



**COUNTY OF SAN MATEO**  
Inter-Departmental Correspondence  
County Manager's Office

**DATE:** September 8, 2016  
**BOARD MEETING DATE:** September 20, 2016  
**SPECIAL NOTICE/HEARING:** None  
**VOTE REQUIRED:** Majority

**TO:** Honorable Board of Supervisors

**FROM:** John L. Maltbie, County Manager  
Reyna Farrales, Deputy County Manager

**SUBJECT:** Review of Private Defender Program (PDP)

**RECOMMENDATION**

Accept reports from the County Manager and Controller on the Private Defender Program, and direct staff to implement recommendations over the next six months to improve County oversight of the contract with the San Mateo County Bar Association, with follow-up audit to be performed by the Controller after March 31, 2017.

**BACKGROUND AND DISCUSSION**

The County has contracted with the San Mateo County Bar Association (SMCBA) since 1968 to operate the Private Defender Program to provide indigent legal defense services. The existing two-year contract is managed by the County Manager's Office and expires on June 30, 2017. The PDP is expected to handle approximately 20,000 cases each year for \$19 million per year. Another \$5 million was provided to the SMCBA in 2013 for legal representation of multiple defendants in the Operation Sunny Day cases, and the funds will be available until all trials have been completed.

**Evaluation of Private Defender Program – Haning/Casey Report (Attachment A)**

In July 2015, the Grand Jury released a report on the Private Defender Program. The report included recommendations to conduct regular evaluations to determine whether the operation of the indigent defense program is consistent with state and national guidelines. The County Manager's Office subsequently contracted with retired Judge Zerme Haning and former County Counsel Thomas Casey to conduct an evaluation of the PDP for purposes of comparison with other indigent defense programs to determine whether the PDP remains the most appropriate model for providing indigent defense services in San Mateo County.

The evaluation was completed in December 2015, with the finding that the PDP is in compliance with the American Bar Association and State Bar of California's standards and principles for the operation of indigent defense programs. Other findings pointed to the need for more County oversight than what is currently provided. Recommendations were

made to address conflicts of interest among executive staff and PDP panel attorneys on the SMCBA Board of Directors, to open up the PDP panel to all qualified members of the SMCBA, address growth in administrative staffing, eliminate the use of PDP attorneys in receiving client complaints, and to increase the roles of the Chief and Assistant Chief Defender and Managing Attorney for Juvenile Services in daily courtroom activities.

### **San Mateo County Bar Association Response to Evaluation Report (Attachment B)**

The SMCBA provided a response to the evaluation report in April, opposing all recommendations and providing information to support the current PDP model.

On April 27, the SMCBA Board of Directors took action to address conflict of interest concerns by separating the position of Chief Defender from the Executive Director position of the SMCBA. It also established Standing Rules to prevent PDP panel attorneys on the SMCBA Board from voting on any matter related to the Private Defender Program.

### **Financial Review of Private Defender Program – Controller’s Office (Attachment C)**

The Haning/Casey evaluation focused primarily on the operational aspects of the PDP, and did not include a financial review to determine how PDP funds were disbursed and utilized. The County Manager’s Office requested the Controller’s Office to conduct this review, to determine if County funds paid to SMCBA were used to provide indigent legal services, to evaluate the reliability of case data and associated costs reported to the County, and to ensure that user access, security, availability, and processing integrity of case management and financial management systems are appropriate and effective.

The results indicate that the monies paid by the County to SMCBA were spent on providing indigent legal services. However, there were a number of issues identified during the review that need to be addressed by SMCBA for improved County oversight:

- Untimely and incomplete independent audit reports for the County
- Inaccurate and deficient reporting to the County
- Inadequate monitoring and analyses of case type and cost data
- Poor internal controls and procedures on paying vouchers (invoices)

The Controller’s recommendations must be implemented so the County can effectively evaluate the PDP’s financial and operational performance as a service provider, and ensure that public funds are spent appropriately. A follow-up audit will be conducted after March 31, 2017.

### **Community Feedback and Evaluation Follow-Up - County Manager’s Office**

The County Manager’s Office distributed the Haning/Casey report to the Court and other criminal justice and community partners for feedback, and posted it along with the SMCBA response on the County website. PDP attorneys were requested to provide feedback on the report, and two public sessions were held at the County Law Library on June 29 and July 12. Feedback was collected via mail, e-mail, phone and in person. Due to the limited response received from PDP clients, a focus group and individual interviews were conducted at Maguire Jail and Service Connect. A summary of the feedback received can be found in **Attachment D** of this report.

For the most part, feedback was positive and supportive of the Private Defender Program. The PDP attorneys in particular commented on the flexibility they have to choose cases, which gives them a more meaningful work experience and better work/life balance. Many pointed to the support they receive from the leadership and staff of the PDP, including training, mentoring and access to investigation and expert resources so they can effectively represent and defend their clients.

Clients said the positive experiences they've had are when they got an attorney who "was a fighter", who "told me not to worry and that we're going to get through this together", kept them and their family informed and involved throughout the process, put time into working on their cases before court appearances (not a few minutes before), gave them options and helped them understand the consequences of each option, and gave them enough time to make decisions. Negative experiences were when they got attorneys who were "just going through the motions", who didn't spend enough time explaining the process and their choices in layman's terms, and didn't know or wasn't motivated to find out if there are programs and other options available to them.

Feedback on suggestions for improvement include:

- Give a simple handout to the client and family members in court, so they know what the Private Defender does, when they will hear from their attorney, what their responsibilities are, and what to expect within specific timeframes
- Assign more than one attorney during arraignments so more time can be spent educating clients about the process from the beginning
- Attorneys need to give clients and family members information about options and resources available to them, including mental health counseling and treatment services, immigration, housing, education and other public assistance
- Provide more transparency with the complaint process; use a 3<sup>rd</sup> party to handle complaints about PDP attorneys, and track responses and resolution; there were comments about non-responsiveness with the current process, and conflict by using PDP attorneys to handle complaints
- Ask clients for feedback on attorneys assigned to them
- Give PDP attorneys access to Odyssey (Court system) to view information about the cases and clients assigned to them

Additional follow-up was conducted to gather more information from the PDP on recommendations from the Haning/Casey evaluation. We thank Assistant Chief Defender Myra Weiher for her responsiveness to our requests.

## **RECOMMENDATIONS**

Given the feedback received on the evaluation report, as well as the Controller review and follow-up with the Private Defender's Office, we recommend the following:

1. **Implement all recommendations from the Controller's financial review of the Private Defender Program, and schedule a follow-up audit after March 31, 2017.** The review revealed that the SMCBA has failed to provide the County with reliable information on cases and costs to effectively oversee and evaluate the SMCBA as a service provider of indigent defense services. Also, the review found poor internal

controls, lack of documented financial policies and procedures, lack of ongoing and year-end financial reviews, and instances of non-compliance with fee schedules that led to issuance of incorrect payments. These must be addressed prior to consideration of another contract with the SMCBA.

2. **Add a termination clause in the existing agreement that requires the County and the San Mateo County Bar Association to give at least 12 months notice before the agreement can be terminated.** The current agreement ends on June 30, 2017 and does not include language that gives sufficient time for transition should the County or SMCBA decide to terminate the agreement. Language should be added that gives both parties at least 12 months to transition to a different service provider(s).
3. **Create a Private Defender Oversight Committee that would meet quarterly to set priorities, monitor PDP operational and financial goals, and select the Chief Defender.** The Private Defender Program plays an important role in carrying out the County's mandated responsibility to provide indigent defense services. At \$19 million annually, it is one of the County's largest contracts for services and is 95% of the SMCBA's budget. The existing partnership between the County and SMCBA can be strengthened to ensure the success of this important service, by including the County in the ongoing oversight of the PDP and in the selection of the Chief Defender.
4. **Develop a PDP Performance Report so that operational and financial goals can be prioritized and results monitored throughout the year.** Exhibit 1 has performance measures for the County and SMCBA to monitor throughout the year. Most of these measures already exist in annual reports prepared by the PDP. There are new measures proposed to improve tracking client experience and client demographics (e.g. repeat clients, clients with multiple cases, clients with children, types of support services provided) so that resources can be better aligned to help clients and their families succeed, and better educate attorneys on the availability of treatment, support services and alternatives to incarceration.
5. **Make the list of PDP attorneys and application process available to the public; include client feedback in attorney evaluations.** The existing application packet to be on the PDP panel appears to be effective in communicating selection criteria and process to candidates. The packet can be found in Attachment E. This can be made available on the PDP and SMCBA websites, along with a list of current PDP attorneys. There have been 17 attorneys added to the panel since 2013. The current number of panel attorneys is 107. All attorneys have to complete an annual survey about their cases, outcomes, and they are evaluated annually by PDP management. While client surveys are currently being sent out to recently closed cases, the response rates have been around 10%. Part of each attorney's annual evaluation should include getting feedback from clients and criminal justice partners who have worked with the attorney during the year.
6. **Retain "Officer of the Day" responsibilities in the contract to respond to inquiries from clients, but develop an independent process for client issues with their assigned PDP attorney.** The number of client inquiries has grown from 317 calls in FY 2010 to over 2,000 in FY 2015 due to Public Safety Realignment and passage of

Proposition 47. It is important to continue this resource and monitor its use, but keep it separate from the process to resolve client complaints about their attorney. The County Manager's Office can work with the PDP and client advocates on this process.

7. **Leave administrative staffing levels as-is and place a 10% expenditure limit in future contracts.** The current administrative expenditure level appears reasonable when viewed as a percentage of the total annual PDP contract amount. Administrative labor costs have been in the range of 9.5% - 11.5% of the annual contract amount over the last five years. It is on an upward trend and should be capped in future contracts. This expenditure range is somewhat difficult to compare with county peers due to the variety of public defense models (public defender, contracts, hybrid).
8. **Maintain supervisory and management roles of the Chief Defender, Assistant Defender and Managing Attorneys.** Given the current caseloads of the PDP, with over 100 panel attorneys and 36 investigators handling 20,000 cases, and the need for succession planning and adequate training, mentoring and evaluation of PDP attorneys, we recommend these roles remain as managers and supervisors and not assigned to individual cases in Juvenile Court or to staff the Criminal Master Calendar.

We want to thank the Honorable Zerne Haning, former County Counsel Thomas Casey, County Controller Juan Raigoza and his team, Chief Defender John Digiaccinto and Assistant Chief Defender Myra Weiher and their team, and all who contributed to the review and continuous improvement of the Private Defender Program.

## **FISCAL IMPACT**

There is no fiscal impact in accepting this report. Any adjustments resulting from Board direction to implement recommendations will be brought to the Board for consideration at future meetings.

## **EXHIBITS**

Exhibit 1 – PDP Performance Report

Exhibit 2 – Summary of All Recommendations

## **ATTACHMENTS**

Attachment A – PDP Evaluation Report (Haning/Casey, December 2015)

Attachment B – Responses to Evaluation Report from SMCBA (April 2016 – Letters Only)\*

Attachment C – PDP Financial Review Report (Controller's Office, September 2016)

Attachment D – Summary of PDP Feedback (County Manager's Office, September 2016)

Attachment E – Application Packet for PDP Attorney Candidates

\*Complete responses can be found at <https://www.smcgov.org/private-defender-program>

## EXHIBIT 1 – PDP PERFORMANCE REPORT

PERFORMANCE MEASURES	FY 2013	FY 2014	FY 2015	FY 2016
<b>Case Counts by Type *</b>				
Type A - Superior Court Arraignments/Other	1,852	2,076	1,815	2,359
Type A - Prop 47 filing to reduce felony conviction to misdemeanor	-	-	995	2,078
Type A - Probation Violations (Felony)	-	163	188	881
Type B - Muni Ct Arraignments/Other	13,406	14,080	13,409	13,777
Type B - Probation Violations (Misd)	1,373	1,475	1,209	1,021
Type C - LPS-Writs & Petition Rehearings	34	40	79	56
Type C - Mental Health LPS-Regular	566	524	606	584
Type D - Juvenile Dependency	610	507	592	539
Type E - Juvenile Delinquency	1,648	1,389	1,346	1,165
Total Cases	19,489	20,254	20,239	22,460
<b>Case Costs by Type (shown per contract; need to also provide actual case costs) *</b>				
Type A - Superior Court	\$1,356	\$1,383	\$1,404	\$1,474
Type B - Municipal Court	\$594	\$606	\$615	\$646
Type C - Mental Health (LPS) and Probate	\$668	\$681	\$691	\$726
Type D - Juvenile Dependency	\$993	\$1,013	\$1,028	\$1,079
Type E - Juvenile Delinquency	\$292	\$298	\$302	\$317
<b>Assignment of Cases</b>				
Number of cases assigned *	19,489	20,254	20,239	22,460
% repeat clients - multiple cases in last 3-6 months (recidivism rate)	NEW			
Case/Client demographics (TBD) – to focus on recidivism reduction and targeted alternatives to incarceration	NEW			
% of cases assigned to PDP attorney within 2 days of Court appointment *	NEW			
% of cases in which attorney consulted with client within 48 hours	NEW			
% of clients represented by the same attorney from time of assignment until case conclusion *	NEW			

PERFORMANCE MEASURES	FY 2013	FY 2014	FY 2015	FY 2016
<b>Client Relations and Survey Results</b>				
# of client calls to Officers of the Day *	707	1,447	2,050	
- # general and specific inquiries*	620	1,368	1,973	
- # complaints about assigned attorney*	87	79	77	
Complaints as % of calls received*	12%	5%	4%	
# of attorneys with multiple complaints	NEW			
Disposition of complaints	NEW			
Removal of attorney granted by Court (Marsden)-irreconcilable differences between attorney and client*	3	8	6	
Removal of attorney granted by Court (Marsden)- ineffective assistance of counsel*	0	0	1	
# of surveys sent to clients –selected from recently closed cases*	N/A	243	358	
# of survey responses received*	N/A	20	38	
Response rate*	N/A	8%	11%	
<b>Breakdown of survey responses:</b>				
% satisfied with overall representation provided by their attorney*	N/A	95%	82%	
% who stated that their attorney returned phone calls*	N/A			
% responding they had a chance to meet with their attorney before their first court appearance*	N/A			
% responding they had enough time with their attorney to discuss their case*	N/A			
% responding their assigned attorney explained sufficiently what was going on in their case*	N/A			
% responding their attorney appeared to be prepared in court*	N/A			
% responding their attorney was on time for meetings*	N/A			

PERFORMANCE MEASURES	FY 2013	FY 2014	FY 2015	FY 2016
<b>Attorney Experience and Evaluation</b>				
Number of attorneys on PDP panel*	108	114	107	
- Experience level 5 years or less*	4%	5%	5%	
- Experience level 6-10 years*	18%	19%	16%	
- Experience level 11-15 years*	9%	12%	11%	
- Experience level 16 years or more*	69%	63%	68%	
- % of PDP panel attorneys with Deputy DA, Public Defender, Management experience*	42%	42%	38%	
% of time devoted by average PDP trial attorney to handling PDP cases*	83%	84%	84%	
% of caseload limit reached by average PDP trial attorney*	46%	47%	43%	
# of new attorneys starting on panel*	NEW			
% of PDP attorneys completing Annual Survey (self-review)*	NEW			
% of PDP attorneys evaluated annually*	NEW			
% of PDP attorneys completing required 15 hours of annual continuing legal education/training*	NEW			
# and % of PDP attorneys who have not had a jury trial in the past three years*	NEW			
% of PDP attorneys who administrators perceive are not utilizing investigation frequently enough in preparing their cases for trial*	NEW			

\*Data already collected for PDP annual reports.



## EXHIBIT 2 – SUMMARY OF RECOMMENDATIONS

### **1. Implement all recommendations from the Controller's financial review of the Private Defender Program, and schedule a follow-up audit after March 31, 2017 (Refer to Attachment C for complete report):**

Recommendation 1: The County should require the Association to provide audited financial statements that include a Statement of Financial Position, Statements of Activities and Changes in Net Assets, and Statement of Cash Flows. The financial statements and Management Letter should be provided to the County no later than December 31 after the fiscal year-end.

Recommendation 2: The County should require the Association to change the PDP's auditors every five years.

Recommendation 3: The County should require the Association to implement accounting procedures so that audited financial statements and the Management Letter can be provided to the County by December 31 after each fiscal year-end.

Recommendation 4: The County should require the Association to provide accurate monthly case count reports and ensure that complete case type details are entered into the defenderData system. Additionally, the report criteria should be reviewed and revised to ensure cases are categorized into the correct type. Also, the cost per case type should be computed based on actual historical expenses and reported quarterly to the County.

Recommendation 5: The County should require the Association to periodically (e.g. quarterly) provide the County with summary and detailed reports on case counts and related costs that can be easily verified to source documentation upon request. The following summary and detailed reports should be provided:

- Expenditures by Attorney
- Expenditures per Court Case Number, Case Type and Sub-Type
- Expenditures by Fee Type
- Expenditures by Administrative Expense Type
- Case County by Type and Sub-Type (with case number details)

Recommendation 6: The County should require the Association to provide detailed reports of actual expenditures incurred for providing indigent legal services to ensure the annual contract amount is reasonable and supported. The County should modify the contract terms to make installment payments quarterly instead of biannually so that the County can earn interest on the cash on hand.

Recommendation 7: The County should require the Association to develop and document its accounting policies and procedures for the PDP. The accounting policies and procedures should be designed to ensure that segregation of duties, proper reviews and approvals, financial analyses, monitoring by management, and other internal controls are followed. Management should ensure compliance with these policies and procedures.

Recommendation 8: The County should require the Association to thoroughly review vouchers for accuracy and compliance with documented policies, prior to paying the vouchers. The review and approval procedures performed by PDP personnel should be well documented to ensure the rules are consistently applied and monitored by management to verify that they are being followed.

Recommendation 9: The County should require the Association to establish policies to ensure that voucher approval duties are segregated from system administration and voucher payment duties. Any deviation from this requirement should be subject to higher level management review and documentation.

Recommendation 10: The County should ensure that the Association properly allocates costs to the PDP. The Association should develop a methodology to allocate employees' salaries and benefit expenses between PDP and non-PDP activities. This corrected allocation should then be reflected in updated case costs and other estimates used to determine the annual contract amount.

Recommendation 11: The County should require the Association to periodically review and document access to critical systems to ensure only authorized users have access and rights that are appropriate to their roles.

Recommendation 12: The County should require the Association to request and review Service Organization Control (SOC) reports for the defenderData and MS Dynamics systems. Any applicable required actions outlined in the reports should be implemented.

- 2. Add a termination clause in the existing agreement that requires the County and the San Mateo County Bar Association to give at least 12 months notice before the agreement can be terminated.**
- 3. Create a Private Defender Oversight Committee that would meet quarterly to set priorities, monitor PDP operational and financial goals, and select the Chief Defender.**
- 4. Develop a PDP Performance Report so that operational and financial goals can be prioritized and results monitored throughout the year.**
- 5. Make the list of PDP attorneys and application process available to the public; include client feedback in attorney evaluations.**
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