



# Legislative Post Audit Performance Audit Report Highlights

Highlights

Board of Indigents' Defense Services: A K-GOAL Audit  
Reviewing Payments Made for Indigents' Defense Services

**AUDIT QUESTION 1:** *Have the Board of Indigents' Defense Services and the courts taken appropriate actions to ensure that services are provided to indigent persons only?*

**AUDIT ANSWERS and KEY FINDINGS:**

**Audit Concern**

Recently legislators have expressed several concerns regarding services provided in district courts and possible misuse of resources.

In particular, concerns were expressed about the sufficiency of the Board's financial affidavit, appointed counsel not providing full information to the court, and the recoupment process in general.

**Other Relevant Facts for Question 1**

Created in 1982, the Board of Indigents' Defense Services provides indigent felony defense services as required by the United States Constitution.

District court judges, not the Board, decide whether a defendant will receive court-appointed representation.

The application and approval process is as follows:

- > The defendant completes a financial affidavit form (designed by the Board) to show he or she has limited financial resources. The form asks questions about issues such as employment, bank accounts, and dependents.
- > The judge reviews the financial affidavit and decides whether to appoint counsel for the defendant.

Kansas' system for providing legal services to indigent persons is generally sufficient, but it has a few problems.

- The Board's financial affidavit doesn't fully comply with the Board's Regulations. It is missing three of seven required items and also asks for information about vehicles, which judges aren't supposed to consider.
- Judges may make decisions about appointing legal representation based on incomplete and unverified information.
  - > For 31 of 71 cases we reviewed, the financial affidavit was missing or incomplete.
  - > The information provided by defendants on the financial affidavit is rarely verified. Court officials told us they don't have the time or staff to verify that information.
- In 13 of 104 cases we reviewed, the defendant did not appear to be indigent. We used State income tax returns, payroll information from the Department of Labor, and benefits eligibility information from SRS and KHPA—information that is not normally available to district court judges—to make this assessment.
- Judges have significant discretion in deciding whether to appoint legal counsel, and differ as to which information they rely on to make this determination. Some consider income and employment status more relevant, while others consider assets and the cost of an attorney.

We also identified several other issues regarding district courts' use of the financial affidavit.

- Many of the financial affidavits contained the defendant's social security number. Because the affidavit is a public document, this creates a risk of identity theft.
- Most of the completed financial affidavits were submitted on outdated forms.
- At least one court uses its own different financial affidavit form, which has not been approved by the Board.

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**AUDIT QUESTION 2:** Do the Board of Indigents' Defense Services and the courts have adequate procedures in place to ensure effective recoupment of fees and costs from indigent defendants?

**AUDIT ANSWERS and KEY FINDINGS:**

The Board spends far more to provide legal representation than it receives back from indigent defendants. In recent years, the Board has spent about \$20 million to provide defense services. In contrast, district courts collected less than \$2 million in fiscal year 2010 from convicted defendants to repay the cost of their legal representation.

- Kansas law limits a district court's ability to recoup the cost of legal representation. Defendants who are found not guilty or have their cases dismissed do not have to repay their legal fees.
- Further, judges can reduce or completely waive the repayment of legal representation. In about one-third of the cases we reviewed, the judge waived the cost of legal representation.
- The courts have not always collected the full amount owed by defendants. In the cases we reviewed, district courts collected only about one-fourth of the amount assessed by judges. Several factors make it difficult to collect legal fees from defendants:
  - Legal fees are the last item defendants have to repay (after court costs and restitution).
  - The Board isn't likely to be repaid until the end of the defendant's sentence or later.
  - Convicted felons may not have the resources to repay legal fees.
  - Defendants can petition the court to waive repayment.

We also noted that some district courts' practices for approving payments to private attorneys may violate State law. In two of the seven judicial districts we reviewed, attorneys did not submit their payment voucher at the time of sentencing, as required by law.

**WE RECOMMENDED**

- The Board address issues pertaining to the design and use of its financial affidavit and modifying its administrative regulations.
- The Kansas Supreme Court require districts courts to use the most updated version of the financial affidavit form issued or approved by the Board, and to ensure that claims submitted by private attorneys for reimbursement are submitted in accordance with the law, or propose amendments to the law.

**Agency Response:** In general, the Board and the Office of Judicial Administration agreed with the report's findings and recommendations.

**HOW DO I GET AN AUDIT APPROVED?**

By law, individual legislators, legislative committees, or the Governor may request an audit, but any audit work conducted by the Division must be approved by the Legislative Post Audit Committee, a 10-member committee that oversees the Division's work. Any legislator who would like to request an audit should contact the Division directly at (785) 296-3792.

**Other Relevant Facts for Question 2**

The Board provides legal representation through a system of public defenders and private attorneys. Public defenders are State employees, while the Board enters into contractual agreements with private attorneys for their services.

Kansas law allows judges to order the defendant to repay the State for the cost of the legal representation if the defendant is convicted and found to be financially able to pay that amount.

The courts are responsible for collecting costs assessed by the judge.

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## Overview of the Indigents' Defense Services System

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### *The Board of Indigents' Defense Services Provides Legal Representation to Defendants Charged with Felonies Who Cannot Afford an Attorney*

The Board of Indigents' Defense Services (the Board) was created by the 1982 Legislature for the purpose of providing indigent felony defense services as required by the Sixth Amendment to the United States Constitution. The Sixth Amendment guarantees legal representation to individuals charged with crimes who are unable to pay for such representation. Before 1982, these services were provided through a program housed in the judicial branch.

The Board provides legal representation through public defenders in some counties and private attorneys in other counties. As of January 2011, 22 counties used public defenders, 66 counties used private attorneys, and 17 counties used both. According to the Board's Executive Director, the decision as to whether a county will be served by public defenders or private attorneys is made by the Board in conjunction with officials from that county.

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### *District Court Judges Decide Whether Defendants Qualify for Indigent Services*

While the Board is responsible for providing the required legal representation, it has no role in deciding whether a defendant will receive court-appointed representation. That decision rests entirely with the judges in each district court. The process has two parts:

- **The defendant completes a financial affidavit form to show he or she has limited financial resources.** At the defendant's first court hearing, the judge will ask the defendant if he or she can afford an attorney. If the defendant informs the court that he or she can't afford an attorney, the defendant is required to complete the financial affidavit. Some district courts also require the defendant to complete another form—an application for appointed defense services. *Appendix B* contains blank copies of these Board forms.

The financial affidavit asks for information that will help the judge decide whether the defendant has the financial resources to hire an attorney. Examples of the type of information the financial affidavit asks for include: whether the defendant and his or her spouse are employed, whether the defendant has money in savings, checking accounts, or other accounts, and the names, ages, and relationship of any dependents to the defendant.

- **The judge reviews the financial affidavit and decides whether to appoint counsel for the defendant.** By law, district court judges must consider the following factors when making eligibility decisions:
  - the defendant's assets and household income
  - the cost of supporting the defendant's household
  - the anticipated cost of private legal representation
  - transfers of assets after the date of the alleged commission of the offense

Finally, if the Board is dissatisfied with any order made by a judge that pertains to a defendant's indigent status, the Board can file a motion for the judge to reconsider the order.

**Convicted Defendants May Be Required To Repay All or Part of the Cost Of Their Legal Representation**

If a judge decides that the defendant qualifies for indigent legal representation, State law allows the judge to assess a \$100 application fee against the defendant. However, the judge can waive all or part of that fee.

If a defendant is convicted, the judge may order him or her to repay legal costs. Kansas law provides that when legal counsel is appointed, the judge shall inform the defendant that any amount expended by the State in providing defense services may be entered as a judgment against the defendant if the defendant is convicted and found to be financially able to pay that amount. In addition, the law allows a judge to find a defendant partially indigent—meaning the defendant may be required to pay for part of the legal representation costs, if convicted. Lastly, if the defendant is found not guilty or the case is dismissed, the defendant cannot be ordered to pay for the cost of legal representation and any amount already paid, including the application fee, must be returned to the defendant.

The courts are responsible for collecting any costs assessed by the judge. District court staff record any amount assessed as an account receivable of the court, and work with the defendant to collect the amount owed. When amounts go unpaid, court staff may forward the amount due to collections.

