May 22, 1995

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENT OF ADMINISTRATION
ALASKA PUBLIC DEFENDER AGENCY
OFFICE OF PUBLIC ADVOCACY
ELIGIBILITY ISSUES AND
OTHER PROGRAM ASPECTS

May 22, 1995

Audit Control Number
02-4507-95

This audit discusses the issues surrounding the appointment of public counsel from the Alaska Public Defender Agency and Office of Public Advocacy. Specifically, the report points out deficiencies in the eligibility screening procedures, identifies procedural weaknesses in the public counsel appointment process, and makes recommendations to improve screening procedures. The report also discusses the collection of "*Criminal Rule 39*" fees from clients appointed public counsel.

The audit was conducted in accordance with generally accepted government auditing standards. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology section of this report.

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Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, an audit was conducted to primarily review the eligibility standards/criteria and eligibility screening procedures for Public Defender Agency and Office of Public Advocacy services in respect to criminal proceedings. The audit also reviewed other public defender/public advocacy program issues including the collection of client (user) fees and the role of the Alaska Court System (ACS) in the appointment of clients to the agencies and its impact on agency caseloads.

<u>Objectives</u>

Our primary objectives were:

To obtain an understanding of the roles of the public defender and public advocacy agencies.

To obtain an understanding of the eligibility screening procedures.

To determine whether only indigent citizens are receiving public defender and public advocate services.

Other audit objectives were:

To review the role of ACS in the appointment of clients to the public defender and public advocate agencies.

To review the process of Criminal Rule 39[1] collection of fees for client services.

To search for and review evidence indicating client screening, client agreement to pay a portion of costs, and court imposition of cost judgments.

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[1] As discussed further under the Organization and Function section of this report, Alaska Rules of Court Criminal Rule No. 39 was amended effective July 1, 1992 to require that upon conviction of an offense by defendants represented by public counsel the court may enter judgment against the defendant for recovery of costs of appointed counsel.

Scope

We focused our review primarily on ACS as the court is responsible for the eligibility screening and referral of defendants to the public defender and public advocate offices. We reviewed criminal court cases that have been resolved within the past year including witnessing recent defendant arraignments. Our review also included following through on collections of Criminal Rule 39 judgments on the older cases we reviewed.

Scope Limitation

Our ability to efficiently and thoroughly review the eligibility and screening procedures and analyze the resultant impact on the public defender and public advocate caseloads was hindered in two respects and accordingly our scope was limited beyond our control.

Our first limitation resulted from the Public Defender Agency and Office of Public Advocacy invoking confidential privilege in regard to the public counsel client files. As such, we were not able to verify information disclosed by defendants to the court when requesting public counsel with information that may be contained in the client files, nor were we able to verify and authenticate caseload statistics reported by the agencies. Secondly, and most importantly, ACS denied access to defendant financial declarations made to the court. The defendant financial declarations which are primarily used in the Fairbanks and Anchorage courts, and to a lesser degree in other jurisdictions, contain relevant income, expense and asset data used by ACS to determine defendant eligibility for public defender and public advocate services. Without this information it was impossible for us to determine what income and assets were disclosed to the court for their consideration. This also restricted our ability to verify those declarations to ascertain the thoroughness of the eligibility screening process.

Methodology

Our evaluation included:

- Review of applicable statutes and regulations.
- Review of public court case files.
- Attendance at urban and rural arraignment hearings to observe the judicial public counsel screening and appointment process.
- Discussions with judges, magistrates, district attorneys, assistant district attorneys, public defenders and public advocates.
- Discussions with Department of Law Collections Unit personnel and review of client fee collection procedures.
- Discussions with Anchorage and Fairbanks Pre-Trial Services screening personnel and review of their procedures.
- Review of various publications and relevant reports.

ORGANIZATION AND FUNCTION

Office of Public Advocacy

In 1981, the public guardianship program was created within the Alaska Court System (ACS). The Office of Public Advocacy (OPA) was established in 1984 (AS 44.21.400) and organized within the executive branch under the Department of Administration. At that time, certain responsibilities were transferred from ACS to the executive branch.

OPA has three primary statutory responsibilities:

1. Provide guardian ad litem representation to abused and neglected children and is therefore appointed in most Child in Need of Aid actions filed in the Superior Court and in child custody disputes. The guardian ad litem is an attorney or other professional who represents the best interests of the child in court.

2. Represent indigent criminal defendants when the Public Defender Agency (PDA) has a conflict of interest ("conflict out" cases).[2]

3. Act as public guardian and conservator for citizens who suffer from disabilities and whom the court has decided are unable to manage their own affairs.

OPA provides representation when appointed by the Superior Court or when the PDA "conflicts out" indigent criminal defendants. Accordingly, OPA is characterized as a responsive agency and cannot choose its cases or limit its caseload.

As of December 1994 OPA had thirty-two staff members with thirty-one located in the Anchorage and Fairbanks population centers and one employee located in Juneau. For OPA clients located outside the major population centers, OPA has engaged seventy professional service contractors to provide services in those other Superior Court locations. In Fiscal Year 1994, OPA reported having serviced approximately 10,000 cases.

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[2] [2] Most indigent criminal defendants are referred to PDA. When that agency already represents a party to the case such as a co-defendant, witness or informant, PDA "conflicts out" as they consider themselves to have an ethical conflict and the defendant is referred to OPA for representation.

OPA's total expenditures and reported caseloads for the past seven years have been:

Fiscal Year	Expenditures (in 000's) (unaudited)	Number of cases (unaudited)
1988	$ 3,668.4	6,438
1989	4,139.5	7,164
1990	5,003.4	8,061
1991	5,588.0	9,395
1992	6,281.3	11,170
1993	6,803.5	9,916
1994	7,021.9	10,099

Source: Expenditures per State of Alaska, Division of Legislative Finance and are unaudited. Caseload statistics per Office of Public Advocacy and are unaudited.

Public Defender Agency

The need for the Public Defender Agency (PDA) was a consequence of the United States Supreme Court case *Gideon v. Wainwright* (1963) which guaranteed counsel for indigent persons in certain state court criminal proceedings.

Created in 1969, PDA was initially organized under the Office of the Governor. By Executive Order No. 42 in 1980, the governor transferred the PDA from the governor's office to the Department of Administration. The public defender is appointed by the governor from nominations made by the judicial council and is subject to a majority confirmation by the legislature in joint session. The public defender serves a term of four years and may be reappointed by the governor with majority confirmation by the legislature.

Like OPA, the PDA caseload is generally dictated by ACS.[3] The court makes the determination of indigency and refers criminal defendants to PDA. The PDA handles a variety of cases which include:

- Criminal cases.
- Representing parents whose children have been taken into custody by the State.
- Some Child in Need of Aid cases.
- Juvenile delinquency cases.
- People placed in mental institutions or otherwise confined against their will.
- Fathers charged with contempt such as failure to pay child support.
- People who violate parole conditions and probation revocations.
- Convicts seeking post-conviction relief.
- Felony and misdemeanor conviction appeals.
- Cases in which the Office of Public Advocacy conflicts out.

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[3] [3] In this context we are referring to the fact that the court directs criminal defendants to OPA and/or PDA for representation and that most of those two agencies caseloads are not because of "walk-in" clientele. We realize there are other variables such as social, economic and legal factors that impact caseload also.

In Fiscal Year 1994, PDA reported 17,582 cases. The PDA staff consisted of 57 attorneys, 20 secretaries, and 10 investigators. Unlike OPA, PDA does not engage contract attorneys.

PDA's total expenditures and reported caseloads for the past seven years have been:

Fiscal Year	Expenditures (in 000's) (unaudited)	Number of cases (unaudited)
1988	$ 6,138.0	12,524
1989	6,436.8	13,272
1990	6,696.4	14,901
1991	7,170.1	15,030
1992	7,759.1	17,094
1993	7,486.5	16,137
1994	7,845.9	17,582

Source: Expenditures per State of Alaska, Division of Legislative Finance and are unaudited. Caseload statistics per Public Defender Agency budget submissions and annual reports and are unaudited.

The Alaska Court System and Pre-Trial Services

The Alaska Court System (ACS) is responsible for directing defendant/clients to PDA and OPA. ACS determines whether a criminal defendant is indigent and therefore eligible for public counsel basically by one of three ways:

Through a Pre-Trial Services office (PTS) in the Anchorage court which basically interviews new, male felon arrests. All others defendants are reviewed by the judge for public counsel eligibility;

Through the PTS office in the Fairbanks court which interviews most defendants; or,

Through determinations made by the judge in other court jurisdictions.

The services of PTS function differently between Anchorage and Fairbanks, however, both have the responsibility to screen the defendant and make a recommendation regarding the appointment of the public defender.

Anchorage PTS consists of a staff of two. Each day, after having received a list of newly arrested felony defendants, staff will visit the Cook Inlet Pretrial facility and conduct indigency determination interviews. PTS staff only interview in-custody felony defendants. During the interview, PTS staff will inquire about, among other items, marital status, date of birth, present and past employers, information on dependents, monthly income and assets. At the conclusion of the interview, PTS staff make the eligibility determination and informs

the defendant whether or not the public defender will be appointed. Misdemeanants, female felony defendants, and those defendants not in custody are screened by the judge during arraignment as to their eligibility for public defender services. Anchorage PTS reported staff had conducted 2,323 and 1,970 interviews during 1993 and 1994, respectively.

Fairbanks PTS similarly consists of a staff of two. Unlike Anchorage PTS, Fairbanks conducts interviews of all potential recipients of public defender services. During arraignment the defendant will indicate to the court whether or not they desire an attorney and cannot afford one. The judge will then refer the defendant to make an appointment with PTS for an interview, or if the defendant is in-custody the court will advise the defendant that PTS will interview him\her at the jail. All determinations of eligibility for public defender services is made by the PTS staff. Unlike the Anchorage court, judges in the Fairbanks court generally make no decisions regarding appointment of the public defender. Fairbanks PTS reported staff had conducted 2,596 and 3,134 interviews during 1993 and 1994 respectively.

Criminal Rule 39

The official rules governing the operation of ACS are found in the *Alaska Rules of Court*. These rules, as adopted by the Supreme Court, provide the framework and guidance for, among other things, rules of civil procedure, rules of evidence, rules of appellate procedure, Alaska Bar rules, administrative rules, and rules governing criminal procedures. The rules of criminal procedure govern the practice and procedure in the superior court in all criminal proceedings and, as applicable, the practice and procedure in all other courts.

Criminal Rule 39, as part of the general provisions of the rules of criminal procedures, addresses the appointment of counsel - specifically, the requirement of the court to advise the defendant of the right to be represented by counsel and procedures governing the appointment of counsel for persons unable to afford an attorney.

In 1990 the Alaska State Legislature amended the public defender statute (AS 18.85.120) which addresses the determination of indigency for appointment of public counsel purposes, and more significantly, upon a person's conviction permitted the court to enter a judgment upon that person for whom public counsel is appointed to pay for the cost of representation and court costs.

In response to the change in statute the Supreme Court on July 1, 1992, after serious discussion of the proposal issued Supreme Court Order 1088 amending Criminal Rule 39 to provide for the entry of judgment for the costs of appointed counsel - only upon conviction. The fee schedule ranges between $200 and $5,000 depending on the nature of the offense and type of legal action taken. Generally, the judgments are collected via garnished permanent fund dividends.

ACS is responsible for including, as part of sentencing, the entry of judgment for costs of appointed counsel and forwarding the judgment to the Department of Law Collections Unit. As of March 29, 1995 the Department of Law reported having processed 14,746 Criminal Rule 39 judgments totaling $3.4 million, of which $1.1 million had been recovered.

At the present time the Alaska Supreme Court is considering an appeal to the Criminal Rule 39 cost recovery requirements. The issue is a divisive one within ACS and the legal community. A divided Supreme Court issued the 1992 order adopting the Criminal Rule 39 amendments with two justices dissenting on the adoption. In his dissent, the Chief Justice stated, in part:

> *I think it can be safely predicted that these amendments will have a chilling effect on an indigent defendant's obtaining the services of appointed counsel as well as on an indigent defendant's decision whether or not to seek review or to appeal.*

In May 1993 a District Court Judge, Fourth Judicial District, declared Criminal Rule 39 unconstitutional. The Judge held that the rule violates (1) an indigent defendant's right to jury trial under the Alaska Constitution, (2) the defendant's equal protection rights under the federal and state constitutions, and (3) the defendant's right to counsel under the federal and state constitutions. The following month a Superior Court Judge, Fourth Judicial District also declared Criminal Rule 39 to be unconstitutional for the reasons set forth by the District Court. At the present the Supreme Court is considering the State's appeal.

REPORT CONCLUSIONS

The Public Defender Agency (PDA) and, to a lesser degree, the Office of Public Advocacy (OPA) provides legal defense services to indigent persons. Representation is constitutionally guaranteed to individuals who are charged with crimes and face a potential sentence of imprisonment. Additionally, since the creation of PDA and OPA, the legislature and courts have extended the right to representation in other cases.

Public counsel caseloads reportedly continue to increase. The PDA reports annual caseloads growing every year since 1988 (with the exception of a decline in 1993).

While it is speculative to predict caseload size from year to year, all indications are that PDA caseload will continue to grow, particularly with the passage of new crime bills at the state and federal levels and as crime remains a priority with the public.

Because representation is in most cases guaranteed there are only limited steps that can be taken to control caseload. While the guarantee to basic representation cannot be changed, steps can be taken to control the number of cases to which the guarantee applies (a legislative prerogative) and, similarly, steps can be taken to adequately screen criminal defendants for eligibility before referral to PDA (an administrative remedy).

Despite our scope constraints of being denied access to documentation within the court system and PDA and OPA offices, we have determined that the eligibility screening process as employed by the Alaska Court System (ACS) for public defender services severely lacks in scope and depth. Based on our court room observations, file review, and discussions with judges, magistrates, district attorneys, and pre-trial services coordinators it is apparent to us that the eligibility screening process for criminal defendants is not standardized, is not uniformly applied, varies widely between judicial districts and even within a district, and has resulted in the appointment of public defenders to defendants who clearly had resources to retain their own counsel.

There are no written guidelines or definitions of indigency which are used by the court to determine eligibility. The effort to determine indigency is hampered by: (1) the court not verifying income or expenses claimed by defendants, (2) the court rarely taking into consideration employment potential, and (3) the court's concern for keeping the "system" moving without any impediment or delays caused by a defendant searching for private counsel or defending themselves (Pro se). Despite our inability to review defendant financial declarations made to the court and client files at PDA and OPA, during our review we did note instances of an indigency determination process gone awry. For example:

We observed the court appointment of a public defender for a person arraigned on

misdemeanor charges in spite of her informing the court that she had $24,000 in savings.

We noted the court appointment of a public defender for a person arraigned on DWI charges despite the fact she disclosed to the court she and her husband had joint annual income of $80,000, monthly expenses of $3,280 and liabilities of $26,950.

The court appointed a public defender for an individual charged with a misdemeanor who declared income of $16,000 and an IRS liability of $10,000, without any verification of the debt.

We were informed of an instance where the court appointed the public defender to an individual and the public defender appealed for a continuance to the court so that his client may return to work on the North Slope.

Additional concerns center around the relationship that should exist between PDA, OPA, and ACS. PDA and OPA have invoked attorney-client privilege over their client files. ACS has denied access to defendant financial disclosures. Contrary to the court's administrative rules,[4] PDA and OPA do not communicate with ACS about the financial matters of the defendant/client. Additionally, ACS does not provide PDA and OPA with the financial disclosures made by the defendant to the court when the court considers eligibility for public counsel. This lack of communication and extremism in keeping what is arguably public information confidential contributes to the already inadequate eligibility screening process and contributes to the lack of accountability for public counsel programs. We believe that better communication between PDA, OPA and ACS on these critical eligibility matters and a more thorough and fair public counsel eligibility screening process would result if ACS and the Department of Administration (which oversees the PDA and OPA programs) were to jointly develop eligibility and indigency standards and criteria which, within limits, can be uniformly applied.

We are of the opinion that eligibility screening procedures need to be formalized and uniformly applied and have addressed that in the Findings and Recommendations section of this report.

We have also identified other areas of the operation of ACS, PDA and OPA that warrant attention which include:

PDA and OPA should begin honoring court administrative rules governing their responsibility to inform the court when clients may no longer be eligible for public paid counsel. (Recommendation No. 3)

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[4] [4] Court Administrative Rule 12 places a requirement upon an attorney appointed to represent an indigent person to inform the court of any changes in the financial status of the client that may render the client ineligible for publicly appointed counsel. (Also see Recommendation No. 3.)

Criminal Rule 39 judgments should be imposed on all defendants - regardless whether or not the defendant is convicted. (Recommendation No. 5)

ACS should adopt standardized documentation between districts regarding eligibility screening and appointment and should use standardized documentation for Criminal Rule 39 judgement processing. (Recommendation Nos. 1 and 6)

ACS should reassess defendant eligibility for public counsel when legal issues subsequent to conviction are raised. (Recommendation No. 4)

The Department of Administration and ACS should request statutory and regulatory amendments to more clearly define indigency for public counsel purposes. (Recommendation No. 2)

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Alaska Court System in partnership with the Department of Administration should develop public counsel eligibility criteria and screening procedures which can be uniformly and consistently applied.

The Public Defender Agency (PDA) and Office of Public Advocacy (OPA) are organized under the executive branch within the Department of Administration. Both agencies are "responsive" in nature. PDA and OPA client caseloads are generally dictated by court orders of appointment generated by the Alaska Court System (ACS). Currently the costs of these agencies are the responsibility of the executive branch which must react to caseload dictates of ACS - totally beyond the control of the executive branch.

As discussed in the prior sections of this report and elaborated in more detail in the following recommendations, ACS bears almost exclusive responsibility for appointment of public counsel. ACS, without regard to PDA and OPA budgetary constraints, appoints public counsel without performing a thorough review of the ability of the defendant to procure private counsel. Based on our limited review we observed the appointment of public counsel in different jurisdictions and witnessed an eligibility screening process that has no standards, criteria, consistency, and in some instances lacking a sense of reality.

We noted the judicial appointment of public counsel had widespread and varying degrees of consideration in the appointment. For example:

In the Anchorage court, qualification for public counsel is automatically presumed if the defendant receives any form of public assistance. The Fairbanks court does not make this automatic presumption.

> One bench automatically appoints public counsel if the defendant states his or her income was less than $20,000.
>
> One judge stated that his presumption is if the defendant wants a lawyer he will get one.
>
> Some courts take into consideration commercial fishing permits held by defendants; others do not.
>
> Some courts do not take into consideration joint income or joint savings when determining eligibility.

> In one instance we noted where the judge did not administer an oath to defendants when questioning them about their resources.

And in most all instances, ACS does not verify the financial information disclosed by the defendant.

The Anchorage and Fairbanks courts have Pre-Trial Services (PTS) officers who are responsible for determining whether a defendant qualifies for public counsel. The Anchorage PTS officers conduct interviews of “new felons” - those recently arrested and still incarcerated pending arraignment. Misdemeanor arrests and felony arrests that have been released on bail or other means are not interviewed. Fairbanks PTS officers interview all defendants requesting public counsel. During arraignment if the defendant indicates the need for public counsel the court will refer the defendant to PTS for an interview. If the defendant is in custody, Pre-Trial Services officers will interview the defendant at the jail.

Generally the information obtained from the interviews is not verified. ACS has not dedicated the necessary resources to investigate, cross check, and verify the financial information of the defendant - information which is relevant in determining a need based upon indigency. There is no verification of employment (or unemployment); there is no verification of assets; no verification of claimed expenses or liabilities such as rent receipts or amounts owed on loans or liens; and no verification of the number of dependents claimed.

Defendants who are not interviewed by a Pre-Trial Services officer are interviewed by the bench. The judge will ask questions about income, savings, sometimes about assets, and sometimes about expenses. As in the case of Pre-Trial Services interviews, there is no effort to verify the defendants statements prior to the appointment of public counsel.

Lacking uniformly applied criteria and at a minimum a responsible process of verifying a defendant's financial declarations made to the court, it is entirely probable that defendants with sufficient resources to procure private counsel are receiving a judicial appointment of the public defender. For example:

> We observed the court appointment of a public defender for a person arraigned on misdemeanor charges in spite of her informing the court that she had $24,000 in savings.

> We noted the court appointment of a public defender for a person arraigned on DWI charges despite the fact she disclosed to the court she and her husband had joint annual income of $80,000, monthly expenses of $3,280 and liabilities of $26,950.

> The court appointed a public defender for an individual charged with a misdemeanor who declared income of $16,000 and an IRS liability of $10,000,

without any verification of the debt.

We were informed by the Pre-Trial Services officers of an instance where the court appointed the public defender to an individual and the public defender appealed for a continuance to the court so that his client may return to work on the North Slope.

Given the inherent weaknesses in the eligibility screening process, we are convinced that individuals who are not indigent are receiving court appointed public counsel. However, because of our limited access to documentation, we could not determine the degree of ineligible appointments of counsel.

We recommend that ACS and the Department of Administration develop and adopt standardized guidelines and criteria - including income, asset, liability, and expense tests and criteria - that can be consistently applied. By doing so and thereby restricting the discretion of individual courts, the abuse of the public counsel programs would be reduced and the programs made more accountable.

Recommendation No. 2

The Department of Administration, working in concert with ACS, should request statute and regulation amendments to define indigency for public counsel purposes.

Alaska does not have a universal or consistent definition of indigency to be used in the appointment of public counsel.

OPA appears to have an obscure definition of indigency which many people including judges, Pre-Trial Services personnel, and OPA personnel themselves were not familiar with.

OPA indigency determination appears to be stated in court Administrative Rule 12 which states in part:

12(c)(2) *For appointments of the office of public advocacy under this rule, other than an appointment required because of a conflict of interest with the public defender agency, a person is indigent if the person's income does not exceed the maximum annual income level established to determine eligibility for representation by the Alaska Legal Services Corporation.*

In our various discussions with ACS and OPA personnel no one could identify what the income levels as established by the Alaska Legal Services Corporation were.

PDA indigency “standards” are based in statute with collateral references made in the court's administrative rules. Administrative Rule 12, in regard to public defender appointments,

states:

> 12(b)(2)*Determination of indigency or financial inability for appointments under [this section] of this rule must be made in accordance with the provisions of Criminal Rule 39.*

Criminal Rule 39(b)(1) states in part:

> *If defendant desires the aid of counsel but claims a financial inability to employ counsel, the court or its designee shall determine whether defendant is an "indigent person",* ***as defined by statute****, by placing defendant under oath and asking about defendant's financial status, or by requiring defendant to complete a signed sworn financial statement.* (emphasis added)

The only statutory references that can be found regarding indigency for public defender purposes is AS 18.85.120, which states:

> *(a) The determination of a person's indigency shall be made by the court in which an action against the person is pending.*
>
> *(b) In determining whether a person is indigent and in determining the extent of the person's inability to pay, the court shall consider such factors as income, property owned, outstanding obligations, and the number and ages of dependents.*

and, AS 18.85.170 (definitions) which states:

> *(4) "indigent person" means a person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing, or shelter and who has not disposed of any assets since the commission of the offense with the intent or for the purpose of establishing eligibility for assistance under this chapter.*

OPA and PDA have different indigency standard criteria. PDA indigency criteria is less clear than that of OPA. Without a clear definition of indigency we find it difficult to understand how ACS, OPA, and PDA ascertain the appropriateness of a defendant's appointment of public counsel.

Accordingly, we recommend that Department of Administration and ACS develop recommendations for statutory and regulatory amendments concerning the definition of indigency for public counsel purposes.

Recommendation No. 3

The Public Defender Agency and Office of Public Advocacy should follow the Alaska Rules of Court Administrative Rule 12 requiring the notification to the court of a change in a client's financial status that would render them ineligible for public counsel services.

As discussed earlier, ACS handles the appointment of public counsel differently throughout the State. However, a general precept applies throughout the entire court system which was created as a tool to be used in the eligibility determination process. The Court System has adopted Administrative Rule 12 *Procedure for Counsel and Guardian Ad Litem Appointments at Public Expense*. The intent of this rule as stated in the Alaska Rules of Court is:

> *The court shall appoint counsel or a guardian ad litem only when the court specifically determines that the appointment is clearly authorized by law or rule, and that the person for whom the appointment is made is financially eligible for an appointment at public expense.*

A critical element of Administrative Rule 12 places a responsibility upon the appointed public counsel to inform the court should their client's financial status change and thereby render the client ineligible for initial, or continued, public counsel representation. Administrative Rule 12(f)(1) *Responsibilities of Appointed Counsel* states:

> *An attorney appointed to represent an indigent person must advise the court if the attorney learns of a change in the person's financial status that would make the person financially ineligible for appointed counsel.*

To further point out the court's intention by this rule and pass onto the defendant the importance of this rule, ACS has developed form CR-205 Request for Appointed Counsel. On this form, which the defendant signs, it is explicitly stated:

> *If my financial situation changes and I do not report this to the court, the law requires my appointed attorney to do so.*

In spite of this critical and important requirement ACS has imposed on publicly appointed counsel, the PDA and OPA offices[5] do not, or refuse to, inform the court of any aspects of their clients financial condition. We take exception to this "policy" of the public counsel agencies.

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[5] [5] The director of the Office of Public Advocacy stated he does not have a philosophical problem with the requirements of Administrative Rule 12. However, as a matter of practice OPA appears not to pursue compliance with the rule.

The public defender has invoked attorney-client privilege over these matters and believes it to be a violation of his ethical responsibilities should he inform the court as required by Administrative Rule 12.

The Alaska Bar Association has recently issued an "Ethics Opinion" discussing this issue. In summary the Bar's opinion states:

> *The Committee has been asked the following question: Does defense counsel in a criminal proceeding have an obligation to reveal client confidences to the court if relevant to the client's eligibility for appointed counsel? The Committee concludes that Alaska Rule of Professional Conduct 3.3 and Administrative Rule 12(f) each impose an independent obligation on defense counsel to inform the court of changes in the client's financial status which may affect the client's continued eligibility to receive legal services at public expense.*

The Bar's opinion states further:

> *Failure to report the change defrauds the state by forcing it to expend limited resources, intended to benefit the truly indigent, on defendants who can bear the cost of their own defense. The lawyer's knowledge of [clients receipt of funds] and failure to report it to the court makes the lawyer an accomplice to the client's fraudulent act.*

We support the Bar's Ethics Opinion. We recommend that the public defender and public advocate establish a process for informing the court of changes in their client's financial status that the court should be made aware of for a possible redetermination of indigency and a redetermination of eligibility for public counsel representation.

Recommendation No. 4

The Alaska Court System (ACS) should impose Criminal Rule 39 fees for all public counsel cases including post conviction relief, sentence modifications, and probation revocation issues. ACS should reassess defendant eligibility for public counsel in instances where legal representation is requested for issues subsequent to conviction.

We were informed by Pre-Trial Services officials and district attorneys that oftentimes, subsequent to a defendant's conviction of a crime, post-conviction release and probation revocation issues may be raised. We were also informed that post-conviction release and probation revocation issues raised by a prior PDA-represented defendant or prosecuting authority generally results in PDA representation of the client again. Oftentimes the court does not review defendant eligibility for public counsel at these subsequent hearings.

We believe Criminal Rule 39 requires the redetermination of indigency and eligibility for public counsel at post conviction relief and probation revocation hearings. As such, an eligibility determination should be conducted by, as appropriate, Pre-Trial Services or the bench. Automatic referral by either the court or the defendant to the public defender is not proper and the public defender should not provide representation in these matters until a judicial eligibility determination and appointment is rendered.

Similarly, Criminal Rule 39 establishes fees for public counsel representation at post conviction relief and probation revocation hearings in amounts, depending on the nature of the crime, between $250 and $750. We have been advised that court imposition of these fees is inconsistent.

We recommend that in issues of post-conviction relief, sentence modifications, and probation revocation that ACS render a judicial appointment of public counsel after an eligibility determination has been made by Pre-Trial Services or the bench. Additionally, we recommend ACS develop procedures to ensure that Criminal Rule 39 judgments are imposed for post conviction relief and probation revocation issues where public counsel has been appointed.

Recommendation No. 5

Alaska Statute 18.85.120, Criminal Rule 39, and Appellate Rule 209 should be amended to permit the court to enter judgment against a defendant represented by public counsel regardless of whether the defendant is convicted.

At present, statute permits the court to enter a judgment against a person to whom public counsel has been appointed only "*upon the person's conviction.*" We believe the legislature and ACS should consider expanding the imposition of judgment to all defendants that are represented by public counsel - whether or not the defendant is convicted.

People who do not qualify for public counsel representation must procure their own attorney services with whatever means they may have. These citizens must pay for all services rendered by the attorney - such as investigation, trial, appeal, post conviction relief, and probation revocation issues - and must pay for these services whether or not the defendant is successful in their action.

A number of individuals within ACS, the Department of Law, and public counsel agencies expressed views that indicated the public counsel system would overall be more fair in comparison to non-public counsel situations if defendants represented by public counsel were required to pay a portion of their attorney services regardless of the outcome. From this perspective, we agree. Also, from a revenue enhancement perspective, we support requiring public counsel defendants having judgment imposed for a portion of their public services, regardless of outcome.

We recommend that statute and court rules be amended to assess judgement against public counsel defendants not on the basis of if convicted, but rather on the mere fact that services were provided.

Recommendation No. 6
The Alaska Court System should establish policies to ensure that at time of sentencing the court takes a formal action on Criminal Rule 39 judgments.

During our review of court case files we noted instances where the judges sentencing report was silent on the imposition of Criminal Rule 39 judgments. Lacking the entering of judgment in the sentencing report or mention of such a judgment in the log notes, the court cannot process the judgment and submit it to the Department of Law Collections Unit for satisfaction.

We recommend ACS establish procedures whereby at time of sentencing the bench is required to take formal action in regard to imposition of Criminal Rule 39 judgments. The sentencing report or log notes should clearly indicate whether or not (versus silence in the record) Criminal Rule 39 judgments have been imposed, reduced, or waived.

Members of the Legislative Budget
and Audit Committee:

We have reviewed the responses from the administrative director of the Alaska Court System (ACS) and the commissioner of the Department of Administration (DOA), and have the following comments.

Regarding the issue of access to defendant financial declarations made to the court, on page one of its response ACS states:

> *I understand that access was denied by a trial court representative based upon an understanding that these records are confidential, but the auditors never requested my staff's assistance to explore whether access could be obtained with our help.*

At the time we requested access to defendant financial declarations we pursued the path recommended to us. At the request of the Anchorage Pre-Trial Services section we contacted a Third Judicial District Superior Court judge. This judge informed us that she would contact the Chief Justice of the Supreme Court to consider our request. Shortly after that she requested that we discuss the issue with the Third Judicial District Superior Court presiding judge. As instructed we met with the presiding judge, another sitting judge, and other representatives of ACS — not merely a trial court "representative" — where the issue of access to the defendant's written financial declarations was discussed and our requested access was not granted. Like many other governmental agencies this office does not have unlimited resources to pursue all issues through all avenues. We took in good faith the decision of the presiding judge and the other ACS participants at that meeting.

On page two of the ACS response it is stated:

> *. . . your preliminary audit minimizes the importance of preventing public access to confidential records.*

ACS obtains defendant personal financial information basically in one of two ways. First, the defendant may be administered an oath and state on the public record during court session what

his or her financial resources are. These statements made in open court are part of the public record to which there is access. The second way a defendant's financial information may be obtained is through the interview process with Pre-Trial Services officers. The information compiled from these interviews are much similar to that obtained from the defendant under oath in open court on public record. It was this information to which we requested access. We continue to believe that the "written record" obtained through interviews is equally public information as is the same information on the "stated record" obtained from defendants in open court. In this respect we do not minimize the importance of confidential records.

Also, beginning on page two of its response, ACS discusses our use of "*undocumented anecdotal information*". The three "Cases" to which ACS provides extensive response are more than a brief story of an interesting incident, but rather factual statements of actual events.

The examples provided in the report illustrate a system that does not ensure the proper appointment of public counsel. In Case No. 1, ACS points out that it was not a state case in question but rather a local one. Regardless of whether any particular case is a state or local issue, the point remains that the system employed by ACS to appoint public counsel did in fact make the appointment. In this instance we are not questioning the appointment of the Public Defender, Office of Public Advocacy, or a local public counsel, but rather the process employed by ACS to ensure that only those truly indigent receive the appointment of public counsel.

On page four of the ACS response there is a brief description of "*Factual errors in the description of court processes*." In our interviews with Anchorage Pre-Trial Services staff we were not informed in regards to their responsibilities for interviewing out-of-custody defendants and parties to other civil issues. However, we were informed that the use of MOTZNIK computer system, APSIN, and commercial credit bureaus to verify defendant statements were extremely rare. We were informed that the use of MOTZNIK to verify real property holdings was performed only in instances where the defendant disclosed any real property holdings. We were informed that there was no verification for existence of real property holdings or other potentially salable assets when such assets were not disclosed.

On page five of the ACS response under Report Conclusions it is stated that our review does not support our conclusions regarding the appointment of public counsel for ineligible defendants based upon the ACS analysis of the cases cited in our report. We believe the specific examples provided, combined with our observations and discussions with various members of the bench do in fact reveal a public counsel appointment system that utilizes inconsistent criteria.

In regard to the defendant financial declarations, on page five of its response ACS asserts that a "*defendant can be charged with the crime of perjury for submitting false information*." In theory this is true; practically speaking this is an ineffective tool to ensure truthfulness in submitting personal financial information to the court. To pursue a perjury claim against a defendant who unjustly obtained the services of public counsel the prosecuting authorities must wait to obtain the evidence of perjury until the current representation is complete, including appeals. Only then can the prosecuting authorities file a motion with the court to obtain the perjured evidence. As a practical matter this does not work as the financial information is old by the time the original case may be resolved. The most effective way to ensure the integrity of the public counsel programs and to ensure that only those truly eligible are receiving the service is verification and screening prior to the court appointment of public counsel.

On page three of its response, DOA stated that the director of the Public Defender Agency offered an arrangement to excise names from client files prior to providing that information to the Division of Legislative Audit. This was an unworkable situation as the purpose of our request was to obtain the necessary information to enable us to determine the appropriateness of the appointment of public counsel for randomly selected individuals. Without the names of those individuals, it would have been impossible for us to make the determination as to eligibility for appointment of public counsel.

Sincerely,

Randy S. Welker, CPA
Legislative Auditor