

SAN MATEO COUNTY PRIVATE DEFENDER PROGRAM EVALUATION

The undersigned were asked by the County Manager's Office to conduct an evaluation of the San Mateo County Private Defender Program for purposes of comparison with other programs providing representation for indigent criminal defendants to determine whether the PDP remains the most appropriate model for providing indigent defense services in San Mateo County.

I. BACKGROUND

The Private Defender Program (PDP) is maintained and operated by the San Mateo County Bar Association (SMCBA) pursuant to a contract with the County and has provided legal representation for indigent criminal defendants in San Mateo County since 1968 through a panel of private attorneys from the SMCBA. Prior to that time counsel for indigent defendants were randomly appointed directly from the bench by the particular judge before whom they were appearing. The PDP stands in contrast to the Public Defender model in that it is not a County department but an entity external to the County, being maintained and administered solely by the SMCBA. The SMCBA and the County agree upon the contractual terms for indigent defense and the County appropriates funds to the SMCBA for this purpose. In that regard the PDP is similar to a "contract" system in which the attorneys representing indigent criminal defendants act in the capacity of independent contractors as opposed to public employees.

The contract system consists of a contractual arrangement between a county and a private law firm to provide indigent defense services and is used by a number of smaller counties.

A Public Defender system is a County Department staffed by county employees (attorneys, investigators, secretarial and administrative staff) similar in structure to a District Attorney's office, and utilized by all the larger California counties.

Public Defenders and contract systems both require utilization of outside private attorneys for conflict and multiple defendant cases.

II. SCOPE

This evaluation reviewed the historical and current structure of the PDP and contrasted it with other indigent defense models, focusing on the adequacy of representation, financial accountability, proper utilization of public funds, and the objective characteristics of the program as a business model for the provision of a required publicly funded service. This

evaluation did not undertake a detailed analysis of the quality of representation provided by individual attorneys, nor perform a financial audit to determine how PDP funds were disbursed and utilized. To do so would involve not only an exhaustive examination of hundreds, perhaps thousands, of individual case files but also require waivers in each case of the attorney-client privilege and other constitutional and privacy rights.

III. FINDINGS

The PDP was established in 1968 and operated for some years thereafter with a Chief Defender and a clerical staff of three, later adding an investigator. The Chief Defender made most of the Superior Court master calendar appearances and assigned cases to individual attorneys among the SMCBA who acted in the capacity of independent contractors in representing the accused as though they were privately retained. The current PDP administrative staff has grown substantially over the years, currently consisting of fourteen salaried personnel:

- The Chief Defender
- Assistant Chief Defender
- Managing Attorney for Superior Court
- Managing Attorney for Juvenile Court
- Chief Investigator
- Executive Assistant to the Chief Investigator
- Office Manager
- Case Assignment Secretary
- Administrative Assistant for Superior Court
- Administrative Assistant for Juvenile Court
- Receptionist
- Controller
- Senior Bookkeeper
- Bookkeeper

The PDP is under the overall control of the SMCBA board of directors who select and hire the Chief Defender, his subordinates and staff. The PDP and SMCBA share the same office space in a building owned by the SMCBA; the Chief Defender also serves as Executive Director of the SMCBA and the Assistant Chief Defender supervises the SMCBA staff. The administrative staff do not personally represent indigent defendants. When the court determines that a defendant is indigent the Chief Defender or Assistant Chief Defender assign the defense of that case to a

private attorney on the PDP panel who then operates independently and assumes complete responsibility for and control over the defense as do privately retained attorneys, although the PDP provides investigative and forensic services requested by the assigned panel member. Panel members are reimbursed pursuant to a fee schedule established by the PDP through the Private Defender Committee of the SMCBA. A Special Fee Committee assists in reviewing "special fees" for "extraordinary" cases.¹ Both the Private Defender and Special Fee committees are composed entirely of PDP panel members.

The PDP appears to operate in accordance with the terms of its contractual agreement with the County. There are no state or federal statutory mandates or guidelines governing public or private defender programs. However, the American Bar Association and the State Bar of California have formulated recommendations for the operation of such programs and the PDP appears to be in compliance therewith. In fact, the current Chief Defender was a member of the State Bar committee that drafted the state recommendations. Although there was some criticism of the representation provided by some panel members, the overall assessment of the program gleaned from interviews with current and former judges, prosecutors and criminal defense attorneys indicated that the overall quality of representation is adequate and supporting investigative and forensic assistance is excellent, especially in the more serious cases.² PDP support services (investigative, forensic, etc.) are generally recognized as better than that provided by many Public Defenders offices. In short, there is no evidence that a Public Defender would necessarily provide better or more cost effective representation.³ Further, a Public Defender's office requires developing a new and extensive County department and is not necessary as long as SMCBA criminal lawyers continue to provide adequate service. The PDP also eliminates the need for an alternate defender's office required in all Public Defender and contract system models to deal with multiple defendant cases and conflicts of interest, and a 2012 evaluation of the PDP estimated that not having an alternate defender's office resulted in an annual savings of \$1.5 million.

¹ See PDP Annual Report to the Board of Supervisors, Section V—Extraordinary Fee Requests.

² In 2012 the American Bar Association and the National Legal Aid and Defender Association awarded the Private Defender Program its Harrison Tweed Award for long-term excellence in providing for the defense of the indigent.

³ With the exception of one recent case the PDP has not had any convictions reversed for ineffective assistance of counsel.

The PDP contract has increased 42.4% over 10 years and comprises approximately 95% of the SMCBA's budget. In FY 2005-06 the PDP contract was \$12.9 million. For FY 2015-16 the contract is \$18.5 million. This increase is comparable with that experienced by other counties of similar size. It is noted that the PDP contract remained static for FY 2009-12 as San Mateo County responded to the national economic recession.

According to the most recent information, the PDP is anticipating a reduction in the total number of cases it handles, and the PDP contract contains a meet and confer clause if case loads fall out of line with expectations. For FY 2013-14 the PDP represented defendants in 20,254 cases. This number is projected to decrease to around 20,000 by FY 2015-16. Another factor to be noted is that in addition to the decrease in cases, the number of cases actually going to trial is also on a downward trend as well as a reduction in the number of death penalty cases, in which two attorneys are appointed for each accused. The PDP's fee schedule has remained static since 2008 and is currently being revised. Considering the cost of living and maintaining a law office in San Mateo County the current fee schedule does not appear unreasonable. It is well below the rates normally charged by private attorneys for similar services.⁴ However, the PDP was not created for the purpose of providing a sustainable income for its panel members. The original intent of the program was to spread responsibility for indigent criminal defense among as many qualified bar members as possible who were willing to accept a limited number of PDP cases at the scheduled rates with the understanding that their willingness to do so would not result in their being overburdened with such work. In that regard it is worth noting that several PDP panel members appear to be working nearly full time on PDP matters. This may have a positive effect on overall efficiency, but the concentration of assignments among a limited number of attorneys may also inhibit the growth of expertise that should be developed in newer members of the bar and impede the continuation of qualified panel members.

A Public Defender system for San Mateo County entails the establishment of a new department consisting of a Chief Public Defender and approximately fifty attorneys⁵, administrative staff,

⁴ We are referring here only to the currently established hourly rate and flat rate schedule. For the reasons explained elsewhere in this report we were unable to evaluate the manner in which these rates are actually applied. A copy of the fee schedule is contained in the PDP's annual report to the Board of Supervisors.

⁵ The San Mateo County District Attorneys office currently has fifty seven (57) prosecutors. The District Attorney prosecutes all criminal cases whether defense counsel is appointed or retained. The District Attorney also investigates incidents which do not result in criminal charges being filed, but nonetheless requires prosecutorial

clerical staff, and investigators together with all the other incidents of public employment, both material and financial. Space would be required in all three courthouses currently in operation—Redwood City, South San Francisco and Juvenile Court, and a Public Defender still requires an alternate defender or other system to handle conflict and multiple defendant cases.

A contract system, i.e., a contractual arrangement with a private law firm for the provision of indigent defense services, is not feasible for San Mateo County at this time because, *inter alia*, there is no law firm in the county of sufficient size and specialized staff able to provide adequate indigent defense services. In fact, there does not appear to be a firm with these requirements anywhere in the bay area. Even if there were, in dealing with a private law firm the County would not have any control over the selection and training of the specific attorneys handling individual cases and, as with a Public Defender, an alternate system would also be required for conflict or multiple defendant cases.

Recognizing the many positive aspects of the PDP, there was one significant and troubling issue which was repeatedly brought to our attention and which surprised us in the breadth and severity of its criticism. We were advised that the SMCBA Board of Directors is failing in its responsibility to manage and oversee the operation of the PDP. This criticism of the Board came from a very broad cross section of the legal community including Judges, present and former board members, panel members, and other attorneys. Particular concern was raised about the potential for board members who are also panel members to have conflicts of interest. When panel members who sit on the SMCBA's Board of Directors earn significant income from the PDP the potential for serious conflicts of interest are obvious. We were repeatedly told that the board fails to provide any significant oversight of the program to eliminate such conflicts, and that some individual board members can be abusive and engage in self promotion vis-à-vis the PDP. For an organization that is providing a very important public service and entrusted with the management of substantial public funds this is unacceptable.

IV. RECOMMENDATIONS

For the foregoing reasons it is not recommended that the County transition to a Public Defender or a contract system, but that it maintain the general PDP structure of assigning indigent criminal cases to a panel of qualified private attorneys, albeit with some administrative changes to eliminate inherent conflicts of interest.

time and resources. In general, the PDP only represents indigent defendants against whom criminal charges have actually been filed, as well as some witnesses whose testimony could expose them to prosecution.

The PDP should be completely severed, both physically and financially, from the SMCBA in order to avoid any possible financial and material conflicts of interest. The County has the ultimate responsibility for providing indigent defense services and insuring the proper use of public resources for that purpose, but the Chief Defender lacks the necessary objective autonomy to protect either the County or the PDP's best interests since he is hired by and also serves as Executive Director of the SMCBA, many of whose members also serve on the PDP panel and derive income therefrom. The Chief Defender has the ultimate responsibility for the assignment of cases and payment of fees to the very persons by whom he is employed and at whose pleasure he serves, while also being under a contractual obligation to the County for the proper utilization and disbursement of the public funds he oversees. The Private Defender and Special Fee Committees, which periodically rotate membership, consist solely of panel members who also benefit financially from the program. By any standard which considers the County's obligations for the use of public funds as well as the interests of the indigent defendants, this creates a potential conflict of interest and cannot be considered a satisfactory business model for the use of public funds. Any program in which a private agency is utilized to provide a service with public funds must not only be fair and free from conflicts of interest, it must also *appear* to be fair and free from conflict and structured to prevent conflicts from arising.

To insure that the PDP's sole function is limited to the provision of indigent defense services, guarantee its independence, and provide financial accountability for the County we recommend that the selection of the Chief Defender be made by the County. If this were done the administration and management of the PDP would be conducted by County personnel, while the attorneys to whom cases were assigned would continue to operate as independent contractors. Since the ultimate responsibility for indigent defense services lies with the County, such an arrangement would provide the County with effective oversight of its public funds and guarantee the PDP's independence. The nature of the current arrangement is such that the County appropriates an agreed upon sum for indigent defense services without any particular knowledge of how that sum is spent. (The PDP does publish an annual report after each fiscal year which includes a line-item budget.) However, the current process for appraising indigent defense costs when renewing the contract is haphazard at best. This issue will become more salient with the continued decline of felony case counts in the wake of Proposition 47 and any future procedural changes. Since providing counsel for indigent defendants is a public function, it requires a greater degree of public oversight than it currently receives under the current PDP system, and an indigent defense program independent from persons or entities benefiting

financially reformed would provide that while retaining the efficacy of assigning cases to private counsel.

However, if the County were to maintain its current contractual relationship with the SMCBA, we recommend the following changes for purposes of fiscal integrity and accountability:

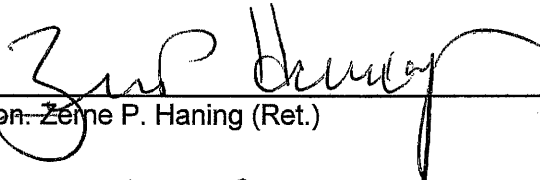
- A periodic, independent review of the PDP's finances should be conducted either by County personnel or an outside auditor to assure that the public moneys allocated for indigent defense are used solely and exclusively for such purposes.
- PDP panel members should not participate in the review and determination of special fees or fees in any cases where there may be a question of the amount of work or the number of hours or time expended.
- The current managing attorney at Juvenile Court acts in a supervisory role only. Some years ago the PDP hired a staff attorney for Juvenile Court who personally handled an active case load which in turn reduced the need for additional panel attorneys and thereby functioned as a more cost effective method for the County. If a supervising attorney is required at juvenile court, it should be someone who also handles an active case load.
- The exclusive use of panel attorneys to cover the master criminal calendar should be discontinued. The master criminal calendar is handled by the criminal presiding judge of the Superior Court. All arraignments, motions, pre-trial and settlement conferences, pleas, sentencing, trial assignments and other matters not involving actual jury trials are conducted in this court. It is the one department where the daily performance of panel attorneys can be regularly observed and critiqued. Using panel members to observe and critique one another on a rotating basis creates the appearance of self-evaluation and cannot be considered an objective method of performing this function. It should be handled by an independent Chief or Assistant Chief Defender.
- The current contract provides for an "officer of the day," a rotating panel member, to handle telephone inquiries including, *inter alia*, complaints about assigned panel attorneys. Again, this self-policing practice of using panel members to field complaints about one another lacks the necessary objectivity required for this function and should be handled internally by a Chief Defender independent of the SMCBA or panel members. The current PDP contractual clause establishing the position of officer of the day should be eliminated.

- We received a number of concerns over the current staffing level of the PDP. The program was originally designed as a conduit for assigning indigent criminal cases to private attorneys who accepted complete responsibility for the defense of the accused. If the PDP is to function in that limited capacity, then compared to the program as originally established the current PDP appears overstaffed, especially when considering the dropping case levels, reduced number of trials and technological advances.
- A recurrent criticism of the PDP panel is that it has been “closed” or limited in numbers, which again runs contrary to its original intent. The panel should be open to all qualified members of the SMCBA. Such qualification should be made objectively based on established written criteria.

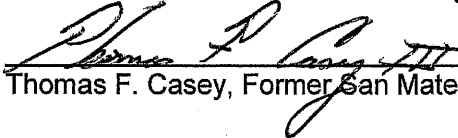
We emphasize that our recommendations are premised solely on the current structure of the PDP as a business model, keeping in mind the County’s interest in curtailing any unnecessary costs, insuring that public funds allocated for indigent defense services are utilized only for that purpose, and the necessity of eliminating any appearance of conflicts of interest. We do not suggest any deliberate mismanagement by the PDP or the SMCBA or that the parties or individuals involved are not operating other than with the intent to serve the best interests of the accused and the County.

We would like to acknowledge the cooperation of the County and PDP staff during the course of this evaluation.

Dated: December 8, 2016



Hon. Zerne P. Haning (Ret.)



Thomas F. Casey, Former San Mateo County Counsel