

April 2015

**AUDIT OF THE CONTRACT WITH THE ERIE COUNTY BAR
ASSOCIATION AID TO INDIGENT PRISONERS
JANUARY 1, 2014 THROUGH DECEMBER 31, 2014**



**STEFAN I. MYCHAJLIW
ERIE COUNTY COMPTROLLER**

**HON. STEFAN I. MYCHAJLIW
ERIE COUNTY COMPTROLLER'S OFFICE
DIVISION OF AUDIT & CONTROL
95 FRANKLIN STREET
BUFFALO, NEW YORK 14202**



April 27, 2015

Erie County Legislature
92 Franklin Street 4th Floor
Buffalo, New York 14202

Dear Honorable Members:

The Erie County Comptroller's Office has completed an audit of the contract with the Erie County Bar Association Aid to Indigent Prisoners for the period January 1, 2014 to December 31, 2014.

We conducted our audit in accordance with Generally Accepted Government Auditing Standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions. Our objectives were to:

- Document and evaluate internal controls over the program and the list of attorneys performing the legal work.
- Verify compliance with the County contract for services and reporting and any applicable state and/or federal regulations.
- Review records of fees from your records using financial records, especially IRS form 1099 annual payments.

We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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BACKGROUND

The Erie County Bar Association Aid to Indigent Prisoners was formed in 1962 under Section 501 (C)(3) of the Internal Revenue Code non-profits. The Assigned Counsel Program is performed by them. They hire attorneys under contract for fees set by law.

Under Article 18-B of New York State County Law:

1. All counsel assigned in accordance with a plan of a bar association conforming to the requirements of section seven hundred twenty-two of this article whereby the services of private counsel are rotated and coordinated by an administrator shall at the conclusion of the representation receive: (a) for representation of a person entitled to representation by law who is initially charged with a misdemeanor or lesser offense and no felony, compensation for such misdemeanor or lesser offense representation at a rate of sixty dollars per hour for time expended in court or before a magistrate, judge or justice, and sixty dollars per hour for time reasonably expended out of court, and shall receive reimbursement for expenses reasonably incurred; and (b) for representation of a person in all other cases governed by this article, including all representation in an appellate court, compensation at a rate of seventy-five dollars per hour for time expended in court before a magistrate, judge or justice and seventy-five dollars per hour for time reasonably expended out of court, and shall receive reimbursement for expenses reasonably incurred.

In the *Gideon v. Wainwright* (1963), the Supreme Court ruled that the Constitution requires the states to provide defense attorneys to criminal defendants charged with serious offenses who cannot afford lawyers themselves. The Supreme Court, in a unanimous decision, ruled that *Gideon's* conviction was unconstitutional because *Gideon* was denied a defense lawyer at trial. The Court ruled that the Constitution's Sixth Amendment gives defendants the right to counsel in criminal trials where the defendant is charged with a serious offense even if they cannot afford one themselves; it states that "in all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense."

The Comptroller's Office performed an audit of the agency which handles indigent defense and falls under the New York State Office of Indigent Legal Services whose mission is to monitor, study and make efforts to improve the quality of services provided pursuant to Article Eighteen-B of County Law.

The program coordinates the assignment of attorneys to represent, at no cost to the clients, those who cannot afford to retain an attorney, when those individuals are charged with a crime or a violation in the criminal courts or family court.

The Assigned Counsel Program handles all matters, both misdemeanor and felony, in each of the 40 Justice Courts in Erie County, as well as most of the felony work in Superior Court. In addition, it handles cases in Buffalo City Court for the most serious felony charges (in general A,B and C felonies) and cases in which the Legal Aid Bureau cannot represent clients because of conflicts due to multiple defendants, for example. The Assigned Counsel program has some "Attorneys of the Day," which means that they are paid a specific amount to be present to defend indigents.

Assigned Counsel Program representation is also provided at final parole revocation hearings, on parole appeals, and on criminal appeals from local courts to County Court. Appeals to the Appellate Division or the Court of Appeals are handled by the Legal Aid Bureau whether it was handled in the lower courts by them or was handled by the Assigned Counsel Program.

In addition, the Assigned Counsel Program coordinates the assignment of attorneys for certain Family Court matters. These Family Court matters include representation of respondents in neglect, abuse, termination of parental rights, paternity, and support order violation matters, as well as both petitioners and respondents in family offense, custody and visitation matters. They do not include divorces, modification of child support orders or representation of paternity petitioners.

The annual budgets for the services are fairly uniform from one year to the next. There are also separate grants from state funds and these have their unique requirements so are separated in the accounting system. The New York State grants are pass-through grants with Erie County. The budget for the Assigned Counsel program for 2014 was \$7.9 million. By contract any unspent monies are eligible to be returned to the County.

OBJECTIVES

- Document and evaluate internal controls over the program and the list of attorneys performing the legal work.
- Verify compliance with the County contract for services and reporting and any applicable state and/or federal regulations.
- Review records of fees using financial records, especially IRS form 1099 annual payments.

As part of auditing under these objectives, we interviewed the officials, reviewed any policy correspondence and constructed a workflow diagram of the process. We sought to determine if the attorneys in the program were in fact registered in New York and did not have any suspensions, disbarments or other classifications while conducting their defense in court of the indigent population they serve as counsel to.

The contract with the County includes a budgeted amount paid quarterly and periodic reporting to the Legislature of their activity and list of attorneys used in the program as required under the contract.

The fees paid to the attorneys who are engaged are determined under section Article 18-B Representation of Persons Accused of Crime or Parties before the Family Court or Surrogate's Court provision of New York State County Law. At the Erie County Bar Association Aid to Indigent Prisoners we examined a representative random sample of court cases and found that the requisite signatures, orders and approvals were in evidence. We also verified the mathematical accuracy of the fees paid to attorneys, and found no unusual charges or hours that were not acceptable.

All of the attorneys are in fact currently registered (status with the Office of Court Administration is on-line).

AUDIT FINDINGS

Non-registered attorney

A review of the New York Stated Unified Court System on-line system of registered attorneys revealed that one attorney was not registered. This was not a surprise since this fact was already disclosed by the Erie County District Attorney and charges filed as evidenced by newspaper articles.

The unregistered attorney was able to perform services at the Erie County Bar Association Aid to Indigent Prisoners due to lack of some controls at the time. The payments to him based on IRS 1099 forms reported totaled \$3,720 in 2014 (also \$13,668 in the prior year).

The registry of attorneys in New York State is available on-line, whether registered late in payment of fees, suspended, disbarred, etc. We inputted the names of individuals in the Assigned Counsel program from a report to the Legislature, and also in our review of the IRS forms. The Court Administration web site is (http://iapps.courts.state.ny.us/attorney/AttorneySearch#search_result). Since that individual is not listed, the next step is to inquire. Their singular control mechanism is to ask for documentation from attorneys as to their eligibility to practice in New York State. There are over 350 attorneys on the current list of attorneys who have been reviewed for practice with the agency. In December of 2014 this procedure was greatly improved.

In our review we noted that two other attorneys were marked as "suspended", but when that fact was determined at the time by the administration, those cases were then turned over to other attorneys. For example, a check of the Appellate Division records and periodic reporting to the public revealed that the suspension in one case went into effect as of February 7th and resulted in no payment or service rendered past February 6, 2014. Many attorney cases take years to resolve any serious grievances. The records case files, accounting reports and IRS 1099 forms validate this.

RECOMMENDATIONS RELATING TO THESE TYPE OF FINDINGS

On December 14, 2014, a policy letter was sent to all of the attorneys in the program which included a statement for their signature to attest to their registration in good standing with the New York State Bar Association. A follow-up letter was issued during our visit.

The procedure started in December 2014 is for all new attorneys in the program to provide a copy of their registration certificate, as well as the acknowledgement under the letter discussed above.

We would further recommend that they review every attorney's status on a test basis periodically verifying license numbers and current status. This is in addition to the weekly updates from the Unified Court System on disciplinary proceedings and suspensions for specific periods of time.

The administration stated that there is a review of all attorneys over a three year period. Attorneys are reviewed if there is advancement to more serious crime defense.

Quarterly report to Erie County Legislature

A contract requirement calls for quarterly reports to the Legislature. It appears that since the reports for quarters in 2013, there has been no reporting for 2014. The Erie County Bar Association Aid to Indigent Prisoners audited reports were reviewed during our audit. The IRS 990 Information financial reports have been filed through 2013 for both.

The reports to the Legislature, whether quarterly or semi-annually, provide public information of the program.

Latest Reports to Erie County Legislature from Erie County Bar Association Aid to Indigent Prisoners

February 21, 2014 #5M-13 report of the period October 1, 2013- December 31, 2013

February 21, 2014 #5M-12 report of minutes from Board June 1, 2013- December 31, 2013

The payment request from the County Attorney, in the amount of \$7,887,313 with four equal payments as of March 10, 2014, included a contract with The Erie County Bar Association Aid to Indigent Prisoners Society Inc. referenced in article 18-B of the County Law for Erie County.

As to reporting, "... the Society agrees during the term of this Agreement to submit to the Erie County Attorney, for filing with the Erie County Legislature, quarterly reports showing the disposition and status of the County funds provided for indigent defense, including all appropriations, and denoting which attorneys have received such funds for their services."

The Law Department in its description of services contained in the annual budget:

"The Division of Law also administers the Indigent Defense Program. This program provides operating funds to assure legal services to individuals who cannot afford a private attorney consistent with a strict screening process."

The sources and uses reporting requirement should reflect that the agencies spent the money on the program and on specific line items and that the possibility exists to return any unspent monies. We

noted that the financials do not show any dramatic increases in Unrestricted Net Assets from year to year, hence no obvious call for return of funds. There have been increases of \$200-300,000 in the annual budgets as the resulting increases in volume or complexity of defenses.

The contracts allow for the Budget and Management Office to require reports and the possibility of an audit from the Erie County Comptroller. The practice has been for the agencies to meet with the Department of Budget and Management prior to submission of the current budget proposals.

WE RECOMMEND

We recommend using middle names or initials in the records. This became an issue in our testing.

We recommend issuing quarterly reporting or making a change in the contract with the County. The federal law requires the state which requires the county to fulfill the mission of providing legal services to indigents. The State of New York may in the future assume the funding as other states have done. The reporting into a system they require may also be in the future.

We have not considered efficiency of hours and dollars spent, but when a state-wide report was made public, five other counties were criticized for their service level. Erie County was not one of those counties.

AUDITOR COMMENTS

The profession needs to be protected and the public served by the employment of sound internal control procedures as well as other practices that are now in place. The cases are divided into three basic categories at the agency. These include misdemeanors which should be able to be defended by most licensed attorneys that have been specifically trained and reviewed by the panels. The other categories are felonies and family court cases. These require more expertise and the separate panels create these groups of attorneys to use as well as provide in-house training.

A control mechanism at the agency is the review of all the attorneys in the Assigned Counsel Program, which occurs every three years. Any attorney who has been handling misdemeanors can make an application to move up to defending more serious cases.

The list of attorneys from late 2013 agrees with the 2014 IRS #1099 forms with few exceptions of mostly newer attorneys. We found no issues with that list.

One other minor comment is that there is a lack of use of middle names or initials. This made it more difficult to determine if the individuals were in fact the attorney marked as "registered."

We noted that a sizable number of attorneys were late in their updated payment of license fees.

The state system may in the future require the use of a common system so any automation or system improvement may need to be referenced to that.

RESULTS OF EXIT CONFERENCE

The conference was held on April 2, 2015 and the auditee agreed to consider our suggestions in the Auditors Comments section. They had established some improvements prior to our audit and will report to the Legislature on a more-timely schedule. A recent system change delayed some of the reporting and is now in full operation.

ERIE COUNTY COMPTROLLER'S OFFICE

cc: Erie County Bar Association Aid to Indigent Prisoners Society, Inc.
Mark C. Poloncarz, County Executive
Robert W. Keating, Director of Budget and Management
Michael A. Siragusa, County Attorney

EXHIBIT ONE: WORKFLOW

Internal Process for Assigned Counsel Program

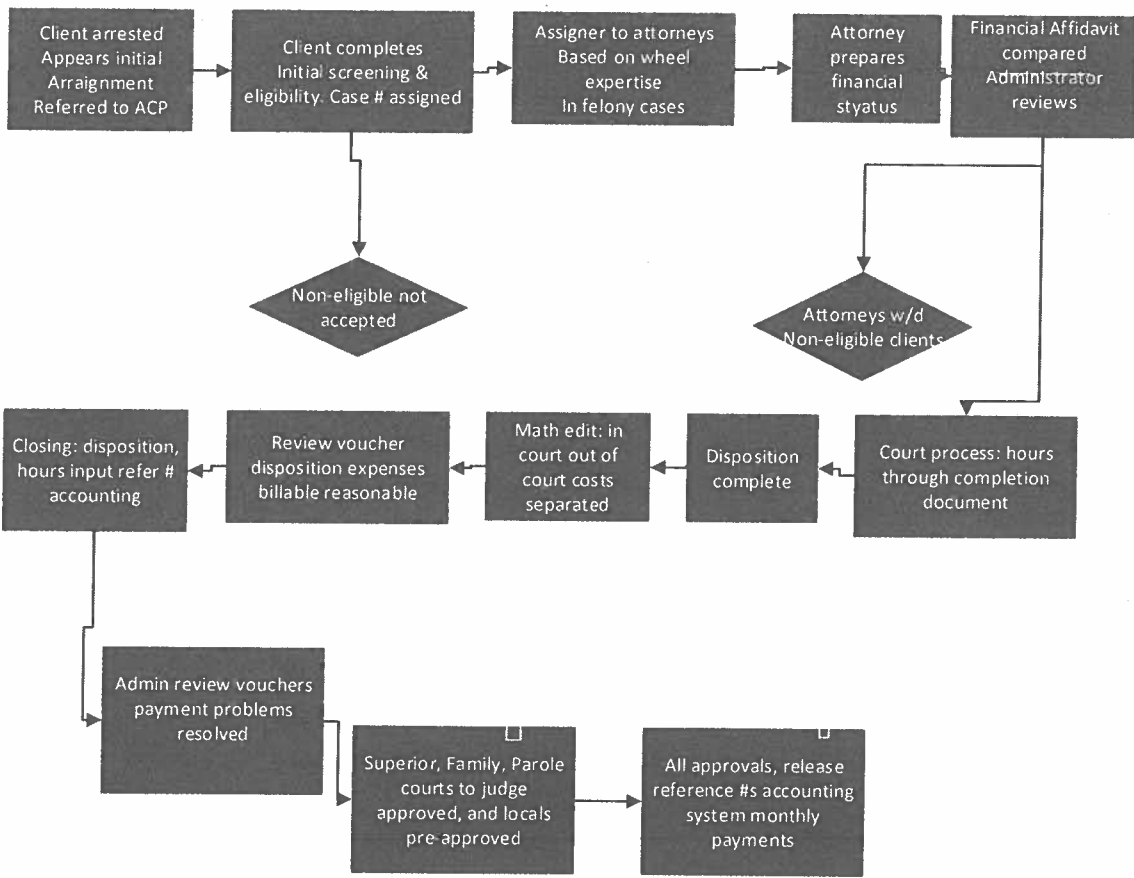


EXHIBIT TWO: ATTORNEY REGISTRATION ISSUES RESOLVED

ECBA AIP Audit

Questionable Results from a search of the NYS Unified Court System

The Supreme Court of the State of New York Appellate Division, Fourth Judicial District issued final rulings

<http://www.nycourts.gov/courts/ad4/Clerk/Decisions/index.htm>

Attorney		results	correct	comments	comments	resolution
#1		suspended	#xxxxx46 was in fact suspended	Suspended as of 2/7/14 by Appellate for 2 years' time	Did he in fact have any activity beyond that date with the ECBA AIP? –last activity was in fact on 2/6/14 accounting summary agrees to 1099	resolved
#2		suspended	#xxxxx78 was in fact suspended	Suspended as of 8/8/14 by Appellate for 9 months' time	Did he in fact have any activity beyond that date with the ECBA AIP? –last activity was in fact on 8/6/14 accounting summary agrees to 1099	resolved

EXHIBIT THREE: DISTRIBUTION OF CONTRACT ATTORNEY ASSIGNMENTS

Distribution of assignments is evidenced by the lower number of dollars for most attorneys, and more experienced attorneys with more complicated cases fewer.

