



BALANCING THE SCALES OF JUSTICE Between the Prosecution and Defense in San Mateo County

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ISSUE

Has the County implemented recommendations from a 2015 evaluation of the Private Defender Program, and provided sufficient oversight of the program?

SUMMARY

“Equal justice under the law is not merely a caption on the façade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...it is fundamental that justice should be the same, in substance and availability without regard to economic status.”¹

Lewis F. Powell, Associate Justice of the Supreme Court of the United States

Since 1968 San Mateo County has contracted with the San Mateo County Bar Association (SMCBA) to provide approximately 100 attorneys to represent indigent defendants through SMCBA’s Private Defender Program (PDP). San Mateo County is the only county in California with a population over 500,000 that does not have a county Public Defender Office.

Because of the importance of the PDP’s representation for indigent County residents, the 2014-15 Grand Jury recommended that the program be evaluated. In light of that evaluation, the 2019-2020 Grand Jury’s goal was to determine:

- Whether recommendations from the 2015 evaluation were implemented;
- Whether the County provides sufficient oversight of the PDP.

The review focused on four categories: finances, operations, oversight, and quality of legal representation. The 2019-2020 Grand Jury found that:

- Only after four audits between September 2016 and June 2020, was the County Controller able to confirm that the SMCBA had implemented all 12 financial and 12 contractual recommendations made in September 2016 regarding SMCBA internal accounting controls and SMCBA compliance with the County’s contract for the PDP;
- The County’s contract with the SMCBA does not require the PDP to analyze any of the performance data it collects nor compare it to national defense performance benchmarks;

¹ Lewis F. Powell, Associate Justice of the Supreme Court of the United States, August 1976.

- The County’s oversight since 2016 primarily focused on the financial deficiencies cited by the Controller with limited oversight of program effectiveness aspects of the program;
- The PDP lacks sufficient resources, including staff and software programs, to provide meaningful performance data to the County;
- The PDP has limited oversight and supervision of its independent contractor attorneys;
- Once a case is assigned, neither the County nor the PDP take any responsibility for the effectiveness of PDP attorney legal representation;
- Funding for the PDP is less than half of the County District Attorney’s Office for approximately the same number of cases. This impacts the PDP’s ability to provide meaningful representation;
- In the 52 years of the PDP, the County has never authorized a comprehensive, independent and objective review of the PDP against national public defense requirements that could the need for changes to or replacement of the County’s indigent legal defense model.

The Grand Jury recommends that the San Mateo County Board of Supervisors authorize a comprehensive, independent and impartial review of the PDP to evaluate the program against national public defense requirements and estimate costs for improving the PDP model or implementing an alternative system. Other recommendations address:

- The lack of both performance criteria in the contract with the PDP and oversight by the County;
- The resources required by the PDP if it is to establish and measure performance and ensure the quality of representation provided to County residents.

GLOSSARY

American Bar Association (ABA) – Founded in 1878, the ABA is a membership organization of lawyers, judges and others interested in law-related issues who are committed to advancing the rule of law in the United States. It provides practical resources for legal professionals, law school accreditation, model ethics codes and more.

Chief Defender – Reports to the Board of Directors of the San Mateo County Bar Association and is the leader and person responsible for the overall operation of the Private Defender Program.

Deputy District Attorney (DDA) – an attorney in the prosecutor’s office who reports to the District Attorney.

Panel – Is the group of private attorneys that contract with SMCBA to represent indigent County residents through the Private Defender Program.

Private Defender Program (PDP) – The PDP is a program of the San Mateo County Bar Association, led by a Chief Defender and funded by the County of San Mateo to provide attorneys to County residents financially eligible for counsel at public expense.

Public Defender Office –Departments in most California counties and jurisdictions in other states in which full-time attorneys are employed to represent and advise those financially eligible for the appointment of counsel at public expense.

San Mateo County Bar Association (SMCBA) –An organization for attorneys and judges in San Mateo County which works to educate members, foster high professional standards, encourage congeniality and cooperation between its members and the judiciary in order to advance the fair and effective administration of justice for all. The SMCBA contracts with the County for the provision of the PDP.

BACKGROUND

2014-2015 Grand Jury Report Findings

The 2014-2015 San Mateo County Civil Grand Jury² investigated the County’s Private Defender Program (PDP) to assess whether the County’s approach to indigent defense was consistent with national and state guidelines. They also determined that there had not been a formal evaluation of the program between 2003 and 2012 and previous evaluations (in 2001, 2003, and 2012) had not addressed whether the PDP remained the best model for the County to provide indigent legal defense.

In response, the Board of Supervisors agreed that the County should conduct an evaluation of the PDP every five years and noted that one would be completed during the period of the contract which was in existence at the time. The purpose of the evaluation would be to determine whether “the current system continues to be the best model for the County for providing indigent legal defense” and the County further noted that “...future evaluations will consider the merits and efficacy of the indigent defense system...”³

The County undertook an evaluation of the PDP in late 2015. Because of the importance of the PDP’s representation of indigent criminal defendants, the 2019-2020 Grand Jury decided to review the evaluation and reports completed since 2015 to determine:

- Whether recommendations from the evaluation were implemented;
- Whether the County provides sufficient oversight of the PDP.

Legal Counsel for Indigent Criminal Defendants

The Sixth Amendment to the United States Constitution guarantees that defendants have the right to counsel. However, it wasn’t until 1963 in *Gideon v Wainwright* that the Supreme Court held that states had an obligation to provide lawyers to indigent defendants. Since *Gideon*, subsequent Supreme Court decisions have clarified that states are required to appoint counsel for the poor not only for felonies but also for misdemeanors as well as for children in delinquency proceedings.⁴ The American Bar Association’s “Ten Principles of a Public Defense Delivery

² 2014-2015 San Mateo County Civil Grand Jury, *San Mateo County Private Defender Program*.

³ John L. Maltbie, County Manager, Interdepartmental Correspondence, to San Mateo Board of Supervisors, 2014-2015 Grand Jury Response—San Mateo County Private Defender Program, August 20, 2015, County Responses to R1 and R4.

⁴ <https://sixthamendment.org/the-right-to-counsel/effective-assistance-at-critical-stages/>

System,” details specific requirements to assure the quality of public defense representation. One of the principles set forth by the ABA is that there should be “parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.”⁵

Since 1968, San Mateo County has contracted with the San Mateo County Bar Association (SMCBA) to provide attorneys to represent indigent defendants, youth appearing in juvenile court (both in delinquency proceedings as well as dependency proceedings), and those with mental health issues through the SMCBA’s Private Defender Program (PDP).⁶ Twenty-three counties in California contract with legal firms or individual attorneys for legal services for indigent residents⁷ due to the expense of a Public Defender Office for a relatively small number of cases in these counties. San Mateo County is the only county with a population over 500,000 that does not have a Public Defender Office.⁸ The current contract between the County and the SMCBA covers the period July 1, 2019 through June 30, 2021, and is renewable by the County for an additional two years.⁹ At a cost of \$19.6 million per year, the PDP contract is one of the largest service contracts executed by the County and is managed by the County Manager.¹⁰

Current Makeup of the PDP

The PDP has 15 employees led by a Chief Defender who oversees operations and reports to the SMCBA’s Board. The current Chief Defender was appointed in December 2019, after serving as the Assistant Chief Defender for two years. Other key staff include an Assistant Chief Defender, a Managing Attorney, and a Chief Investigator. Accounting staff are shared with the SMCBA. The approximately 100 PDP attorneys (the Panel) contract with the SMCBA as independent contractors. Cases are assigned to Panel attorneys by PDP staff. The majority of PDP attorneys have 11 or more years legal experience, and the average PDP attorney devotes 76% of his/her time to the representation of PDP clients. During the fiscal year ending June 30, 2019, about half of the 100 attorneys on the Panel worked almost exclusively for the PDP, each with a case load between 90% and 100%.¹¹ The Panel, as a whole, has an annual caseload of approximately 20,000 cases, approximately 80% of which are misdemeanors.¹²

California legislation, AB 5, effective January 2, 2020, will impact employers who use independent contractors.¹³ PDP staff indicated this law may further limit what they perceive as the PDP’s ability to oversee individual attorneys.¹⁴

⁵ American Bar Association, *Ten Principles of a Public Defense Delivery System*, February 2002.

⁶ Agreement between the County of San Mateo and the San Mateo County Bar Association, June 2019.

⁷ The County of Santa Cruz currently contracts with one law office but will be migrating to a Public Defender Program by 2022 according to County of Santa Cruz, *Our Public Defender System: Anticipating Structural Change*, June 21, 2018.

⁸ California Commission on the Fair Administration of Justice, *Report and Recommendations on Funding of Defense Services in California*, April 14, 2008, p 2.

⁹ Agreement between the County of San Mateo and the San Mateo County Bar Association, June 2019.

¹⁰ Grand Jury Interviews.

¹¹ San Mateo County Bar Association, *Annual Report Fiscal Year 2018-2019 to the Board of Supervisors San Mateo County*, p.7.

¹² Grand Jury interviews.

¹³ Now Labor Code Section 2750.3.

¹⁴ Grand Jury interviews.

The County of San Mateo and the PDP may also be impacted by the settlement of an ACLU lawsuit on January 9, 2020, regarding the inadequate funding by Fresno County and the State of California for the public defense of indigents.¹⁵ The lawsuit alleged that Fresno County’s public defense system was not “capable of putting the prosecution’s case to meaningful adversarial testing” so that “courts cannot ensure that their decisions, judgments, verdicts and punishments are rendered fairly and accurately.”¹⁶ Fresno County agreed to increase funding of public defense by \$10 million per year to close the large funding gap with its District Attorney’s Office (DA’s Office) starting in fiscal year 2019-20, a 75% increase over fiscal year 2018-19; implement six new operational requirements and nine new policies, procedures and performance guidelines; and provide extensive quarterly, semi-annually and annual reports to the ACLU beginning April 1, 2020. In addition, the State of California agreed to additional funding of indigent legal defense in the State.¹⁷

2015 Evaluation and Follow-Up

Following the release of the 2014-2015 Grand Jury Report, the County Manager contracted with a retired San Mateo County judge and a former county counsel to conduct an evaluation of the PDP to determine whether the PDP remained “the most appropriate model for providing indigent defense services in San Mateo County.”¹⁸ The evaluation focused on 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.”¹⁹ The evaluators issued a report on December 8, 2015. That report, however, expressly noted that the evaluation “did not undertake a detailed analysis of the quality of representation provided by individual attorneys, nor perform a financial audit to determine how the PDP funds were disbursed and utilized.”²⁰

The evaluators did not recommend that the County transition to a Public Defender model based on:

- Anecdotal discussions with current and former judges, prosecutors, and criminal defense attorneys who indicated that the overall quality of representation was adequate,
- The evaluators’ high cost estimate of developing a County Public Defender Office, and
- Their conclusion that the operation of the Private Defender Program was in compliance with the American Bar Association and State Bar of California’s standards and principles.

The evaluators did, however, make a number of recommendations regarding the administration of the program and the need to:

¹⁵ Carolyn Phillips et al. v State of California et al., *Settlement Agreement*, Fresno Superior Court, Case No. 15CECG02201, January 9, 2020.

¹⁶ Benjamin, Marc, *The Fresno Bee*, *ACLU lawsuit says Fresno County public defense is inadequate*, July 15, 2015.

¹⁷ *Supra*, Note 13.

¹⁸ Zerme P. Haning and Thomas F. Casey, *San Mateo County Private Defender Program Evaluation*, December 2015.

¹⁹ *Ibid*, p1.

²⁰ *Ibid*, p2.

- Address inherent conflicts of interest between the PDP and the SMCBA;
- Conduct an independent review of the PDP's finances;
- Establish more appropriate oversight of the program by both the SMCBA's Board of Directors and the County.²¹

To address financial concerns raised by the report, the County Manager requested that the Controller's Office conduct a financial review of the Private Defender Program. The Controller's initial audit report was issued on September 1, 2016,²² the same day the County Manager issued a memo and its own assessment of the PDP to the Board of Supervisors.

DISCUSSION

The 2019-2020 Grand Jury's review of the PDP focuses on four categories:

- Finances
- Operations
- Oversight by the County and SMCBA
- Quality of PDP Legal Representation

Finances

According to the Controller's first audit of SMCBA/PDP, issued on September 1, 2016,²³ several significant issues were identified in the following areas:

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

Additionally, twelve specific issues and recommendations were identified by the Controller (see Appendix A). The most serious related to financial payments the County made to the SMCBA:

- Reports on case counts and costs provided by SMCBA were found to be inadequate for financial management oversight. Cases were incorrectly classified, and records that were incomplete and inaccurate were key factors in determining certain payment amounts under the contract and forecasted expenditures.²⁴
- Vouchers (attorney invoices) did not comply with the contracted fee schedule. Of the approximately 189,000 vouchers issued during the review period, 593 were selected for review and 25% of them had errors that resulted in the issuance (by the SMCBA) of incorrect payments.²⁵

The seriousness of the audit findings was reflected in the Controller's following statement:

²¹ Ibid, p6-7

²² County of San Mateo Office of the Controller, *Private Defender Program Financial Review Report, for the period July 1, 2013 – February 29, 2016*, September 1, 2016.

²³ Ibid, p1.

²⁴ Ibid, p6.

²⁵ Ibid, p10.

“If all the recommendations in this report to the County Manager’s Office are not implemented, the County should consider changing the current service delivery model for indigent legal services.”²⁶

The County Manager’s memo to the Board of Supervisors on September 1, 2016²⁷ recommended:

- That all recommendations from the Controller’s audit be implemented and that a follow-up audit be scheduled;
- That administrative changes be made to the PDP²⁸;
- That a Performance Report be created by the PDP so that the operational and financial goals could be prioritized and monitored throughout the year.

The seriousness of the issues was acknowledged by the County Manager’s statement that the recommendations “*must be addressed prior to consideration of another contract* (italics added) so that the “County can effectively evaluate the PDP’s financial and operational performance as a service provider and ensure that public funds are spent appropriately.”²⁹ In September the Board of Supervisors unanimously endorsed the implementation of all of the Controller’s recommendations with quarterly progress reports to the Board beginning in March 2017, and a follow-up audit to be completed after June 30, 2017.³⁰ (See Appendix B: *Financial Timeline of Reports and Contracts*).

The County executed a contract with the SMCBA with Board authorization in June 2017 for fiscal years 2017-2019³¹ with changes reflecting some of the Controller and County Manager recommendations and followed by three more amendments or contracts in 2017 and 2018.³² The Controller’s second audit was delayed until the SMCBA’s newly hired independent auditors could finish their FY 2016-2017 audit which was provided to the Controller in January 2018.³³

The second audit by the Controller³⁴ was completed in May 2018, one year and nine months after the first and covered the fiscal year 2016-17. Three of the Controller’s 12 recommendations from September 2016 had been implemented (See Appendix A). Recommendations not implemented related to poor internal controls, the lack of written accounting policies and procedures, and the continued unreliability of PDP invoices to the County. Importantly, the

²⁶ Ibid, p 2.

²⁷ County of San Mateo County Manager’s Office, Information Only *Review of Private Defender Program (PDP)*, September 1, 2016 (Release Date), September 20, 2016 (Board Meeting Date).

²⁸ Recommendations included eliminating the use of PDP attorneys in receiving client complaints, increase the roles of the Chief, Assistant Chief Defender and Managing Attorney and opening up the PDP Panel to all qualified members of the SMCBA).

²⁹ Ibid, p2.

³⁰ Board of Supervisors public meeting video, September 20, 2016.

³¹ Board of Supervisors, *Authorized Agreement with San Mateo County Bar Association June 1, 2017 through June 30, 2019*.

³² Board of Supervisors, *Authorized Agreement or Amendments with San Mateo County Bar Association* executed in December 2017, February and June 2018.

³³ County of San Mateo Controller’s Office, *Private Defender Program Follow-up Audit Report*, May 22, 2018.

³⁴ Ibid, p2.

independent auditor’s disclaimer of opinion and the significant deficiencies described in their audit report indicated that the PDP’s financial accounting records could not be relied upon.³⁵

A third audit³⁶ was completed by the Controller in June 2019 for the six-month period ending December 31, 2018. Of 12 original financial recommendations (from the September 2016 audit) only six were completed. The remaining were listed as “partially implemented” (see Appendix A). The financial recommendations that were tied to evidence of internal control could not be completely evaluated by the Controller because SMCBA’s written financial policies and procedures³⁷ to address the recommendations were not approved by the SMCBA until March 2019, which was after the review period.³⁸ Besides reporting on the implementation of the financial recommendations, the Controller also reported on the status of SMCBA’s contractual compliance (with the contract ending June 30, 2019). Of 12 contractual requirements listed in the Controller’s third audit, only six were completed by December 31, 2018. Moreover, the independent accountant’s Management Letter³⁹ provided in connection with the fiscal year ending June 30, 2018 audit indicated that they identified certain deficiencies in internal control that they considered were material weaknesses and others they considered were significant deficiencies.⁴⁰

By June 2019, following a Grand Jury report in July 2015, an independent evaluation in December 2015, and three audits by the County Controller 2016-2019, there were still financial management and contractual issues when the current contract was adopted by the Board of Supervisors on the recommendation of the County Manager.⁴¹ In his memo to the Board of Supervisors, the County Manager noted that the Controller had completed a follow-up audit of the PDP and found they were complying with financial reporting obligations and performance reports,⁴² a statement not supported by the Controller’s third audit.

A fourth audit was completed in July 2020⁴³ for the 2019 calendar year. The Controller confirmed that all six outstanding financial recommendations and six contractual recommendations were implemented. The independent accountants provided a “clean opinion”⁴⁴ on the financial statements for fiscal year ending 6/30/2019⁴⁵ and there were no significant items

³⁵ Ibid, p3.

³⁶ County of San Mateo Controller’s Office, *Private Defender Program Follow-up Review*, June 28, 2019.

³⁷ San Mateo County Bar Association, *Financial Policies and Procedures Manual*, Adopted March 20, 2019, not implemented in FY2019 per YH Advisors *Opinion and Management Letters to the SMCBA Board of Directors*, December 27, 2019.

³⁸ Ibid, p5.

³⁹ The results of a financial statement audit by the independent public accountants are reported to a company’s management by issuing an opinion letter and a separate management letter that communicates internal control deficiencies and weaknesses.

⁴⁰ YH Advisors, *Communication of Significant Deficiencies and Material Weaknesses*, December 18, 2018.

⁴¹ County of San Mateo Board of Supervisors, *File # 19-594 Resolution*, June 25, 2019.

⁴² County of San Mateo Inter-Departmental Correspondence from Michael P Callagy, County Manager to Honorable Board of Supervisors, *Private Defender Program Contract*, Board Meeting Date: 6/25/2019

⁴³ County of San Mateo Controller’s Office, *Private Defender Program 2020 Review Report*, July 14, 2020.

⁴⁴ The opinion of an organizations auditors that its financial statements are fairly presented in accordance with generally accepted accounting principles.

⁴⁵ YH Advisors, (Opinion) *Letter to the Board of Directors San Mateo County Bar Association*, December 27, 2019.

in that year's Management Letter.⁴⁶ While the PDP approved accounting procedures in March 2019, confirmation of their implementation by the Controller did not occur until July 2020. Thus, the County continued to pay PDP invoices for nearly four years, without confirmation that the underlying financial data was correct.

Operations

The following section describes four areas of PDP operations and contrasts them with operations in Public Defender Programs and the San Mateo County District Attorney's Office. The areas are training and continuing education, oversight of attorneys, program accountability, and resources.

Training and Continuing Education

According to the American Bar Association's (ABA's) *Ten Principles of a Public Defense Delivery System*, defense counsel should be provided with, and required to attend, continuing education appropriate to their areas of practice and at least equal to that received by prosecutors.⁴⁷

The PDP offers in-house training and provides \$750 annually for each attorney to use on continuing education related to their legal work. From July 2018 through June 2019, for example, the PDP offered 15 training programs, four were for new PDP attorneys.⁴⁸ Between 30 and 45 attorneys on average may attend training programs during lunch hours while 60 to 75 may attend training programs during dinner hours. There is no information on the number of classes attended per attorney nor the content of the PDP classes each attends.⁴⁹ The PDP has a mentoring program for new panel attorneys and for those handling more complex cases, and maintains an application that distributes messages on an electronic mailing list that attorneys may use for assistance regarding a specific case or applicability of case law.⁵⁰ However, the PDP does not track attendance at any training taken by Panel attorneys nor track participation in complex case electronic messaging, so there is no way to assess the additional competency gained by Panel attorneys. The PDP does not provide specific information regarding its mentoring program also making it difficult to assess its effectiveness.

In contrast, Public Defender Offices in the Bay Area as well as the San Mateo County District Attorney's Office provide attorneys continuing education that includes daily, weekly, monthly and quarterly mandatory meetings and training often offered by organizational unit (misdemeanors, felonies, juvenile...), by topic or by skill level. Classroom training and continuing education are tracked by attorney and used as part of a formal professional development program customized annually to each person.⁵¹ With tracked continuing education and mandatory meetings Public Defender Programs and the San Mateo County DA's Office have created continuous learning environments. Furthermore, senior staff is available to assist

⁴⁶ YH Advisors, (Management) *Letter to the Board of Directors San Mateo County Bar Association, December 27, 2019.*

⁴⁷ ABA *Ten Principles of a Public Defense Delivery System*, February 2002, American Bar Association.

⁴⁸ PDP Annual Report, Fiscal Year 2018-2019 to the Board of Supervisors San Mateo County, by Myra A. Weiher, Chief Defender, page 10.

⁴⁹ Grand Jury interviews.

⁵⁰ Grand Jury interviews.

⁵¹ Grand Jury interviews.

new attorneys with real-time discussions about pending cases, issues, case law, jury selection, judges and opposing prosecuting or defense attorneys. Moreover, younger attorneys work for more senior attorneys by preparing court documents and briefs for the senior attorneys' cases.⁵²

Public Defender Offices and the DA's Office provide career ladders for attorneys. Attorneys can progress into supervisory roles or as they gain experience, move from misdemeanors to felonies to homicide cases (with the supervision and training previously discussed) and take on progressively more complex cases.

Oversight of Attorneys

According to the ABA, defense counsel should be supervised and periodically evaluated for competence and efficiency.⁵³

The PDP and the DA's Office handle approximately 20,000 cases each per year. The PDP has Juvenile cases that the DA's Office does not handle which offsets the DA's Office's non-PDP cases. However, both offices handle approximately 85%-90% of the same cases. Staffing in the two offices differs considerably. The PDP has four management positions to oversee approximately 100 defense attorneys (approximately 50% full time, and 50% part time attorneys) and ten full time support staff. The DA's Office has approximately 137 full time positions,⁵⁴ including 60 full time attorneys and ten senior management positions plus 67 investigative staff, paralegals, information systems and administrative staff.

The Chief Defender and the two legal management staff have limited oversight of the Panel. There is oversight of new attorneys and annual evaluations of all PDP attorneys, but no oversight of the legal representation provided by Panel attorneys who, as independent contractors, are held to be solely responsible for management of the cases assigned to them by the PDP.⁵⁵

Oversight provided by PDP staff includes observation of new attorneys and annual evaluations. The Assistant Chief Defender or the Managing Attorney observes less experienced PDP attorneys in court although the frequency of these observations or the feedback provided are not tracked or documented.⁵⁶ Panel attorneys are evaluated annually in part through self-assessments submitted by each attorney. Measures used include:

- Effective use of PDP's independent investigators;
- Willingness to try cases;
- Use of legal research and pretrial motions;
- Consideration of immigration issues and use of resources;
- Attendance at PDP training and use of their own PDP education fund budget;
- An assessment of overall professional growth.⁵⁷

⁵² Grand Jury Interviews

⁵³ Supra, Note 42.

⁵⁴ FY 2019-21 County of San Mateo Recommended Budget, *All Funds FY 2019-21 Authorized Position Summary*, page B-30 and Grand Jury interviews.

⁵⁵ Grand Jury interviews.

⁵⁶ Grand Jury interviews.

⁵⁷ Grand Jury interviews.

Annual self-assessment forms are reviewed by the Chief Defender and/or Assistant Chief Defender along with a review of motions submitted to the court for their appropriateness and client surveys and complaints. However, no analysis or summary of evaluations is included in the annual PDP reports to the Board of Supervisors. The report only provides descriptive information on the review process for the panel as a whole.

The San Mateo County DA's Office appears to have more management oversight of the attorneys in its office and uses different measures for evaluation. The evaluation process includes monitoring how long it takes to get a case to trial and whether attorneys are meeting milestones, delays in filings, number of filings, their writing and professionalism in court, as well as visits with clients.⁵⁸ New attorneys in the DA's Office are evaluated at six months, one year, and 18 months with similar metrics as described above. All staff are evaluated at least annually, though there is a less formal process for attorneys practicing more than four to five years.⁵⁹ Cases in the DA's Office are monitored via a case management system that tracks the speed, status and disposition of each case by attorney. This evaluative process did not differ from a Public Defender Office in the Bay Area which holds supervising or lead attorneys accountable for the effectiveness of the less experienced attorneys who are direct reports. Supervising attorneys review written communication including briefs and motions as well as court observations of their staff.⁶⁰

Program Accountability

Public Defender Offices and the San Mateo County DA's Office hold department heads responsible for the work of the attorneys in their respective units, providing built-in incentives to track attorney and unit metrics such as:

- Time commitment;
- Resources employed and speed to motion;
- Trial or resolution;
- Volume of work and the results.

Because the PDP manages Panel attorneys as independent contractors, there is no such oversight structure built into the Private Defender Panel. The Chief Defender does not exercise formal supervision over the legal representation provided by PDP attorneys and is not responsible for the Panel's performance or case results.

Resources

According to the ABA, there should be parity between defense counsel and the prosecution with respect to resources. This includes such things as: workload, salaries, and other resources, (e.g., technology, legal research, support staff, investigators).⁶¹

The PDP and Public Defender Offices offer similar legal representation services to the indigent, including expungement clinics to help individuals expunge convictions from their records. A well-funded Bay Area program expanded its services, for example, by meeting clients in

⁵⁸ Grand Jury interviews.

⁵⁹ Grand Jury interviews.

⁶⁰ Grand Jury interviews.

⁶¹ *Supra*, note 42.

homeless shelters, encampments, community centers for non-English speaking residents, and with newly arrested individuals in jails prior to arraignments.⁶² Some Public Defender Offices in the Bay Area and the San Mateo County’s DA’s Office translate their materials into multiple languages.⁶³ Currently, PDP materials are printed only in English.⁶⁴

PDP staff measure the workload of Panel attorneys based on staff’s knowledge and observations of PDP attorneys, communications from judges and the DA’s Office, and client complaints. Since PDP attorneys are responsible for their own legal research and case management, the PDP uses a case management system only to make assignments and billing, not to provide a database of legal research or briefs. Some Bay Area Public Defender Offices and the County DA’s Office employ case management software to manage and balance workloads and maintain brief banks to leverage best practices and make brief creation more efficient. They also have lawyers and paralegals to research case law. Grand Jury interviews of judges and current and former DA’s Office lawyers indicate that there is little parity between the PDP and the DA among these factors.

The PDP budget may be insufficient to address some of the inherent disadvantages of the PDP model regarding training, oversight, accountability and resources. A direct comparison between the PDP and the DA’s Office is difficult since the PDP budget represents the sum of fees charged for indigent representation while the DA’s Office budget includes salaries and benefits of County employees. However, over the last several years, the PDP budget has stayed virtually flat versus the DA’s Office budget which has grown to more than twice the PDP budget (2.2 times in the 2019-2020 budget) as the chart below shows.⁶⁵ In fact, if one were to take inflation into account, it could be argued that the PDP’s budget actually *declined* from 2015 to 2020 by \$546,000.⁶⁶

Fiscal Years	PDP Budget*	DA’s Office Budget*	DA’s Office versus PDP Budget
2014-2015	\$18.5	\$29.4	1.6x Greater
2015-2016	\$20.1	\$31.8	1.6x Greater
2016-2017	\$19.9	\$32.8	1.7x Greater
2017-2018	\$11.3 ⁶⁷	\$36.4	3.2x Greater
2018-2019	\$18.9	\$40.6	2.1x Greater
2019-2020	\$19.6	\$43.5	2.2x Greater
2020-2021	\$19.6	\$45.2	2.3x Greater

* in millions of dollars

⁶² Grand Jury interviews.

⁶³ Grand Jury interviews.

⁶⁴ Grand Jury interviews.

⁶⁵ Actual and Budget amounts 2016-17 from County Budget, Amended 9/24/2019.

⁶⁶ U.S. Inflation Calculator, www.usinflationcalculator.com, April 9, 2020.

⁶⁷ The decrease from 2016-17 to 2017-2018 is due to the County reducing the advance payment to the SMCBA from six months to three months and reflects the County Controller’s first audit results revealing over-invoicing by the PDP.

Comparing the PDP Panel to County staffing of a Public Defender Program or DA's Office is difficult. Nonetheless, a well-funded office can better offer a holistic defense by not only hiring attorneys that specialize in specific areas of the law but also employ social workers and mental health professionals, as one Bay Area County does.⁶⁸ In addition, senior staff can participate in county-wide forums such as public safety and gang task force meetings, prison reform committees or domestic violence forums as well as community meetings.⁶⁹ The PDP's small management team is insufficient in size to take advantage of all of these opportunities or have the same continuity or uniformity as the DA's Office.

Oversight by the SMCBA Board and County

The SMCBA Board is responsible for oversight of the PDP. Day-to-day operations of the PDP are managed by the Chief Defender.⁷⁰ The County has oversight responsibilities for the contract with SMCBA's PDP and the overall quality and administration of indigent legal defense.

The SMCBA's Board

Following issuance of the 2015 evaluation and September 2016 Controller's audit,⁷¹ the SMCBA Board responded by:

- Separating the Executive Director and Chief Defender positions;
- Having Board members who are PDP attorneys recuse themselves on votes regarding the management of the PDP;
- Changing public accounting firms;
- Replacing accounting staff;
- Outsourcing the SMCBA Controller position to oversee accounting services;⁷²
- Approving accounting policies and procedures (March 2019) with an Appendix describing PDP voucher approval and payment procedures.⁷³ These procedures were implemented in FY 2020 (after 6/30/2019).⁷⁴

For continued oversight, the Chief Defender attends the monthly SMCBA Board and the Board's Executive Committee once per month. The Board's By-Laws list a Private Defender Committee composed of active members of the PDP panel and a member of the Board. The PDP Committee's function is to advise the Chief Defender regarding operations and expenditure of funds to "insure the efficient and just operation" of the PDP.⁷⁵ The Committee is currently staffed by a Board member who reports to the Board⁷⁶ about the activities of the Chief Defender and the PDP monthly at regular Board meetings.⁷⁷ Additionally, the By-Laws list a Fee

⁶⁸ Grand Jury interviews.

⁶⁹ Grand Jury interviews.

⁷⁰ PDP Position Description: *Chief Defender*, January 2020 and SMCBA *By-Laws*, as amended February 24, 2016.

⁷¹ *Supra*, Note 19.

⁷² Grand Jury interviews.

⁷³ Financial Policies and Procedures Manual, San Mateo Bar Association, Adopted March 20, 2019.

⁷⁴ YH Audit Opinion Letter and Management Letter for FYE June 30, 2019, December 27, 2019.

⁷⁵ San Mateo County Bar Association, *ByLaws*, as amended February 24, 2016, San Mateo County Bar Association, page 18.

⁷⁶ Grand Jury interview.

⁷⁷ Grand Jury interview.

Committee composed of the Chief Defender and experienced PDP attorneys who review attorney vouchers.

County Manager

The County Manager or designated staff is responsible for oversight of the contract with the PDP. Staff meets with the Chief Defender twice per month. Not surprisingly, given the Controller's audits, the County's oversight of the PDP has focused on financial deficiencies.⁷⁸ The 2019-2021 contract now requires the PDP to provide quarterly reports to the County that include expenditures by panel attorney as well as case type and case counts.

The current contract includes a number of what it refers to as "performance benchmarks" in the following areas: attorney education, attorney evaluations, client complaints, caseload, initial client meetings, community outreach, and client surveys.⁷⁹

Information regarding these performance benchmarks are reported in the PDP's annual reports to the Board of Supervisors. However, the County appears less interested in monitoring these qualitative aspects of the program. The County does not require the PDP to provide the raw data or analysis that compares their data to nationally recognized performance benchmark standards. For example, regarding training, the County simply requires that the PDP ensure that attorneys complete their annual continuing legal education already required by the State of California to renew their license to practice law. National ABA standards require defense attorneys to obtain education that is appropriate to their area of practice,⁸⁰ however, the PDP does not track Panel training.

The PDP includes the number of client complaints within broad categories of complaints in annual reports. Also, included in annual reports is general information regarding initial client meetings. In both cases these are provided without any comparisons to performance standards or benchmarks.

According to the ABA one of the most important factors in "rendering of quality representation" is the workload of defense attorneys, factoring in quantity and complexity of cases, support services, and other responsibilities.⁸¹ Though the number and type of cases which an attorney is assigned impacts the quality of representation individual clients receive,⁸² the contract only requires the PDP to report caseloads by type of case with an overall summary of the average caseload per attorney without reference or analysis based on national caseload standards.⁸³ In contrast, the DA's Office uses a new automated case management system that tracks cases (and the assigned attorneys) from arrest/pre-trial through post-adjudication prosecution, including discovery, evidence management, motions and trials and allows the DA's Office to perform data analytics and performance management and establish customized benchmarks to measure

⁷⁸ Grand Jury Interview.

⁷⁹ Agreement between the County of San Mateo and the San Mateo County Bar Association, June 2019.

⁸⁰ ABA Ten Principles, February 2002.

⁸¹ *Supra*, Note 42, #5.

⁸² *Supra*, Note 42.

⁸³ National Advisory Commission on Criminal Justice Standards and Goals, *National Caseload limits*, NAC Standard 13.12, 1973.

performance against. Moreover, this system electronically stores and manages all of the case records and documents electronically.⁸⁴

In contrast to the contractual “performance benchmarks” used by the County, national organizations describe data that needs to be tracked and used to oversee and improve defense programs. For example, there are specific data regarding the process of case management/case events that include, for example, not only the number of motions filed but at what stage in the case and whether there was a hearing on the motion. Another example involves client contacts which include both phone and email contacts while an individual is detained and when released. (See Appendix C for details). Such information can help determine whether there are sufficient resources and assess both attorney activities and client outcomes.⁸⁵ It is, however, unclear whether the PDP model (with attorneys who are independent contractors) and the PDP’s limited case management capabilities would support such data collection and analysis.

Although County staff periodically review SMCBA financial data, five amendments or contracts have been signed with the PDP even though the Controller recommended, and the County Manager and Board of Supervisors formally concurred, that if all 12 of the recommendations were not implemented, the County should consider changing the current service delivery model for indigent legal services.⁸⁶ Indeed, the 2017-2019 contract was signed nine months after the Controller’s first audit. The 2019 contract was signed in June 2019 despite SMCBA’s failure to implement six of the 12 Controller recommendations in nearly four years and without considering an alternate model for the delivery of legal defense services for county indigent residents.⁸⁷

The 2014-2015 Grand Jury recommended (and the County Manager agreed) that evaluations of the PDP should be conducted every five years. As previously noted, the last evaluation of the PDP was completed in December 2015. The current contract requires that a committee be formed to evaluate ongoing PDP performance no less than every five years.⁸⁸ The committee is to include members of the judiciary, and SMCBA as well as other interested individuals. The make-up of such an evaluation committee would seem to make it difficult to perform an independent evaluation of PDP performance and oversight of the program. Even so, the County has failed to schedule the evaluation that is due December 2020.⁸⁹

⁸⁴ National Consortium for Justice Information and Statistics, *Prosecutor Case Management System Functional Requirements*, September 2018.

⁸⁵ Basic Data Every Defender Program Needs to Track: A Toolkit for Defender Leaders, National Legal Aid and Defender Association, Marea Beeman, 2014.

⁸⁶ Supra Note 24 page 2.

⁸⁷ Santa Cruz County confronted a similar need to evaluate the delivery of legal services to county indigent defendants that had been provided by a single private law firm. After a comprehensive review, the county decided to transition to a Public Defender Program in a 3 to 4-year process now underway with a limited contract extension agreed to by the law firm.

⁸⁸ Supra, Note 8 page 16.

⁸⁹ Though the Covid19 pandemic may delay an evaluation, an evaluation had not been planned for 2020 at the time Grand Jury interviews were conducted before the pandemic.

Quality of Representation

It is difficult to assess the quality of representation by the PDP without a comprehensive and independent objective evaluation of the legal representation of the PDP Panel. There have been limited reviews based on anecdotal information. Neither the SMCBA nor the County have established objective evaluation criteria to assess PDP attorney's performance or the model's success in delivering effective indigent representation.

Client complaints and assessments do offer a possible means to assess the quality of representation. The lack of any 2018-19 *Marsden* motions granted by the court for allegations of ineffective assistance of PDP counsel is an excellent indication of the quality of PDP representation.⁹⁰ 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 or for irreconcilable differences between lawyer and client.⁹¹ Regarding client assessments, PDP client surveys are not useful because so few surveys are sent out by the PDP, those surveys, are only sent to clients in English, and so few are returned.⁹² For example, in FY 2019 just 386 surveys were sent out and 35 replies received, representing only 0.15% of total cases.⁹³

Anecdotal information reported from the 2015 PDP evaluation cited earlier in this report, noted that "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 was adequate and supporting investigative and forensic assistance was excellent, especially in the more serious cases."⁹⁴ The 2015 PDP evaluation use of "adequacy of representation" to define quality of representation, differs from case law which uses the standard of "effective representation."⁹⁵ The County Manager did reach out to PDP attorneys and for public comment via a focus group and reported in a memo to the Board of Supervisors that "for the most part, feedback was positive and supportive of the PDP."⁹⁶

The 2019-2020 Grand Jury conducted a series of interviews with past and present members of the DA's Office and current judges. The assessment of PDP representation described differed considerably from those cited above. The interviewees' consensus was that approximately 25 percent of PDP attorneys are outstanding, and these attorneys are assigned the most difficult cases by PDP staff. An additional 50-60 percent are very good to excellent. However, interviewees indicated they could identify a number of attorneys with poor skills and/or representation. Several interviewees estimated these attorneys accounted for 15-20 percent of the Panel.⁹⁷

⁹⁰ Supra, Note 43 page 18.

⁹¹ *People v Marsden*, 2 Cal.3d 118 (1970). San Mateo County Law Library, "Making Marsden and/or Faretta Motions," Research Guide #11.

⁹² PDP staff indicated that the survey will be translated into a two-sided English/Spanish form and will be sent to clients. The survey is available on the PDP website and in the office lobby.

⁹³ Supra, Note 43 pages 18-19.

⁹⁴ Supra, Note 15.

⁹⁵ *McMann v Richardson* 397 U.S. 759, 771 n.14 (1970).

⁹⁶ Supra, Note 24.

⁹⁷ Grand Jury interview.

Interviewees noted that attorneys delivering very good to outstanding service displayed many of the following characteristics:

- Attorneys showed appropriate time management and organizational skills. They met with prosecuting Deputy District Attorneys early in a case to understand the evidence;
- They met their clients and/or family members quickly and communicated regularly, explaining how the case was likely to unfold;
- They were well prepared in court and had knowledge of the prevailing law and its applicability;
- They brought motions that advanced their cases;
- They were smart advocates for their clients and professional adversaries of the Deputy District Attorneys, demonstrated in the judicious use of motions and briefs.

The qualities of poor attorney representation as noted by interviewees include the following:

- They were over committed and took on too many cases;
- They did not know the law or how it applied to their client's case;
- They accepted cases that were beyond their legal capability;
- They wasted the court's and prosecution's time with frivolous motions;
- They were disorganized and unprepared in court;
- They rarely if ever, reached out to the prosecuting Deputy District Attorney to discuss problems with the evidence or to better understand the Deputy District Attorney's theory of the case before trial.

As previously noted, there are systemic challenges to the PDP contract model which PDP management believes limits their oversight of PDP attorneys' legal representation. AB5 (effective 1/1/2020) which tightened independent contractor rules, has further reinforced PDP management's belief that they cannot get involved in the quality of representation delivered by independent Panel attorneys,⁹⁸ though lawyers are exempted from AB5.⁹⁹ The disparity between the PDP's budget and the County's District Attorney's Office budget also raises questions concerning the parity of resources and the impact this could have on the adequacy of PDP defense representation.

The Grand Jury is aware that there are non-profit organizations that review and measure indigent defense systems in the United States against Sixth Amendment case law and established standards of justice to recommend improvements to the current public defense system, while promoting public safety and fiscal responsibility.¹⁰⁰ These organizations have legal, management and accounting experts who begin with data collection and analysis, continue with justice system and court observations and complete the review interviewing a broad cross-section of stakeholders. This information is compared against the ABA's *Ten Principles of a Public*

⁹⁸ Grand Jury interview.

⁹⁹ Grand Jury interviews and excerpt from AB5: Exempted from AB5 is "an individual who holds an active license from the State of California and is practicing one of the following recognized professions: lawyer, architect, engineer, private investigator, or accountant."

¹⁰⁰ Sixth Amendment Center, Boston Mass, *Background Information*, August 23, 2019

*Defense System*¹⁰¹ to tailor recommendations for the effective, efficient, high quality, ethical and conflict-free legal representation for criminal defendants who are unable to afford an attorney.

Neither the SMCBA nor the County has completed a comprehensive, independent, and objective review of this nature conducted by experts in legal criminal defense, devoid of relationships with existing members of the county legal community, judiciary, and County management. With 52 consecutive years of contracts between the County and the SMCBA, the quality of representation warrants a comprehensive, independent and objective review.

FINDINGS

Finances

- 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.
- 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.
- 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.
- 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.
- 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.
- 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

¹⁰¹ Supra, Note 4

financial statements for the fiscal year ending 6/30/2019 and there were no significant items in that year's Management Letter.

- 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.

Operations

- 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.
- 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.
- 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.

Oversight by the SMCBA and County

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

Quality of Representation

- F15. PDP client surveys are sent to a very limited number of clients and only in English.
- F16. Anecdotal reports by prosecuting attorneys and judges provide a wide range of quality assessments of PDP attorneys, from outstanding to poor.
- 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.

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.
- 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.
- 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.
- 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.
- 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.

- 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.
- 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.

REQUEST FOR RESPONSES

Pursuant to Penal Code Section 933.05, the Grand Jury requests responses as follows:
From the following governing bodies:

San Mateo County Board of Supervisors (R1-R7)

The governing body indicated above should be aware that the comment or response of the governing body must be conducted subject to the notice, agenda, and open meeting requirements of the Brown Act.

METHODOLOGY

The Grand Jury reviewed documents including the 2015 PDP evaluation, PDP annual reports to the Board of Supervisors, County memos to the Board of Supervisors and videotaped meetings concerning PDP, contracts between the County and the SMCBA, audit reports by the Controller, memos, and reports from state and national organizations addressing indigent defense services. Interviews were conducted with PDP staff, San Mateo County and other Bay Area county staff, current and former district attorneys, and judges.

Documents

- County of San Mateo Office of the Controller Private Defender Program Review report and three follow-up reports
- County of San Mateo Agreements with the San Mateo County Bar Association

Interviews

Reports issued by the Civil Grand Jury do not identify individuals interviewed. Penal Code Section 929 requires that reports of the Grand Jury not contain the name of any person or facts leading to the identity of any person who provides information to the Civil Grand Jury.

- The Grand Jury interviewed thirteen individuals, including current and former attorneys who have served in the San Mateo County Bar Association's Private Defender Program,

the County of San Mateo District Attorney's Office, current San Mateo County Judges and individuals responsible for private or public defense programs in other Counties.

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APPENDIX A: COUNTY OF SAN MATEO CONTROLLER RECOMMENDATIONS FOR RETAINING THE PRIVATE DEFENDER PROGRAM

County of San Mateo - Controller's Office
 Private Defender Program
 Status of Twelve Audit Recommendations

	Audit #1 (report dated 9/1/16)	Audit #2 (report dated 5/22/2018)	Audit #3 (report dated 6/28/2019)	Audit #4 (report dated 6/30/2020)
	Reviewed 7/1/2013 -2/29/2016	Reviewed 7/1/2016 - 6/30/2017	Reviewed 7/1/2018 – 12/31/2018	Reviewed 1/1/2019 – 12/31/2019
	RECOMMENDATION	STATUS	STATUS	STATUS
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 Flow. The financial statements and Management Letter should be provided to the County no later than December 31 after the fiscal year-end.	Partially Implemented Association's Independent Auditor Disclaimed Opinion on Financial Statements.	Partially Implemented The audited financial statements were received on December 12, 2018. However, the Management Letter was provided to the County after December 31, upon request during the review. The Management Letter identified material weaknesses and significant deficiencies in internal controls.	Implemented
2	The County should require the Association to change the PDP's auditors every five years.	Implemented	Implemented	Implemented
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.	Partially Implemented The PDP developed written accounting procedures but in many areas they are inadequate.	Partially Implemented The Association adopted the Financial Policies and Procedures manual on March 20, 2019; which occurred after the review period.	Implemented
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 (PDP's managements system)	Partially Implemented The monthly case count reports the County received did not agree to the case count information reported from the defenderData system.	Implemented	Implemented
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.	Partially Implemented The summary and detailed case count and related costs reports from defenderData do not agree with the periodic reports provided the County. Therefore, regular case count and attorney reports to the County are incomplete and inaccurate.	Implemented	Implemented
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	Partially Implemented Appendix B in the FY16-17 PDP contract listed the average cost for each case type, and the costs were used to determine the FY16-17	Implemented The Association provided detailed reports of actual expenditures. Advanced available cash from the	Implemented

	Audit #1 (report dated 9/1/16)	Audit #2 (report dated 5/22/2018)	Audit #3 (report dated 6/28/2019)	Audit #4 (report dated 6/30/2020)
	Reviewed 7/1/2013 -2/29/2016	Reviewed 7/1/2016 - 6/30/2017	Reviewed 7/1/2018 – 12/31/2018	Reviewed 1/1/2019 – 12/31/2019
	RECOMMENDATION	STATUS	STATUS	STATUS
	make installment payments quarterly instead of biannually so that the County can earn interest on the cash on hand.	PDP contract amount. However, the actual FY16-17 average case cost by case type is significantly lower. This resulted in PDP receiving payments from County in excess of PDP's actual costs by approximately \$950,000.	County at December 31, 2018 is around \$2 million. Contract terms were modified to make advance quarterly installment payments.	
7	The County should require the Association to develop and document 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.	Partially Implemented Fourteen accounting policies and procedures were developed. Eight of these had inadequately designed internal controls such as, lack of clearly defined approval authority and improper separation of review and approval duties.	Partially Implemented The Association adopted the Financial Policies and Procedures manual on March 20, 2019, which occurred after the review period. Internal Audit will evaluate in the next follow up if these new procedures are being followed and are adequate	Implemented
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.	Partially Implemented PDP has documented the voucher approval procedures. However, internal controls are inadequately designed in several areas such as lack of clearly defined approval authority, and improper separation of review and approval duties.	Partially Implemented The Association adopted the Financial Policies and Procedures manual on March 20, 2019; which occurred after the review period. Internal Audit will evaluate in the next follow-up if these new procedures are being followed and are adequate.	Implemented
9	The County should require the Association to establish policies to ensure that the 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.	Not Implemented The System Administrator, who has complete access rights to the system, also approves case vouchers. Other compensating controls, such as additional review and approval procedures do not exist.	Partially Implemented The Association adopted the Financial Policies and Procedures manual on March 20, 2019; which occurred after the review period. Internal Audit will evaluate in the next follow-up if these new procedures are being followed and are adequate.	Implemented
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 benefits 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.	Not Implemented Although salaries and benefits of accounting staff are being allocated, PDP's accounting procedures do not identify other costs that should be allocated, or how they are to be allocated.	Partially Implemented The Association adopted the Financial Policies and Procedures manual on March 20, 2019; which occurred after the review period. Internal Audit will evaluate in the next follow-up if these new procedures are being followed and are adequate.	Implemented
11	The defenderData system user access and rights within the systems should be checked periodically to ensure users have not been	Implemented	Implemented	Implemented

	Audit #1 (report dated 9/1/16)	Audit #2 (report dated 5/22/2018)	Audit #3 (report dated 6/28/2019)	Audit #4 (report dated 6/30/2020)
	Reviewed 7/1/2013 -2/29/2016	Reviewed 7/1/2016 - 6/30/2017	Reviewed 7/1/2018 – 12/31/2018	Reviewed 1/1/2019 – 12/31/2019
	RECOMMENDATION	STATUS	STATUS	STATUS
	provided inappropriate access. This is particularly important due to the confidential information maintained in the defenderData system.			
12	The County should require the Association to request and review SOC reports for the defenderData and MS Dynamics systems. Any applicable required actions outlined in the reports should be implemented.	Implemented	Implemented	Implemented

APPENDIX B: FINANCIAL TIMELINE OF REPORTS AND CONTRACTS

Month/Year Issued	Author or Sponsor	Name of Document, Contract or Amendment
September 2016	County of San Mateo Controller	Private Defender Program Financial Review Report (Audit #1)
September 2016	County of San Mateo County Manager	Review of Private Defender Program (PDP)
June 2017	County of San Mateo Board of Supervisors	Authorized Agreement with San Mateo County Bar Association (SMCBA) July 1, 2017 through June 30, 2019
December 2017	County Manager	Contract Amendment with SMCBA January 1 – 31, 2018
February 2018	Board of Supervisors	Authorized Agreement with SMCBA February 1, 2018 through June 30, 2019
May 2018	County Controller	PDP Follow-up Audit Report (Audit #2)
June 2018	Board of Supervisors	Authorized Agreement with SMCBA July 1, 2018 through June 30, 2019
June 2019	County Controller	Private Defender Program Follow-up Audit Report (Audit #3)
June 2019	Board of Supervisors	Authorized Agreement with SMCBA July 1, 2019 through June 30, 2021
July 2020	County Controller	Private Defender Program Follow-up Audit Report (Audit #4)

**APPENDIX C:
EXCERPT FROM NLADA BASIC DATA EVERY DEFENDER NEEDS TO TRACK**

Prepared by Marea Beeman National Legal Aid &
Defender Association © 2014. All Rights Reserved.
*Funded by grants from the Open Society Foundations and the Ford
Foundation*

Introduction

In today's environment of big data and performance-based budgeting, it is an incontrovertible reality that data drives decision-making. Within the criminal justice context, indigent defense providers have been relatively late to the practice of employing data to inform and improve performance. Since the 1990s, law enforcement agencies, for example, have been employing Compstat practices to better identify patterns of criminal activity, allowing them to concentrate resources in hotspot areas for greatest impact.¹⁰² Similarly, policy makers are increasingly relying on empirical evidence about what does and does not work in driving down recidivism, and are funding programs in accordance with those findings.

Today, data-informed decision-making is a fundamental component of smart defender management. Failing to use data will handicap efforts to do the most you can for your clients. The goal of this paper is to answer basic questions of why defender leaders should collect data and what type of information they should collect. It also offers suggestions for how to collect and utilize that information. The intended audience includes managers of all types of indigent defense programs, including public defender offices, assigned counsel programs, and contract counsel programs. The paper recognizes the wide variety in size, resources and administrative capacity among defender organizations across the country. Depending on an organization's capacity, the answers to what data and how to collect them will vary somewhat. But all organizations, regardless of size, should prioritize core data collection.

This paper was prepared as part of the Justice Standards, Evaluation and Research Initiative (JSERI). JSERI is an effort by the National Legal Aid & Defender Association (NLADA), in conjunction with the North Carolina Office of Indigent Defense Services, to build the capacity of public defense agencies across the country to conduct in-house research and data analysis to improve their programs. JSERI's work includes development of defender tools and resources, provision of training and technical assistance, and developing and testing methodologies in pilot sites.

Why Track Data?

Data Collection and Use Will Make You a Better Manager and a More Effective Advocate

Data make a defender manager's job easier by adding certainty and reducing guesswork. Data-informed decision-making is based on empirical information, not hunches. Regularized data collection and analysis is a practice that will help defender managers carry out their core managerial functions more effectively, assess progress in meeting organizational goals and objectives and, in turn, help improve their program's effectiveness. The collection and use of data can help defenders be more responsive to staffing issues, advocate more persuasively for budgets and resources, and produce better outcomes for clients. Performance indicators provide feedback on how well you are achieving your organizational goals. The data, or performance indicators, you track should be quantifiable measurements that reflect the critical success factors of your organization.

¹⁰² CompStat, or Comstat (short for computer statistics, or comparative statistics), is a strategic management philosophy used by police to approach crime reduction. First used in New York City and replicated in jurisdictions throughout the country, CompStat is not a software package but rather a methodology for collecting, analyzing, and mapping crime data and other essential police performance measures on a regular basis.

At their core, defenders are advocates. Data can support advocacy efforts on multiple fronts, including individual client advocacy, advocacy for your program and advocacy for criminal justice policy that is fair, just and cost-effective.

Client Advocacy

Objective information about case activities and outcomes enhances defender managers' abilities to supervise staff and evaluate performance in order to improve client representation. Examples include case activity information, such as the nature and frequency of client contact, investigator and social worker usage, or motion practice considered in conjunction with case outcomes.

Program Advocacy

There are many applications of data for program advocacy, chief among them budget and resource justifications. Whether making a convincing case that you serve your clients well or that you are overloaded and need more resources, you can substantiate your argument with data. Coupled with performance standards for your own program, or nationally accepted standards and principles, data on workload levels for your office are objective information that funders are better able to understand than anecdotes alone. And any effort to secure supplemental funding, such as from a foundation, will require substantiation of need. Beyond resource advocacy, data are also essential to evaluate effectiveness of any internal changes to practice, such as a pilot project.

Policy Advocacy

Many public defenders' practice in climates that are far from just or effective, and their voices are essential to the call for smarter policies. Data, coupled with first-hand observations, are necessary when advocating for changes to criminal justice system practice or policy.

What is Data Tracking?

Data tracking is documentation: documentation of what you do for clients, and how you do it. Data tracking and analysis allow you to quantitatively measure things rather than rely on intuition to know how things are going.

What documentation should defenders collect? Defender programs should collect multiple points of information about their cases and clients. When considered with other bits of information, through comparison or statistical analysis techniques, these data points, or indicators, help paint a picture or tell a story.¹⁰³

Consider the following data points about a defender program:

1. Case type, caseload, case outcome;
Or these:
2. Client age, client gender, client race
And how about this one:
3. Number of attorneys.

¹⁰³ When reading about research practices or study results, you often see the terms “indicator,” “metric,” and “measure” used interchangeably. To avoid any potential confusion in this toolkit, we will be referring to the data you need to collect (e.g., charge type, number of client phone conversations) as “data points” or “indicators.” If you come across the term “Key Performance Indicators” or “KPIs” in other toolkits or research reports, keep in mind that KPIs are simply referring to a list of the most important indicators that can be used to track performance. They are usually presented in the form of averages or percentages.

Any one of these data points on its own fails to tell much of a story about a defender program yet, if collected over time and viewed comparatively, can tell quite a dramatic story. Consider a fictional example of the Acme Defender Program:

In 2012, three attorneys at the Acme Defender Program were assigned 590 juvenile delinquency cases, a workload considered acceptable according to the program's caseload standards. Late in the fiscal year, new legislation was enacted requiring defenders to represent all juveniles, whether indigent or not, at first appearance. No new resources were provided to the Acme Defenders. At a hearing for the law, the Chief Defender testified that the change would put an unmanageable burden on her office but, as one legislator said, "This body is not going to be cajoled into appropriating funds over opportunistic and unsubstantiated whining."

In 2013, the three juvenile defenders were assigned 740 cases. The average amount of time to dispose cases within the unit has increased to 12 weeks compared to nine weeks. One of the three defenders, who has 10 years of experience and carries a disproportionate number of cases compared to the other two, less experienced attorneys, is threatening to leave unless her workload moderates.

The next step, of course, would be for Acme's Chief Defender to return to the legislature and advocate again for additional resources. This time though, armed with empirical information about consequences to clients, to the overall justice system's efficiency and to program staffing stability, she could not be characterized as being opportunistic or whining. **How are these Indicators Tracked?**

Data points are tracked by counting, *consistently and over time*, the same information about every case you touch. To count, and make sense of those counts, you need an electronic case-tracking platform.

Today, there are commercial case management systems available for every budget, and it is not the purpose of this paper to recommend one system or another.¹⁰⁴ Invest in the best system you can afford, but keep in mind that the system is only as good as the data you actually enter and use. Avoid selecting a system that requires staff or technical support you do not have.

What to Measure?

A Suggested, Uniform Approach

To guide the JSERI work, the NLADA established a national Research and Data Analysis Advisory

Committee (RDA Committee) consisting of defenders, researchers, policy experts and others who support the creation of a strong foundation for indigent defense research.⁴ One goal of JSERI is to provide tools that increase capacity of defender agencies across the country to assess and make improvements to their programs. As part of that work, RDA Committee members set out to develop a list of key indicators, or data points, that every defender program should track.

¹⁰⁴ For information on what type of CMS to select, see the section, "Ways to Track, Your Case Management System," p. 6, in *Using Data to Sustain and Improve Public Defense Programs*, by Marea Beeman, prepared for the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (August 2012). ⁴ See Appendix A for a list of RDA Committee members.

The list that follows (Figure 1) was the result of much discussion. The list is supplemented with collection rationale for each category.

The RDA Committee considers the items on the list to be essential, fundamental data points that every defender agency should track. Data on a common set of indicators will give defender agencies a reliable set of data from which they can review and assess performance over time. Another rationale for uniform data collection is the creation of a powerful source of material from which to compare performance among divisions, across offices, and from state to state. The list is not intended to be exhaustive; there are always additional data points that can be considered depending on your program's needs.

DATA POINTS EVERY DEFENDER AGENCY SHOULD TRACK
NLADA Research and Data Analysis Advisory Committee

Variable	Category	Rationale
Cases Handled by the Office	<ul style="list-style-type: none"> a. Number of charges <ul style="list-style-type: none"> i. Opened ii. Closed b. Charge Type <ul style="list-style-type: none"> i. Felony ii. Misdemeanor iii. Juvenile iv. Dependency v. Other 	Creates separate counts of cases handled according to type
Defendant Characteristics	<ul style="list-style-type: none"> a. Sex b. Race c. Age 	Creates separate counts of clients according to distinguishing characteristics
The Process of Case Management/Case Events	<ul style="list-style-type: none"> a. Was client detained or released b. Bail <ul style="list-style-type: none"> i. Bail amount ii. Type of bail c. Motions filed <ul style="list-style-type: none"> i. Number of motions filed ii. What stage in the process filed. iii. Was there a hearing for the motion <ul style="list-style-type: none"> 1. Motion argument upheld/denied d. Client Contact <ul style="list-style-type: none"> i. In person (# visits, time spent) <ul style="list-style-type: none"> 1. While detained 2. Office visits. <ul style="list-style-type: none"> a. Court ii. Phone conversations (number of times) <ul style="list-style-type: none"> 1. While detained 2. When released iii. Email conversations (number of times) <ul style="list-style-type: none"> 1. While detained 2. When released 	Identifies the nature and quantity of case-related activities undertaken

Variable	Category	Rationale
The Process of Case Management/Case Events	<ul style="list-style-type: none"> e. The use of investigators <ul style="list-style-type: none"> i. Requests made <ul style="list-style-type: none"> a. Granted b. Denied ii. Time spent on investigation iii. # of witnesses contacted/interviewed <ul style="list-style-type: none"> 1. # of times canvassed for witnesses iv. Photographs taken v. Did the investigator testify f. The use of social workers <ul style="list-style-type: none"> i. Request Made <ul style="list-style-type: none"> 1. Granted 2. Denied ii. Time Spent on Social Work iii. Did the social worker testify g. The use of other experts 	
Case Disposition and Sentence	<ul style="list-style-type: none"> a. Plea b. Dismissal <ul style="list-style-type: none"> i. Type of dismissal c. Probation <ul style="list-style-type: none"> i. Length of probation d. Sentence length <ul style="list-style-type: none"> i. Local sanctions or prison ii. Was client detained during conviction <ul style="list-style-type: none"> 1. Length of time prior to conviction e. Restitution 	Identifies client outcomes
Who Handled Case	<ul style="list-style-type: none"> a. Attorney b. Years of experience 	Identifies attorney experience level

Issued: September 1, 2020



County of San Mateo

Inter-Departmental Correspondence

Department: COUNTY MANAGER

File #: 20-891

Board Meeting Date: 11/17/2020

Special Notice / Hearing: None
Vote Required: Majority

To: Honorable Board of Supervisors

From: Michael P. Callagy, County Manager

Subject: Board of Supervisors' 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' 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 titled "Balancing the Scales of Justice Between Prosecution and Defense in San Mateo County." The Board of Supervisors is required to submit comments on the findings and recommendations pertaining to the matters over which it has some decision-making authority within 90 days. The Board's response to the report is due to the Honorable Danny Y. Chou no later than November 30, 2020.

DISCUSSION:

The Grand Jury made 17 findings and 7 recommendations in its report. The Board responses follow each finding and the 7 recommendations that the Grand Jury requested that the Board respond to within 90 days.

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 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. The Controller determined that the financial irregularities had been resolved in or about April 2019, prior to execution of the current 2019-21 contract, but the formal report confirming resolution of the financial irregularities was not completed until after execution due to delays in the ability to test the PDP's policies and procedures.

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 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 approved by the SMCBA Board until March 2019. However, as explained above in response to F1, the County received confirmation from the Controller in or about April 2019 that the audit was complete and all financial irregularities had been resolved. Moreover, the SMCBA had implemented the accounting policies and procedures before FY 2020 and the Controller began testing those policies and procedures in December 2019.

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, the County received confirmation from the County Controller in or about April 2019 that the audit was complete and all financial irregularities had been resolved.

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 **disagrees** with this Finding. As explained above in response to F1, F4, and F5, the County received confirmation from the County Controller in or about April 2019 that the audit was complete and all financial irregularities had been resolved. Moreover, the County required that, until the County Controller completed its audit and signed off on all financial reporting obligations, 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 accepting this report.



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.