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PRIVATE DEFENDER PROGRAM
SAN MATEO COUNTY BAR ASSOCIATION

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April 13, 2016

Mr. John L. Maltbie, County Manager
Mr. Michael Callagy, Assistant County Manager
Ms. Reyna Farrales, Deputy County Manager
County Manager's Office
400 County Center
Redwood City, CA 94063

Dear Mr. Maltbie, Mr. Callagy and Ms. Farrales:

Attached hereto you will find copies for each of you of the Private Defender Program's Response to the Haning/Casey "Private Defender Program Evaluation Report" received by our office on March 9, 2016. We have included a copy of our cover letter to the Response which we addressed to the San Mateo County Board of Supervisors, as well as a packet of Attachments referenced in our Response, all of which was distributed to the Supervisors this morning.

Very truly yours,

John S. Digiacinto
Chief Defender

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April 11, 2016

To: Honorable Warren Slocum, President
Honorable Don Horsley, Vice President
Honorable Carole Groom
Honorable Adrienne Tissier
Honorable Dave Pine

Accompanying this letter is the Private Defender Program's Response to the San Mateo County Private Defender Program (PDP) Evaluation submitted by retired Justice Hon. Zerne P. Haning and former San Mateo County Counsel, Thomas F. Casey. The County Manager's Office requested Justice Haning and Mr. Casey to evaluate the PDP for purposes of "comparison with other indigent defense programs to determine whether the PDP remains the most appropriate model providing indigent defense services in San Mateo County."

It should be noted that a five-member committee appointed by the current County Manager in 2012, which included Supervisor Dave Pine, concluded that the PDP was *"a well-managed program and considered a model throughout the country for providing indigent defense."* The Board of Supervisors, on the recommendation of the current County Manager accepted that Committee's evaluation. The 2014–2015 San Mateo Civil Grand Jury acknowledged that the PDP was regarded as *"well-managed, effective, and economical."* The American Bar Association and National Legal Aid and Defender Association awarded the PDP the Harrison Tweed Award in 2012 for *its long-term excellence in providing legal services* to the indigent of San Mateo.

It is in this context that the County Manager's Office commissioned the report by Justice Haning and Mr. Casey (Haning/Casey report) to evaluate the PDP.

In summary, the San Mateo Private Defender Program unequivocally opposes the "recommendations" made by the County Manager's Office based upon the Haning/Casey report. Two of the recommendations contradict or violate both the American Bar Association Ten Principles of a Public Defense Delivery System and the California State Bar guidelines regarding indigent defense organizations. All of the recommendations will destroy or degrade the high quality indigent defense the PDP has provided in San Mateo County for the last forty-seven years.

A review of the recommendations and our response is summarized below:

Severing PDP from SMCBA and County Appointing Chief Defender

The Haning/Case reports recommends that the PDP should be financially and physically severed from the San Mateo County Bar Association (SMCBA) and that (1) the County of San Mateo appoint the Chief Defender as a County employee, and (2) that the PDP program be administered by County employees.

This recommendation is based upon what they view as a *potential* conflict created by the fact that some members of the SMCBA Board who appoint the Chief Defender also receive legal work from the PDP. It is undisputed in the Haning/Casey report that the PDP is well-managed, cost-effective, and provides a high quality of representation to indigent defendants. Therefore, this perceived conflict has had absolutely no effect on the quality of legal defense provided by the PDP. However, appointment of the Chief Defender by the County strips the Chief Defender of his ability to *independently negotiate* with the County Manager for funding. The Chief Defender, as an appointment and employee of the County, is placed in a situation where he or she must accept the funding *assigned* by the County or reject the funding level and jeopardize his or her appointment. This is an *actual* conflict between the financial interest of the County and indigent criminal defendants' interest in obtaining sufficient funding for defense.

This *actual* conflict between the County and the PDP as provider of indigent defense conflicts with the American Bar Association Ten Principles of a Public Defense Delivery System (Principle 1) which states "[T]he public defense function, including the selection, funding and payment of defense counsel, is independent," and the California State Bar of California Guidelines on Indigent Defense Services Delivery Systems (2006) which states that a Chief Defender must "avoid any conflict" regarding available defense resources, "without regard to political pressure exerted by County government that may threaten the administrator's livelihood or the continued existence of the organization itself."

It is this *actual* conflict that exists between a County and a Chief Defender who is a County appointment and employee that has hobbled Public Defenders across the country and recently caused the United States Supreme Court to state in Luis v. Kentucky that only 27% of Public Defender's offices in this country are adequately funded. The proposal that the PDP be financially severed from the SMCBA and the Chief Defender be appointed by the County will *destroy* the nationally recognized high quality of representation provided by the PDP to indigent defendants in San Mateo County for the last forty-seven years. The PDP opposes this recommendation.

Eliminating Chief Defender's Discretion to Limit Number of Program Attorneys

The Haning/Casey report also proposes that the PDP eliminate the Chief Defender's discretion to limit the number of attorneys in the program and open up the program to all San Mateo County Bar members who meet "objective criteria." This proposal *directly* violates both the American

Bar Association Ten Principles of a Public Defense Delivery System which provides in Principle 1 that "T[]he public defense function, including the *selection*, funding and payment of defense counsel, is independent" and the California State Bar Indigent Defense Guideline which *explicitly requires* that the Chief Defender of an assigned counsel program have discretion to limit attorney participation in the program "in order to ensure the level of skill of [program] attorneys." Eliminating the Chief Defender's discretion to limit the number of attorneys in the program will violate both American Bar Association and California State Bar guidelines and also destroy the nationally recognized high quality of representation provided by the program for the last forty-seven years.

Cutting PDP Staffing and Cost Cutting Measures

Justice Haning and Mr. Casey concede that, given the excellent performance of the PDP as presently constituted over the past forty-seven years, the County may wish to maintain its' current contractual relationship with the San Mateo County Bar Association. However, they propose several cost-cutting measures, including cutting the PDP staff. These proposed cost-cutting measures are consistent with the County's interest of saving money, but are totally inconsistent with maintaining the high quality representation to our clients. These cost-cutting measures, on the heels of the construction of a $165 million jail to incarcerate predominantly indigent defendants, runs the risk of causing the perception, not unnoticed in San Mateo's under served communities, that San Mateo favors incarceration over justice, education, and rehabilitation. The proposed cost-cutting measures also demonstrate what will inevitably happen to funding for the PDP if the Chief Defender is made a County appointment/employee.

Cutting PDP Staff

The Haning/Casey report further proposes cutting the PDP support staff. The PDP caseload has gone from approximately 4000 cases annually at the program's inception in 1969 to 20,000 cases currently. In recent years, the PDP was appointed in as many as 25,000 cases. The PDP had four staff members in 1969, nine staff members in 1978 and currently has fourteen staff members, three of whom spend part of their time on SMCBA related tasks. This moderate increase in staff is perfectly consistent with a modern-day administrative office administering a $19 million budget and a caseload five times greater than the caseload at the program's inception. Cutting the PDP support staff will degrade the level of service and representation provided by the PDP.

Managing Attorney on Juvenile Court Level

Justice Haning and Thomas F. Casey also question the necessity of having a Managing Attorney on the juvenile court level. They also suggest that, should the Juvenile Managing Attorney on the juvenile court level be necessary, the Managing Attorney should carry a caseload in addition to fulfilling his or her responsibilities as Managing Attorney.

The Managing Attorney on the juvenile court level has numerous critical responsibilities. The Juvenile Managing Attorney oversees twenty-eight lawyers, monitoring and evaluating their

performance and sharing with them his experience and expertise, including reviewing the lawyers' requests for using experts and investigation. He reviews all new cases before assigning them to the attorney with the appropriate level of skill and experience. If there is a complaint from a client or family member, he documents and resolves the complaints. In addition to consulting with probation officers, social workers, mental health workers and juvenile court judges on a daily basis, the Managing Attorney also participates in several committees and work groups which are tasked with enhancing and improving the care, health, education and rehabilitation of the youth in Juvenile Hall and also in the community.

Given the foregoing critical responsibilities of the Juvenile Managing Attorney, he or she does not have the necessary time to provide a minor in the juvenile justice system with the effective level of representation that a minor requires and deserves. The Juvenile Managing Attorney position must be maintained as is and remain unencumbered with a caseload that will directly interfere with the Juvenile Managing Attorney's effective performance of his or her critical duties.

Chief Defender Covering Master Calendar

The Haning/Casey report recommends that the Chief Defender or Assistant Chief Defender handle the daily Master Calendar in the court of the Presiding Criminal Judge. This recommendation is apparently based on their incorrect assumption that the attorneys assigned to the master calendar are there to observe and evaluate the lawyers of the program. That has never been the case. Not only is this categorically wrong but the perspective of the authors is distorted by their additional incorrect assumption that the criminal justice system is exactly the same as it was in 1969.

Given the evolution of criminal law, the PDP's increasing caseload, and the modern-day complexities of administrating a $19 million budget, the Chief Defender or Assistant Defender do not have the time available to handle the Master Calendar. The Chief Defender and Assistant Defenders attend and evaluate program attorneys in court performance at pre-trials, jury trials, and specialty court calendars which are the phases of the criminal justice system that give insight into attorney performance. Program attorneys are also evaluated by the Annual Attorney Survey, which includes a report from the attorney regarding the number of jury trials they have completed and their outcomes, evidentiary hearings they have initiated, pleadings they have prepared and filed, their use of investigators and immigration attorney resources, and their participation in legal continuing education. The recommendation that the Chief Defender or Assistant Defender on the adult level handle the Master Calendar is uninformed and baseless.

Elimination of Officer of the Day

The Haning/Casey report also recommends that the Officer of the Day position be eliminated. The Attorney of the Day provides a critical link for the public to the PDP that enables clients to have questions answered about their cases, including how to comply with terms of probation, access to County programs and services, and general legal questions. The Attorney of the Day

also provides a direct link to the general public regarding SMCBA legal services available in San Mateo County. The Attorney of the Day position is critical in providing clients and their families' direct access to legal services and general legal information to citizens of San Mateo County and must be maintained.

Conclusion

In summary, the Private Defender Program repeatedly has been found to be a well-managed and cost-effective provider of quality indigent legal defense services by the 2012 County Manager's Committee, the 2014–2015 San Mateo Civil Grand Jury, the County Manager himself, and the authors of this current evaluation. The American Bar Association and National Legal Aid and Defender Association commended the PDP in 2012 for *its long-term excellence in providing legal services* to the indigent of San Mateo as did the California Western School of Law.

An article from the California Western School of Law Faculty Scholarship Paper: "The California Public Defender: Its Origins, Evolution and Decline" by Laurence A. Benner (2010) discusses the decline of indigent defense organizations throughout the nation as a result of cost-cutting by county governments. The article points to the San Mateo County Private Defender program as the *one program in the nation* that has escaped the destructive influence of a county's direct control over its' indigent defense program.

The article states: "Only one county, San Mateo, uses a bar association administered assigned counsel system as the primary provider. The San Mateo system, known as the Private Defender Program, actually functions, however, much like an institutional defender office. It has an investigative staff and employs supervising attorneys who provide training and monitor the performance of assigned counsel panel members."

The proposed radical changes, including co-opting the appointment of the Chief Defender by the County and opening the program to any San Mateo County attorney who belong to the SMCBA and meet certain objective criteria, contradict and/or violate American Bar Association Ten Principles and the California State Bar guidelines and will destroy the high-quality indigent defense the PDP has provided San Mateo County for the last forty-seven years. The cost-cutting measures proposed by the report, including the cutting of the PDP staff, will also degrade the quality of representation and, coming on the heels of the construction of $165 million jail, will create the perception, not unnoticed in San Mateo's under served communities, that San Mateo County favors incarceration over quality legal representation.

We strongly urge the Board of Supervisors to reject each and every recommendation in the Haning/Casey report and preserve the highly effective, nationally recognized defense organization dedicated to providing indigent individuals with high quality legal representation and provided this vital service the San Mateo County or the last forty-seven years.

Respectfully submitted,

John S. Digiacinto
Chief Defender

Myra A. Weiher
Assistant Chief Defender

Kevin R. Nowack
by mn
Kevin R. Nowack
PDP Panel Attorney

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April 11, 2016

To: Honorable Warren Slocum, President
Honorable Don Horsley, Vice President
Honorable Carole Groom
Honorable Adrienne Tissier
Honorable Dave Pine

San Mateo County Board of Supervisors:

This document is the Private Defender Program (PDP) response to the "San Mateo County Private Defender Program Evaluation" authored by retired Justice Hon. Zerne P. Haning and former San Mateo County Counsel, Thomas F. Casey. There will be a separate response prepared by the Board of Directors of the San Mateo County Bar Association (SMCBA), which response will be submitted before the May 9, 2016 deadline set by the County Manager.

The County Manager's Office hired Justice Haning and County Counsel Casey to conduct an evaluation of the PDP for purposes of "comparison with other indigent defense programs to determine whether the PDP remains the most appropriate model providing indigent defense services in San Mateo County." Justice Haning and former County Counsel Casey make recommendations for radical changes to the PDP, including appointment of the Chief Defender by the County, opening the PDP to all San Mateo County lawyers, and cutting staff, despite the fact the PDP has been repeatedly recognized, by San Mateo County entities, including the County Manager's office, as a *well-managed, cost-effective, nationally recognized organization providing high-quality defense services to the indigent.*

In summary, the San Mateo Private Defender Program unequivocally opposes the "recommendations" made by the County Manager's Office based upon Justice Haning's and Thomas Casey's report (Haning/Casey Report). Two of the recommendations contradict or violate California State Bar guidelines regarding indigent defense organizations and all of the recommendations will serve only to destroy or degrade the existing high quality defense services the PDP currently provides to the indigent in San Mateo County.

It should be noted that Justice Haning has not practiced criminal defense or been associated with a criminal defense organization for many years. Thomas Casey was formerly the County Counsel for San Mateo County and acted as the attorney for the County Manager's Office, the very entity now making these recommendations to the Board of Supervisors. Their lack of knowledge and experience regarding the PDP and criminal defense is reflected throughout the report and its

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recommendations, including several central recommendations which violate American Bar Association and the California State Bar indigent defense guidelines – the very national and state guidelines with which the 2014–2015 Grand Jury instructed the County Manager to ensure the PDP's compliance.

Prior to responding to the report and its' recommendations the context in which the report was requested and prepared must be articulated. The Private Defender Program has been repeatedly evaluated and scrutinized since 2012 and has been repeatedly found to be well managed and cost effective.

In 2012 the County Manager appointed a five-member committee, including the Hon. David Pine, San Mateo County Supervisor, to evaluate the PDP program. After an intensive investigation that Committee found that the PDP was "a well-managed program and considered a model throughout the country for providing indigent defense." The Pine Committee recommended that the PDP be evaluated at least *every ten years* pursuant to section 11 of the agreement between the County and the PDP. On December 26, 2012, County Manager, John Maltbie, recommended that the Board of Supervisors, accept that Committee's evaluation. It should be noted that Supervisor Pine's Committee set out the methodology and the resources upon which the Committee relied in its' evaluation of the Private Defender Program. **(ATTACHMENT A: Evaluation of Private Defender Program; December 26, 2012.)** In stark contrast to the transparency of the Pine Committee's report, the Haning/Casey report did not identify any sources upon which the authors relied in making their findings and recommendations.

In 2014–2015 the San Mateo Civil Grand Jury examined the PDP Program. The Grand Jury acknowledged that the PDP was regarded as "*well-managed, effective, and economical.*" The Grand Jury recommended that the Board of Supervisors direct the County Manager's Office to evaluate the PDP *every five years*. The Grand Jury also recommended that the evaluation include whether the PDP continued to be the best model for the County to provide indigent legal defense and whether the PDP was *in compliance with state and national guidelines*. **(ATTACHMENT B: 2014-2015 San Mateo County Civil Grand Jury Report)** In this July 6, 2015 report, the Grand Jury stated that it had been informed by an unnamed "County official" that "a current evaluation is underway that will include a determination of whether the PDP still provides the best approach for San Mateo County residents." (Id. at p. 5). The Grand Jury further stated in their report that the unnamed official told them that the evaluation would focus on two aspects: 1) parity of resources with the prosecution and 2) cost comparisons with alternate methods of indigent defense services. (Id. at p. 5)

In the County Manager's Report to the Board of Supervisors, dated August 20, 2015, Mr. Maltbie recommended that the Board of Supervisors approve the Grand Jury's findings and recommendations, stating that the review of the "current system" was already under way. **(ATTACHMENT C: page 2.)**

As indicated below, the Haning/Casey report ignores the parity issue despite the fact PDP annually receives approximately *$14 million less* than the San Mateo County District Attorney's Office. The report then concludes *like every other previous analysis of the PDP* that the PDP is

as cost-effective as any other indigent defense model. The Haning/Casey report then goes on to recommend cost-cutting measures to the PDP, including a reduction in staff, which would destroy the quality of representation provided by the PDP and *exacerbate* the lack of parity ignored by their report.

Each October, the PDP submits an exhaustive Annual Report to the County which provides more detailed information about its' operation than any other entity providing services to the County. In addition, the PDP is audited at the end of each fiscal year by an outside firm. A copy of that audit is provided to the County Manager. The County has never expressed any concern or caution about the accuracy or integrity of the audit.

American Bar Association Harrison Tweed Award

The San Mateo County Private Defender Program was awarded the Harrison Tweed Award in 2012 by the American Bar Association and the National Legal Aid and Defender Association for *its long-term excellence in providing legal services to the indigent of this County*, including criminal defense, juvenile defense, representation of individuals involuntarily hospitalized in a mental health facility and legal representation of parents and children in dependency matters. The Private Defender Program was nominated for the award by the Executive Director of the Texas Indigent Defense Commission, who described the Private Defender Program as a "tremendous model for indigent defense organizations in Texas." **(ATTACHMENT D: Nominating letter from James D. Bethke, Executive Director Texas Indigent Defense Commission, dated March 23, 2012).** [1]

The State of Texas *enacted legislation* to create managed assigned counsel programs modeled expressly on the Private Defender Program of San Mateo County. The legislation was crafted and sponsored by Texas State Senator Rodney Ellis. Senator Ellis states that the Private Defender Program is "widely regarded as one of the premier indigent defense organizations in the United States." **(ATTACHMENT E: Letter of support from Texas State Sen. Rodney Ellis dated March 21, 2012).** That legislation has been put into effect and Austin, Texas now has an indigent defense system based on the Private Defender Program model. Lastly, former Presiding Judge of the San Mateo County Superior Court, the Honorable Beth Labson Freeman, now sitting on the United States Federal District Court, Northern District, wrote the American Bar Association in support of the Private Defender Program receiving the Harrison Tweed Award attesting to the "extraordinarily high-caliber legal representation" and "superb support system so that the attorneys have access to investigators, mental health professionals, interpreters, expert witnesses, and other professionals to assist in investigating and submitting their case to juries." **(ATTACHMENT F: Letter of support from, Presiding Judge, San Mateo County Superior Court, Honorable Beth Labson Freeman, dated March 20, 2012).**

In addition, the Haning/Casey report commissioned by the County Manager's Office states that the Private Defender Program provides "cost-effective representation". The report also states

[1]. The authors of the report relegate the fact that PDP earned a national award from the American Bar Association and the NLADA for excellence in representation of the indigent in San Mateo County to a footnote.

there are no issues regarding the quality of representation provided to indigent defendants by the Private Defender Program. In fact, in her letter referenced above, Judge Freeman described the level of representation provided by the Private Defender program as *"extraordinary high-caliber legal representation."* This is the context in which the San Mateo County Manager's Office now requests the Board of Supervisors to approve radical changes in the Private Defender Program as well as a reduction of support staff and cost-cutting measures to the program.

Severing PDP from SMCBA - Appointment of Chief Defender by County

The first recommendation of the Haning/Casey report is that the PDP should be severed both physically and financially from the SMCBA and the Chief Defender should be appointed and employed directly by the County. The authors of the report base this recommendation on what it describes as the *appearance* of a conflict of interest between the Chief Defender of the PDP and the SMCBA Board of Directors because some of the members of the Board of Directors are also attorneys for the PDP and receive significant income from the program.

The report is careful to point out that the Chief Defender of the PDP and members of the SMCBA are *"not operating with any intent other than the intent to serve the best interests of the accused and the County."* Therefore, the authors acknowledge that the potential conflict has not affected the actions of the Board of Directors and the Board has acted only with the intent to serve the best interests of the accused in the County. In addition, despite this apparent potential conflict, the SMCBA Board of Directors has managed to select Chief Defenders of the PDP for the last *forty-seven years* who, according to the American Bar Association, have provided high-caliber representation to indigent individuals in San Mateo County.

The central problem with the report's recommendation is that its' authors analyze the conflict issue from the perspective of the County as opposed to the perspective of the individuals that the PDP serves, the indigent in San Mateo County. In contrast to the *potential* conflict caused by some members of the Board of Directors also belonging to the Private Defender Program the recommendation that the Chief Defender of the PDP be appointed and employed by the County creates an *actual* conflict between the County, the PDP and the individuals the PDP serves. This actual conflict consists of the conflict between one of the County's primary interests, conservation of taxpayer funds, and *the* primary interest of the PDP, ensuring sufficient funding for indigent defense.

The Chief Defender of the PDP is able to ensure adequate funding for the PDP, unlike a Public Defender appointed and employed by the County, *precisely* because the PDP Chief Defender is *not a County appointment or employee*. The Chief Defender, as an employee of the San Mateo County Bar Association and not the County, has the power to *independently* negotiate the level of funding for indigent defense with the County. If the Chief Defender were to be appointed by

the County and became a County employee the County would no longer have to negotiate with the Chief Defender regarding the level of funding that would be dedicated to indigent defense in this County because the Chief Defender as an employee of the County would *serve at the pleasure of the County*. The Chief Defender, as employee of the County, would be given the choice of accepting the level of funding assigned by the County or rejecting the level of funding and thus jeopardizing his or her employment.

The proposal in the Haning/Casey report that the County appoint the Chief Defender of the PDP and that the appointee be a County employee, violates the very first principle articulated by the American Bar Association in its' Ten Principles of a Public Defense Delivery System. The ABA's first principle states: "The public defense function, including the selection, funding, and payment of defense counsel, is independent." **(ATTACHMENT G: ABA Ten Principles of a Public Defense Delivery System, American Bar Association, 2002.)**

This actual conflict between the County and the Chief Defender of an assigned counsel program regarding funding for services is explicitly recognized by the State Bar of California, in its Guidelines on Indigent Defense Services Delivery Systems (2006). The State Bar Guidelines state:

> *Since County government funds assigned counsel programs in California care must be taken by the administrators of such organizations to* ***assiduously avoid any conflict*** *with the unequivocal duty of loyalty owed to each individual client. Decisions about what resources are reasonable and necessary to prepare a client case, for example, must be made* ***without regard to political pressure exerted by County government that may threaten the administrator's livelihood or the continued existence of the organization itself.*** *(Emphasis added).*
>
> State Bar of California, in its Guidelines on Indigent Defense Services Delivery Systems (2006).

It is this very *actual* conflict recognized by the American Bar Association and the California State Bar in their guidelines that has caused many Chief Public Defenders across this country to accept funding that is inadequate for the defense of the indigent of that County. This *actual* conflict recognized by the American Bar Association and the California State Bar between the County and a Chief Defender appointed and employed by the County is the very conflict that has hobbled funding for indigent defense for Public Defender's offices throughout the country and resulted in many Public Defenders offices who lack the access to the level of ancillary services that have made the PDP a unique, exemplary, and nationally recognized defense organization.

Lack of independence of Chief Defenders from the county government is cited as "the primary reason" public defense programs have insufficient funding. (Norman Lefstein: *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, American Bar Association, 2011 at page 22.) The San Mateo County Private Defender Program is cited by Professor Lefstein as an example of an organization that is able to receive sufficient funding *specifically because of the Chief Defender's appointment by the SMCBA* and consequent independence from the County. (Id.at p. 218) It should be noted that insufficient funding is a primary cause of ineffective

assistance of counsel reversals and damage payments made in client-initiated malpractice lawsuits.

Judge Freeman stated in her letter to the American Bar Association, that the PDP Chief Defender "ensures that the PDP is adequately funded by the County Board of Supervisors." In contrast, United States Supreme Court in Luis v. Kentucky recently noted that only 27% of Public Defender's offices in the United States are adequately funded and most have "limited resources". The ABA in its Amicus Brief concerning Luis v. Kentucky described court-appointed counsel as "disadvantaged because their lawyers will have *limited resources* available to them for conducting research and investigation, and for developing strategies for defense." ABA Amicus, Luis v. Kentucky, page 6. This is in *stark contrast* to the ABA awarding the PDP for its' "long-term excellence" in providing legal services to the indigent based, in part, on the availability of sufficient funding for ancillary services.

An article from the California Western School of Law Faculty Scholarship Paper: "The California Public Defender: Its Origins, Evolution and Decline" by Laurence A. Benner (2010) **(ATTACHMENT K)** discusses the decline of indigent defense organizations throughout the nation as a result of cost-cutting by county governments. The article points to the San Mateo County Private Defender program as the *one program in the nation* that has escaped the destructive influence of a county's direct control over its' indigent defense program.

The California Western School of Law article states:

> "Only one county, San Mateo, uses a bar association administered assigned counsel system as the primary provider. The San Mateo system, known as the Private Defender Program, actually functions, however, much like an institutional defender office. It has an investigative staff and employs supervising attorneys who provide training and monitor the performance of assigned counsel panel members."

All of the authors of the letters recommending the PDP for the Harrison Tweed award noted that the PDP was able to provide its' attorneys with what Judge Freeman described as a "superb support system so that the attorneys have access to investigators, mental health professionals, interpreters, expert witnesses, and other professionals to assist in investigating and submitting their case to juries." The extraordinary availability of these ancillary services is a feature of the PDP which is derived *directly* from its' ability to *independently negotiate* funding for indigent defense with the County. The actual conflict of interest existing between the County's representation of taxpayer interests and the PDP's representation of the interests of indigent criminal defendants is properly resolved by maintaining the Chief Defender as employee of an *entity other than the County*, namely the San Mateo County Bar Association. It is only through this arrangement that the County and its' citizens can ensure that a fair and reasonable level of funding is achieved through negotiation with the County by an independent Chief Defender.

The authors of the report state that the PDP budget achieved through current negotiations with the County is cost-effective for the County. Therefore, the proper balance between the financial

interest of the County and the PDP's interest in maintaining the necessary level of funding for the effective defense of indigent defendants is achieved by having a Chief Defender who is employed by an entity other than the County *independently negotiating* the PDP budget with the County.

The report also ignores the necessity and cost of building what would be a quasi-governmental defender program which would necessarily include hiring a new Chief Defender, purchasing and/or supplying office space with computer and tech support, re-interviewing and evaluating lawyers and investigators to re-establish skill and experience levels for case assignment purposes, locating and retaining experts, purchasing malpractice insurance or setting aside funds to self-insure, retaining an organization to provide immigration advice and re-constructing a continuing education program.

Permitting the County to co-opt the responsibility of appointing the PDP Chief Defender will destroy the unquestionably high quality of representation provided to indigent defendants by the PDP *for the last 47 years*. The San Mateo County PDP strenuously opposes altering the current nationally recognized, cost-effective model to shift responsibility for appointing the Chief Private Defender from the independent SMCBA to the County and introducing the destructive *actual* conflict recognized by the American Bar Association and the California State Bar between counties and indigent defense organizations.

Maintaining Contract With SMCBA - Cutting Staff – Cost-Cutting Measures

The Haning/Casey report concedes that, given the excellent performance of the PDP as presently constituted the County may wish to maintain its current contractual relationship with the PDP. The authors then make certain recommendations assuming the County continues its' current contractual relationship with the SMCBA. Tellingly, several of the changes are cost-cutting measures consistent with the County's primary financial interest versus the primary interest of the indigent criminal defendants the PDP serves.

The PDP opposes the recommendations/cost-cutting measures contained in the report. The recommendations are based upon a view of the criminal justice system and Private Defender Program that existed over forty years ago, immediately after the United States Supreme Court decision in Gideon v. Wainwright, holding that the 14th Amendment required the government to provide attorneys to indigent criminal defendants and are ill-advised in the context of the current criminal justice system. The recommendations also ignore the fact that the PDP is already a cost-effective organization.

Prior to discussing the cost cutting measures put forth in the report some context should be established regarding the funding levels for the various entities involved in the San Mateo County criminal justice system:

> --San Mateo County Sheriff's budget for 2015–16 was $250,000,000, an increase of $30,000,000 from 2014–15. This increase was in addition to the expenditure of $165,000,000 for construction of a new jail.

--The San Mateo District Attorney's Budget was $34,000,000 in 2015–2016, essentially unchanged from 2014–2015.[3]
--The 2015-16 budget also includes $47,000,000 expended on a new IT infrastructure, including replacement of an already existing coordinated case management system to be used by the District. Attorney, Probation Department, Sheriff Department, and Courts.
--An additional $78,000,000 was expended by the County to cover *salary and benefit increases for County employees* and the corresponding increase in charges by internal services departments to recoup the higher wages.[4]

In contrast, the Private Defender's 2015–16 budget is $18,502,766.00.[5]
It is in the context of these numbers that the authors recommend *cutting* the current staffing level of the PDP and other cost-cutting measures. This recommendation again demonstrates the competing financial interest of the County verses the paramount interest of the PDP, providing quality legal services to the indigent citizens in San Mateo County.

It should also be noted that San Mateo County recently built a new jail with a cost to taxpayers of $165,000,000. The fact that the County Manager's Office has submitted a report requesting a reduction in the staffing and cost-cutting measures of the organization that provides defense services to indigent defendants on the heels of the construction of a new jail will create a perception, not unnoticed in San Mateo County's under served communities, that the County favors incarceration over high quality representation. The Private Defender Program objects to the unnecessary cutting of staff and cost-cutting measures.

A look at the case and staffing numbers from 1969 to present indicate that the recommendation to cut the PDP staff is baseless. The PDP at its inception in 1969 handled approximately 4000 cases annually and employed a director and three staff members. In 1978, the case load had grown to approximately 7,000 to 8,000 cases annually and the PDP staff had grown to nine members. In 2016, the PDP is expected to handle 20,000 cases – five times more than in 1969 and more than double the 1978 case level. The current staff of the PDP is eleven full time positions and three part time individuals who split their responsibilities between the SMCBA and the PDP. The current staff of the PDP administers an approximately $19 million budget. In addition, several specialized courts and court programs have been initiated since the PDP's inception including Drug Court, Veterans Court, Pathways Mental Health Treatment Court, Bridges and Laura's Law (in progress), necessitating additional record keeping and staffing.

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[3] See County of San Mateo Adopted Budget 2015–2016/2016–2017, p.53

[4] hhtp://cmo.smcgov.org/blog/2015-06-03/county-san-mateo-releases-balanced–budget

5The PDP also received an additional $5,000,000 budget supplement in 2015 to cover the extraordinary cost of the unprecedented simultaneous filing of ten special circumstance homicides by the San Mateo County District Attorney. This supplement was approved by the County Manager and County Counsel after input from the District Attorney. This is the only time in 47 years that the PDP has required an extraordinary budget supplement.

The Haning/Casey report itself concedes that the PDP is a cost-effective entity whose budget has risen in accord with other similar defense organizations. Given the magnitude of the increase in the budget and cases handled by the PDP and the complexity of programs now being run by the San Mateo's County Superior Court, the current additional staffing is well within the needs and norms of a modern-day administrative office. The cutting of staff is an unsupported and unnecessary cost-cutting measure that will only serve to degrade the quality of representation and delivery of services to the indigent by the PDP.

Periodic Outside Audit/Review of PDP Finances

The second recommendation is a periodic, independent review of the PDP's finances by the County or an outside auditor to ensure that the monies provided to the PDP are used solely and exclusively for defense of the indigent. The PDP already has an independent audit every year by the firm of Lautze and Lautze, a private audit firm. A copy of this audit is provided to the County Manager every year. In addition, the PDP's contract with the county entitles the County to perform an independent audit whenever they choose. This recommendation demonstrates the authors' confusion of how the PDP actually operates and a lack of effort to familiarize themselves with these operations. It is also perplexing that the authors would spend so little effort in investigating the facts.

Review of Special Fee Bills

The third recommendation is that special fee case bills should not be reviewed by lawyers who participate in the Private Defender Program, but should be reviewed instead by individuals who do not participate in the program. Apparently the authors were unaware that no bill is ever paid without review and approval by the administrative staff. The review of Special Fee bills is a two-tier review process and no bill is ever paid without having been reviewed by the Chief Defender, Assistant Chief Defender, or one of the Managing Attorneys **and** a member of the Special Fee Committee. The administrative staff have the ultimate say in the bill approval process. The Special Fee Committee was created as a result of the1993 report of the Blue Ribbon Committee chaired by the SMCBA president. The Committee was created in response to questions and problems concerning attorney compensation in the case known as the "Billionaire Boys' Club" case. This recommendation again demonstrates the authors' lack of knowledge regarding the PDP operations.

Juvenile Managing Attorney

The Haning/Casey report recommends that the County should determine if a Managing Attorney is necessary at Juvenile Court, and if they determine it is necessary, then the authors recommend that the Managing Attorney be required to handle an active caseload. The Private Defender Program opposes this recommendation. The report lacks an understanding of the complexity of the contemporary juvenile justice system and the consequent absolute necessity of a Managing Attorney on the Juvenile Court level.

The authors came to their conclusion without conducting any inquiry about the nature of the position of the Managing Attorney at Juvenile Court. Despite their lack of knowledge about the

PDP's Juvenile Office, the authors did not interview or seek to interview Richard Halpern, the present Managing Attorney at Juvenile Court. Further, the authors did not question the Probation Staff, the District Attorney's Office at Juvenile or anyone at the HSA (Human Resources Administration) or County Counsel's Office about the function of the Managing Attorney at Juvenile. The rendering of an opinion as to the potential elimination of a position, as the authors did in this case, without any knowledge of the actual function of that position and throws into doubt the validity of their entire report.

Having a full time Managing Attorney at Juvenile Court is essential to ensuring that indigent Juveniles receive competent legal representation in delinquency cases and that parents, their children and other essential parties receive competent representation in dependency cases. Representation in Juvenile Court and the responsibilities of the appointed lawyer have become highly complex and comprehensive. As the Administrative Office of the Courts noted in its pamphlet Effective Representation of Children in Juvenile Delinquency Court written and distributed by the Administrative Office of the Courts with the assistance of the State Bar of California. **(ATTACHMENT H)**

Responsibilities of Counsel

> *"An attorney representing children in delinquency court has a dual role. First and foremost, the child's counsel defends the child against the charged allegations, evaluating the allegations and possible defenses and vigorously presenting a defense. Second counsel is a child advocate, working to have the child receive care, treatment, and guidance consistent with his or her best interest...."*

This is further underscored by the recent enactment of Welfare and Institutions Code section 634.3 in January of 2016 which enumerates numerous responsibilities now required of Attorneys representing Juveniles in delinquency cases. **(ATTACHMENT I: Welfare and Institutions Code section 634.3.)**

The requirements for the representation of clients in Dependency cases has also evolved. Rule of Court 5.660 sets out in great detail the educational requirements to qualify as appointed dependency counsel, as well as the responsibilities of dependency lawyers. A simple perusal of these rules makes clear why the attorneys who are involved in the practice of indigent dependency law devote the majority of their time to this practice. **(ATTACHMENT J: Rule of Court 5.660)**

Responsibilities of Managing Attorney at Juvenile Court

The Managing Attorney at Juvenile Court coordinates the services of twenty-eight attorneys, and directly assigns them to represent PDP clients in all delinquency and dependency cases on which we are appointed by the Court (approximately 90% of all cases). He also administers the Lanterman Petris & Short (LPS) panel for the Private Defender and assigns counsel to represent persons involuntarily hospitalized in local mental health facilities.

In making assignment decisions in all matters, the Managing Attorney reviews every case before assigning the attorney(s) in order to ensure that the attorney(s) with the appropriate level of skill and experience is paired with the individual client. In assigning delinquency cases the Managing Attorney takes into consideration not only what charges the District Attorney has filed, but also the background of the client, the apparent dispositional needs of the client and the skill level of the attorney. In Dependency cases, the Managing Attorney assigns attorneys to represent the minors and also assigns counsel for the parents, step parents and other parties some of whom may also have criminal liability arising from the facts. In assigning LPS cases, the Managing Attorney, again, always takes into consideration the level of complexity of the mental health, medical and legal issues and the skill level of the attorney needed to handle such a case

The Managing Attorney reviews every bill submitted by the Panel Attorneys and participates as a member of the Juvenile Special Fee Committee.

Any complaint about the assigned attorney is sent directly to the Managing Attorney who makes himself available to meet with the minor, parent or other client to listen to the complaint, discuss with the parties the issues and problems involved and to try to resolve them. The Managing Attorney frequently communicates with clients who are detained in Juvenile Hall, and also speaks with probation officers, social workers, mental health workers and the Juvenile Court Judges concerning case issues and problems that arise during the day.

The Managing Attorney has been involved actively with the Redesign of Camp Glenwood (as a member of the Steering Committee for the Camp Redesign), and has participated in two subcommittees involving gangs and education. He also participated in preparing competency protocols for the Juvenile Court in collaboration with staff members from the Probation Department and the District Attorney's Office. The Managing Attorney also has collaborated with other Juvenile agencies to find representation for Private Defender clients in school expulsion cases as well as in matters with immigration issues.

The Managing Attorney consults with the PDP attorneys during the day concerning their cases. He reviews all requests for Experts which are being requested by the attorneys. He also makes time during the day to observe the attorneys in Court in order to monitor their performance.

In addition to the above responsibilities and duties, the Managing Attorney is also involved in a great deal of Community Outreach. He is a member of the Juvenile Justice Coordinating Council, the Pacific Juvenile Defender Center, The Blue Ribbon Commission on Foster Care, the education sub-committee of the Blue Ribbon Commission, and the Forensic Evaluators Committee. He is a member of the Advisory Committee for the Training Institute for Holistic Representation of the Legal Services for Children of San Francisco, and on the Advisory Council for Project Change at the College of San Mateo which provides secondary education opportunities for our incarcerated clients. Finally, he participates in the advisory committee to SWAG (Students with Awesome Goals) Program.

Managing the Juvenile Dependency and Delinquency and LPS panels is and should be a full time position. .While it is true that some years ago, the Managing Attorney handled some individual cases (primarily a few probation violations), the requirements of the job have grown. Further,

given all the responsibilities and commitments of the Managing Attorney position, that person certainly would not have the requisite time needed to review and assign cases, participate in committees with the Court, Probation Department and District Attorney's Office and still handle a full case load which would require investigation of the facts of the case, hiring experts, visiting and preparing the clients and witnesses to testify and perform all other tasks essential to the adequate representation of the client.

Further, in Dependency Cases the Private Defender represents both the minors and their parents. That can occur only if the attorneys are independent contractors. If the Managing Attorney were to represent a party, that representation would create a conflict and the all the other parties in each case would have to be represented by attorneys not on the panel at a significant additional cost to the County due to the need to create a conflicts panel or to provide outside counsel.

Chief/Assistant Chief Defender Handling Criminal Master Calendar

The authors of the report recommend that the Chief Defender or Assistant Chief Defender cover the "master" criminal calendar held in the Criminal Presiding Judge of the Superior Court each day. The rationale for the recommendation is that the daily performance of program attorneys can be regularly observed and critiqued by the Chief Defender or Assistant Chief Defender during the Master criminal calendar. This recommendation again demonstrates that the perspective of the authors of the report is that of the PDP that existed decades years ago.

Neither the Chief Defender nor the Assistant Chief Defender has been assigned to handle a master calendar before the Presiding Criminal Judge for over *thirty years*. Contrary to what the authors apparently believe, neither of them has ever handled the Criminal Presiding Judge's calendar *for purpose of evaluating program attorneys*. Given the large caseload the PDP currently handles, it is unworkable for the Chief Defender or Assistant Chief Defender to handle that calendar. PDP attorneys with serious felony experience are assigned to handle the Presiding Criminal Judge's calendar on a rotating basis. The program attorney handling Presiding Criminal Judge Calendar does not evaluate attorneys under any circumstances and has never done so.

The Chief Defender, Assistant Chief Defender and Managing Attorneys evaluate program attorneys by observing them in court at pre-trials, jury trials, preliminary hearing and motion hearings, and by attending the various specialty court calendars. These are the phases in the criminal justice process, unlike the Presiding Criminal Judge Calendar, which actually offer insight into the attorneys' substantive performance. Program lawyers are also evaluated by a mandatory Annual Survey, which includes a report from the attorney regarding the number of jury trials they have completed and their outcomes, evidentiary hearings they have initiated, pleadings they have filed on behalf of their clients in support, use of investigators and experts, communication with and use of ILRC (Immigration Legal Resource Center) for immigration advice, and their participation in continuing legal education.

Clearly, the authors misunderstood the purpose of having an attorney assigned to the Presiding Criminal Judge Calendar. Their belief that the calendar attorneys, be it an administrator or a panel member were assigned there to evaluate the attorneys' performance is wrong. Program attorneys are evaluated thoroughly and in detail each year. The recommendation by the authors

that the Chief Defender or Assistant Defender handle the so called "Master Calendar" to evaluate attorneys should be rejected.

Officer of the Day

The Haning/Casey report recommends eliminating the PDP Officer of the Day position. Again, this recommendation is consistent with the County's primary interest, conservation of taxpayer funds verses the PDP's paramount interest, providing high quality legal services to indigent individuals in San Mateo County. The PDP attorneys who are assigned to be the Officer of the Day, all have serious felony experience and are deemed qualified to answer even the most serious questions posed by clients and members of the public. The Officer of the Day facilitates the public's connection and access to the PDP program.

The primary activity of the Officer the Day is to answer the phone calls from incarcerated clients (free phone access from correctional facilities) and calls and drop-in visits from members of the public all of which pose a myriad of questions and problems to be addressed. PDP clients and their families have questions about their cases, including cases in which the Court proceedings have been concluded. Clients have questions about how to comply with terms of probation, where to access County programs and services, and many general legal questions.

The issue of the accuracy of jail credits against a sentence is a frequent subject of inquiry from inmates in the local correctional facilities. An inaccurate or incomplete calculation of custody credits against a sentence can result in a client being detained after he or she should have been released. This situation can result in civil law suits against the County and can be costly. Lastly, the Officer of the Day answers questions from the general public about legal issues, or the workings of the court and provides a direct link to the public regarding available legal services in San Mateo County. It should be noted, that many of our criminal justice partners refer people to us for assistance with their problems. The Officer of the Day often has people coming to the PDP office who have been directed there by the Clerk's Office, the Probation Department, Revenue Services and the DA's Office so that we can assist the person with problems that the other agencies cannot handle for various reasons.

Any minor complaints which can be handled by the Officer of the Day are closed at that level. However, any substantive complaints made to the Officer of the Day are passed on to the PDP administrative staff for review and resolution of the complaints.

When the Officer of the Day position is viewed from the perspective of providing quality legal services to indigent individuals in San Mateo County it is apparent that the this position is a cost-effective way to provide clients and their family access to the PDP administration regarding complaints or concerns and provides access to the general public to San Mateo County legal services. It would be an error to eliminate the Attorney of the Day position depriving clients, and clients' families of this vital public service. The Officer of the Day provides essential access to and information about legal services provided by the County as well as direct access to the PDP for assistance.

Open Versus Closed Panel Membership Limited by Chief Defender's Discretion

The authors of the report state that the PDP is "closed or limited in numbers [of attorneys], which runs contrary to its original intent." The authors recommend that the PDP should be open to all "qualified members" of the San Mateo County Bar Association and qualifications should be made objectively based on established "written criteria." This recommendation violates the very state guidelines the 2014-2015 Grand Jury instructed the County Manager's office to ensure were being complied with by the PDP.

The State Bar of California Guidelines on Indigent Defense Services Delivery Systems (2006), Qualification of Indigent Defense Providers, page 12, states:

> *In order to ensure the level of skill of panel attorneys, criteria established for each panel should make clear that meeting the minimum requirements does not create an entitlement to participation on a particular panel.* ***The Administrator must retain the discretion to deny participation at the level requested, or at all,*** *(emphasis added) where an applicant meets the listed minimum requirements but whose skill level and/or past performance does not represent the competency required for quality representation. . . .*"
> The State Bar of California Guidelines on Indigent Defense Services Delivery Systems (2006)

This recommendation also completely disregards the evolution of criminal law and criminal defense since the PDP was initially created in 1968. Criminal law and criminal defense have evolved in a dramatic way since the PDP's inception in 1968 requiring a high level of specialization for a criminal lawyer to provide effective representation. As a result, attorneys on the PDP must be assigned a critical mass of cases that enable them to gain the knowledge and skill level necessary to effectively represent clients in a dramatically altered criminal justice system whose penalties and consequences for clients have dramatically increased. Limitation of the number of attorneys who participate in the program at the Chief Defender's discretion has resulted in the creation of a highly specialized, highly skilled criminal defense bar necessary to the effective representation of indigent defendants in the modern criminal justice system. Providing the Chief Defender discretion to limit the number of attorneys who participate in the program not only the places the PDP in compliance with State Bar guidelines it has a *positive and necessary influence* on the quality of the representation provided by the program envisioned by the guidelines.

In the forty seven years since the PDP first began representing indigent clients in San Mateo County, Penal statutes have been passed by the California Legislature which dramatically increased punishments for certain conduct and crimes which necessitate, particularly on the felony level, that an indigent defendant be represented by a highly experienced criminal defense attorney.

In 1994 the Legislature passed AB 971, commonly known as the Three Strike Law. The Three Strike Law significantly increased the penalties for individuals convicted of felonies who had been previously convicted of serious or violent felonies. These penalties included the doubling of

mandatory prison sentences and consecutive sentences of 25 to life for each new felony conviction. The Three Strikes Law has since been amended by Proposition 36 in 2012 to require that the new felony be a serious or violent felony to trigger the Three Strikes Law but the mandatory doubling of prison sentences and consecutive 25 to life sentences remain.

Sentences requiring "one strike" 25 to life sentences for sex offenders have been enacted. See Penal Code section 667.61. Penal Code section 290 requiring several categories of sex offenders to register as sex offenders for their lifetime, a devastating consequence for the individual, has been enacted. Penal Code section 186.22 et. Seq. has been enacted by the legislature to address the issue of gang violence in the state of California. Penal Code section 186.22(b) is a gang enhancement which makes any gang homicide a special circumstance murder subject to the death penalty. Penal Code section 186.22(b) also adds two to ten years to the penalties for any felony committed for the benefit of the gang. Defense of gang cases require a working knowledge of the gang culture and internal operation of gangs in San Mateo County. Penal Code section 12022.53, the personal use of a firearm enhancement, has been enacted adding 10 years, 20 years, and 25 years to life for felonies committed by individuals who personally used a firearm during the felony.

Homeland Security actively seeks out and deports non-citizen defendants convicted of certain crimes. The United States Supreme Court in Padilla v. Kentucky, (2010) 559 US 356, has held that a criminal defense attorney is *obligated* to provide specific immigration advice to non-citizen defendants regarding the immigration consequences of any conviction. A defense attorney's obligation to provide specific immigration advice to non-citizen defendants was codified in California by Penal Code section 1016.2. Immigration laws are complex and require a high level of experience and familiarity to provide competent immigration advice to non-citizen defendants.

Lastly, when the PDP was first created in 1968 San Mateo County prosecutors only remained with the District Attorney's Office for four to five years before moving onto another form of practice. Currently, however, the San Mateo County District Attorney's office is staffed by career prosecutors, many of whom remain with the office for over twenty years. These prosecutors as a result have developed a knowledge and skill level unseen in the early years of the PDP. The only way to create a criminal defense bar in San Mateo County with the level of skill, knowledge, and expertise to effectively represent them in the modern-day criminal justice system is to give the Chief Defender discretion to select and limit the number of lawyers who receive cases from the Private Defender Program so that PDP attorneys are assigned the critical mass of cases each year necessary to attain the necessary knowledge and skill level.

The *sole original intent* which has guided the PDP since its' creation in 1968 was to provide high quality legal representation to indigent defendants. The practice of modern criminal law requires that a criminal defense attorney handle a significant number of criminal cases so that he or she can learn the intricacies involved in the modern practice of criminal law. The practice of criminal law also requires that the attorney handle a significant number of criminal cases to gain experience and develop courtroom skills and tactics, as well as skill in investigating and evaluating cases, researching the law, using the rules of evidence to a client's advantage, and advocating in the courtroom setting effectively.

Indigent defendants in San Mateo County deserve a truly experienced criminal defense attorney to defend them. The only way to create a criminal defense bar in San Mateo County with the level of skill, knowledge, and expertise to effectively represent them in the modern-day criminal justice system is to obey the California State Bar guidelines and give the Chief Defender discretion to select and limit the number of lawyers who receive cases from the Private Defender Program. The fact that this may result in attorneys participating in the program earning a substantial portion or all of their income from the program has no impact on the quality of representation and is, therefore, of no moment.

Conclusion

In summary, the PDP as presently constituted is a nationally recognized, cost-effective program based on a model that has provided *high-caliber representation* to indigent individuals in San Mateo County *for 47 years*. This PDP model has been recognized nationally as *the model* upon which assigned counsel program should be based. The uninformed, unnecessary, ill-advised and radical changes to the current PDP model proposed by the report, including the County co-opting the power to select and appoint the Chief Defender, and opening up the Private Defender Program to any San Mateo attorney who meets objective criteria, regardless of the actual skill, competence, and specialization level of the attorney will without a doubt *destroy* the recognized high quality of representation that has been provided by the Private Defender Program for the last forty-seven years. These recommendations and the cost-cutting recommendations, including the reduction of Private Defender Program staff, in the context of the recent construction of a new jail to house predominantly indigent defendants is a problematic and foreboding prospect for the County.

We strongly urge the Board of Supervisors to reject each and every recommendation in the Haning/Casey report and preserve the highly effective, nationally recognized defense organization that has defended indigent individuals in San Mateo County for the last forty-seven years.

Respectfully submitted,

John S. Digiacinto
Chief Defender

Myra A. Weiher
Assistant Chief Defender

Kevin R. Nowak
PDP panel attorney

Richard W. Halpern
Managing Attorney
by M.W.

Eric Liberman
Managing Attorney

ATTACHMENT

A

COUNTY OF SAN MATEO
Inter-Departmental Correspondence
County Manager

Date: December 26, 2012
Board Meeting Date: January 15, 2013
Special Notice / Hearing: None
Vote Required: Majority

To: Honorable Board of Supervisors

From: John L. Maltbie, County Manager

Subject: Evaluation of the Private Defender Program

RECOMMENDATION:
Accept the Committee's report on the evaluation of the Private Defender Program.

BACKGROUND:
During the Preliminary Budget hearing on March 29, 2012; your Board asked the County Manager's office to conduct a performance evaluation of the Private Defender Program pursuant to Section 11 of the contract, which states:

> *The County may form a committee to evaluate ongoing performance under the terms of this Agreement, at any time during the period of this agreement, that shall include members of the judiciary, members of the Bar Association who are not actively participating as Private Defender Program attorneys, and may include other interested persons as determine by the County, to make such reports and recommendations as may be appropriate and of assistance to the parties hereto.*

On September 1, 2012; the County Manager's Office appointed a five-member committee to evaluate the Private Defender Program. The Committee members were:

Joshua Bentley, President, San Mateo County Bar Association
Honorable Robert Foiles, Assistant Presiding Judge, San Mateo Superior Court
Jim Fox, Retired San Mateo County District Attorney
Honorable David Pine, San Mateo County Supervisor, District One
Susan Swope, Vice-Chair, Juvenile Justice Delinquency and Prevention Commission

DISCUSSION:

The Private Defender Program Structure

Since 1968, the County of San Mateo has contracted for indigent defense with the San Mateo County Bar Association (the Association) through the Private Defender Program (the Program). The current contract's term is July 1, 2012 to June 30, 2013 with a not to exceed amount of $16,860,272.

The Chief Defender manages the Program and is responsible for its day-to-day operations. The Assistant Chief Defender assists in the day-to-day operation of the Program, a Managing Attorney for Juvenile Court Operations is responsible for managing the delinquency and dependency caseload of the Program, and a Chief Investigator manages the investigation division.

The Program has approximately 110 attorneys who are assigned cases based on their ability, training and experience, their availability to appear on the dates set for a particular case, and an assessment of each attorney's current caseload. There are 36 investigators who work on a contract basis with the Program and investigate about 1,200 cases per year.

Methodology:

The Committee relied on the following resources to evaluate the Private Defender Program:

- Interviews with representatives of the following agencies/groups:
  - The San Mateo County Superior Court (2)
  - The District Attorney's Office (1)
  - The Private Defender Program (3)
  - The County Counsel's Office (5)
  - The Probation Department (1)
  - Private Defender Program Panel Attorneys (2)
  - Former Private Defender Program clients (4, all adults)
  - Community advocates (2)
- The Private Defender Program Chief Defender's Annual report for FY 2011-12
- The Private Defender Program Chief Investigator's Annual report for FY 2011-12
- The current contract between the County and the Association
- Two prior evaluations of the Private Defender Program that were conducted in 2001 and 2003
- A review of documentation that was provided by interview participants

The Committee held 13 meetings and heard invited testimony from 20 individuals, representing a wide range of experiences interacting with the Program. Each interview was between 30 to 60 minutes and each participant was provided with a list of questions to review in advance. The Committee also asked follow-up questions of each participant during the interview. The Chief Defender and Chief Investigator returned for a second interview to answer questions that had been raised by other interviews. Input

from recent clients was limited to four adults. No juveniles were interviewed because of privacy concerns.

Summary of the Interviews
The following is a summary of the issues, questions, and concerns that were brought up during the interviews.

Complaint Investigation Process: The Program has a felony-qualified lawyer on duty every day (the Officer of the Day (OD)) during regular business hours to address complaints. When a complaint is received, the OD logs the complaint, describes the complaint briefly, and notes any resolution reached. If appropriate, the OD may review Court records and contact the attorney involved to investigate the merit of the complaint.

Requirements to be a PDP panel attorney: PDP attorneys must have a license to practice law in California and have their principle office located in San Mateo County. There is an extensive application process that includes a complete background investigation, reference checks of peers on both sides of the criminal justice system, an interview with the Assistant Chief Defender, and finally, on a recommendation by the Assistant Chief Defender, an interview with the Chief Defender. The Panel has not added any new attorneys in the last two years.

Client Feedback: The committee asked whether, at the conclusion of a case, is feedback solicited from the client regarding their attorney's performance? As a result of this question, the Program is in the process of developing a survey instrument and process to solicit feedback from clients regarding their attorneys' performance that will be implemented in early 2013.

Attorney/Client Conferencing: The Committee asked, based on client feedback, whether it was reasonable that attorneys conferred with their clients only 15 minutes before appearing in court. The Program has a policy requiring attorneys to visit their clients the day before any court appearance. The Program also monitors when attorneys interview their incarcerated clients—a statistic that is noted in its annual report to the County. The Committee interviewed only four former clients, and so did not have a statistically significant sample. (Some of the former clients told the committee that they felt that their attorney was not available to take their calls or that their meetings were short and often rushed.)

Time Spent with Clients: On average, the time an attorney spends with a client largely depends on the seriousness of the case and the sophistication of the client. Also, as part of the Program's evaluation standards, an attorney is required to maintain contact with both in and out of custody clients in order to provide competent representation for each court appearance. This could mean that, for a relatively minor case and a highly sophisticated client, an attorney might spend 30 minutes with a client. However, with a very serious case and a not so sophisticated client, an attorney and investigator may spend many hours with the client.

Issues Around Kendra's Law and Laura's Law: Why did the County choose not to enact them here? This issue is outside the purview of the Committee's evaluation but is noted as a point that was raised.

Communication Between PDP Attorneys and Clients: Is there a need to improve the ability of clients, both adult and juvenile, to talk with their attorneys? The Committee found that Panel attorneys have 24/7 phone and in-person access at the Youth Services Center. They cannot, however, make calls into the Maguire Correctional Center, and the Maple Street Complex. Some PDP attorneys will not accept collect calls from the adult facilities. Inmates' access to a phone in the adult facilities is severely limited.

Some improvements and/or efficiencies can be made with regards to client visits. One such example that the Program gave was to implement teleconferencing for some client visits so that the attorneys or investigators don't have to physically go to the jail, thereby saving time and money.

PDP Use of Technology: The Program does not use technology, e.g., Power Point as a presentation tool during trial, as much as the District Attorney's Office. The District Attorney can set policy in his office, which Deputy District Attorneys must follow. Because the PDP attorneys are all independent contractors, they cannot be bound by such requirements. In a follow-up interview with the Chief Defender and Chief Investigator, they indicated that the PDP does make technology (such as Power Point) available to its attorneys. Additionally, the Program has trained the investigative staff on the use of technology to serve as a resource to the attorneys.

Gaps in Juvenile Representation: There was concern that there are perceived gaps in representation of juveniles, e.g., name changes and fiduciary responsibility for a minor in the event the minor is named an insurance beneficiary. The Committee found that the Program does handle name changes for minors through adoption and dependency cases in the Juvenile Court. However, any petition filed outside the Juvenile Court relating to a minor is not a part of the current contract.

Special Immigration Juvenile Status Petitions: Concern was expressed in some interviews as to whether it is appropriate for a Panel attorney to pursue Special Immigration Juvenile Status (SIJS) petitions for their juvenile delinquency clients. The Committee was told that SIJS petitions are not initiated by the Panel attorneys but are filed with the U.S. Citizenship and Immigration Services by immigration attorneys.

However, in order to file an SIJS petition on behalf of a minor, there must be a factual finding in a juvenile court that has jurisdiction over the minor. Although obtaining this type of finding is not specified in the current agreement or fee schedule, under the current agreement, attorneys have an obligation to provide appropriate and competent legal services on behalf of their clients. Furthermore, in 2004 the Administrative Office of the Courts published a brochure titled "Effective Representation of Children in Juvenile Delinquency Court", which states that "advocating for representation of the client in collateral proceedings if appropriate." It is the Programs position that effective

representation of counsel includes obtaining the necessary findings for a minor and providing them to the immigration attorney, who then files the petition with CIS.

Section 366.26 Cases: The Committee asked why cases pursuant to section 366.26 of the Welfare and Institutions Code for the purpose of (1) the termination of parental rights, or, (2) the establishment of legal guardianship of a dependent minor are deemed a separate case when the attorney was previously appointed pursuant to Section 317 of the Welfare and Institutions Code. The Committee was informed that the County requested that 366.26 cases be deemed separate for the purposes of statistical reporting to the Administrative Office of the Courts.

Findings

The Committee finds that the Private Defender Program is a well-managed program and considered a model throughout the country for providing indigent defense.

In the course of the interviews, the Committee learned:

1. The last evaluation of the Program was in 2003.
2. The Program handles approximately 19,000 cases per year
3. There were 98 client complaints filed in FY 2011-12.
4. It has been a remarkably stable program with only seven managers since its creation in 1968.
5. In FY 2011-12, the Program received the Harrison Tweed Award from the American Bar Association for preserving and increasing access to legal services to the poor.
6. Panel attorneys are generally well prepared, committed, and passionate about their work, and advocate vigorously for their clients.
7. The Program's investigative unit conducts approximately 1,200 investigations totaling approximately 33,000 investigative hours annually. Investigators are competent and professional and produce a high quality product. They work collaboratively with the PDP attorneys as well as other criminal justice and governmental agencies.
8. The current case-management system vendor, Justice Works, does not follow information security best practices by maintaining a backup location at least 50 miles away from its data center. Its back-up site is only 12 miles from the data center.

Recommendations:

The Committee recommends that the Private Defender Program:

1. Be evaluated at least every ten years or as requested pursuant to section 11 of the agreement. In any year in which a program evaluation is requested and conducted, the Program should not be required to prepare and submit an annual report to the Board of Supervisors.
2. Make a client survey instrument and process to be implemented in early 2013 available to all clients. Include survey results in the Chief Defender's annual

report beginning in FY 2013-14. This will provide a more complete picture of the Program.

3. Assess the exposure the Program has with the Justice Works case management system back-up site being only 12 miles away from the data center. It may make sense for the Program to arrange to regularly download its data for local storage as a secondary backup to the Justice Works primary backup site in Salt Lake City.
4. Establish a policy that PDP attorneys should accept collect calls from adult facilities when the attorney is available in the office to take the call.

FISCAL IMPACT:
There is no fiscal impact by accepting this report.

ATTACHMENT

B

SAN MATEO COUNTY PRIVATE DEFENDER PROGRAM

Issue | Summary | Glossary | Background | Methodology | Discussion | Findings Recommendations | Requests for Responses | Bibliography | Responses

ISSUE

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

SUMMARY

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

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

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

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

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

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

GLOSSARY

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

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

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

BACKGROUND

Introduction

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

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

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

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

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

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

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

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

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

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

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

The contract agreement (Agreement) between the County and the Bar Association includes terms regarding both the frequency and the manner of evaluation of the program. The Agreement is based upon the estimated number of cases to be handled (20,254 in FY 2013-2014) and a combination of flat and hourly fees for each type of case. The contract amount for 2014-2015 was $17,455,439.[9] However, in extraordinary circumstances, the contract amount can be increased as it was by $5 million in 2014 because of very complex cases involving many defendants (e.g., the "Operation Sunny Day" cases in 2013[10]).

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

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

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

[6] California Commission on the Fair Administration of Justice, *Report and Recommendations on Funding of Defense Services in California*, April 14, 2008, p. 2.
http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf

[7] Ibid.

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

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

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

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

METHODOLOGY

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

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

DISCUSSION

Why Does San Mateo County Use This Approach?

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

What Are Seen as Advantages of PDP?

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

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

[12] Digiacinto, *Annual Report Fiscal Year 2012-2013.* https://www.smcba.org/UserFiles/files/docs/ANNUAL%20%20REPORT%20FY%202012-2013%20DVD%20Final_opt.pdf. Digiacinto, *Annual Report Fiscal Year 2013-2014.*

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

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

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

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

Is the PDP Consistent with State and National Guidelines?

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

Section 11 of the Agreement[18] provides that the County may form a committee to evaluate ongoing performance and can be done at any time. According to a County official, a current evaluation is underway that will include a determination of whether the PDP still provides the best approach for San Mateo County residents. The evaluation will also focus on two aspects: parity of resources with prosecution and cost comparisons with alternate methods of indigent defense services.[19]

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

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

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

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

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

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

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

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

FINDINGS

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

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

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

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

RECOMMENDATIONS

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

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

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

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

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

REQUEST FOR RESPONSES

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

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

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Issued: July 6, 2015

ATTACHMENT

C

COUNTY OF SAN MATEO
Inter-Departmental Correspondence
County Manager

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

To: Honorable Board of Supervisors

From: John L. Maltbie, County Manager

Subject: 2014-15 Grand Jury Response - San Mateo County Private Defender Program

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

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

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

DISCUSSION:
Findings:

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

Response: Agree.

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

Response: Agree.

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

Response: Agree.

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

Response: Agree.

Recommendations:

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

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

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

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

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

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

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

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

FISCAL IMPACT:

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

ATTACHMENT

D

TIDC
TEXAS INDIGENT DEFENSE COMMISSION

March 23, 2012

American Bar Association
Standing Committee on Legal Aid and Indigent Defendants (SCLAID)
Attention: Tamaara Piquion
321 N. Clark St, 19th Floor
Chicago, IL 60654-7598

Re: Nomination of San Mateo County Bar Association
Harrison Tweed Award

Dear Standing Committee on Legal Aid and Indigent Defendants:

This letter is written to nominate the San Mateo County Bar Association (SMCBA) to receive the 2012 Harrison Tweed Award for the demonstrated and long term excellence of its Private Defender Program (PDP). The SMCBA is a non-profit corporation governed by a 14-member Board of Directors, has about 1400 members, and has facilitated the creation of a unique system of indigent defense that has been replicated by several counties in Texas. The managed assigned counsel program, headed by SMCBA Executive Director and Chief PDP Defender, John Digiacinto, has served the poor of San Mateo County, California, for the past 43 years and is widely regarded as one of the premier indigent defense organizations in the United States. My visit to the PDP offices and the interaction I have had with its leaders, lawyers, staff and others in the criminal justice system in San Mateo County has confirmed the accuracy of that assessment.

The PDP is the finest example I have found of a successful integration of the private bar and the indigent defense function and has become a model for several programs and new legislation in Texas. The Mission Statement of the SMCBA includes its commitment to "furnish excellent indigent criminal defense," and below I outline the ways in which the program continues to meet this commitment, starting with the history of PDP development.

The United States Supreme Court's decision in *Gideon v. Wainwright* in 1963 caused state courts and county governments across America to move quickly to comply with its mandate. At that time, the San Mateo County courts established what could best be

described as an *ad hoc* system for appointing counsel, in which each judge controlling the appointments of lawyers in his courtroom for all eligible cases that were set there. For a variety of reasons, this system proved to be unworkable and the County set out to comply with the mandate of *Gideon* some other way. In 1967 and 1968 the San Mateo County Board of Supervisors considered the recommendation of its own staff that a public defender office be established. When it considered a counter-proposal presented by the San Mateo County Bar Association to establish and operate the County's indigent defense program, it liked what it heard and accepted the proposal in late 1968. The SMCBA's Private Defender Program began operations in February 1969.

The idea of a PDP was attractive to the County because it was a comprehensive program that provided quality attorneys to the poor. The program highlights and should be commended for its attention to: the importance of representation early on and throughout the process; the importance of auxiliary defense services; and the importance of attorney performance measures. These points both cement and symbolize the commitment of the SMCBA to indigent defense.

At the time of arraignment in the Superior Court, a person who wishes to be represented by a court-appointed attorney completes a financial declaration form and submits it to the Court. If the Court determines that the defendant is eligible for court-appointed counsel, the PDP is appointed. The PDP in turn assigns the case to an attorney who will handle the case through disposition based on their ability, training and experience, their availability to appear on the dates set for a particular case, and an assessment of the attorney's current caseload. All of the lawyers to whom cases are assigned by the PDP staff are members of the SMCBA and are in private practice in San Mateo County. (Presently, there are 110 lawyers on the PDP panel.) Prompt appointment of counsel allows PDP attorneys to interview the client and collect information that may help get charges dismissed or secure a bond reduction early in the process. This may save the county money by reducing jail time for defendants, but it also allows PDP attorneys to develop a relationship with their clients and strategize a defense appropriate to the case.

The PDP also believes that assigning the right lawyer early on is only part of the job. They espouse the belief that even the most talented lawyer will be unable to provide constitutionally adequate representation unless they have *adequate resources* to defend the case. For example, in the agreement between the County of San Mateo and the SMCBA, parity of resources between the prosecution and the defense is always the centerpiece of contract discussions. Of the $16.5 million budget for the fiscal year ending June 30, 2011, $10.9 million was spent on attorney's fees, $2 million was spent on investigation and $1.5 million was spent for experts. The policy with respect to experts is straightforward and uncomplicated. If an expert is needed for the case, a request for the funds to hire such an expert will be granted. Requests for investigators are similarly addressed: any request for an investigator to be assigned to any case – felony, misdemeanor, juvenile delinquency, juvenile dependency or any other type of case – will be granted. This reflects the philosophy of the PDP with respect to the importance of ancillary services to the representation of their indigent clients: they are absolutely necessary.

Another area where the PDP excels is in attorney performance evaluation. Unlike many indigent defense systems across the nation, the PDP is able to monitor attorney training, client relations, attorney caseloads, initial client meeting and community outreach, as well as conduct performance evaluations. These are document in the Annual Report to the Board of Supervisors of San Mateo County (for the Fiscal Year 2010-2011 it can be found at:

https://www.smcba.org/UserFiles/files/docs/ANNUAL%20REPORT%20FYE%202010%20-%202011.pdf).

For example, the PDP presented 33 hours of "in-house" continuing legal education and received 235 client inquiries. In addition, the Chief Defender provided a detailed description of the way the PDP sets its maximum caseload targets based on an empirical study of how much time is needed to complete different types of cases, and the number of assigned cases of each type (misdemeanor, domestic violence misdemeanor, felonies subject to pre-preliminary-hearing negotiation, felonies not subject to such negotiations, juvenile delinquency and juvenile dependency) was reported for each PDP lawyer. Finally, the Attorney Evaluation Performance Benchmark includes the standards by which the performance of every PDP lawyer is measured, how the evaluations are conducted, what is emphasized and the results, in general terms, of those evaluations.

As the Executive Director of the Texas Indigent Defense Commission, I believe that the PDP serves as a tremendous model for indigent defense organizations in Texas. After several visits to the PDP offices to meet with the Chief Defender and his staff, we began the process of creating private defender programs in Texas. We enacted legislation that enabled us to create managed assigned counsel programs modeled **expressly** on the PDP. We are so grateful for the many hours that the PDP staff gave of its time to help us learn how to do it right.

We have now opened two managed assigned counsel offices modeled on the PDP – one in Lubbock and one in Montgomery County, Texas. The adage "imitation is the finest form of flattery" certainly fits what the State of Texas has done with the PDP. I certainly hope that the ABA's SCLAID will honor the San Mateo County Bar Association for the continuing and pervasive excellence of its Private Defender Program.

Very truly yours,

James D. Bethke

James D. Bethke
Executive Director
Texas Indigent Defense Commission
Jim.bethke@txcourts.gov

Enclosures: 1) Nomination Submission Confirmation, 2) Letters of Support (Laurence Benner, Rodney Ellis, Beth Freeman, Norm Lefstein, David Slayton), 3) Articles of Support

ATTACHMENT

E

The Senate of
The State of Texas

SENATOR RODNEY ELLIS
District 13

PRESIDENT PRO TEMPORE
1999-2000

COMMITTEES:

Chair, Government Organization
Criminal Justice
Transportation & Homeland Security
State Affairs

March 21, 2012

Via electronic mail to: tamaara.piquion@americanbar.org

American Bar Association
Standing Committee on Legal Aid and Indigent Defendants (SCLAID)
Attention: Tamaara Piquion
321 N. Clark St, 19th Floor
Chicago, IL 60654-7598

Re: San Mateo County Bar Association Harrison Tweed Award

To Whom It May Concern:

As senator, one of my legislative priorities is the quality of indigent defense. This letter is written to nominate the San Mateo County Bar Association (SMCBA) to receive the 2012 Harrison Tweed Award for the demonstrated and long term excellence of its Private Defender Program (PDP). This managed assigned counsel program has served the poor of San Mateo County, California for the past 43 years. The PDP is widely regarded as one of the premier indigent defense organizations in the United States.

During the last legislative session my staff and I worked closely with the Texas Indigent Defense Commission on enacting legislation that enabled us to create managed assigned counsel (MAC) programs specifically based on the SMCBA PDP program. We have now opened two MAC offices modeled on the PDP – one in Lubbock and one in Montgomery County, Texas.

I certainly hope that the ABA's SCLAID and the NLADA will honor the SMCBA for the continuing and pervasive excellence of its PDP. It is my belief that the PDP serves as a tremendous model for indigent defense organizations in Texas.

Sincerely,

Rodney Ellis

Rodney Ellis

ATTACHMENT

F

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO
HALL OF JUSTICE
400 COUNTY CENTER
REDWOOD CITY, CALIFORNIA 94063

BETH LABSON FREEMAN
PRESIDING JUDGE

(650) 363-4805
FAX (650) 363-4698
E-mail: bfreeman@sanmateocourt.org

March 20, 2012

American Bar Association
Standing Committee on Legal Aid and Indigent Defendants
tamaara.piquion@americanbar.org
jim.bethke@txcourts.org

Re: 2012 Harrison Tweed Award
Nominee: San Mateo County Bar Association Private Defender Program

Dear Committee Members:

As Presiding Judge of the San Mateo County Superior Court it gives me great pleasure wholeheartedly to support the nomination of the San Mateo County Bar Association for the 2012 Harrison Tweed Award. San Mateo County's Private Defender Program (PDP) is an effective, innovative program that has provided decades of extraordinarily high caliber legal representation to indigent defendants in San Mateo County, California. In my view, the PDP is an exceptionally well qualified recipient of this prestigious award.

For the past 43 years, the Private Defender Program has drawn highly qualified attorneys from the local private bar to represent indigent individuals charged with crimes, represent parents and children in juvenile delinquency and dependency cases, adoptions and paternity cases and assist mental health patients exercise their due process rights. Enabling private practitioners to serve the community while maintaining a private practice has been the cornerstone of the success of the PDP. Our county has been able to draw from a more varied and experienced field of attorneys than it otherwise would have been able to accomplish. Cases that present novel and complex legal and factual issues are directed to attorneys with known and relevant expertise from the panel of 110 attorneys who have been vetted and trained by the PDP. The vast array of specialized skills required to assist our indigent parties could never be amassed in a more traditional public defender program, which would in turn require a search for a private attorney who was not accustomed to handling indigent defense.

In no small part, our County's PDP is successful because of the dedication and skill of its Chief Defender John Digiacinto and his fine staff of managing attorneys. The Chief Defender has ensured that the PDP is adequately funded by the County Board of Supervisors. This has been accomplished because the PDP is well understood by our elected officials and valued by them. Additionally, the PDP has a proven track record for efficiency and economy. The panel

of attorneys are not public employees and remain on the panel only so long as their legal representation remains at a high level. Quality is thus ensured while costs remain reasonable.

From the Court's perspective, the PDP's excellent organization ensures the fluidity of the assignment of counsel at the earliest stage of proceedings. The PDP has developed a collegial and open process whereby cases are easily referred to the PDP by the court. Indigent parties are insured prompt assignment of counsel and quick personal contact. Without exception, when counsel appears in court the client has been interviewed and counsel is prepared to discuss the disposition of the case or schedule further proceedings. Over many years, the PDP has also assembled a superb support system so that the attorneys have access to investigators, mental health professionals, interpreters, expert witnesses and other professionals to assist in investigating and submitting their cases to juries.

Collaboration with justice partners is a hallmark of the PDP. In California, recent changes in state law have caused a seismic shift in the manner in which felony convictions are handled locally. Under Criminal Justice Realignment, counties are grappling with a new system where most convicted felons remain in county jail to serve their sentences and remain in the community supervised by local probation officers rather than being sent to state prison followed by state-supervised parole. The PDP has served as an active and integral partner along with the District Attorney, Sheriff, County Mental Health and Social Service providers and the Court in developing a local community based plan to reduce recidivism in our communities. The PDP has garnered the respect of all of these organizations and had an influential role in shaping our county's response to this massive change in criminal sentencing, incarceration and rehabilitation.

This fine program deserves your careful consideration for the 2012 Harrison Tweed Award. I cannot imagine a more deserving program with such a stellar history and significant impact on the delivery of legal services to the indigent. In my opinion, the San Mateo County Bar Association's Private Defender Program has demonstrated accomplishment of the highest goals and aspirations for indigent defense held by the ABA and the Harrison Tweed Award. Thank you for your careful review of the Private Defender Program.

Very truly yours,

Beth Labson Freeman
Presiding Judge

ATTACHMENT

G

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

Black Letter

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.

2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5. Defense counsel's workload is controlled to permit the rendering of quality representation.

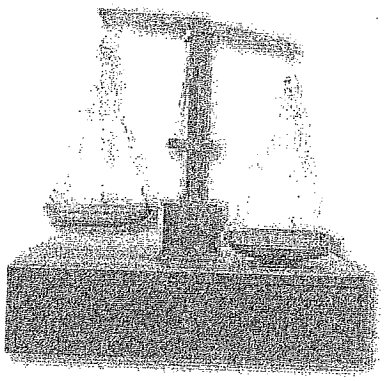
6. Defense counsel's ability, training, and experience match the complexity of the case.

7. The same attorney continuously represents the client until completion of the case.

8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

9. Defense counsel is provided with and required to attend continuing legal education.

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.



ATTACHMENT

H

Effective Representation
of
Children
in
Juvenile Delinquency Court

This pamphlet provides juvenile court defense attorneys with both guidance on fulfilling the requirements of rule 5.663 of the California Rules of Court and suggestions for effective advocacy beyond what is mandated by law. It does not establish minimum practice standards, nor does it supply an exhaustive list of responsibilities. The purpose of this pamphlet is to provide information and guidance on what an attorney can and should do to assist the child client in order to serve the needs of this population and achieve the goal of the juvenile justice system: rehabilitation.

ADMINISTRATIVE OFFICE
OF THE COURTS

The Administrative Office of the Courts gratefully acknowledges the State Bar of California for its assistance in the development of this pamphlet.

Responsibilities of Counsel

An attorney representing children in delinquency court has a dual role. First and foremost, the child's counsel defends the child against the charged allegations, evaluating the allegations and possible defenses and vigorously presenting a defense. Second, counsel is a child advocate, working to have the child receive care, treatment, and guidance consistent with his or her best interest. Children are entitled to effective representation. There are a number of responsibilities that constitute effective representation. It is critical that counsel, while performing each of these, remain mindful that the client is a child and communicate in a manner that is appropriate for the child's age and maturity level.

Listen and Advise

Counsel should interview the client before all court appearances, preferably in a private place to emphasize the importance of confidentiality to the client. Communication with the client needs to be consistent with the child's age and ability to understand. Good client communication includes:

- Introducing him- or herself to the client, explaining the attorney's role and how it differs from that of other individuals in the court system, and emphasizing the confidentiality of the conversation consistent with the attorney-client privilege
- Providing contact information to the client and encouraging ongoing communication
- Explaining to the client why he or she is in court, describing the current stage of the case and what may happen at that stage, and advising the client of his or her legal rights
- Finding out what legal result the client wants and enabling the client to make an informed decision
- Speaking with the client about the allegations and seeking information to help defend the client against them

Counsel should be aware of the client's issues and needs as well as any family dynamics that have affected the client. Identifying a client's issues and needs may change the way in which a case is handled or influence the disposition. Counsel should address issues with the client and others such as:

motivators
education
weaknesses
mental health
strengths
language/culture
family needs
immigration status
physical health
substance abuse
goals
role models
family violence
socioeconomic status

- Reviewing with the client any reports, photographs, tapes, or other relevant discovery
- Discussing possible defenses with the client
- Thoroughly explaining possible consequences of contesting the matter or entering an admission
- Preparing the client to be interviewed by report writers, if counsel concludes that making a statement is appropriate
- Reviewing with the client any recommendations or case plans, including the disposition report
- Advising the client on what to do if he or she is contacted by law enforcement or rearrested

Investigate and Assess

Thorough investigation is critical to assessing the strength of any allegations in the petition and to revealing information that may help in fashioning dispositional alternatives. Counsel needs to be mindful of maintaining attorney-client confidentiality when conducting an investigation. Thorough investigation and assessment may include:

- Getting necessary releases signed
- Interviewing any parties or witnesses who may be relevant to any of the hearings
- Learning about any other experiences the client has had with the court system and speaking with attorneys, social workers, or other appropriate personnel associated with past proceedings
- Reviewing relevant records, which may include social services, psychological, medical, educational, or other records of service providers
- Speaking with the client's parents and/or caretakers

The child's counsel has a critical role to play in investigating and assessing whether the client is appropriately in the delinquency system. When a child appears to come within the jurisdiction of both the dependency and the delinquency courts, Welfare and Institutions Code section 241.1(a) mandates that the child welfare and probation departments evaluate the child and recommend the status that will serve the best interest of the child and the protection of society. If the case is being heard in a county that has adopted a dual-status protocol, as provided in section 241.1(e), the child welfare and probation departments may jointly assess the child and recommend dual status for the child—that the child simultaneously be a ward and a dependent of the juvenile court. Counsel should assess independently which system he or she believes will better serve the client.

Advocate

A juvenile defense attorney is the child's voice in court. Zealous representation includes:

- Appearing in court for all court dates, including postdispositional hearings and reviews
- Reviewing all reports and setting hearings when court action is needed
- Preparing motions and trial briefs as appropriate
- Presenting arguments to advance the client's position
- Requesting contested hearings and trials when appropriate
- Contacting probation about options to ensure proper rehabilitation
- Arranging for competent experts to assist in preparing the defense, to conduct psychological evaluations or needs assessments, or to make dispositional recommendations
- Advocating for representation of the client in collateral proceedings if appropriate
- Assessing the need to file a writ or appeal and advising the client of his or her rights and the attorney's recommendation

> The indispensable elements of due process are: first, a tribunal with jurisdiction; second, notice of a hearing to the proper parties; and finally, a fair hearing. All three must be present if we are to treat the child as an individual human being and not to revert, in spite of good intentions, to the more primitive days when he was treated as a chattel." (*In re Gault* (1967) 387 U.S. 1, 19, fn. 25.)

Stay Involved

A child client is entitled to have his or her interests represented by counsel at every stage of the proceedings. If a client is adjudicated a ward, representation continues into the postdispositional hearings unless the attorney is relieved by the court. This representation extends to matters such as review hearings or violation of probation hearings. Representation in the postdisposition phase should include:

- Maintaining the attorney-client relationship and visiting the client if necessary
- Following implementation of the client's treatment plan
- Reviewing the treatment plan with the client
- Actively representing the client at all delinquency hearings
- Conducting contested hearings if needed
- Requesting that clients in placement who are 16 years or older receive independent living services

• Examining the interests of the client beyond the scope of the juvenile proceedings and informing the court if the client has any other interests that may need to be protected by the institution of other administrative or judicial proceedings

It is critical that the attorney remain a zealous advocate after the case's disposition. For example, the attorney has a critical role to play when wardship is terminated. Records held by the court and other agencies, such as law enforcement and probation, can be ordered sealed. Counsel should bring a motion to seal the client's record as soon as statutorily allowed to do so.

In order to meet these obligations, attorneys are encouraged to:

• Ensure that court orders and treatment plans imposed to assist the client are properly implemented
• Advocate for the continued development of a permanent plan
• Evaluate the reunification plan provided to the families of clients placed out of the home
• Interview treatment providers
• Communicate with the client's probation officer
• Consider, when possible and appropriate, representing the client in related collateral matters, such as dependency cases and placement, educational, or other administrative hearings

Be Educated and Informed

Effective representation during any stage of juvenile delinquency proceedings requires a practitioner to possess the skills necessary to defend the client as well as knowledge of the rules and procedures specific to juvenile court. In addition, the juvenile court advocate should be familiar with topics such as effective advocacy, child and adolescent development, educational and mental health issues, immigration consequences, and capacity.

If an attorney is unaware of the client's educational or mental health issues, then the needs of the client may not be met. The attorney thus should ask for specialists to perform evaluations and make appropriate referrals. In cases where the client would benefit from administrative or judicial proceedings outside the scope of the delinquency court, such as a request for special education status and an individualized education program, the attorney should bring the issue to the court's attention so that the court can take the action necessary to protect the interests of the client.

Counsel also needs to become familiar with resources available to children in the delinquency system, including community resources, programs, and treatment facilities.

Conclusion

An attorney representing children in delinquency proceedings has a dual role. First, the child's counsel needs to possess the skills of a defense attorney in order to provide vigorous representation of the child against allegations of unlawful behavior. Second, the attorney must be a child advocate working to ensure that the child receives the appropriate services. While this dual role brings tremendous responsibility, it also provides an exceptional opportunity to help shape the future of a child.

The Administrative Office of the Courts and the State Bar of California first produced this pamphlet in summer 2004 and updated it January 1, 2007. Staff was ably assisted by a working group composed of delinquency experts from across the state who provided guidance and assistance. We thank all those who contributed their time, energy, enthusiasm, and commitment to an improved justice system.

For additional copies or more information, please contact the AOC Center for Families, Children & the Courts.

Administrative Office of the Courts
Attn: Center for Families, Children & the Courts
455 Golden Gate Avenue
San Francisco, CA 94102-3688
www.courts.ca.gov/cfcc-publications.htm
telephone: 415-865-7739
e-mail: cfcc@jud.ca.gov

CFCC0001.14.2

ATTACHMENT

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§ 634.3. Duties of appointed counsel; Development of rules of court relating to training and education of appointed counsel

(a) Counsel appointed pursuant to Section 634 to represent youth in proceedings under Sections 601 and 602 shall do all of the following:

(1) Provide effective, competent, diligent, and conscientious advocacy and make rational and informed decisions founded on adequate investigation and preparation.

(2) Provide legal representation based on the client's expressed interests, and maintain a confidential relationship with the minor.

(3) Confer with the minor prior to each court hearing, and have sufficient contact with the minor to establish and maintain a meaningful and professional attorney-client relationship, including in the postdispositional phase.

(4) When appropriate, delinquency attorneys should consult with social workers, mental health professionals, educators, and other experts reasonably necessary for the preparation of the minor's case, and, when appropriate, seek appointment of those experts pursuant to Sections 730 and 952 of the Evidence Code.

(5) Nothing in this subdivision shall be construed to modify the role of counsel pursuant to subdivision (b) of Section 657.

(b) By July 1, 2016, the Judicial Council, in consultation and collaboration with delinquency defense attorneys, judges, and other justice partners including child development experts, shall adopt rules of court to do all of the following:

(1) Establish minimum hours of training and education, or sufficient recent experience in delinquency proceedings in which the attorney has demonstrated competence, necessary in order to be appointed as counsel in delinquency proceedings. Training hours that the State Bar has approved for Minimum Continuing Legal Education (MCLE) credit shall be counted toward the MCLE hours required of all attorneys by the State Bar.

(2) Establish required training areas that may include, but are not limited to, an overview of juvenile delinquency law and procedure, child and adolescent development, special education, competence and mental health issues, counsel's ethical duties, advocacy in the postdispositional phase, appellate issues, direct and collateral consequences of court involvement for a minor, and securing effective rehabilitative resources.

(3) Encourage public defender offices and agencies that provide representation in proceedings under Sections 601 and 602 to provide training on juvenile delinquency issues that the State Bar has approved for MCLE credit.

(4) Provide that attorneys practicing in juvenile delinquency courts shall be solely responsible for compliance with the training and education requirements adopted pursuant to this section.

ATTACHMENT

J

Cal Rules of Court, Rule 5.660 (2016)

Rule 5.660. Attorneys for parties (§§ 317, 317.5, 317.6, 353, 366.26, 16010.6)

(a) Local rules On or before January 1, 2002, the superior court of each county must amend its local rules regarding the representation of parties in dependency proceedings.

(1) The local rules must be amended after consultation by the court with representatives of the State Bar of California; local offices of the county counsel, district attorney, public defender; and other attorneys appointed to represent parties in these proceedings; county welfare departments; child advocates; current or recent foster youth; and others selected by the court in accordance with standard 5.40(c) of the Standards of Judicial Administration.

(2) The amended rules must address the following as needed:

(A) Representation of children in accordance with other sections of this rule;

(B) Timelines and procedures for settlements, mediation, discovery, protocols, and other issues related to contested matters;

(C) Procedures for the screening, training, and appointment of attorneys representing parties, with particular attention to the training requirements for attorneys representing children;

(D) Establishment of minimum standards of experience, training, and education of attorneys representing parties, including additional training and education in the areas of substance abuse and domestic violence as required;

(E) Establishment of procedures to determine appropriate caseloads for attorneys representing children;

(F) Procedures for reviewing and resolving complaints by parties regarding the performance of attorneys;

(G) Procedures for informing the court of interests of the dependent child requiring further investigation, intervention, or litigation; and

(H) Procedures for appointment of a Child Abuse Prevention and Treatment Act (CAPTA) guardian ad litem, who may be an attorney or a CASA volunteer, in cases in which a prosecution is initiated under the Penal Code arising from neglect or abuse of the child.

(3) Appropriate local forms may be used.

(Subd (a) amended effective January 1, 2007; previously amended effective July 1, 2001, and January 1, 2003.)

(b) Attorneys for children The court must appoint counsel for a child who is the subject

of a petition under section 300 and is unrepresented by counsel, unless the court finds that the child would not benefit from the appointment of counsel.

(1) In order to find that a child would not benefit from the appointment of counsel, the court must find all of the following:

(A) The child understands the nature of the proceedings;

(B) The child is able to communicate and advocate effectively with the court, other counsel, other parties, including social workers, and other professionals involved in the case; and

(C) Under the circumstances of the case, the child would not gain any benefit by being represented by counsel.

(2) If the court finds that the child would not benefit from representation by counsel, the court must make a finding on the record as to each of the criteria in (1) and state the reasons for each finding.

(3) If the court finds that the child would not benefit from representation by counsel, the court must appoint a CASA volunteer for the child, to serve as the CAPTA guardian ad litem, as required in section 326.5.

(Subd (b) amended effective January 1, 2007; adopted effective July 1, 2001; previously amended effective January 1, 2003.)

(c) Conflict of interest guidelines for attorneys representing siblings

(1) Appointment

(A) The court may appoint a single attorney to represent a group of siblings involved in the same dependency proceeding.

(B) An attorney must decline to represent one or more siblings in a dependency proceeding, and the court must appoint a separate attorney to represent the sibling or siblings, if, at the outset of the proceedings:

(i) An actual conflict of interest exists among those siblings; or

(ii) Circumstances specific to the case present a reasonable likelihood that an actual conflict of interest will arise among those siblings.

(C) The following circumstances, standing alone, do not necessarily demonstrate an actual conflict of interest or a reasonable likelihood that an actual conflict of interest will arise:

(i) The siblings are of different ages;

(ii) The siblings have different parents;

(iii) There is a purely theoretical or abstract conflict of interest among the siblings;

(iv) Some of the siblings appear more likely than others to be adoptable; or

(v) The siblings may have different permanent plans.

(Subd (c) amended effective January 1, 2007; adopted effective January 1, 2006.)

(d) Competent counsel Every party in a dependency proceeding who is represented by an attorney is entitled to competent counsel.

(1) Definition "Competent counsel" means an attorney who is a member in good standing of the State Bar of California, who has participated in training in the law of juvenile dependency, and who demonstrates adequate forensic skills, knowledge and comprehension of the statutory scheme, the purposes and goals of dependency proceedings, the specific statutes, rules of court, and cases relevant to such proceedings, and procedures for filing petitions for extraordinary writs.

(2) Evidence of competency The court may require evidence of the competency of any attorney appointed to represent a party in a dependency proceeding.

(3) Experience and education

(A) Only those attorneys who have completed a minimum of eight hours of training or education in the area of juvenile dependency, or who have sufficient recent experience in dependency proceedings in which the attorney has demonstrated competency, may be appointed to represent parties. Attorney training must include:

(i) An overview of dependency law and related statutes and cases;

(ii) Information on child development, child abuse and neglect, substance abuse, domestic violence, family reunification and preservation, and reasonable efforts; and

(iii) For any attorney appointed to represent a child, instruction on cultural competency and sensitivity relating to, and best practices for, providing adequate care to lesbian, gay, bisexual, and transgender youth in out-of-home placement.

(B) Within every three years, attorneys must complete at least eight hours of continuing education related to dependency proceedings.

(4) Standards of representation Attorneys or their agents are expected to meet regularly with clients, including clients who are children, regardless of the age of the child or the child's ability to communicate verbally, to contact social workers and other professionals associated with the client's case, to work with other counsel and the court to resolve disputed aspects of a case without contested hearing, and to adhere to the mandated timelines. The attorney for the child must have sufficient contact with the child to establish and maintain an adequate and professional attorney-client relationship. The attorney for the child is not required to assume the responsibilities of a social worker and is not expected to

perform services for the child that are unrelated to the child's legal representation.

(5) Attorney contact information The attorney for a child for whom a dependency petition has been filed must provide his or her contact information to the child's caregiver no later than 10 days after receipt of the name, address, and telephone number of the child's caregiver. If the child is 10 years of age or older, the attorney must also provide his or her contact information to the child for whom a dependency petition has been filed no later than 10 days after receipt of the caregiver's contact information. The attorney may give contact information to a child for whom a dependency petition has been filed who is under 10 years of age. At least once a year, if the list of educational liaisons is available online from the California Department of Education, the child's attorney must provide, in any manner permitted by section 317(e)(4), his or her contact information to the educational liaison of each local educational agency serving the attorney's clients in foster care in the county of jurisdiction.

(6) Caseloads for children's attorneys The attorney for a child must have a caseload that allows the attorney to perform the duties required by section 317(e) and this rule, and to otherwise adequately counsel and represent the child. To enhance the quality of representation afforded to children, attorneys appointed under this rule must not maintain a maximum full-time caseload that is greater than that which allows them to meet the requirements stated in (3), (4), and (5).

(Subd (d) amended effective January 1, 2015; adopted as subd (b); amended and relettered as subd (c) effective July 1, 2001; previously relettered effective January 1, 2006; previously amended effective July 1, 1999, January 1, 2005, January 1, 2007, and January 1, 2014.)

(e) Client complaints The court must establish a process for the review and resolution of complaints or questions by a party regarding the performance of an appointed attorney. Each party must be informed of the procedure for lodging the complaint. If it is determined that an appointed attorney has acted improperly or contrary to the rules or policies of the court, the court must take appropriate action.

(Subd (e) relettered effective January 1, 2006; adopted as subd (c) effective January 1, 1996; previously amended and relettered as subd (d) effective July 1, 2001.)

(f) CASA volunteer as CAPTA guardian ad litem (§ 326.5) If the court makes the findings as outlined in (b) and does not appoint an attorney to represent the child, the court must appoint a CASA volunteer as the CAPTA guardian ad litem of the child.

(1) The required training of CASA volunteers is stated in rule 5.655.

(2) The caseload of a CASA volunteer acting as a CAPTA guardian ad litem must be limited to 10 cases. A case may include siblings, absent a conflict.

(3) CASA volunteers must not assume the responsibilities of attorneys for children.

(4) The appointment of an attorney to represent the child does not prevent the appointment of a CASA volunteer for that child, and courts are encouraged to appoint both

an attorney and a CASA volunteer for the child in as many cases as possible.

(Subd (f) amended effective January 1, 2007; adopted as subd (e) effective July 1, 2001; previously amended effective January 1, 2003; previously relettered effective January 1, 2006.)

(g) Interests of the child At any time following the filing of a petition under section 300 and until juvenile court jurisdiction is terminated, any interested person may advise the court of information regarding an interest or right of the child to be protected or pursued in other judicial or administrative forums.

(1) *Juvenile Dependency Petition (Version One)* (form JV-100) and *Request to Change Court Order* (form JV-180) may be used.

(2) If the attorney for the child, or a CASA volunteer acting as a CAPTA guardian ad litem, learns of any such interest or right, the attorney or CASA volunteer must notify the court immediately and seek instructions from the court as to any appropriate procedures to follow.

(3) If the court determines that further action on behalf of the child is required to protect or pursue any interests or rights, the court must appoint an attorney for the child, if the child is not already represented by counsel, and do one or all of the following:

(A) Refer the matter to the appropriate agency for further investigation and require a report to the court within a reasonable time;

(B) Authorize and direct the child's attorney to initiate and pursue appropriate action;

(C) Appoint a guardian ad litem for the child. The guardian may be the CASA volunteer already appointed as a CAPTA guardian ad litem or a person who will act only if required to initiate appropriate action; or

(D) Take any other action to protect or pursue the interests and rights of the child.

(Subd (g) amended effective January 1, 2007; adopted as subd (d) effective January 1, 1996; previously amended and relettered as subd (f) effective July 1, 2001; amended effective January 1, 2003; previously relettered effective January 1, 2006.)

ATTACHMENT

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2010

The California Public Defender: Its Origins, Evolution and Decline

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THE CALIFORNIA PUBLIC DEFENDER:

Its Origins, Evolution and Decline

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> "It is still the duty of the State and of the court, its instrument, quite as much to protect the innocent as to punish the guilty. Honest administration of justice is the end sought . . ."[1]
>
> — Clara Shortridge Foltz, 1897

INTRODUCTION

As California approaches the centennial of the birth of the first Public Defender office in the state and the nation, it is perhaps appropriate to reflect upon the reasons for establishing an institutional Public Defender as part of government and make an appraisal of the institution's current

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[1] Clara Shortridge Foltz, *Public Defenders*, 31 AM. L. REV. 393, 395 (1897) [Foltz, *Public Defenders*].

health in California today. The concept of the Public Defender, considered radical at the time of its inception, was initially the brainchild of Clara Shortridge Foltz. A champion of women's rights and the first woman admitted to practice law in California, she spearheaded a national movement to create an elected office known as the Public Defender. The County of Los Angeles became the first government to establish a Public Defender office, which began providing representation in both criminal and certain civil cases in 1914. What would Clara Foltz think of the Public Defender system as it has evolved in California today? How does our present system differ from what she envisioned?

Sadly, while the road has been marked with many successes, and fortified by U.S. Supreme Court decisions establishing the right to the effective assistance of counsel under the Sixth Amendment, if Clara Foltz were to return today she would find a criminal justice system that has broken faith with one of its fundamental underlying premises: the presumption of innocence. Instead, as a consequence of local funding and control over indigent defense services, many counties have chosen to operate under a presumption of guilt, resulting in a system where processing the "presumed guilty" as cheaply as possible has been made a higher priority than investigating the possibility of their innocence.

This should not be surprising. Members of a county board of supervisors, many of whom are not lawyers, can easily be persuaded by political pressures arising from the competition for scarce tax dollars to provide only minimal resources for the defense of those who are accused of crime. That translates into just enough funding to facilitate the plea bargaining regime upon which the entire system relies, as no county has the resources to have trials in all cases. This may seem logical because many defendants are in fact guilty. But the system is based upon a false premise. It is assumed that those who are providing defense representation will somehow be able to distinguish between the many who are guilty and the few who are innocent. It also further assumes that the indigent defense system will be able to provide an effective defense for the innocent by managing to triage the limited resources available. This cannot be done, however, if the system does not ensure adequate defense investigation into the possibility of innocence in the first place. Yet recent empirical research conducted for the California Commission on the Fair Administration of Justice has

shown that the current structure within which indigent defense services are provided in many counties fails to ensure this important safeguard.

This is not to say that all of California's counties across the board are providing indigent defense services that are inadequate. What Clara Foltz would immediately recognize, however, are the glaring disparities that exist between counties in the adequacy of indigent defense services they provide. She would also be struck, although not surprised, by the tremendous disparity in funding that exists between the defense and the prosecution functions. Finally, she would no doubt be alarmed at the growing trend toward unregulated privatization of indigent defense services that threatens the very existence of competent and efficient institutional Public Defender offices. This is because in an ever expanding number of counties justice is now up for sale to the lowest bidder.

ORIGINS OF THE PUBLIC DEFENDER CONCEPT

Clara Foltz first introduced her proposal for an elected Public Defender in a speech at the Chicago World's Fair in 1893, given before the Congress of Jurisprudence and Law Reform.[2] She envisioned the Public Defender as a counterweight to even the scales of justice and correct the "grave evils" that plagued the administration of criminal justice in her day.[3] As she later explained in a law review article, "judicial crimes"[4] were repeatedly being committed because of 1) the abuses of unchecked and overzealous prosecutors,[5] 2) the incompetence of untrained, inexperienced and unpaid appointed counsel for the indigent accused,[6] and 3) the buzzard mentality

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[2] The speech was reprinted in the ALBANY LAW JOURNAL: *Public Defenders — Rights of Persons Accused of Crime — Abuses Now Existing*, 48 ALB. L.J. 248 (1893) [WORLD'S FAIR SPEECH]. Other notable presenters at the Congress included John Henry Wigmore, David Dudley Field and James Bradley Thayer. *See generally* Barbara Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267 (2006) [Babcock] for an excellent account of the life and times of Clara Shortridge Foltz and the influences that led her to originate the idea of a publicly funded attorney for all defendants accused of crime.

[3] *See* Foltz, *Public Defenders*, *supra* note 1.

[4] *Id.* at 393.

[5] *Id.* at 395-97.

[6] *Id.* at 399.

and dishonesty of a "shyster" element among the private bar who preyed upon those defendants with meager resources.[7]

Called the "Portia of the Pacific,"[8] Foltz was at the time of her World's Fair speech an able and experienced criminal defense practitioner, who shortly afterwards would win a notable victory in the California Supreme Court. In *People v. Wells*[9] — a case involving prosecutorial misconduct — she represented a successful business agent who had been charged as an accomplice to a client's forgery involving a promissory note and mortgage. Wells testified he had been deceived by the client who falsely represented herself as the owner of property which was mortgaged to secure the loan. The California Supreme Court reversed Wells's conviction because of "utterly inexcusable and reprehensible" conduct by the prosecutor who repeatedly employed improper questions on both direct and cross examination to interject inadmissible and unsubstantiated accusations for the sole purpose of prejudicing the jury against the defendant. In granting a new trial, Justice McFarland declared in a revealing statement:

> It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent.[10]

Foltz identified the causes of such prosecutorial abuse as naturally arising from human nature — the prosecutor's "vanity of winning," and "the fear of newspaper criticism" coupled with the ability to rationalize such

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[7] *Id.* at 397-98.

[8] *See* LOS ANGELES TIMES, Nov. 12, 1888 at 2, and Nicholas C. Polos, *San Diego's 'Portia of the Pacific' — California's First Woman Lawyer*, 26 JOURNAL OF SAN DIEGO HISTORY, No. 3, Summer 1980, San Diego Historical Society. Clara Foltz was an eloquent advocate. For an excerpt from one of her closing arguments, *see* MICHAEL S. LIEF, ET AL., LADIES AND GENTLEMEN OF THE JURY : GREATEST CLOSING ARGUMENTS IN MODERN LAW, Chapter 6, *A Man's World No More*, 211 (1998).

[9] 100 Cal. 459 (1893). *Wells* was subsequently referenced by the U.S. Supreme Court in Berger v. United States, 295 U.S. 78 (1935), a seminal case on prosecutorial misconduct.

[10] *Id.* at 465.

behavior through the jaded "assumption that the defendant is always guilty."[11] Prosecutors were allowed to go unchecked, Foltz argued, because with rare exception they had no equal adversary. She pointed out that counsel appointed for the poor "have no money to spend in an investigation of the case, and come to trial wholly unequipped either in ability, skill or preparation to cope with the man hired by the State."[12] Those of modest means, moreover, had neither the knowledge nor the ability from within the walls of their jail cell to secure competent counsel. They were thus easy marks for the "runners" of unscrupulous "shyster" lawyers who, after having obtained a defendant's money, would "botch or neglect" their case.[13]

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[11] Foltz, *Public Defenders*, *supra* note 1, at 396.

[12] WORLD'S FAIR SPEECH, *supra* note 2, at 249.

[13] Foltz, *Public Defenders*, *supra* note 1, at 397. A vivid account of how such shyster lawyers operated in the lower criminal courts of New York is described in ARTHUR TRAIN, THE PRISONER AT THE BAR (1915) 76-77:

> A young girl who had fallen from virtue, but who had never been arrested before, was brought into the Jefferson Market prison. She had saved five hundred dollars with which she intended the following week to return to her native town in New Hampshire and start life anew. The [jailer] led her to believe that she would be imprisoned in the penitentiary for nearly a year unless she could "beat the case." One of these buzzards [i.e. a shyster lawyer] learned of her distress and offered to procure bail for her for the sum of fifty dollars. A straw bondsman was produced, and she paid him the money and was liberated. Meanwhile the lawyer had learned of the existence of her five hundred dollars. By terrifying her with all sorts of stories as to what would possibly happen to her, he succeeded in inducing her to pay him three hundred as a retainer to appear for her at the hearing in the magistrate's court. He had guaranteed to get her off then and there, but when her case was called he happened to be engaged in reading a newspaper and, looking up from where he was sitting, merely remarked, "Waives examination, your Honor." The girl had only one hundred and fifty dollars left, and as yet had had no defense, but the shyster now demanded and received one hundred dollars more for representing her in the Special Sessions. She now had but fifty dollars. Immediately after the hearing in the police court the bondsman "surrendered" her and she was locked up in the Tombs pending her trial, for she had not money enough to secure another bail bond. Here she languished three or four days. When at last her case appeared upon the calendar the shyster did not even take the trouble to come to court himself, but telephoned to another buzzard that she still had fifty dollars, telling him to " take her on." Abandoned by her counsel, alone and in prison, she gave up the last cent she had, hoping thus still to escape the dreadful fate predicted for her. When she was called to the bar the second

Indeed, at the time of the *Wells* decision California did not even have an integrated State Bar that could control the admission to practice law.[14] The reputation of the legal profession also hardly inspired confidence. As one of Foltz's contemporaries observed, the bar in general was considered "a pool of mediocrity."[15]

THE PUBLIC DEFENDER ENVISIONED BY CLARA FOLTZ

To remedy the evils afflicting the administration of criminal justice, Clara Foltz proposed that an office of the Public Defender be created in each county. The Public Defender was to be elected and hold office for a three-year term. Only an attorney who had been a resident of the county for at least one year was eligible to stand for election. The duties of the Public Defender were "to attend all criminal courts, and to appear for and defend all persons charged with violation of the law who are without counsel and who desire an attorney to appear for them."[16] The Public Defender's duties also included "appearing for and in behalf of all persons charged with being insane or lunatic."[17] The Public Defender was empowered to hire assistant Public Defenders and employees when such positions were authorized by the county.[18] When a capital or "other important criminal action" was

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lawyer informed her she had no defense and the best thing she could do was to plead guilty. This she did and was fined twenty-five dollars, but, having now no money, was compelled to serve out her time, a day for each dollar, in the City Prison, at the end of which time she was cast penniless upon the streets.

[14] The California State Bar was not created until 1927.

[15] MICHAL R. BELKNAP, TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY (1992) at 12. As Professor Belknap points out, the movement to organize state bar associations and regularize admissions to the bar through bar examinations did not begin until the late 1800s. *Id.* The American Bar Association and the Los Angeles Bar Association were both formed in 1878. *Id. See also* Patricia Phillips, *Meeting Challenges: The Association's History of Accomplishment*, LOS ANGELES LAWYER, March 2003, 33.

[16] *An Act to Create the Office of Public Defender, Provide for His Election, Define His Duties, and Fix His Compensation in the Several Counties, and Cities and Counties of New York*, reprinted in 55 ALB. L.J. 65 (1897) [Foltz's *Defender Bill*]. The bill is also available in the appendix to Babcock, *supra* note 2.

[17] *Id.*

[18] *Id.*

to be tried, the Public Defender could hire special co-counsel with judicial approval.[19]

It is noteworthy that Foltz's bill entitled *all* criminal defendants to representation by the Public Defender regardless of whether they were indigent or not. In her view the person of average means should not be "ruined by payment of counsel fees in order to be protected from a malicious prosecution."[20] She reasoned that because the right to the assistance of counsel was a constitutional right, it should be free like other constitutional rights such as the right to a jury.[21] There was also a practical reason. As Babcock has observed, Foltz correctly foresaw that if the Public Defender was only for "the friendless and destitute" the office "would not command the respect or resources necessary to do the job."[22] The bill nevertheless provided that a defendant with means still retained the option to hire his or her own counsel who could defend either alone or jointly with the Public Defender.[23]

Although Foltz lobbied tirelessly for the Public Defender concept and introduced bills in state legislatures across the country, it was not until 1913 that the County of Los Angeles amended its charter to create the first Public Defender office, which opened its doors on January 7, 1914.[24] In contrast to Foltz's Public Defender who would be available to all, the Los Angeles office represented only those who were financially unable to afford counsel.[25] The Los Angeles Defender was tasked with representing

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19 *Id.*

20 Foltz, *Public Defenders*, *supra* note 1, at 393.

21 *Id.* at 398.

22 Babcock, *supra* note 2, at 1272.

23 Foltz's *Defender Bill*, *supra* note 16.

24 REGINALD HEBER SMITH, JUSTICE AND THE POOR (1919) at 117 [SMITH].

25 Section 23, charter of Los Angeles County, which provides:

> Upon request by the defendant or upon order of the court, the Public Defender shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged, in the Superior Court, with the commission of any contempt, misdemeanor, felony or other offense. He shall also, upon request, give counsel and advice to such person in and about any charge against them upon which he is conducting the defense, and he shall prosecute all appeals to a higher court or courts, of any person who has been convicted upon any such charge, where, in his opinion, such appeal will, or might reasonably be expected to, result in a reversal or modification of the judgment of conviction.

indigent defendants "charged in the Superior Court, with the commission of any contempt, misdemeanor, felony or other offense."[26]

Surprisingly, the Los Angeles charter also authorized the Public Defender to bring civil actions to collect unpaid wages (where the amount did not exceed $100) and to defend any person unable to employ counsel who was sued in civil court where in the opinion of the Public Defender the defendant was being "persecuted or unjustly harassed."[27] The reasons for providing civil legal aid appear to have their origins in the reform movement during the Progressive Era to improve the administration of justice generally. In *Justice and the Poor*, published in 1919, Reginald Heber Smith described in detail the defects in the administration of justice in America which had given rise to the widely held belief during that era that there was "one law for the rich and another for the poor."[28] Because the poor could not afford legal advice and representation, they were easily taken advantage of and exploited. In response to this need for legal assistance, legal aid societies sprang up in many of the larger cities.[29] Some, such as the Voluntary Defenders Committee of New York provided criminal defense representation.[30] While most legal aid offices were funded by private donations, there were also a handful that operated as public bureaus of city governments.[31] The Los Angeles County charter's provision of counsel in certain limited civil cases reflects a similar attempt to give the poor access to the courts, denied them due to the inability to afford counsel.

Although Smith devoted much of his analysis in *Justice and the Poor* to the need for legal aid in civil cases, he also asserted that nowhere was the injustice arising from the lack of adequate counsel more apparent than in the criminal justice system.[32] Smith examined the assumption that the rights and procedural protections given to a defendant were adequate safeguards against unjust conviction and concluded that standing alone they

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[26] *Id.*

[27] Section 23, charter of Los Angeles County, *supra* note 25. This same provision was also enacted in state legislation establishing Public Defender offices. *See* CAL. GOVT. CODE § 27706.

[28] SMITH, *supra* note 24, at 105.

[29] *Id.* at 176 and 187-191.

[30] *Id.* at 117.

[31] *Id.* at 173.

[32] *Id.* at 105.

were ineffective because "[a]dequate protection, in the last analysis, depends on adequate representation."[33] Most defendants then, as now, could not afford to hire counsel. The fairness of the criminal justice system thus depended upon defense representation provided through a system of assigning counsel for the indigent accused.

Examining the assigned counsel system, Smith echoed many of Foltz's arguments. Although counsel assigned in capital cases were generally paid and given an allowance for expenses, in routine felonies, counsel was either not provided at all, or went unpaid and without funds to conduct any investigation.[34] Thus even a competent criminal defense lawyer appointed to a case was forced not only to provide representation for free, but also to pay for investigation expenses and expert witnesses out of his own pocket. The lawyers who could afford to provide such pro bono representation, however, were generally members of civil law firms and were largely exempt from assignment because they had no experience in criminal work.[35]

Smith moreover found that the "shyster" lawyers Foltz had complained about had taken over the assigned counsel system and corrupted it.[36] Smith observed:

> These men have learned how to make a living out of assigned cases. . . . They are willing to take assignments because they . . . know how to strip a prisoner and his relatives of every last cent . . . [by] magnify[ing] the crime . . . and the horrors of prison . . . .
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> If well paid, the professional assigned counsel undertakes a defence [sic] that knows no bounds of honesty or propriety. . . . If not paid, he is perfectly willing to betray his client by neglecting the case, or forcing him to plead guilty, or deserting him altogether.[37]

Thus except for murder cases, where reputable lawyers would step forward because of a sense of duty and the potential to enhance their reputation, the assigned counsel system deserved, in Smith's judgment "unqualified

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[33] *Id.* at 111.

[34] *Id.* at 112.

[35] *Id.* at 112-113.

[36] *Id.* at 111.

[37] *Id.* at 114. Smith maintained that it was because of the dishonest tactics of these shyster lawyers that prosecutors had become "aggressive" and "partisan." *Id.* at 111 and 114.

condemnation."[38] The salaried professional Public Defender envisioned by Smith, would, by contrast, be honest, ethical, and provide uniformly competent representation.

For Smith there was also an additional ideological reason for providing adequate defense services for the poor. This was necessary in his view to prevent a loss of confidence in the judicial system that might further encourage the anarchist movement. The turn of the century witnessed economic changes that gave rise to conflict as a result of the pressure from two growing influences — the escalating unrest between the laboring class and their employers and the great wave of immigration from eastern and southern European countries. It was a turbulent time in American history — from the Haymarket Square bombing in Chicago in 1886, and Panic of 1893 when the stock market crashed, to the assassination of President McKinley in 1901 by an anarchist and the bombing of the *Los Angeles Times* building in 1910.[39] The fear of "sedition and disorder" created by these and other similar events clearly emanated from Smith's writings.[40]

Smith was especially concerned about the masses of recently arrived unskilled immigrant workers.[41] The International Workers of the World (known as the Wobblies), actively recruited such unskilled workers to join

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[38] *Id.*

[39] *See generally* ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW (1960), ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877–1920 (1967) and RAY GINGER, EUGENE V. DEBS: THE MAKING OF AN AMERICAN RADICAL (1970). *See also* PBS, THE AMERICAN EXPERIENCE, TIMELINE: ANARCHISM AND EMMA GOLDMAN, [PBS TIMELINE] *available at* http://www.pbs.org/wgbh/amex/goldman/peopleevents/e_freespeech.html (All online sources cited in this article were last visited Dec. 1, 2010).

[40] SMITH, *supra* note 24, at 11.

[41] Due to political and religious persecution, famine and the lack of economic opportunity, immigration jumped to almost 9,000,000 during the decade from 1900 to 1910. *See* Table No. HS-8. Immigration — Number and Rate: 1900 to 2001, *available at* http://www.census.gov/statab/hist/HS-08.pdf. *See generally* ALAN M. KRAUT, THE HUDDLED MASSES: THE IMMIGRANT IN AMERICAN SOCIETY, 1880–1921. Smith observed in JUSTICE FOR THE POOR that the immigrant

> comes to this country . . . with high hopes, expecting to receive fair play and square dealing. It is essential that he be assimilated and taught respect for our institutions. . . . When he finds himself wronged or betrayed, keen disappointment is added to the sense of injustice. Through bitter disillusionment he becomes easily subject to the influence of sedition and disorder. *Id.*

its radical agenda, which was based upon Marxist principles.[42] During one such effort in 1912, for example, San Diego passed an ordinance banning union activity in its business district. This sparked protest demonstrations which were brutally suppressed by both law enforcement and vigilantes.[43] It was against this backdrop of violence and unrest that Smith warned in the *Journal of the American Judicature Society* that

> the revolutionary proponents of a new world order . . . may undermine public confidence in our justice if they attack its results, and demonstrate its inequality in case after case. Such an attack might come perilously near to succeeding because it has truth on its side. The present drive for Americanization furnishes an illustration. The plan is to educate the immigrant . . . so that he will understand and respect our institutions. But suppose after his education he finds in America institutions which, in part at least, do not deserve the respect of intelligent men. And if his contact with justice has been in the lower criminal courts where he has been preyed upon by runners, shysters and straw bondsmen,[44] may he not mistake

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[42] The I.W.W.'s constitution, drafted in 1908, called for class warfare, proclaiming:

> The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people, and the few, who make up the employing class, have all the good things of life. Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

PBS TIMELINE, *supra* note 39.

[43] Rosalie Shanks, *The I.W.W. Free Speech Movement: San Diego, 1912*, 19 THE JOURNAL OF SAN DIEGO HISTORY, SAN DIEGO HISTORICAL SOCIETY QUARTERLY, No. 1, Winter 1973.

[44] Straw bondsmen were individuals secured by shyster lawyers to swear false affidavits pledging non-existent property to secure the amount of the bond. If the prosecutor discovered the fraud, the bond was revoked, the defendant returned to jail, and of course the amount the defendant paid to the straw bondsman was lost. Even if the fraud went undiscovered, the bondsman would "surrender" his client at the first court appearance and the defendant would be returned to jail. News reports suggest that this practice was prevalent in California. A column reporting on court cases in a San Francisco paper in 1887, for example, noted two straw bondsmen were sentenced to significant prison terms (six and seven years, respectively) and described the trial judge's lengthy speech that "reviewed the evils of the straw bond business and severely cored lawyers who would desecrate their oaths by offering to procure such bonds." *The Straw*

the part which he knows for the whole and conclude that our judicial institutions ought to be overthrown?[45]

Smith found a solution in the concept of the institutional Public Defender where counsel are paid for their services, resources are provided to cover needed expenses such as investigation and expert witnesses, and where "centralization of work makes for economy, efficiency, and responsibility."[46] Smith praised the results of the Los Angeles Public Defender experiment and cited its work as empirical proof that the concept of an institutional defender office was not "visionary" or "subversive of fundamental rights" as a prelude to socialism.[47]

In its first year of operation in 1914 the Los Angeles Public County Defender handled 260 felony cases.[48] Favorably comparing the results obtained by the Public Defender with that of privately retained counsel, Smith found that the Public Defender took approximately the same percentage of cases to trial as private counsel (22% vs. 26% for private counsel), had roughly the same success rate at trial (34% not guilty or hung jury vs. 36% for private counsel) and obtained probation for a slightly greater percentage of his convicted clients than private counsel (33% vs. 30%).[49] Smith also argued that the Public Defender had improved the efficiency of the court by filing fewer frivolous motions "for purposes of delay" and spending on average fewer days per trial than retained counsel.[50] For example, Smith cited statistics showing private counsel filed motions in 17% of their cases but were successful only 6% of the time, while the Public Defender filed motions in only 3% of its cases and was successful 25% of the time.[51]

One striking fact revealed by Smith's statistics was that 70% of the clients represented by the Public Defender pleaded guilty, while retained

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Bondsmen Sentenced, DAILY ALTA CALIFORNIA, August 25, 1887, *available at* http://www.newspaperabstracts.com/link.php?id=25776.

[45] R. H. Smith, *Denial of Justice*, 3 J. AM. JUD. SOC. 112, 113 (1919–1920).

[46] SMITH, *supra* note 24, at 115-16.

[47] *Id.* at 115 and 122-24.

[48] Id. at 122. After civil service examinations, Walton J. Wood was chosen as the first Public Defender. *Id.* at 117.

[49] *Id.* at 123.

[50] *Id.* at 122.

[51] *Id.*

counsel entered guilty pleas in only 48% of their cases. Foltz had detested plea bargaining. In her view reducing a defendant's sentence because his guilty plea saved the county the time and expense of a trial was akin to bribery. She wrote: "Think of the spectacle of a *court* remitting part of a criminal's legal punishment for a money consideration!! And yet who has not witnessed it."[52]

Foltz was a strong proponent of the adversary system and believed the truth emerged from the contest at trial fought by ethical advocates on both sides. Smith and the reformers of the Progressive Era, on the other hand, while not rejecting the adversary system, believed in a more collaborative system of justice.[53] Reacting to the dishonest tactics in which the shyster lawyers had engaged with impunity, the Public Defender they envisioned was not just an ethical trial lawyer, but also an officer of the court who, while ensuring that the innocent were protected, would not stand in the way of the guilty being fairly punished. This vision of the Public Defender of course begs both the larger philosophical question of whether such "truth" is indeed knowable and the more practical question of whether a busy staff attorney at a Public Defender office with a heavy caseload and limited resources for investigation has the ability to know the truth regarding guilt or innocence. Smith's statistics, however, point to the Achilles' heel of the Public Defender concept: the high volume of cases handled.

As Smith chronicled in *Justice and the Poor*, the Los Angeles experiment was successful in eliminating the abuses of the shyster lawyers, and the California state legislature subsequently passed legislation in 1921 authorizing county governments to create an office of the Public Defender.[54] That legislation, however, left it up to county governments to determine whether or not to have a Public Defender and also whether the chief Public

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[52] Foltz, *Public Defenders*, *supra* note 1, at 399 n.2.

[53] Smith, for example, praised the Los Angeles Defender's handling of insanity cases because, instead of engaging in a battle of experts, the defender and prosecutor agreed to have the court appoint three physicians to examine the accused and stipulated that no other experts would be called at trial on that issue. Smith observed that "[i]nstead of working at odds, it has been possible for the two attorneys to work in harmony to a common end." SMITH, *supra* note 24, at 121-22.

[54] CAL. GOVT. CODE § 27700. The current statute is derived from legislation enacted in 1921.

Defender would be elected or appointed.[55] Thus in contrast to Foltz's bill which mandated an elected Public Defender in each county, California has evolved into a hodgepodge of arrangements for providing indigent defense services. Only the Public Defender of the City and County of San Francisco is an elected official.[56]

In the 1960s and 1970s U.S. Supreme Court decisions in *Gideon v. Wainwright*[57] and *Argersinger v. Hamlin*,[58] vindicated Clara Foltz's belief that defense counsel was constitutionally required in felony and misdemeanor cases. This spurred the growth of Public Defender offices to handle the constitutional mandate to provide counsel. The U.S. Department of Justice sponsored the National Advisory Commission on Criminal Justice Standards and Goals (1973)[59] and the National Study Commission on Defense Services (1979) which promulgated maximum attorney caseload standards and other guidelines for establishing such offices. In 1973, *The Other Face of Justice*, reporting the findings of a nationwide study of indigent defense delivery systems, found that California had 31 Public Defender offices and 16 assigned counsel systems.[60] In 11 counties defense services were provided through contractual arrangements with law firms or individuals.

THE PUBLIC DEFENDER TODAY

Clara Foltz envisioned that a professional Public Defender would represent virtually all criminal defendants. While this concept was never accepted in theory, as a practical matter today more than eight out of ten defendants accused of serious crimes in California are provided with counsel.[61] Foltz

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[55] CAL. GOVT. CODE § 27701.

[56] Web site of the San Francisco Public Defender's Ofice *available at* http://www.sfpublicdefender.org.

[57] 372 U.S. 335 (1963).

[58] 407 U.S. 25 (1972).

[59] NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, 276 (1973). *See infra* note 97.

[60] THE OTHER FACE OF JUSTICE, Appendix 1A, 90-91, and Appendix 1D, 112-13.

[61] *See* L. Benner, *Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California* 45 CALIFORNIA WESTERN LAW REVIEW 263, 311 n.111 [*Systemic Factors*], reporting results from a survey of presiding Superior Court judges indicating a state-wide indigence rate in excess of 85%.

would be dismayed, however, at what has happened to the Public Defender concept and the current crisis confronting the delivery of indigent defense services. She, along with Reginald Heber Smith, would also find that like the themes from Greek tragedies, the problems they identified still persist.

In 2008, the California Commission on the Fair Administration of Justice ("Fair Commission") reported that 33 of California's 58 counties now have an institutional Public Defender office which serves as the primary provider of indigent defense services.[62] While the number of counties employing an institutional Public Defender office grew by only two since 1973, the number of counties using contract defenders more than doubled. In 24 counties (most having a population of less than 100,000) defense services are now provided by contractual arrangements with either a law firm or solo practitioners.[63] Only one county, San Mateo, uses a bar association administered assigned counsel system as the primary provider. The San Mateo system, known as the Private Defender Program, actually functions, however, much like an institutional defender office. It has an investigative staff and employs supervising attorneys who provide training and monitor the performance of assigned counsel panel members.[64]

While the San Mateo assigned counsel system has been a success, it appears that the assigned counsel systems in other counties were replaced by contract defenders. Unfortunately, California has had a disturbing history with respect to contract defenders. Contracts for indigent defense services are not regulated by any state standards nor is there even any requirement

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[62] FINAL REPORT, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE 92 (2008) [CCFAJ FINAL REPORT] *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf. An institutional Public Defender is defined as a county department where attorneys are employed on a salaried basis as public employees. While the primary institutional defender office handles the lion's share of indigent cases, other arrangements must be made to represent co-defendants and other cases where the primary defender has a conflict of interest. This is done through the creation of one or more alternate defender offices, or through an assigned counsel panel or by contractual arrangement with a law firm or individual.

[63] *Id.* There is a variety of contractual arrangements. One law firm, for example, provides representation in eight different counties, while one county has seven separate contracts with solo practitioners.

[64] *See* SAN MATEO COUNTY BAR ASSOCIATION PRIVATE DEFENDER PROGRAM ANNUAL REPORT, FISCAL YEAR 2009–2010, *Administration and Structure*, 6-7; *Attorney Training*, 35-37; and *Attorney Evaluation*, 40-44.

that performance of the contractor be monitored for quality control. A monograph published by the U.S. Justice Department's Bureau of Justice Assistance revealed the dangers of such unregulated low bid contracts in the following report of a disastrous experience with a California contract defender:

> In 1997 and 1998, a rural county in California agreed to pay a low bid contractor slightly more than $400,000 a year to represent half of the county's indigent defendants. The contractor was a private practitioner who employed two associates and two secretaries, but no paralegal or investigator. The contract required the contractor to handle more than 5,000 cases each year. All of the contractor's expenses came out of the contract. To make a profit, the contractor had to spend as little time as possible on each case. In 1998, the contractor took fewer than 20 cases — less than 0.5 percent of the combined felony and misdemeanor caseload — to trial.
>
> One of the contractor's associates was assigned only cases involving misdemeanors. She carried a caseload of between 250 and 300 cases per month.[65] The associate had never tried a case before a jury. She was expected to plead cases at the defendant's first appearance in court so she could move on to the next case.
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> One afternoon, however, the associate was given a felony case scheduled for trial the following week. The case involved multiple felony and misdemeanor charges. When she looked at the case file, the associate discovered that no pretrial motions had been filed, no witness list had been compiled, no expert witnesses had been endorsed, and no one had been subpoenaed. In short, there had been no investigation of any kind into the case, and she had no one to help her with the basics of her first jury trial.
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> The only material in the case file was five pages of police reports. In these reports she found evidence of a warrantless search, which indicated strong grounds for suppression. She told the judge she was not ready to proceed and that a continuance was necessary to preserve the defendant's Sixth Amendment right to counsel. The continuance was denied. The associate refused to move forward with the case. The contractor's other associate took over

[65] The national standard is only 400 misdemeanor cases per attorney *per year.*

> the case and pled the client guilty to all charges. The associate who had asked for a continuance was fired.[66]

The Justice Department report concluded: "In this California county, critics' worst fears about indigent defense contract systems came true. When contract systems are created for the sole purpose of containing costs, they pose significant risks to the quality of representation and the integrity of the criminal justice system."[67]

In a deposition arising out of a lawsuit brought by the associate who had been summarily dismissed, the contract defender stated that he was able to handle such a high volume of cases because he pleaded 70% of his clients guilty at the first court appearance after spending thirty seconds explaining the prosecutor's offer.[68] The county of Shasta, where this occurred, subsequently established an institutional Public Defender office.[69]

The Fair Commission observed that despite the notoriety of this disturbing example of abuse, nothing has been done to prevent its recurrence and reported that "flat fee contracts are still being negotiated for defense services with no separate funding for investigators and ancillary services."[70] Indeed, testimony before the Fair Commission revealed that some counties employing contract defenders have solicited bidding wars in an attempt to further cut the cost of indigent defense services. The Commission reported the story of one contract defender of long standing who had repeatedly fought off low bidders in the past with the support of the judiciary. His budget, which had been 41% of the District Attorney's budget in 2000, declined to only 27% in 2005. Yet in 2006, he was undercut by a bid from a competitor that was almost 50% less than his submission. He lost the contract he had repeatedly held since 1990. According to the Commission:

> He was undercut by a bid from John A. Barker & Associates, now operating as Richard A. Ciummo & Associates. Ciummo now contracts

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[66] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 1-2 (2000).

[67] *Id.*

[68] CCFAJ FINAL REPORT, *supra* note 62, at 95 (citing deposition of Jack Suter in Fitzmaurice-Kendrick v. Suter, Civ. S-98-0925 (E.D. Cal. 1999)). The lawsuit reportedly resulted in a substantial settlement for the plaintiff. *Id.*

[69] *Id.*

[70] *Id.*

> with eight California counties to provide defense services.... Ciummo's operation has been described as the "Wal-Mart Business Model" for providing defense services, "generating volume and cutting costs in ways his government-based counterparts can't and many private-sector competitors won't." Mr. Ciummo responds that he operates on a single-digit profit margin, and substantial savings result from hiring attorneys on a contract basis that does not include expensive benefit and retirement packages. While his contracts with counties provide separate reimbursement for interpreters and expert witness fees, there is no separate reimbursement for investigative services.[71]

The Commission noted that the successful bidder's Web site contains an advertisement stating: "What Would Your County Do With Hundreds of Thousands of Dollars?" The advertisement suggests the answer ("Better schools? Better fire protection? More police? Improved roads? More parks?") and boasts: "Every county we have contracted with has saved substantial funds over their previous method of providing these services. Additionally, our firm has an excellent record of containing cost increases."[72]

In hard economic times, competitive bidding can obviously lead to a dangerous downward spiral of cost-cutting that can result in bids that provide an inadequate number of attorneys who have little or no experience, and who are given little or no training, supervision, or support services.

Unfortunately, no action has been taken to regulate indigent defense contracting and evidence of abuse continues to be reported. For example, Fresno County awarded a flat fee contract for $80,000 to an attorney in a death penalty case where the Public Defender was unable to provide representation because of a conflict of interest. On appeal, after the defendant was sentenced to death, it was revealed that the contract attorney spent less than $9,000 for investigation and expert witnesses, although in justifying his bid he had budgeted $60,000 for such expenses. The attorney instead pocketed $71,000 of the $80,000 fee.[73] It was conceded that even

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[71] *Id.* at 95 (quoting Cheryl Miller, *Calif. Defense Firm Borrows Wal-Mart Business Model*, THE RECORDER, Dec. 26, 2007).

[72] CCFAJ FINAL REPORT, *supra* note 62, at 94-95 n.4.

[73] People v. Doolin, 45 Cal.4th 390, 457-58 (2009) (opinion of Kennard, J. concurring and dissenting). The California Supreme Court assumed without deciding that

though counsel was aware that the defendant had a learning disability and had been abused as a child, the contract attorney failed to conduct a background investigation and social study of defendant as required by ABA standards governing the duties of defense counsel in capital cases.[74] In *Sears v. Upton*,[75] the U.S. Supreme Court recently held that the failure to conduct an adequate investigation into the defendant's background before deciding on a mitigation strategy constituted deficient performance, even where counsel employed a plausible mitigation strategy.

Another example that reveals the contrast in the quality of representation between flat fee contractors and institutional Public Defenders was seen in the case of two juveniles who were both charged with the same crime: assault with a deadly weapon. The older of the two was represented by the Public Defender, but the younger, aged 15, was assigned a contract attorney who took juvenile cases for a flat fee of $345 regardless of complexity. The Public Defender's client was adjudicated in juvenile court, but the younger boy, represented by the contract attorney, was charged as an adult. Upon transfer to Superior Court he was represented by the alternate Public Defender who immediately recognized that the child had serious mental deficits and should not have been transferred to adult court. It was later determined that the contract attorney had "failed to provide even a minimal level of representation" and the case was transferred back to juvenile court.[76]

The Fair Commission, noting that state laws impose standards for county contracts involving public works, has recommended that the state legislature adopt at least minimal standards to protect against such demonstrated abuses where the liberty of a citizen is at stake.[77]

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counsel's performance was deficient, but on the record produced on direct appeal found no prejudice was shown as required by Strickland v. Washington, 466 U.S. 668 (1984). Two Justices (Kennard and Werdegar) dissented arguing that prejudice should be presumed because of the inherent conflict of interest created by the flat fee contract. Post conviction proceedings are still pending.

[74] AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989).

[75] 130 S. Ct. 3259 (2010).

[76] Molly Hennessy-Fiske, *Juvenile Justice Diverges in Court*, LOS ANGELES TIMES, June 14, 2010.

[77] CCFAJ FINAL REPORT, *supra* note 62, at 97.

THE IMBALANCE BETWEEN DEFENSE AND PROSECUTION

Clara Foltz saw the institutional Public Defender as a means of correcting the imbalance between counsel for the accused, who was often either inept or dishonest, and the strong district attorney, who was often overzealous because the "pride of contest" overcame the "spirit of justice."[78] The institutional Public Defender office has, when properly implemented, eradicated this gross imbalance. By providing an organization where properly trained and supervised attorneys can embark upon a professional career as a Public Defender, defense counsel can be on a par with their counterpart in the district attorney's office and provide excellent and cost-effective defense representation. The San Francisco Public Defender, for example, represented over 28,000 clients during 2009, obtained an acquittal rate at trial of 46.5% (which would be the envy of many private practitioners who get to choose their clients) and saved an estimated "$5 million in incarceration costs [through placement of clients] in vocational, educational, substance abuse and mental health programs."[79]

There can be no doubt, therefore, that the scales of justice have tipped toward a more even balance as thousands of dedicated career Public Defenders and their support personnel strive daily throughout California to provide the best representation possible. As a former client of the Los Angeles County Public Defender's Office stated in tribute after being acquitted of murder on the grounds of self defense:

> Even if I had $10,000 I couldn't buy that kind of defense.... And here I am a nobody, just a 52-year-old bartender in a jam. When a plain nobody gets a defense only a rich somebody could buy, you got a real great country.[80]

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[78] C. Foltz, *Duties of District Attorneys in Criminal Prosecutions*, 18 CRIM. L. MAG. & REP. 415 (1896).

[79] Web site of the San Francisco Public Defender's Office, *available at* http://sfpublicdefender.org/media/2010/01/ year-report-demand-public-defenders-remains-high-economic-crisis/.

[80] Web site of the Los Angeles County Public Defender, *available at* http://pd.co.la.ca.us/History.html.

Despite such successes, however, serious imbalances still remain. Foltz could not have envisioned the tremendous volume of cases our criminal justice system handles today. As a nation we imprison more citizens per capita than any other country in the world.[81] Starting with only 260 felony cases in 1914, the Los Angeles County Public Defender (LACPD), for example, now handles an "estimated 420,000 misdemeanor cases, 100,000+ felony cases, 41,000 juvenile cases and 11,000 mental health cases, for a total of over 571,000 cases annually.[82]

Funding Disparities

The financial burden of providing counsel falls primarily upon county governments. Recent empirical research conducted in 2007 for the Fair Commission reveals, however, that tremendous disparities exist from county to county regarding the resources allocated to indigent defense services. For example, while the average spent per capita on indigent defense for all counties is $19.62, Sutter County with a population of 91,000 spends only $5.85 per capita.[83] Significant disparities in expenditure also exist between counties within the same population class. Butte County, for example, with a population of 217,000 spends less than $10.00 per capita on indigent defense while Yolo County, with a population of 190,000 spends almost $31.00 per capita.[84]

Still more glaring is the disparity between funding for the prosecution and funding for indigent defense. As a consequence of local budgetary decisions, the Yolo County Public Defender Office, for example, has been forced to provide representation (including representation in a death penalty case) with less than half of the resources of the prosecution.[85] Looked at from the viewpoint of resources per attorney, the district attorney has the advantage of over $100,000 more per staff attorney than the Public

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[81] The United States imprisons over 700 persons per 100,000 population. R. WALMSLEY, WORLD PRISON POPULATION LIST (7th ed.) King's College, London, International Centre for Prison Studies, *available at* http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf.

[82] COUNTY OF LOS ANGELES, ANNUAL REPORT 2009–10, 24.

[83] *Systemic Factors*, *supra* note 61, at 309.

[84] *Id.* at 310.

[85] *Id.*

Defender.[86] An even more extreme example is Sutter County, which spends five times more on prosecution than it does on indigent defense.[87]

In *Argersinger v. Hamlin*, Chief Justice Burger declared that "the system for providing counsel and facilities for the defense should be as good as the system which society provides for the prosecution."[88] Yet statewide, for every dollar spent on prosecution, California counties spend only fifty-three cents on indigent defense.[89] At least 85% or more of the criminal docket in the Superior Courts of California, however, must be handled by the indigent defense system.[90] In some counties the indigence rate is as high as 95%.

Prosecutors have argued that they need greater resources because they have to screen arrests made by police that do not result in charges. This argument has been refuted, however, by a statistical analysis which shows that the additional prosecution workload to screen such arrests is more than offset by the additional workload imposed on indigent defense systems to handle non-traffic misdemeanor cases that occur within cities.[91] Because these cases are prosecuted by the city attorney rather than the district attorney, they are not part of the prosecution's workload. In addition, the indigent defense system has other added workloads not shared by the district attorney. It must also provide representation for clients involved in involuntary mental health commitments and conservatorships. Thus, even if privately retained counsel handle between 5% to 15% of the criminal caseload, one would not expect to see such gross disparities in funding between the prosecution and defense functions.

The disparity in funding between prosecution and defense is also not limited to less populated counties that might be expected to have less

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[86] *Id.* This comparison actually overstates the resources per Public Defender staff attorney because it is based upon the indigent defense budget for the county as a whole and not all those funds go to Public Defender office. It also does not include additional investigative resources available to the prosecutor from the city police, county sheriff's department and state highway patrol.

[87] *Id.* at 310.

[88] Argersinger v. Hamlin, 407 U.S. 25, 43 (1972).

[89] *Systemic Factors*, *supra* note 61, at 311.

[90] *Id.* at 311 n.111.

[91] *Id.* at 314 n.117. The comparison showed that indigent defenders handled over 60,000 more cases statewide than did county prosecutors.

adequate financial resources. The Fair Commission study conducted an in-depth examination of funding for the district attorney's office and the indigent defense system in Santa Clara County, one of the richest counties in the nation. In terms of per capita income, Santa Clara ranked 17th out of 3,000 counties in 2008.[92] Yet in terms of parity with the prosecution, funding for Santa Clara County's indigent defense system was below the state average. For fiscal year 2007 the Santa Clara prosecutor's budget was more than twice that of all the indigent defense components combined.[93] This translates into a dramatic disparity in staffing resources. The Santa Clara County District Attorney's Office, which has its own crime lab (funded out of a separate budget financed in part by fines from convicted drug offenders pursuant to Health and Safety Code section 11372.5) had a staff of over 500 in 2007.[94] The primary and alternate Public Defender offices combined had a budgeted staff of only 206.

This type of disparity in resources has consequences, as the indigent defense system simply cannot keep up with the volume of cases generated by the more generously resourced law enforcement and prosecution components of the criminal justice system. Once held to be an exemplary office, the primary Santa Clara County Public Defender was forced after budget cuts to ration representation and had to take the drastic step of no longer providing counsel at misdemeanor arraignments. After newspaper articles revealed that uncounseled defendants were pleading guilty at arraignment without being aware of the consequences, some funding was

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92 *Id.* at 318 n.122.

93 In addition to county funding, the Santa Clara District Attorney received $1.4 million from the State of California's Department of Insurance and $1.9 million from the federal government's Office of Emergency Services. Other grants included an Anti-Drug-Abuse Enforcement Program Fund, Child Abuse Vertical Prosecution Fund, D.A. Worker's Compensation Fraud Grant Fund, Hi-Tech Identity Theft Program Fund, and Welfare Fraud Investigation Fund. Combined with county funds and money from the Public Safety Sales Tax (known as Proposition 172 funds) the prosecutor's budget for 2007 totaled over $86 million. The total funding for the Santa Clara County Public Defender Office, Alternate Public Defender Office, and Legal Aid Society of Santa Clara County, which administers an assigned counsel panel to handle conflict of interest cases the Alternate Public Defender cannot represent, totaled only $42.7 million. *Id.* at 318 n.123.

94 *Id.* at 319.

finally restored to the office.[95] If a prosperous county like Santa Clara can only grudgingly muster the will to provide even basic defense services, the picture appears bleak for the future of indigent defense in counties across the state that are less financially well-endowed.

Excessive Caseloads

The disparity in funding might be less disturbing if Public Defender offices were given adequate staffing to handle the caseloads generated by the prosecution. However, as U.S. Attorney General Eric Holder candidly acknowledged in his keynote address at the 2010 National Symposium on Indigent Defense, Public Defender offices across the country are overloaded with too many cases. California is a prime example. When asked to rate the health of the institutional Public Defender in the county in which they practiced, 73% of private practitioners certified as criminal defense specialists indicated that excessive caseloads were a significant problem for the institutional Public Defender in their jurisdiction.[96] The majority of Public Defender offices in California carry caseloads that exceed the national standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals (NAC).[97] In Santa Clara County, for example, the Primary Public Defender office staff attorneys were attempting to handle more than 300 felonies annually, which is twice the national standard.

A recent examination of the Los Angeles County Public Defender (LACPD) shows the impact that the excessive caseload crisis has had on

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[95] Aram James, *Public Defender Must Staff Misdemeanor Courts*, SAN JOSE MERCURY NEWS, January 7, 2010; *Public Defender Access Expanded*, SAN JOSE MERCURY NEWS, June, 26, 2010.

[96] *Systemic Factors*, *supra* note 61, at 286.

[97] *Id.* at 286 citing NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, 276 (1973). Standard 13.12 specifies maximum caseload standards per attorney per year as follows: for felonies (150), misdemeanors (400), juvenile (200), mental health (200), and appeals (25). As the National Study Commission on Defense Services later observed, however, these standards should only be used as a starting point because only an actual workload study can determine the maximum number of cases an attorney can effectively handle given the unique practice environment in a particular jurisdiction, including logistical considerations and other operational characteristics that impact defense representation such as prosecutorial charging and plea bargaining practices and judicial sentencing practices.

misdemeanor defendants. Observing the arraignment of misdemeanor defendants, the author reported:

> The processing of L.A. citizens in misdemeanor arraignment court is nothing short of Orwellian. Detainees are brought into the courtroom in groups, shackled together in pairs at the wrist, and held in a cage-like enclosure [the 'box'] off to one side of the courtroom during the proceedings . . . and must communicate with the judge through slats.
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> LACPD misdemeanor attorneys dispose of 1,200 cases per attorney per year, about three times the recommended national maximum. In-court observation supports the conclusion that LACPD's misdemeanor caseload is grossly excessive. . . . Only after their arrival at misdemeanor arraignment court do detainees have the opportunity to speak with counsel for the first time. Police reports are transported along with detainees, so that Public Defenders must await the arrival of their prospective clients before viewing the evidence [against them]. . . . The majority of misdemeanor cases are disposed of by guilty pleas at arraignment. Since detainees generally meet their Public Defenders only a few moments before appearing before the judge, many guilty pleas take place without any investigation into the facts or the opportunity for a full-scale interview. Terms of the plea agreement generally include a fee representing recoupment of a portion of the cost of providing Public Defender services.
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> The author witnessed a group of African American women paraded into the box in groups of six, each shackled to a partner. In order to rise and approach the slats when her case was called, each woman was dependent upon the willingness, or unwillingness, of her partner to rise and take a few steps. Each woman signed a plea agreement, clumsily juggling papers between her free hand and her shackled hand. . . .
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> The confusion apparent in the L.A. misdemeanor arraignment court is illustrative of an assembly-line type of justice. On one occasion, a male defendant stood in the box, straining to hear the judge, who spoke in a soft voice. The defendant called out, "I can't hear you. I don't know what's going on!" A second defendant, a

female, was informed that her bail would be $10,000, whereupon she changed her plea to guilty so that she could be released. In the latter case, California's bail bond system[98] and the defendant's poverty determined the outcome.[99]

Recent news reports reveal that excessive caseloads in several counties have become markedly worse. In June of 2010, for example, it was reported in a "Gideon Alert," published by the National Legal Aid and Defender Association, that both the Sacramento County and San Joaquin County Public Defender offices were operating with caseloads that were two to four times the maximum allowed by national standards.[100]

Lack of Investigative Assistance

The maximum attorney caseload standards, moreover, are predicated upon having adequate investigative assistance. Yet over two-thirds (69%) of the presiding Superior Court judges surveyed in the study conducted for the Fair Commission stated that the lack of resources to investigate indigent cases thoroughly was a problem in their jurisdiction.[101] Two rural Public Defender offices had no investigator on staff at all and one of those offices reported having significant difficulty in obtaining court approval for funds to obtain investigative assistance.[102]

Public Defender offices employing staff investigators reported that their investigators were also laboring under excessive workloads.[103] The

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98 To obtain bail the defendant would have had to pay the bondsman 10% ($1,000) which was apparently more than the fine. L. BENNER, BAIL PROJECT MANUAL, 25, California Western School of Law (2010).

99 Nancy Albert Goldberg, *Los Angeles County Public Defender in Perspective*, 45 CAL. W. L. REV. 445, 466-67 (2009).

100 *See* David Carroll, GIDEON ALERT: CALIFORNIA COUNTIES EXHIBIT WIDE DISPARITY OF SERVICES, National Legal Aid & Defender Association, *available at* http://www.nlada.net/jseri/blog/gideon-alert-california-counties-exhibit-wide-disparity-services.

101 *Systemic Factors*, *supra* note 61, at 278.

102 *Id.* at 288 and Figure 6 at 282. Also revealing was the fact that 100% of the institutional Public Defender offices reported that they had difficulty interviewing prosecution witnesses. More than one quarter (27%) classified this problem as "serious." *Id.* at 289.

103 *Id.* at 288.

recommended standard is one investigator for every three attorneys.[104] In several counties, however, the ratio was discovered to be as high as eight attorneys to just one investigator. One of these offices handled ten death penalty cases during the year.

As the U.S. Supreme Court has explained, the "core" of the Sixth Amendment right to counsel "has historically been and remains today, the opportunity for a defendant to consult with an attorney, and to have him investigate the case and prepare a defense for trial."[105] In *Powell v. Alabama* the Court recognized that the period between arraignment and trial is "perhaps the most critical period" of the proceedings against an accused.[106] Because the majority of felony cases in California are disposed of by guilty pleas that are entered less than 45 days after the filing of charges,[107] the inability of defense counsel to conduct a prompt investigation into guilt or innocence thus amounts to nonrepresentation at this critical investigative stage. Not surprisingly, an analysis of over 2,500 California appellate court decisions involving claims of ineffective assistance of counsel revealed that the failure to conduct an adequate investigation has been a major cause of ineffective representation.[108] By continuing to tolerate excessive attorney and investigator workloads, we continue to run an unnecessary and unacceptable risk that an innocent accused will be wrongfully imprisoned or executed.

It should be noted that the difficulty created by the lack of adequate investigative resources is aggravated by several additional factors. First, virtually all of the Public Defender offices have no contact with an indigent defendant until they are appointed at the arraignment, several days after arrest.[109] This delay jeopardizes the ability to preserve evidence and makes it more difficult to locate witnesses who may be favorable to the defense.

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[104] NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS, STANDARD 4.1 (1976).

[105] Kansas v. Ventris, 129 S. Ct. 1841 (2009) at 1844-55.

[106] Powell v. Alabama, 287 U.S. 45, 57 (1932).

[107] *See* CALIFORNIA JUDICIAL COUNCIL, 2010 COURT STATISTICS REPORT (covering fiscal year 2008–09) Tables 8a and 10a disclosing that the disposition of 71% of all felony filings in California occurs in less than 90 days, while over half (56%) are disposed of in less than 45 days.

[108] *Systemic Factors*, *supra* note 61, at 277-78, Figure 3.

[109] *Id.* at 290.

Second, as a result of the loss of California's traditional preliminary hearing, occasioned by the passage of Proposition 115, defense counsel no longer have the right to confront prosecution witnesses at a preliminary hearing.[110] The statements of witnesses, untested by cross-examination, can simply be presented by a police officer, who may not even have been the interviewing officer.[111] As a result, the preliminary hearing has become an empty ritual that deprives defense counsel of the ability to make an informed assessment of the prosecutor's witnesses' credibility and, given the limited investigative resources otherwise available to the defense, effectively precludes an intelligent evaluation of the merits of the case against an accused.[112] To make matters worse, almost half of the Public Defender offices surveyed by the Fair Commission study reported that felony cases are routinely disposed of at a disposition conference held approximately a week after the arraignment, prior to the time set for preliminary examination.[113] Where the prosecutor presents a "take it or leave it" offer at this early stage, pressure is thus placed upon the defendant to accept the plea bargain before there has been time to conduct any meaningful investigation.

Perhaps only a defense attorney who has advised a defendant to plead guilty to reap the benefits of a "good deal" — and later discovers that the client was innocent — can truly appreciate the wisdom of the law's command that a defendant should be presumed innocent until proven guilty. When defense counsel, without adequate investigation, recommends that a client pleaded guilty, the weight of that advice can tip the scales and cause an innocent defendant to rationally forego a trial, the outcome of which he believes is a foregone conclusion. Numerous cases have documented that innocent defendants have pleaded guilty to avoid a more severe prison sentence even though the evidence against them was later discovered to be perjured testimony and planted evidence.[114] Recognizing the vital role defense

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[110] *Id.* at 335-339.

[111] *Id.*

[112] While the prosecutor retains the right to call key witnesses, both indigent defense providers and certified criminal defense specialists reported that key witnesses, such as victims and eyewitnesses, were rarely or only occasionally called at a preliminary hearing. *Id.* at 337.

[113] *Id.* at 294.

[114] *See* Ted Rohrlich, *Scandal Shows Why Innocent Plead Guilty*, Los Angeles Times, Dec. 31, 1999, reporting on the Rampart Division police scandal in Los Angeles

investigation serves in our adversarial criminal justice system, the ABA Standards on Criminal Justice state that counsel has a duty to investigate "the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case . . . regardless of the accused's admissions or statements to defense counsel."[115] An example demonstrating the necessity for fulfilling this duty is found in the reported case of an innocent juvenile who was charged with armed robbery of a cab driver and tried as a adult:

> Footprints in the snow led from the crime scene to the defendant's family home, where he was arrested and identified by the victim as the robber. Although the youthful defendant expressed his willingness to plead guilty, investigation disclosed that his older brother, who would have faced life imprisonment as a habitual offender, was the actual assailant. The family, believing the younger brother would only be sentenced as a juvenile, had kept silent about the misidentification in order to protect the older brother.[116]

Prosecutorial Misconduct

> "When a prosecutor plays by Machiavelli's rules and neither judge nor counsel for defense resists, our system and all hope for justice is destroyed."[117]

In a thoughtful and revealing book, Arthur Campbell, tells of convicting an innocent man as a young prosecutor. Defense counsel had failed to conduct an adequate investigation, the police had been inept, and Campbell candidly confessed that he perhaps had been overzealous in his prosecution of the hapless defendant because of "my warrior's will to win." The story corroborates Foltz's view that prosecutors, in the heat of an adversarial contest, can become caught up in, as Campbell puts it, "the fighter's lust

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where corrupt officers committed perjury and planted evidence causing numerous guilty pleas to be overturned. *See also* WHEN THE INNOCENT PLEAD GUILTY, The Innocence Project, *available at* http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php.

115 ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 126, Standard 4-1.3(3) (3d ed. 1992).

116 *Systemic Factors*, *supra* note 61, at 289 n.49.

117 Arthur W. Campbell, TRIAL & ERROR: THE EDUCATION OF A FREEDOM LAWYER, VOLUME TWO: FOR THE PROSECUTION, 123 (2010).

for victory" and lose sight of the "spirit of justice" which should properly guide their conduct.[118]

While intended to be a counterweight to correct this condition, under-resourced and overburdened Public Defenders have not proven to be very successful in preventing the type of prosecutorial abuses Foltz sought to eliminate. Among the litany of unfair prosecutorial practices described by Foltz, many would not be unfamiliar to readers of California appellate court opinions today. A recent study of California appellate cases from 1997 to 2009 documented over 700 instances in which the court found that a prosecutor had committed misconduct.[119] In addition to the misconduct found in *People v. Wells*[120] (interjecting inadmissible evidence for the purpose of prejudicing the defendant), the types of misconduct found by the Misconduct Report ranged from intimidating witnesses to presenting false evidence.[121]

Also documented were constitutional violations that would not yet have been established as such in Foltz's time, including discriminatory jury selection, violating the defendant's Fifth Amendment right to remain silent and, perhaps most important of all, the failure to disclose exculpatory evidence.[122] The Fair Commission likewise found substantial evidence that prosecutors were not complying with their statutory and constitutional obligations to provide essential information to the defense through discovery procedures. An overwhelming majority (over 90%) of both defenders and experienced private criminal defense attorneys reported that prosecutors failed to turn over evidence favorable to the defendant (*Brady*

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[118] *Id.* at 122. Campbell, after discovering evidence post-trial that exonerated the defendant, corrected the error. *Id.* at 105.

[119] K. RIDOLFI AND M. POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 [MISCONDUCT REPORT], Northern California Innocence Project, Santa Clara University School of Law at 3.

[120] Discussed *Id.* at 3.

[121] *See also* Genzler v. Longanbach, 410 F.3d 630 (2005) detailing allegations in a civil rights case against a San Diego prosecutor for suborning perjury in a murder case. The lawsuit later settled out of court. Confirmed by conversation with Patrick L. Hosey, attorney for Genzler.

[122] MISCONDUCT REPORT, *supra* note 119, at 25. Prosecutors have a constitutional duty to disclose evidence favorable to the accused, including evidence that could be used to impeach a prosecution witness. Brady v. Maryland, 373 U.S. 83 (1963), United States v. Bagley, 473 U.S. 667 (1985).

evidence) and delayed providing even routine information the defense is statutorily entitled to receive in discovery.[123]

The Misconduct Report concluded:

> [P]rosecutors continue to engage in misconduct, sometimes multiple times, almost always without consequence. And the courts' reluctance to report prosecutorial misconduct and the State Bar's failure to discipline it empowers prosecutors to continue to commit misconduct. While the majority of California prosecutors do their jobs with integrity, the findings of the Misconduct Study demonstrate that the scope and persistence of the problem is alarming. Reform is critical.[124]

Professional Independence

> *Gideon v. Wainwright* established the right of state criminal defendants to the "'guiding hand of counsel at every step in the proceedings against [them].'" . . . Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.[125]

Clara Foltz thought the Public Defender should be elected to ensure the professional independence necessary to carry out the defense function in an adversary system and guarantee equal stature with the District Attorney. However, with the exception of San Francisco, today all Public Defenders are chosen by county government, sometimes with judicial approval required, and serve at the will of either the county board of supervisors or the county's chief executive officer.[126]

Reginald Heber Smith had been wary of local government control over the provision of civil legal aid and indigent defense services. In *Justice and the Poor,* he wrote: "It is commonplace that many American municipalities possess improper and inefficient governments in which politics play

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123 *Systemic Factors, supra* note 61, at 279-80.

124 MISCONDUCT REPORT, *supra* note 117, at 5.

125 Polk County v. Dodson, 454 U.S. 312, 322 (1981).

126 *Systemic Factors, supra* note 61, at 299-300, CAL. GOVT. CODE § 27702 (West 2009).

an undue part. It is always a question whether it is safe to entrust an essential service such as legal aid to such a government."[127] Smith was here referring to the unfortunate experience he had witnessed with respect to publicly funded legal aid bureaus that were controlled by municipal governments. Initially there had been adequate funding and little political interference.[128] However, in 1917 several incidents made the dangers of politically controlled legal services manifest. After an election in Dallas, Texas, the new mayor dismissed the department head responsible for overseeing the Legal Aid Bureau and attempted to appoint his personal friend to the bureau. When this prompted a "storm of protest" the mayor abolished the Legal Aid Bureau.[129] Similarly, in Portland, Oregon, that same year, the attorney who headed the combined legal aid and defender office (established in 1915) had not supported the newly elected mayor. Because the attorney held a permanent civil service appointment and could not be fired, the new mayor simply had the city council abolish the legal aid and defender office.[130] Smith therefore concluded in 1919 that although the "ultimate goal" was for legal services for the poor to "become part of the state's administration of justice," whether they should be publicly or privately funded in the short term was a matter that depended upon local conditions.[131]

Smith's insight that funding and control at the local level makes the delivery of legal services for the poor vulnerable to political interference unfortunately still resonates today almost a century later.[132] California has

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127 SMITH, *supra* note 24, at 184.

128 *Id.* at 185.

129 *Id.* at 185-86.

130 *Id.* at 186.

131 *Id.*

132 Although direct interference in the operation of a Public Defender office by county officials would seem unthinkable today, it does occur. Recently, Chief Public Defender Edwin Burnette of Cook County, Illinois, successfully sued the president of the Cook County Board of Commissioners to prevent such interference with management of the Public Defender Office in Chicago. The county board president had unilaterally selected thirty-four assistant public defenders for termination (called layoffs) and had ordered other staff to take unpaid furlough days. In a unanimous decision, the Illinois Appellate Court ruled that the county board president "lacked the authority to select whom to hire, fire or retain among the public defender's staff." Burnette v. Stroger, No. 1-08-2908, slip op. at 32 (Ill. App. Ct. Mar. 30, 2009). Unfortunately the

had a sad history of harassment and termination of chief Public Defenders who have had the courage to fight against excessive caseloads. Chief Public Defender Sheldon Portman of the Santa Clara County Public Defender Office, for example, was first reprimanded, then denied a pay raise and finally fired after persistently challenging excessive caseloads. His offense was stating at a public budget hearing that his staff attorneys would be violating their ethical duty to provide competent representation and could face professional disciplinary action if the board did not provide funding for additional lawyers. Although Portman was later vindicated by an ABA Ethics Opinion regarding the duties of defense counsel when faced with an excessive caseload,[133] he lost the legal battle over his vindictive firing.[134]

Unfortunately the Portman example is not an isolated incident. A chief Public Defender, who was a member of the Fair Commission, related that at the time they were offered the position, it was made very clear to them that they would be expected to do the job with the limited resources given to them and if they could not, then the board would find somebody else who would.[135] In research conducted for the Fair Commission, three fourths (73.1%) of the responding institutional Public Defenders reported that county board pressure to keep costs down was a significant problem

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courageous Chief Defender paid the ultimate price for this victory. While he was not an "at will" employee, having secured the protection of a contract for a term of years, he was nevertheless at the end of his contract, which was not renewed. *See* Hal Dardick, *Public Defender Wins Last Case Over Stroger; County Board Chief has Limited Control of Appointee's Office*, CHICAGO TRIBUNE, Apr. 1, 2009, at C6. Clara Foltz, who believed in the democratic process, would perhaps not have been surprised to learn that county board President Stroger subsequently lost his bid for reelection. Patrick Boylan, *Stroger era ends in Cook County*, NWI.COM, Dec 1, 2010, *available at* http://www.nwitimes.com/news/local/illinois/article_def7c4be-8d14-502b-87e3-ee4366014780.html.

133 ABA FORMAL OPINION 06-441: ETHICAL OBLIGATIONS OF LAWYERS WHO REPRESENT INDIGENT CRIMINAL DEFENDANTS WHEN EXCESSIVE CASELOADS INTERFERE WITH COMPETENT AND DILIGENT REPRESENTATION, May 13, 2006.

134 *See* Portman v. County of Santa Clara, 995 F.2d 898, 901 (9th Cir. 1993) holding that Portman had no standing to challenge the constitutionality of the "at will" statute on Sixth Amendment grounds, and had no due process rights concerning his termination because as an "at will" employee he had no property interest in his job. *See also* Wilson v. Superior Court, 240 Cal. Rptr. 131 (Cal. Ct. App. 1987) and Gail Diane Cox; *Public Defenders Find Independence Can Be Precarious*, L.A. DAILY J., Feb. 21, 1986 (both describing other similar incidents).

135 *Systemic Factors, supra* note 61, at 300 n.82.

in their jurisdiction.[136] The American Bar Association has recommended that to safeguard professional independence, the oversight of a Public Defender system should be in the hands of a nonpartisan board of trustees.[137] However, none of the institutional Public Defenders in California appear to have the protection of such a board.[138]

WHAT WOULD CLARA FOLTZ THINK OF TODAY'S PUBLIC DEFENDER?

If Clara Foltz could return today to see how her concept for a Public Defender has evolved, she would no doubt be gratified to see how popular and widespread it has become. The majority of California's counties have adopted her basic idea, and for good reason. The institutional Public Defender office is, in theory, the most effective delivery system for providing quality representation in a cost-effective manner. Its capacity to develop and maintain skilled expertise, provide comprehensive training and supervision, and furnish the support services and supportive environment necessary for effective representation is without equal.

At the same time, however, she would undoubtedly be disappointed to find that California's Public Defenders have been denied the independence she sought to ensure. Imagine a district attorney or a judiciary that served at the will of the county board of supervisors. Why should an equally important component of the criminal justice system be treated differently? The lack of independence has been due in part to the failure to make the position of chief Public Defender an elected office as Foltz envisioned, or in the alternative, to insulate it from political pressure by having a governing board of trustees, as the ABA has recommended. The lack of independence has also been a result of the refusal to make the Public Defender available to all

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136 *Id.* at 299-300.

137 ABA Standing Comm'n On Legal Aid And Indigent Defendants, Ten Principles Of a Public Defense Delivery System (2002) *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf. These standards, approved by the ABA House of Delegates in February 2002, were created to assist governmental officials and "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." *Id.*

138 *Systemic Factors*, *supra* note 61, at 299.

criminal defendants, as Foltz planned. These omissions have made it difficult for the Public Defender to marshal political support for the institution.

The failure to have a broad base of political support for the Public Defender has of course, as Foltz foresaw, made it more difficult to secure adequate resources. Yet the Public Defender today represents more than 85% of the defendants accused of serious crimes. While the average citizen probably never thinks about whether he or she could afford competent criminal defense representation, a staff attorney from the Public Defender's office is in fact the attorney upon whom innocent middle class citizens must rely for their defense if wrongfully accused of a crime.

Funding decisions for the indigent defense system, moreover, have been left in the hands of local officials who, chafing under an unfunded mandated imposed by the federal Constitution, understandably desire to spend only the bare minimum necessary to keep the system functioning. Most defendants plead guilty because of the pressures created by a system of plea bargaining in which no penalty is imposed upon a prosecutor who overcharges to increase the incentive to plead. Thus, only enough funding to process the "presumed guilty" is deemed necessary.

While Foltz would have been appalled at our current system of plea bargaining, she would have been equally disturbed at the tremendous imbalance between the resources allocated to the prosecution and the system for providing defense services. The fact that on average a Public Defender office receives only about half the resources granted to the District Attorney makes it exceedingly difficult, even given heroic efforts, for the Public Defender to serve as the counterweight that she envisioned would balance the scales of justice. Equally troubling is the glaring disparity *between* counties in their ability and in some cases their willingness to adequately fund indigent defense services.

Nevertheless, the Public Defender has been able to achieve one goal of both Clara Foltz and Reginald Heber Smith: the elimination of the incompetent assigned attorney and the unethical and greedy "shyster" lawyer who preyed upon criminal defendants with limited resources and corrupted the unregulated assigned counsel system. Institutional Public Defender offices have been successful in building a cadre of competent, professional, well-trained career defense attorneys in many jurisdictions across the state. But even here it would appear that the Public Defender has become

a victim of its own success. Making the Public Defender a career office at relative parity with the district attorney in terms of salary, health care and retirement benefits, has caused it to become increasingly expensive.

Efforts by county administrators to curb expenditures on indigent defense have thus taken two approaches. The first option has been to make budget cuts which reduce staff levels and increase the caseloads handled by the Public Defender office. Because Chief Defenders are "at will" employees they risk their jobs (and their healthcare and retirement benefits) if they resist. When courageous chief Public Defenders stand up to this pressure they can either be replaced or the county can move to the second option.

The second approach has been to contract indigent defense representation out to the lowest bidder. While properly regulated contract defenders can provide competent and cost effective services, this system is also open to abuses. The primary contractor winning the bid, can in turn subcontract indigent cases out in lots to individual private attorneys. In this way the entrepreneurial primary contractor can eliminate the overhead expenses necessarily incurred in having a career office. No healthcare or retirement benefits need be provided to subcontracting attorneys who may be just starting out and need the work to help pay their office overhead while they develop their practices. Because such contracts are unregulated, there are no minimum requirements regarding the training or experience levels of such subcontractors. Even where the primary contractor is qualified, at least in terms of experience, that is no guarantee a qualified attorney will actually perform the representation if there is no requirement that the county monitor who is providing the services.

Likewise, in the absence of any regulation, there is no requirement that the attorney providing the representation be currently trained, or supervised or provided with adequate investigative services. Where flat fee contracts are employed, there are built-in incentives to pocket the money that should be used to conduct an adequate investigation and obtain competent experts to assess forensic evidence that has increasingly been shown to be unreliable.[139] Our criminal justice system should not be reduced to

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[139] *See* COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE COMMUNITY, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES OF SCIENCE, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009). *See also* Harry T. Edwards, *The National Academy of Sciences Report on Forensic*

the status of a bargain basement where unregulated contracting of constitutionally mandated legal services makes possible the return of the inept and the shyster lawyer whom Clara Foltz sought to eliminate by creating a public office that would attract career professionals.

As a result of making funding decisions based upon the presumption of guilt, many Public Defender offices operate under crushing caseloads while an increasing number of counties are cutting costs by providing indigent defense services through unregulated low bid contracts. The dangers existing under both approaches are clear. So are the consequences. During a 15-year period examined by a recent study, courts released more than 200 inmates from California prisons because they had been wrongfully convicted.[140] While this is an astonishing figure, it does not mean that the concept of the Public Defender has been a failure. Nor does it mean that contract defenders cannot provide competent representation. It does, however, mean that reforms are necessary to fulfill the potential of either system to provide the effective assistance of counsel guaranteed by the Constitution.

SOLUTIONS

> "I have been a public defender for over thirty years in three different counties. There is a great disparity in the quality of defender services throughout the state."[141]

What can be done? The fact that the members of the Fair Commission in 2008 were unable to agree on any recommendation to solve California's admitted funding crisis in indigent defense services speaks volumes about

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Sciences: What it Means for the Bench and Bar, paper presented at the Conference on The Role of the Court in an Age of Developing Science & Technology, Superior Court of the District of Columbia, May 6, 2010, *available at* http://www.cadc.uscourts.gov/internet/home.nsf/AttachmentsByTitle/NAS+Report+on+Forensic+Science/$FILE/Edwards,+The+NAS+Report+on+Forensic+Science.pdf.

[140] Nina Martin, *Innocence Lost*, SAN FRANCISCO MAGAZINE, November 2004, *available at* http://www.deathpenalty.org/downloads/SFMag.pdf.

[141] Comment made by a chief Public Defender from an urban Public Defender office. *Systemic Factors*, *supra* note 61, at 351.

how politically difficult the problem is to solve.[142] It was estimated in 2007 that to bring indigent defense services up to 85% of parity with the prosecution, funding would have to be increased by approximately $300 million.[143] The gap between prosecution and defense was widening then and has likely increased substantially since that estimate.[144]

A significant portion of the funds needed to improve California's indigent defense system could be found by simply rethinking how we spend our criminal justice dollars and redirecting the cost savings from some of California's current poor choices. There are a number of areas where cost savings could be achieved. These include: (1) abolishing the death penalty, (2) abolishing mandatory minimum sentences, and (3) decriminalizing some non-violent misdemeanor offenses by making them infractions. In addition, fines currently given exclusively to law enforcement should be shared so that an appropriate portion is given to the defense component of the criminal justice system. Finally, the bail system could be reformed so that defendants would pay 10% of the amount of bail to the state rather than a private bail bondsman.[145]

While some of these solutions can only be addressed by state legislation, local prosecutors can also exercise their discretion to reduce the number of cases in which the death penalty is sought, and to make appropriate charging decisions. It is clear, for example, that more than a third of the funding needed to improve indigent defense systems in California could be found by simply eliminating the death penalty. The Fair Commission estimated that it costs $137.7 million annually to maintain the present death penalty system in California. By contrast, only $11.5 million would be required to handle these same cases if a sentence of life without parole were imposed. Thus, $126.2 million in current expenditures could be employed to improve indigent defense in California.[146]

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[142] The Fair Commission essentially punted on this issue by recommending that the California State Bar reconsider the issue by convening yet another commission. CCFAJ FINAL REPORT, *supra* note 62, at 99.

[143] *Systemic Factors*, *supra* note 61, at 313.

[144] The gap widened from fiscal year 2003–2004 to fiscal year 2007–2007 by 20 per cent. *Id.* at 317.

[145] Illinois, for example, operates such a system. *See* 38 ILL. COMP. STAT. 110-7 (2009).

[146] CCFAJ FINAL REPORT, *supra* note 62, at 156.

The Fair Commission also considered a proposal to establish at the state level an Indigent Defense Commission similar to those that exist in Texas, Virginia, Massachusetts and Indiana.[147] Such commissions are empowered to set minimum performance and caseload standards and provide reimbursement to counties for meeting those standards. This proposal has been objected to, however, by those who believe that California counties currently funding above such "minimum" standards would cut their funding in a "race to the bottom."[148] In any event, given the state's current economic condition (the current 2010 budget deficit is approximately $20 billion and is projected to rise to $25 billion by 2012[149]) it seems unrealistic to expect that funding for indigent defense services can be shifted to the state. A recent study by the federal Bureau of Justice Statistics of state funded and organized public defender systems, revealed that state funding was no guarantee that adequate resources would be provided. In 15 of the 22 statewide systems, felony and misdemeanor caseloads still exceeded national standards.[150]

For over thirty years there has also been a call for federal assistance and the creation of a national Center for Defense Services. In 1977 the ABA Standing Committee on Legal Aid and Indigent Defendants, together with the National Legal Aid & Defender Association (NLADA) and the National Clients Council, prepared a "Discussion Proposal" for such a Center.[151] The basic concept underlying this proposal was an

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147 *Id.* at 99.

148 *Id.*

149 Anthony York, *Brown calls Sacramento budget meeting for Wednesday*, Los Angeles Times, December 2, 2010.

150 L. Langton, D. J. Farole, Jr., Bureau of Justice Statistics, Special Report: Census of Public Defender Offices, 2007: State Public Defender Programs, 2007, September, 2010, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf.

151 The Center for Defense Services: A Draft Discussion Proposal for the Establishment of a Nonprofit Corporation to Strengthen Indigent Defense Services, ABA Standing Committee on Legal Aid and Indigent Defendants, October, 1977. Copy #37 of the Discussion Draft is on file with the author, who as National Director of Defender Services of NLADA participated in drafting the proposal. In 1979, Senator Edward Kennedy became involved in sponsoring a bill to create a center for defense services. *Defense Services Bill Still in the Works*, 65 ABA Journal 1629, November 1979.

independent federally-funded granting entity constructed upon the following four principles:

> (1) federal funding for the improvement of defense services must be structured so as to provide continuity and stability over a significant number of years,
>
> (2) financial support should be instituted through a grant in aid program;
>
> (3) the funding program should contain incentives for local communities to maintain and augment their current efforts; and
>
> (4) the entity administering the program must be independent of any of the three branches of the federal government.[152]

Based upon these principles it would be possible for federal assistance grants to fund a Center for Indigent Defense Improvement in each state requesting such assistance. Recognizing that a one-size-fits-all approach to standards is neither accurate nor politically feasible in California, the Center's first task would be to conduct an audit of the indigent defense delivery systems of each county. The audit would determine the need for additional attorneys, investigators, and other support personnel by conducting a Workload Assessment. Using methodology similar to that designed by the National Center for State Courts to determine when additional judges are needed, time studies can be employed to create objective data upon which to make evidence-based decisions. Such time studies can translate raw caseload filings into actual workload by measuring real events that accurately reflect the unique practice environment in a particular jurisdiction, including logistical considerations and other operational characteristics that impact defense representation, such as prosecutorial charging policies and judicial sentencing practices. By learning how much time it actually takes to handle different types of cases given, on average, their various levels of complexity, it can be mathematically determined how many attorneys will be needed to handle a given mix of cases.

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[152] *Id.* at 53-54.

After determining appropriate staffing levels, the center would then certify that a county is in compliance when those staffing levels are met.[153] Certification would also be conditioned upon the professional independence of the Public Defender being assured either by making the office a nonpartisan elected position for a term of years, or by creating a nonpartisan board of trustees, independent from any of the branches of local government, to oversee the office. While provision would be made to retain the existing chief Public Defender, the board would thereafter be empowered to select the chief Public Defender and only the board would have the power to terminate the chief Public Defender for good cause. The Board would also be authorized to award contracts for indigent defense services that would be governed by the same standards created for institutional Public Defender offices.

Upon satisfaction of these requirements, the county would then be reimbursed for the amount needed to bring the county's indigent defense system into compliance with its own locally established standards. This amount would become an annual subsidy payment to the county. The center would also assist in providing training for new attorneys, investigators, and support personnel, and in rural areas would create regional backup service centers that would provide qualified investigators and sentencing mitigation specialists in death penalty and other appropriate cases.

A condition of continued reimbursement would be a requirement that the Center receive from each county basic statistical data sufficient to permit it to monitor the health of the indigent defense delivery system. In the event excessive caseloads reappeared and were not corrected within a reasonable period, the Center would have the power to revoke the county's certification and stop the annual subsidy payment. The negative publicity from de-certification, the legal impact this would have on ineffective assistance of counsel claims arising from that county (as well as providing a basis for a lawsuit to order compliance), and of course the financial impact of withdrawal of federal reimbursement, would provide strong incentives for voluntary compliance with the maximum workload levels established by the Center. Because this proposed hybrid system would provide each county its own unique workload standard, there would be no race to the bottom.

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153 The author is indebted to Marshall J. Hartman, former National Director of Defender Services for NLADA who originally proposed the idea that defender offices should be accredited the same as police departments and departments of correction.

The argument for federal assistance is compelling especially because it is the federal Constitution that requires the provision of effective assistance of counsel. However, waiting for a federal bailout may also not be feasible in the short term as action is needed now to correct currently existing conditions. In *Ligda v. Superior Court*,[154] the California Court of Appeal stated: "When a public defender reels under a staggering workload, he . . . should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him."[155] Litigation may thus be the most immediate way to obtain a remedy. As New York's high court recently held in *Hurrell-Harring v. New York*, a civil action to obtain injunctive relief will lie where "systemic" deficiencies result in the denial of "core" assistance by counsel, despite the nominal appointment of counsel.[156] The complaint in *Hurrell-Harring* alleged that due to inadequate funding and staffing the indigent defense system was "structurally incapable" of providing legal representation at critical stages prior to trial as required by the Constitution.[157]

There are also a number of other systemic conditions that could be reformed such as bringing back the traditional preliminary hearing and improving the discovery rules to ensure prompt and meaningful discovery by the defense. But until we reduce the glaring disparity in resources both between counties and between the prosecution and defense functions, we destroy the promise of the Public Defender that Clara Foltz envisioned to ensure administration of criminal justice honestly and equally for all.

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154 Ligda v. Superior Court, 5 Cal.App.3d 811 (1970). The Court stated: "Such relief, of necessity, involves the constitutional injunction to afford a speedy trial to a defendant. Boards of supervisors face the choice of either funding the costs of assignment of private counsel and often, increasing the costs of feeding, housing and controlling a prisoner during postponement of trials; or of making provision of funds, facilities and personnel for a public defender's office adequate for the demands placed upon it." *Id.* at 828. The court was apparently not aware that county administrators would come up with a third option: low bid contracts.

155 *Id.* at 827-28.

156 15 N. Y. 3d, 8, at 22-24, 930 N.E. 2d 217 at 224-226 (2010).

157 Hurrell-Harring v. New York, Brief for Plaintiff Appellants, 8, 2009 WL 6409871 (N.Y.). A multitude of systemic deficiencies were asserted including the fact that in some circumstances misdemeanor defendants were not provided counsel at arraignment. The complaint alleged as an independent claim that attorneys did not have any meaningful contact with their clients nor were investigative services essential to preparing a defense provided.

EPILOGUE

On October 20, 2010, the County of Fresno took the first step toward deinstitutionalizing its primary Public Defender office by issuing the following Request for Proposal:

> The County of Fresno is soliciting proposals to provide appropriate and competent primary indigent defense services and associated criminal investigation services to financially eligible persons accused of crime in Fresno County, persons subject to the laws of the juvenile court, and to all those entitled to services of court-appointed counsel in other proceedings (services which have been historically provided by the Public Defender's Office in the Fresno County Superior Court).[158]

In fiscal year 2006–2007, the institutional Public Defender had 76 staff attorneys and 19 investigators and was handling both felony and misdemeanor caseloads twice the maximum allowed by national standards. For fiscal year 2010–2011, the office was cut to only 48 staff attorneys and 9 investigators. As a result of such severe budget cuts, the chief Public Defender felt he was ethically obligated to declare the office unavailable to accept new cases and began refusing some new cases, which had to be assigned to private counsel.[159] The County's response was to put all the primary indigent defense services up for sale to the lowest bidder.

Research conducted for the Fair Commission found that the gap in funding between indigent defense and prosecution was significantly larger in counties employing contract defenders and those having an institutional Public Defender office.[160] There was also a statistically significant relationship between the type of provider and the rate at which felony cases were taken to trial: institutional Public Defenders were twice as likely to take a case to jury trial as a contract defender.[161] If Clara Foltz were here today she would no doubt sound the alarm as she watched the dismantling of her legacy. ★

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[158] COUNTY OF FRESNO, REQUEST FOR PROPOSAL NUMBER 962-4878: PRIMARY INDIGENT DEFENSE, October 20, 2010.

[159] Brad Brannon, *Fresno Co. public defender cuts may backfire*, FRESNO BEE, September 25, 2010.

[160] *Systemic Factors*, *supra* note 61, at 315.

[161] *Id.* at 316.