



County of San Mateo

Inter-Departmental Correspondence

Department: COUNTY MANAGER

File #: 21-150

Board Meeting Date: 2/23/2021

Special Notice / Hearing: None
Vote Required: Majority

To: Honorable Board of Supervisors

From: Michael P. Callagy, County Manager

Subject: Board of Supervisors' Amended Response to the 2019-2020 Civil Grand Jury Report "Balancing the Scales of Justice Between the Prosecution and Defense in San Mateo County"

RECOMMENDATION:

Approve the Board of Supervisors' amended response to the 2019-2020 Civil Grand Jury Report, "Balancing the Scales of Justice Between the Prosecution and Defense in San Mateo County."

BACKGROUND:

On September 1, 2020, the 2019-2020 San Mateo County Civil Grand Jury issued a report entitled "Balancing the Scales of Justice Between Prosecution and Defense in San Mateo County" ("Report"). The Report included 17 findings and seven (7) recommendations. The Board of Supervisors was required to submit comments within 90 days on those findings and recommendations in the Report pertaining to the matters over which it has some decision-making authority.

The Board approved a response to the Report on November 17, 2020. The County Manager recommends that the Board clarify its responses to four (4) of the 17 findings in the Report; specifically, F1, F4, F5, and F7. The Board's original response to the Report is otherwise unchanged.

DISCUSSION:

Findings

F1: Following a Grand Jury Report in July 2015 and an evaluation of the PDP in December 2015, the San Mateo County Controller completed three audits of the PDP between 2016 and 2019 and found significant financial irregularities that were not resolved prior to the execution of the 2017-19 contract and the current 2019-21 contract.

The County **partially disagrees** with this Finding. The County agrees that, following a Grand Jury Report in July 2015 and an evaluation of the PDP in December 2015, the Controller's Office

completed three audits of the PDP between 2016 and 2019 and found significant financial irregularities that were not resolved prior to the execution of the 2017-2019 contract. However, the County disagrees that the financial irregularities were not resolved prior to execution of the current 2019-21 contract. In April 2019, the SMCBA/PDP informed the Controller's Office that they had adopted all recommended accounting policies and procedures, prior to execution of the current 2019-21 contract, but the audit steps/testing to verify implementation of all of the newly adopted policies were completed later. The Controller's Office 4th audit report on SMCBA/PDP, completed on June 30, 2020, examined activities between January 1, 2019 and December 31, 2019 and confirmed that SMCBA/PDP had in fact been following its newly adopted policies during that time period.

F2: Immediately following issuance of the Controller's initial audit in 2016, the SMCBA Board:

- *Addressed conflicts of interest of members of the SMCBA Board;*
- *Separated the SMCBA Executive Director and Chief Defender positions;*
- *Replaced the SMCBA independent auditors and accounting staff.*

In March 2019 the SMCBA adopted Financial Policies and Procedures.

The County **agrees** with this Finding.

F3: Following issuance of the Controller's initial audit in 2016, the San Mateo Board of Supervisors approved the County Manager's recommendation that all of the Controller's recommendations be implemented prior to consideration of a new contract with the SMCBA in 2017.

The County **agrees** with this Finding.

F4: A third audit by the Controller completed in June 2019 found that the SMCBA/PDP had not completed six of 12 financial recommendations and six of 12 contractual requirements. The SMCBA accounting policies and procedures were not approved until March 2019 and not implemented until FY 2020 after the Controller's audit period. Consequently, auditors could not test whether the policies and procedures were sufficient to address deficiencies.

The County **partially disagrees** with this Finding. The County agrees that a third audit by the Controller's Office completed in June 2019 found that the SMCBA/PDP had not completed six of 12 financial recommendations and six of 12 contractual requirements. The County further agrees that the SMCBA accounting policies and procedures were not adopted by the SMCBA/PDP until March 2019. However, as explained above in response to F1, in April 2019, the SMCBA/PDP informed the Controller's Office that they had adopted all recommended accounting policies and procedures. The Controller's Office began testing those policies and procedures in December 2019 and the 4th audit report on SMCBA/PDP completed on June 30, 2020, which examined activities between January 1, 2019 and December 31, 2019, confirmed that SMCBA/PDP had in fact been following its newly adopted policies during that time period.

F5: The current contract with the SMCBA was approved even though the Controller audits could not confirm that more than half of the initial recommendations (from 2016) had been addressed.

The County **disagrees** with this Finding. As explained above in response to F1 and F4, in April 2019, the SMCBA/PDP informed the Controller's Office that they had adopted all recommended accounting policies and procedures. The Controller's Office 4th audit report on SMCBA/PDP, completed on June

30, 2020, examined activities between January 1, 2019 and December 31, 2019 and confirmed that SMCBA/PDP had in fact been following its newly adopted policies during that time period.

F6: A fourth audit was completed by the Controller in July 2020 and found that all six outstanding financial recommendations and six contractual requirements were implemented. The PDP's independent accountants provided a "clean opinion" on the financial statements for the fiscal year ending 6/30/2019 and there were no significant items in that year's Management Letter.

The County **agrees** with this Finding.

F7: The PDP did not approve written accounting procedures including voucher review procedures until March 2019 and confirmation of their implementation by the Controller did not occur until June 2020. The County continued to pay PDP invoices for nearly four years, without confirmation that the underlying financial data was correct.

The County **partially disagrees** with this Finding. As explained above in response to F1, F4, and F5, in April 2019, the SMCBA/PDP informed the Controller's Office that they had adopted recommended accounting policies and procedures. The Controller's Office 4th audit report on SMCBA/PDP, completed on June 30, 2020, examined activities between January 1, 2019 and December 31, 2019 and confirmed that SMCBA/PDP had in fact been following its newly adopted policies during that time period. Moreover, the County required that, until the Controller's Office completed its audit and verified implementation of audit recommendations, only unspent funds remaining from advance payments made under the 2015-17 contract could be used to pay for PDP services provided after September 30, 2017.

F8: PDP staff have limited oversight and supervision of, and accountability for, PDP attorneys regarding education and training and the quality of their legal representation. This is due, in part, to PDP's understanding of their independent contractor relationship with the Panel attorneys.

The County **lacks sufficient information to agree or disagree** with this Finding. However, the County will be retaining an independent investigator to conduct an evaluation of the PDP, and the issues raised in the Finding will be addressed by the independent investigator.

F9: There is little parity between the PDP and the San Mateo District Attorney's Office regarding processes and systems that would enable the PDP to analyze, monitor, and report on the quality of legal representation provided by PDP attorneys.

The County **lacks sufficient information to agree or disagree** with this Finding. However, the County will be retaining an independent investigator to conduct an evaluation of the PDP, and the issues raised in the Finding will be addressed by the independent investigator.

F10: The District Attorney's Office is funded at 2.2 times the PDP's budget in FY 2019-20. Further, the PDP budget has been virtually flat since 2015 and may actually be declining in real dollars.

The County **partially agrees** with this Finding, as the total budget for the DA's Office is double the

value of the PDP's contract. The DA's Office, however, receives a large portion (\$10.2 million) of its overall funding from the State pursuant to Proposition 172. The County's net general fund contribution to the PDP (\$19.4 million) is nearly equal to that of the DA's Office (\$21.6 million). Additionally, the programs have different cost structures. For example, while the PDP attorneys are independent contractors, the DA's Office spends over 75% of its budget on salaries and benefits. Part of the reason the County's net contribution to the PDP remained relatively flat was because, by the end of fiscal year 2016-17, the PDP had amassed nearly \$19 million in reserves and was directed to draw down on those funds prior to receiving payment during the following year. Under the PDP's new contract, it is paid for services rendered, as opposed to receiving a set dollar amount.

F11: The SMCBA Board oversees the PDP through a Private Defender Board Committee to advise the Chief Defender. That committee is staffed by PDP attorneys and a representative from the Board.

The County **agrees** with this Finding.

F12: "Performance benchmarks" delineated in county contracts require the PDP to present data without analysis or comparison to state or national defender program benchmarks.

The County **agrees** with this Finding.

F13: The County requires the PDP to report caseloads by type of case and average caseload per attorney, without reference or analysis to national caseload standards which factor in case complexity, resources, attorney activities and client outcomes.

The County **agrees** with this Finding. The Agreement with the County requires the PDP to report, on a quarterly basis, the case count by type and sub-type with case number details and the names of all attorneys who represented PDP clients during that quarter. The PDP is also required to include the caseloads of each PDP attorney by types of cases, as well as the average caseloads for the Private Defender Program as a whole, in the Program's annual report to the County.

F14: An evaluation of the PDP was completed in 2015 by a retired County Judge and former County Counsel. Though the contract requires an evaluation every five years, none had been scheduled for 2020 at the time of Grand Jury interviews.

The County **agrees** with this Finding. The County intended to put out a request for proposals for an evaluation in the spring of 2020, but due to the COVID-19 pandemic, that effort has been delayed.

F15: PDP client surveys are sent to a very limited number of clients and only in English.

The County **partially disagrees** with this Finding. The County is aware that the survey exists in English and Spanish but lacks information about how many surveys are sent to clients.

F16: Anecdotal reports by prosecuting attorneys and judges provide a wide range of quality assessments of PDP attorneys, from outstanding to poor.

The County **lacks sufficient information to agree or disagree** with this Finding. However, the

County will be retaining an independent investigator to conduct an evaluation of the PDP.

F17: The County has never completed a comprehensive independent review of the PDP that could:

- *Impartially evaluate the PDP against national public defense requirements;*
- *Compare the program to other models;*
- *Recommend improvements to the current model.*

The County **partially disagrees** with this Finding. In 2016, Retired Judge Zerne P. Haning and Retired County Counsel Thomas Casey conducted a review of the PDP and published a report. That report stated that the American Bar Association and the State Bar of California had formulated recommendations for the operation of public and private defender programs and that the PDP appeared to comply with those recommendations. The report found that a contractual arrangement with a private law firm would not be a feasible way to provide indigent defense. The report also found no evidence that a Public Defender would necessarily provide better or more cost-effective representation for indigent criminal defendants in the County. Judge Haning and County Counsel Casey made a number of specific recommendations for improvements of the PDP, including financial review, calendar staffing, and maintaining a panel open to all qualified members of the SMCBA. Four years have passed since this report was published and the County plans to retain an independent investigator to conduct a new evaluation of the PDP.

Recommendations

R1: The Board of Supervisors should request that County Controller audit the PDP prior to renewal or implementation of every contract with the PDP. Audits should be completed at least four months before contract renewal and findings presented to the Board no later than three months before contract renewal, and in any event in time to provide input to contract negotiations.

The County **generally agrees** with this Recommendation and will undertake best efforts to meet the recommended deadlines, subject to the County Controller having sufficient audit resources available.

R2: The Board of Supervisors should require the PDP to translate descriptive information about the PDP and relevant written materials important for clients and their families to understand the judicial process, into multiple languages on the website to address the language needs of County residents. This should be completed by January 31, 2021.

The County **agrees** with this Recommendation, and will work with the PDP to provide the materials in threshold languages, which are languages spoken by 5% or more of the County's population. Those threshold languages are currently English, Spanish, Chinese, and Tagalog.

R3: The Board of Supervisors should recommend that the Chief Defender review Public Defender Offices in other California counties to understand the scope and breadth of indigent legal services programs, the resources that are required to establish and measure performance and how quality oversight is conducted. Likewise, the PDP should discuss with the DA's Office its professional development and career advancement programs for staff as well as processes, systems and resources. These reviews should be completed by

January 31, 2021.

The County **agrees** with this Recommendation.

- R4. *The Board of Supervisors should authorize a comprehensive, independent and impartial review of the PDP by an organization with legal, management and accounting expertise to evaluate the program against national public defense requirements and estimate costs for improving the PDP model or implementing an alternative system. This evaluation should be completed by March 31, 2021, and made publicly available.*

The County **generally agrees** with this Recommendation. The County will seek an evaluation of the Program in relation to all best practices for indigent defense and will evaluate the cost of trying to implement any best practices not currently in place. Given the County's response to the COVID-19 pandemic, the County will issue a request for proposals for an independent evaluator, select a contractor, and seek to have the evaluation completed on or before September 30, 2021.

- R5. *By May 1, 2021 the Board of Supervisors should have the County Manager:*
- *Replace the "performance benchmarks" section in the 2021-2023 SMCBA contract with national and state defense performance criteria and benchmarks that are audited annually by the Controller for PDP compliance;*
 - *Review the independent review report findings and recommendations to determine which should be adopted and on what time schedule;*
 - *Work with the Chief Defender to identify best practice processes, systems and resource needs so the PDP can address the new performance standards;*
 - *Require the PDP to report legal defense performance analytics in its Annual Report to the Board of Supervisors.*

If the SMCBA does not agree to these contractual changes, the County should consider providing SMCBA with a two-year notice to terminate the contract and begin developing an alternate legal defense model.

The County **generally agrees** with this Recommendation. However, the proposed May 1, 2021 deadline is too early, given that the County would seek to have an independent evaluation of the PDP completed on or before September 30, 2021. With respect to the performance benchmarks to be incorporated into the 2021-2023 SMCBA contract, the County will wait to see what the independent evaluator recommends with respect to performance criteria and metrics. The County agrees that the Board of Supervisors should have the County Manager review the independent evaluator's findings and recommendations to determine which should be adopted and on what time schedule. The County agrees that the County Manager should work with the Chief Defender to review the independent evaluator's report and identify best practice processes, systems, and resource needs so the PDP can address any new performance standards for the program that the evaluator recommends. The County agrees that the PDP should be required to report performance analytics in its annual report to the Board of Supervisors. The County will work with the evaluator to determine which metrics should be included in a report to the Board. The County will consider implementing an alternate legal defense model if that is what the independent evaluator recommends.

- R6. *The Board of Supervisors should require the PDP to develop an implementation plan,*

timetable and resource requirements that reflect new processes, systems and performance tracking measures to enable the PDP to provide proper oversight and assume accountability for the quality of legal services provided to indigent clients. This should be completed by May 1, 2021 for review and approval by the County Manager and Board of Supervisors no later than June 1, 2021, and in any event prior to the date by which a new contract with SMCBA for PDP services must be approved for Fiscal Years 2021-2023.

The County **generally agrees** with this Recommendation. However, the proposed May 1, 2021 deadline is too early, given that the County would seek to have an independent evaluation of the PDP completed on or before September 30, 2021. After reviewing the evaluation, the County will work with the PDP to implement appropriate recommended processes and performance measures to ensure quality legal representation for indigent criminal defendants. The new PDP contract will include the requirement that these new processes and performance measures be implemented.

R7. The Board of Supervisors should begin to address the large funding disparity between the defense of indigents and their prosecution, in fiscal year 2021-2022.

The County **generally agrees** with this Recommendation. The total budgets for the DA's Office and the PDP are unequal. The issue, however, is not necessarily funding parity, but whether the PDP has sufficient funds to meet its mandate of providing high quality representation for the County's indigent defendants. The County will review the findings of the independent evaluator with respect to the PDP's staffing and access to investigators, expert witnesses, research materials, consultants, and any other resources they need to competently and zealously represent their clients.

FISCAL IMPACT:

There is no fiscal impact associated with approving this amended response to the Report.