the bills was judged as satisfactory. In three other cases, payments were either reduced or totally denied, with one vendor being suspended from the program. Lastly, another bill was placed in the pending file until further documentation is forthcoming.

#### 6. Court Costs Vendor Fiscal Year Review

A&O reviews vendors over an extended period of time (typically a year) to determine whether billings appear unusually large or exceptional for a particular service type. Staff reviewed 14 cases and in one case reduced the payment to the vendor.

CPCS did not quantify the unallowable/disallowable costs for each type of audit. For example, for the “Random E-Bill Audit” of attorney fees, A&O did not tabulate the total reduced and disallowed amounts for the sample of 232 bills. We tabulated a disallowed amount of \$13,905 based on data provided by CPCS.

For the five audit types other than random E-Bill Audits, CPCS could not provide us with the dollar values examined or questioned by audit type. Rather, CPCS could only estimate that, of the 64 invoices examined totaling approximately \$2,159,000, there were 17 invoices contained deficiencies totaling \$125,000. Based on CPCS’ estimates, there was a 6% error rate in the dollar value of invoices examined, and a 27% error rate in invoices examined.

CPCS did not project the results of its samples onto the entire population of 305,000 invoices because it believes the samples are either systematic (every N<sup>th</sup> item) or judgmental, (expensive, complex, or “problem” cases or attorneys), and are therefore not compatible with statistical analysis. In a written memorandum, CPCS explained its audit strategy, as follows:

*We believe, however, that it is inappropriate and misleading to compute and/or extrapolate an “Error Rate” based upon the results of the A&O Department’s fiscal year 2005 audits and reviews. Objectives must be identified before a sampling plan can be designed. As we have noted, the objectives of the Department’s audits and reviews is to ensure that “...the services billed were provided to the client, that the bills submitted are reasonable in terms of both dollars charged and hours billed and that the attorney/vendor maintains his or her billing records and files in compliance with CPCS billing and record-keeping requirements.” See Assigned Counsel Manual Chapter 7. With these clearly defined objectives in mind, the audit processes contained in the internal control manual were developed, and they provide the most efficient and effective method to achieving our objectives.*

*The bills and cases selected for review were never intended to be representative of the population and our audit testing was never intended to express an opinion regarding the population from which bills were selected for review. Therefore, sampling techniques based upon the mathematical theory of probability were not used. The reviews are not . . . based upon a preexisting and finite population of bills received.*

*The results of the "Random E-Bill Reviews" do not constitute a representative sample of the 305,000 bill population for statistical analysis purposes. Since these results are not based upon the mathematical theory of probability, it is inappropriate to compute or extrapolate an error rate. . . .*

Examining the results of CPCS's samples clearly indicates a potential for significant discrepancies in the bills that attorneys and other court-related service providers submitted to CPCS for payment.

### ***Recommendation***

CPCS needs to address the potential questioned costs in the attorney payment system. To accomplish this, CPCS must first quantify the results of its various audits and also require more timely replies from attorneys. Although CPCS's auditing efforts are commendable given its staff size, it must make efforts to address the potential errors in the attorney billing population. Possible solutions may include having a professional statistician implement sampling plans to formally identify the magnitude of the billing problems. If CPCS cannot establish that the potential error rate is significantly smaller than the sample indicates, it should consider paying attorneys a set fee for each type of case, rather than the present hourly billing system.

Further based on the results of CPCS audits and the fact that it is responsible for the expenditure of approximately \$150 million annually in public counsel services, CPCS should strengthen its oversight of billing by developing a more comprehensive audit plan and allocating additional resources as necessary.

### ***Auditee's Response***

*In keeping with the auditor's recommendation, CPCS adopted new policies, which mandate timely compliance with the Department's Random E-Bill Audits. An attorney's response is now due within thirty days and any attorney who fails to timely reply will be prevented from submitting any further bills to CPCS. As a result of this policy change, 32 of the attorneys who had failed to reply previously submitted written replies and supporting documentation to the Random E-bill inquiry. Although belated, 29 of the 32 attorneys provided a satisfactory response to the audit and produced the documents requested. The remaining three bills were reduced.*

*Current data for the audit period shows that the Department reviewed 232 computer selected attorney bills. One bill (\$101.25) was under review by the Private Attorney Payment Department and another one (\$84.38) was sent for full audit. Of the 230 bills remaining, the total dollars billed was \$86,098 and the total paid was \$83,729.34. The total of all reductions was \$2,368.49 or 2.74%. Reductions were taken for three (3) reasons. First, reductions made by the Audit and Oversight Department for failure to provide adequate documentation or comply with the CPCS Assigned Counsel Manual equaled \$1,266.60 (1.47%). Second, 3 bills totaling \$472.50 (0.55%) remain unpaid as a result of the attorney's failure to reply. These attorneys are currently ineligible to submit further bills on any of their cases. Third, the CPCS billing system made reductions to the 230 computer selected bills in the amount of \$629.39 (0.73%).*

***Auditor's Reply***

We commend CPCS for following up on the problem billings and quantifying the results of its testing. We will examine the new supporting documentation received by CPCS as noted in its response during our next scheduled audit of CPCS.

## APPENDICES

### **CPCS Appropriations History and Private Attorney Compensation Rates**

In its fiscal year 2005 report to the Legislature, CPCS noted that private attorney compensation had not been increased over a six-year period. The hourly compensation rates under which assigned counsel were paid remained virtually unchanged from 1986 to 2005. Compensation for assigned counsel was one of the lowest in the country and resulted in increasing numbers of attorneys declining to accept appointments in favor of more lucrative private legal work. The crisis reached its apex in 2004 and 2005, when there was an inadequate number of private attorneys available to accept court appointments due to insufficient rates of compensation.

In August 2004, the Massachusetts Legislature responded to the crisis with the passage of Chapter 253 of the Acts of 2004 (An Act Relative to Private Attorneys Providing Public Counsel Services), which established a commission to study the provision of legal counsel to indigents. In April 2005, the commission released its report to the Legislature, which subsequently passed Chapter 54 of the Acts of 2005 (An Act Providing Counsel to Indigent Persons). This Act increased attorney compensation further and provided a \$16.7 million supplemental appropriation to CPCS's fiscal year 2005 budget for private attorney compensation (see Appendix II for hourly compensation rates).

Funding for CPCS, including compensation for private attorneys and vendors, is provided through the state budget as part of funding for the judiciary. Appendix I shows CPCS's funding history for fiscal years 1998 through 2007, and Appendix II identifies private lawyer compensation rates for fiscal years 2005 and 2006.

### CPCS Appropriations History

CPCS Appropriations by Line Item	0321-1500/ 0321-1505	0321-1518	0321-1513	Total Staff and Operations	0321-1510	0321-1512	0321-1520	0321-1521	Total	Statute
Fiscal Year 1998										
Original	\$14,568,206	-	-	\$14,568,206	\$35,924,000	\$17,021,000	\$4,560,000	-	\$72,073,206	Chapter 43 - 1997
Expended Supplements	-	-	-	-	7,905,059	3,716,911	1,327,431	-	12,949,401	Chapter 319 - 1998
	<u>\$14,568,206</u>			<u>\$14,568,206</u>	<u>\$43,829,059</u>	<u>\$20,737,911</u>	<u>\$5,887,431</u>		<u>\$85,022,607</u>	
Fiscal Year 1999										
Original	\$14,957,026	-	-	\$14,957,026	\$43,500,000	\$21,000,000	\$4,695,694	-	\$84,152,720	Chapter 194 - 1998
Expended Supplements	-	-	-	-	1,048,042	411,612	1,151,696	-	2,611,350	Chapter 68 - 1999
	<u>\$14,957,026</u>			<u>\$14,957,026</u>	<u>\$44,548,042</u>	<u>\$21,411,612</u>	<u>\$5,847,390</u>		<u>\$86,764,070</u>	
Fiscal Year 2000										
Original	\$16,171,067	-	-	\$16,171,067	\$43,500,000	\$21,000,000	\$4,695,694	-	\$85,366,761	Chapter 127 - 1999
Expended Supplements	231,735	-	-	231,735	-	-	-	-	231,735	Chapter 111 - 2000
Expended Supplements	-	-	-	-	1,582,000	1,556,000	1,865,000	-	5,003,000	Chapter 236 - 2000
	<u>\$16,402,802</u>			<u>\$16,402,802</u>	<u>\$45,082,000</u>	<u>\$22,556,000</u>	<u>\$6,560,694</u>		<u>\$90,601,496</u>	
Fiscal Year 2001										
Original	\$16,464,294	-	-	\$16,464,294	\$43,500,000	\$21,000,000	\$5,186,168	-	\$86,150,462	Chapter 159 - 2000
PAC From 2000	146,380	-	-	146,380	-	-	-	-	146,380	-
Expended Supplements	744,433	-	-	744,433	463,000	2,141,000	2,201,000	-	5,549,433	Chapter 24 - 2001
	<u>\$17,355,107</u>			<u>\$17,355,107</u>	<u>\$43,963,000</u>	<u>\$23,141,000</u>	<u>\$7,387,168</u>		<u>\$91,846,275</u>	
Fiscal Year 2002										
Original	\$16,792,460	-	-	\$16,792,460	\$43,500,000	\$21,000,000	\$5,168,168	-	\$86,460,628	Chapter 177 - 2001
Training PAC From 2001	225,000	-	-	225,000	-	-	-	-	225,000	-
Expended Supplements	-	-	-	-	1,699,909	2,924,927	2,754,158	-	7,378,994	Chapter 118 - 2002
	<u>\$17,017,460</u>			<u>\$17,017,460</u>	<u>\$45,199,909</u>	<u>\$23,924,927</u>	<u>\$7,922,326</u>		<u>\$94,064,622</u>	
Fiscal Year 2003										
Original	\$16,015,989	-	-	\$16,015,989	\$41,184,881	\$19,882,356	\$4,382,420	-	\$81,465,646	Chapter 184 - 2002
Expended Supplements	-	-	-	-	6,086,441	5,758,481	2,203,053	-	14,047,975	Chapter 55 - 2003
	<u>\$16,015,989</u>			<u>\$16,015,989</u>	<u>\$47,271,322</u>	<u>\$25,640,837</u>	<u>\$6,585,473</u>		<u>\$95,513,621</u>	
Fiscal Year 2004										
Original	\$15,225,009	\$250,000	-	\$15,475,009	\$59,381,494	-	\$6,014,020	-	\$80,870,523	Chapter 26 - 2003
PAC From 2003	-	-	-	-	1,022,951	-	414,947	-	1,437,898	-
Expended Supplemental	-	-	-	-	16,000,000	-	-	-	16,000,000	Chapter 65 - 2004
	<u>\$15,225,009</u>	<u>\$250,000</u>		<u>\$15,475,009</u>	<u>\$76,404,445</u>		<u>\$6,428,967</u>		<u>\$98,308,421</u>	

### CPCS Appropriations History

CPCS Appropriations by Line Item	0321-1500/ 0321-1505	0321-1518	0321-1513	Total Staff and Operations	0321-1510	0321-1512	0321-1520	0321-1521	Total	Statute
Fiscal Year 2005										
Original	\$16,676,269	-	-	\$16,676,269	\$67,404,445	-	\$6,428,967	-	\$90,509,681	Chapter 149 - 2004
PAC from 2004	-	-	-	-	-	-	-	\$16,791,600	16,791,600	Chapter 352 - 2004
Retained Revenues	-	\$750,000	-	-	-	-	-	-	750,000	-
Supplemental Appropriation	-	-	-	750,000	10,950,630	-	1,031,546	-	11,982,176	Chapter 6 - 2005
	<u>\$16,676,269</u>	<u>\$750,000</u>		<u>\$17,426,269</u>	<u>\$78,355,075</u>		<u>\$7,460,513</u>	<u>\$16,791,600</u>	<u>\$120,033,457</u>	
Fiscal Year 2006										
Original	\$16,933,131	-	-	\$16,933,131	\$95,146,675	-	\$7,460,513	-	\$119,540,319	Chapter 45 - 2005
PAC from 2005	-	-	-	-	-	-	1,000,000	-	1,000,000	Chapter 106 - 2005
Retained Revenues	-	\$750,000	-	750,000	-	-	-	-	750,000	-
	<u>\$16,933,131</u>	<u>\$750,000</u>		<u>\$17,683,131</u>	<u>\$95,146,675</u>		<u>\$8,460,513</u>		<u>\$121,290,319</u>	
Fiscal Year 2007										
Original	\$17,916,411	-	\$3,571,630	\$21,488,041	\$119,763,305	-	\$8,456,513	-	\$149,707,859	Chapter 139 - 2006
Retained Revenues	-	\$750,000	-	750,000	-	-	-	-	750,000	-
	<u>\$17,916,411</u>	<u>\$750,000</u>	<u>\$3,571,630</u>	<u>\$22,238,041</u>	<u>\$119,763,305</u>		<u>\$8,456,513</u>		<u>\$150,457,859</u>	

Sources: CPCS and Commonwealth of Massachusetts Budget Data

LINE ITEM

- 0321 - 1500 For operation of the Committee for Public Counsel Services
- 0321 - 1505 For additional costs of the Public Defender Division
- 0321 - 1518 Authority of Chief Counsel/CPCS to expend revenues from fees charged to indigent clients
- 0321 - 1513 For the expansion of the Public Defender Division
- 0321 - 1510 For compensation paid to private counsel assigned to criminal and civil cases
- 0321 - 1512 For compensation paid to private counsel assigned to family law and mental health cases
- 0321 - 1520 For fees and costs of behalf of indigents
- 0321 - 1521 For the purposes of hourly rate increases to private criminal and private non-criminal counsel

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**APPENDIX II****CPCS Private Lawyer Compensation Rates**

Case Type	Fiscal Year 2005	Fiscal Year 2006
Murder	\$61.50/hr	\$100/hr
Superior Court	\$46.50/hr	\$60/hr
District Court	\$37.50/hr	\$50/hr
CAFL Cases	\$46.50/hr	\$50/hr
CHINS Cases	\$46.50/hr	\$50/hr

Source: CPCS