



SAN MATEO COUNTY PRIVATE DEFENDER PROGRAM

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ISSUE

Why does the County of San Mateo use an approach to indigent defense that is different from the approach taken in all other California counties? Is the County's approach consistent with national and state indigent defense guidelines?

SUMMARY

The constitutions of both the United States and of California guarantee competent counsel for those who cannot afford to pay. California requires its counties to provide and reasonably compensate such counsel. The County of San Mateo (County) contracts with the local bar association to provide counsel for indigent defendants. It is the only California county with a population over 500,000 that does not work through a Public Defender's Office to provide such counsel. While the approach to indigent defense is fully funded by the County and, in capital cases by the State, it is called the Private Defender Program (PDP) because the indigent defendants' attorneys and investigators are independent contractors, not County employees.

The County adopted this indigent defense system in 1968 and continues to use it because most County officials regard it as well managed, effective, and economical. While San Mateo County's PDP has been praised locally and nationally,¹ the County has not evaluated the program to determine whether the County's utilization of the PDP is consistent with state and national indigent defense system guidelines. Formal evaluations submitted to the Board of Supervisors in 2001, 2003, and 2012, for example, do not specifically include references to such guidelines.

The Grand Jury recommends more frequent formal evaluations of the PDP to which the community is invited to comment. Evaluation should include review of the County's indigent defense approach to ensure that it remains the best model for the County.

¹ Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, American Bar Association, 2011. http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf, pp. 217-228.

Laurence A. Benner, *Support for Nomination of San Mateo Bar Association*, Letter to Members of the Harrison Tweed Award Committee, March 21, 2012. http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ht_san_mateo_submission.authcheckdam.pdf.

James D. Bethke, *Nomination of San Mateo County Bar Association Harrison Tweed Award*, Letter to American Bar Association Standing Committee on Legal Aid and Indigent Defendants, March 23, 2012. http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ht_san_mateo_submission.authcheckdam.pdf.

GLOSSARY

Assigned Counsel Systems: A system for the provision of indigent criminal defense whereby attorneys are appointed on an as-needed basis. The County's PDP model has aspects of an assigned counsel system insofar as private attorneys for indigent defense are appointed by the Bar Association.

Contract System: The contract model of indigent defense involves a contract with an attorney, law firm, or other entity to provide representation for some or all indigent criminal defendants. San Mateo County's PDP has aspects of a contract system as well as an assigned counsel system insofar as the County has a contract with the local Bar Association for the provision of such legal services.

Public Defender: A full-time attorney employed by a governmental organization to represent indigent defendants in criminal cases at public expense.

BACKGROUND

Introduction

The Grand Jury decided to study this issue because the County's approach to indigent defense is unusual. The Grand Jury has not received any citizens' complaints, nor is it aware of recent program criticism. Although the Grand Jury's initial focus was on the reasons this approach is used, that inquiry led the Grand Jury to study whether the County's approach to indigent defense is consistent with state and national guidelines.

Why Is Legal Counsel Provided for Those Who Cannot Afford to Pay and Who Pays for Such Counsel?

While the Sixth Amendment to the United States Constitution guarantees defendants the right to counsel in criminal prosecutions, the states were not required until 1963 to provide counsel for those too poor to pay for their own defense. In *Gideon v. Wainwright*, the United States Supreme Court unanimously ruled that the Constitution's Fourteenth Amendment required states to provide counsel to such indigent defendants. In *Gideon*, the Supreme Court declared, among other things, that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."²

California is one of only seven states that does not contribute, except in capital cases, to indigent defense.³ California law requires that, while the court determines whether appointed counsel is

² American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, 2004. http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf, Introduction.

³ David Carroll, "Why the State of California Is Responsible for the Public Defense Crisis in Fresno County," *Pleading the Sixth* (blog), Sixth Amendment Center: Ensuring Fairness & Equal Access to Justice. September 29, 2013, Accessed May 20, 2015. <http://sixthamendment.org/why-the-state-of-california-is-responsible-for-the-public-defense-crisis-in-fresno-county/>.

adequately representing the indigent person, each county board of supervisors has the responsibility to reasonably compensate appointed counsel.⁴

How Do Other California Counties Provide for Indigent Defense and How Does San Mateo County Differ?

In California, no statewide authority dictates the type of defense program, monitors the adequacy of the defense program, or collects data regarding the level of funding provided by counties for indigent defense. These responsibilities fall on each county. Of the 58 California counties, 33 have a Public Defender's Office,⁵ including every county with a population over 500,000 except San Mateo County. Twenty-four counties contract for indigent defense using a variety of contract agreements.⁶

San Mateo County is the only county utilizing a contract with the local bar association to be the *sole* provider of indigent defense services.⁷ The County has used the PDP since 1968, contracting yearly or for longer periods with the local San Mateo County Bar Association. This system has aspects of both an "assigned counsel system" and a "contract system."

An assigned counsel system is an indigent defense delivery system in which the client is represented by appointed counsel. Virtually every county in California utilizes such assigned counsel "to handle some clients in multiple defendant cases where the primary provider [of legal services] would have a conflict of interest in representing more than one defendant."⁸ An assigned counsel is ordinarily appointed to handle a single case.

The contract agreement (Agreement) between the County and the Bar Association includes terms regarding both the frequency and the manner of evaluation of the program. The Agreement is based upon the estimated number of cases to be handled (20,254 in FY 2013-2014) and a combination of flat and hourly fees for each type of case. The contract amount for 2014-2015 was \$17,455,439.⁹ However, in extraordinary circumstances, the contract amount can be increased as it was by \$5 million in 2014 because of very complex cases involving many defendants (e.g., the "Operation Sunny Day" cases in 2013¹⁰).

The Chief Defender and the Assistant Chief Defender administer the PDP for the San Mateo County Bar Association. Detailed information about the PDP is provided in the

⁴ Casetext, *Phillips v. Seely*, 43 Cal.App.3d 104, 115 (3d Dist., 1974). <https://casetext.com/case/phillips-v-seely>.

⁵ Public defenders are appointees in every county utilizing a public defender's office except for the City and County of San Francisco, which has an elected public defender. Jeff Adachi of San Francisco is the only publicly elected public defender in California. San Francisco Public Defender, Accessed February 3, 2015, sfpublicdefender.org/.

⁶ California Commission on the Fair Administration of Justice, *Report and Recommendations on Funding of Defense Services in California*, April 14, 2008, p. 2.

<http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf>

⁷ Ibid.

⁸ Ibid., p.3. Public defender offices can only represent one defendant in a case.

⁹ John S. Digiacinto, *Annual Report Fiscal Year 2013-2014*. Appendix B. https://www.smcba.org/UserFiles/files/docs/Annual%20Report%20FY%202013-2014_3%20w%20Appx.pdf.

¹⁰ The term *Operation Sunny Day* refers to the term allegedly used by the defendants to confirm the killing a rival gang member. The case concerns 16 defendants indicted for crimes related to their alleged involvement with East Palo Alto gangs.

Bar Association's Annual Report. A copy of the current Agreement is appended to the Annual Report.¹¹

METHODOLOGY

The Grand Jury sought to answer its questions by conducting interviews, by reviewing PDP Annual Reports with attached Agreements,¹² and by studying state and national guidelines for indigent defense as well as related literature (see Bibliography). The Grand Jury was particularly interested in the *ABA Ten Principles of a Public Defense Delivery System*, the California Commission on the Fair Administration of Justice *Report and Recommendations on Funding of Defense Service in California*, and *The State Bar of California's Guidelines on Indigent Defense Services Delivery Systems*.

The Grand Jury interviewed County officials, a judge, officials of the County Bar Association, a retired district attorney, retired public defenders (from another county), a court officer, and a law professor in criminal justice. The interviewees also included members of the PDP's 2012 Evaluation Committee. The interviews were the primary source for determining the County's rationale for utilizing this approach to indigent defense.

DISCUSSION

Why Does San Mateo County Use This Approach?

Since 1968, the PDP has satisfied the courts that it is adequately representing indigent defendants. The PDP was last formally evaluated in 2012 by a five-member evaluation committee appointed by the County Manager. The 2012 Evaluation Committee reported to the Board of Supervisors that "the Private Defender Program is a well-managed program and considered a model throughout the country for providing indigent defense."¹³ Most County officials interviewed affirmed their belief that the PDP is well managed, effective, and more economical than maintaining a public defender's office.¹⁴

What Are Seen as Advantages of PDP?

County officials see an economic advantage to the PDP especially in multiple-defendant cases in which a public defender's office would have a conflict of interest and would not be able to represent all defendants. County officials noted that, by using a PDP panel, which is comprised of independent practitioners, the County achieved savings by not requiring separate agreements for conflict cases (i.e., those cases with more than one defendant, whereby a traditional public defender's office can only represent one defendant). While the joint representation of multiple defendants is not impermissible, California law prohibits defense counsel from representing

¹¹ Digiacinto, *Annual Report Fiscal Year 2013-2014*. Appendix B.

¹² Digiacinto, *Annual Report Fiscal Year 2012-2013*.

https://www.smcba.org/UserFiles/files/docs/ANNUAL%20%20REPORT%20FY%202012-2013%20DVD%20Final_opt.pdf.
Digiacinto, *Annual Report Fiscal Year 2013-2014*.

¹³ 2012 Evaluation Committee Report to Board of Supervisors, January 2013.

¹⁴ County Manager's Office, Court Officials, and County Supervisor: interviews by the Grand Jury.

multiple defendants when such defendants have competing interests.¹⁵ Officials also are of the opinion that the PDP model avoids the costs of structure, overhead, and employee benefits that would apply to maintaining a public defender's office.

Some of the County officials interviewed believe that the private defender model provides superior counsel and that there is no guarantee of quality in a public defender.¹⁶ The utilization of the County's PDP approach was praised for its very low number of *Marsden* motions.¹⁷ A *Marsden* motion is a request to the court by a criminal defendant for discharge of a court-appointed lawyer on the basis of being incompetently or inadequately represented (there were none in 2013-2014) or for irreconcilable differences between lawyer and client (eight in 2013-2014). The Grand Jury was informed that such motions for incompetent or inadequate representation are extremely rare in San Mateo County, which indicates that clients believed that they received adequate or more than adequate defense.

Is the PDP Consistent with State and National Guidelines?

The Grand Jury acknowledges that a guideline is a recommended practice that allows some discretion or leeway in its interpretation, implementation, or use. However, because of the potential seriousness of consequences to an indigent defendant, the Grand Jury believes that the County should ensure that state and national guidelines are carefully considered for indigent defense regardless of the defense model. The 2001, 2003, and 2012 Evaluation reports did not expressly compare the PDP to applicable state and national guidelines regarding the provision of indigent legal defense.

Section 11 of the Agreement¹⁸ provides that the County may form a committee to evaluate ongoing performance and can be done at any time. According to a County official, a current evaluation is underway that will include a determination of whether the PDP still provides the best approach for San Mateo County residents. The evaluation will also focus on two aspects: parity of resources with prosecution and cost comparisons with alternate methods of indigent defense services.¹⁹

The 2012 evaluation was nine years after the previous such evaluation and was not opened for public input and feedback. In contrast, the 2001 evaluation committee meetings were "open to the public and were regularly attended by representatives of the American Civil Liberties Union (ACLU) and the NAACP who also contributed to the Committee's deliberations." The 2003 Review Committee reported: "Our committee also held an open forum allowing members of the community to address the committee and convey their criticisms of the private defender. Among those in attendance included representatives of the ACLU and the NAACP." Although the 2012 Committee instead "heard *invited* testimony from 20 individuals, representing a wide range of experiences interacting with the Program," it did not open up the process to other individuals or

¹⁵ *People v. Barboza*, 29 Cal.3d 375 (1981). Supreme Court of California. *People v. Barboza*. Justia US Law. Crim. No. 21664. May 4, 1981. <http://law.justia.com/cases/california/supreme-court/3d/29/375.html>.

¹⁶ San Mateo County Superior Court Judge, interview by the Grand Jury, January 9, 2015.

¹⁷ *People v. Marsden*, 2 Cal.3d 118 (1970). San Mateo County Law Library, "Making Marsden and/or Faretta Motions," Research Guide #11. <http://www.smclawlibrary.org/needhelp/MarsdenFarettaMotions.pdf>.

¹⁸ Digiacinto, *Annual Report Fiscal Year 2013-2014*. Appendix B.

¹⁹ Official from the County Manager's Office, interview by the Grand Jury.

organizations. The Grand Jury believes that formal evaluations should be held no less than every five years and that the community should be allowed to participate whether or not they have been specifically invited.

County officials have asserted that such evaluations would undoubtedly have included a review of state and national guidelines and that said evaluators would have promptly investigated any deviations from such guidelines. The Grand Jury recommends that future evaluations expressly address whether the PDP complies with such guidelines.

FINDINGS

- F1. According to its Agreement with the San Mateo County Bar Association, the County can conduct contract evaluations at any time, but they have not been done on a regular basis. No evaluation was done between 2003 and 2012.
- F2. None of the last three County evaluations (in 2001, 2003, and 2012) have specifically addressed whether state and national guidelines were considered.
- F3. The County's 2012 evaluation of the PDP limited public input to individuals and entities invited by the evaluation committee to participate. The evaluation process was not open to members of the public or community organizations.
- F4. The County's last three evaluations of the PDP did not report any review or conclusions of whether the PDP continues to be the best model for the County to provide indigent legal defense.

RECOMMENDATIONS

The Grand Jury recommends that the Board of Supervisors direct the County Manager's Office to:

- R1. Conduct formal evaluations of the indigent defense system at least every five years.
- R2. Include, as a component of such formal evaluations, a determination of whether the County's approach to indigent defense is consistent with state and national guidelines.
- R3. Include, as a component of such formal evaluations, input from community members and organizations. The process of receiving community input should be open to the public and not by invitation only.
- R4. Include, as a component of such formal evaluations, whether the current system continues to be the best model for the County for providing indigent legal defense.

REQUEST FOR RESPONSES

Pursuant to Penal Code Section 933.05, the Grand Jury requests responses from the San Mateo County Board of Supervisors to all of the recommendations (R1-R4) set forth above.

The Board of Supervisors' responses must be conducted subject to the notice, agenda, and open meeting requirements of the Brown Act.

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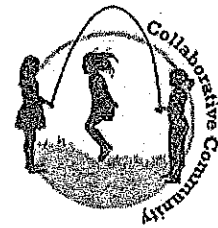
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Issued: July 6, 2015



COUNTY OF SAN MATEO
Inter-Departmental Correspondence
County Manager



Date: August 20, 2015
Board Meeting Date: September 1, 2015
Special Notice / Hearing: None
Vote Required: Majority

To: Honorable Board of Supervisors
From: John L. Maltbie, County Manager
Subject: 2014-15 Grand Jury Response - San Mateo County Private Defender Program

RECOMMENDATION:

Approve the Board of Supervisors' response to the 2014-15 Grand Jury Report, "San Mateo County Private Defender Program."

BACKGROUND:

On July 6, 2015, the Grand Jury filed a report, "San Mateo County Private Defender Program." The Board of Supervisors is required to submit comments on the findings and recommendations pertaining to the matters under control of the County of San Mateo within 90 days. The County's response to the report is due to the Honorable Carole Groom no later than October 4, 2015.

Acceptance of this report contributes to the Shared Vision 2025 outcome of a Collaborative Community by ensuring that all Grand Jury findings and recommendations are thoroughly reviewed by the appropriate County departments and that, when appropriate, process refinements are made to improve the quality and efficiency of services provided to the public and other agencies.

DISCUSSION:

Findings:

F1. According to its Agreement with the San Mateo County Bar Association, the County can conduct contract evaluations at any time, but they have not been done on a regular basis. No evaluation was done between 2003 and 2012.

Response: Agree.

F2. None of the last three County evaluations (in 2001, 2003, and 2012) have specifically addressed whether state and national guidelines were considered.

Response: Agree.

F3. The County's 2012 evaluation of the PDP limited public input to individuals and entities invited by the evaluation committee to participate. The evaluation process was not open to members of the public or community organizations.

Response: Agree.

F4. The County's last three evaluations of the PDP did not report any review or conclusions of whether the PDP continues to be the best model for the County to provide indigent legal defense.

Response: Agree.

Recommendations:

R1. Conduct formal evaluations of the indigent defense system at least every five years.

Response: Agree. The County will conduct an evaluation during the current contract period with the San Mateo County Bar Association.

R2. Include, as a component of such formal evaluations, a determination of whether the County's approach to indigent defense is consistent with state and national guidelines.

Response: Agree. The County will ensure that future evaluations include a requirement to determine whether the current approach to indigent defense is consistent with state and national guidelines.

R3. Include, as a component of such formal evaluations, input from community members and organizations. The process of receiving community input should be open to the public and not by invitation only.

Response: Agree. The County will gather input from clients, community members and organizations, and include an opportunity for members of the public to provide input.

R4. Include, as a component of such formal evaluations, whether the current system continues to be the best model for the County for providing indigent legal defense.

Response: Agree. The County is currently undergoing a review of the current system and looking at alternative models. Unless determined otherwise by the evaluation planning committee, future evaluations will consider the merits and efficacy of the indigent defense system in place at the time of the review.

FISCAL IMPACT:

There is no net county cost associated with accepting this report.