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**SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**



FROM: Executive Office

SUBMITTAL DATE:
June 17, 2009

SUBJECT: Feasibility of Forming an Alternate Public Defender Office

RECOMMENDED MOTION: That the Board of Supervisors receive and file the attached report.

BACKGROUND: During 2009 Budget Hearings, the Executive Office was asked to evaluate the feasibility and potential costs of replacing the conflict defense panels with an Alternate Public Defender's Office (APD). It is important to remember that even with an APD, there will be multiple-defendant cases that still require the services of appointed counsel. When criminal cases involve three or more defendants, the PD and APD, because of potential conflicts of interest, can take only the first two.

The attached report concludes that an APD is not likely to be cost-effective at this time. However, by evaluating a precise proposal from the Public Defender at the next time bid proposals are accepted, the issue can be fully vetted. It is estimated that the time required to establish an APD is at least 90 days, meaning that the RFP process should begin soon after the beginning of 2010 if an APD is to be feasible for the 2010-11 fiscal year.

Kathryn Field, Deputy County Executive Officer

FINANCIAL DATA	Current F.Y. Total Cost:	\$0	In New Year Budget:	no
	Current F.Y. Net County Cost:	\$0	Budget Adjustment:	no
	Annual Net County Cost:	\$0	For Fiscal Year:	n/a

SOURCE OF FUNDS: n/a	Positions To Be Deleted Per A-30	<input type="checkbox"/>
	Requires 4/5 Vote	<input type="checkbox"/>

C.E.O. RECOMMENDATION:

APPROVE

BY: 
Gary M. Christmas

County Executive Office Signature

Dep't Recomm.: Consent Policy

Per Exec. Ofc.: Consent Policy

**Alternate Public Defender's
Office:
A Feasibility Analysis**



*County of Riverside
Executive Office*

June, 2009

Alternate Public Defender's Office - Feasibility Analysis

Background

During 2009 Budget Hearings, the Executive Office was asked to evaluate the feasibility and potential costs of replacing the conflict defense panels with an Alternate Public Defender's Office. While several larger counties have Alternate Public Defender Offices (APDs), past evaluations have found that it would not be cost-effective in Riverside. This analysis is typically made each time the indigent defense contracts are put out to bid. The last bid process was conducted in 2006; the next one is scheduled for early 2010. At that time, if the Law Offices of the Public Defender (LOPD) submit a bid, it can be carefully evaluated in comparison with those from outside providers.

At present, the County has contracts with three providers for indigent defense services: Conflict Defense Lawyers (CDL), handling the adult criminal cases in the Riverside and Southwest courts; Juvenile Defense Panel (JDP), handling the juvenile cases in the Riverside and Southwest courts; and the Desert Conflicts Panel (DCP), handling adult and juvenile cases, as well as some probate, in the Indio and Palm Springs courts.

Below is background information on the cost of FY 2008-09 defense services (legal and investigative):

	FY 2008/09 Adjusted Budget
Public Defender	\$38,670,469
Conflict Panels: Legal Services	11,416,644
Conflict Panels: Investigative Services	745,425
Court-appointed counsel & investigators	407,570
Confidential Court Orders (death penalty investigations)	444,948
Court-appointed death penalty counsel	750,000
TOTAL:	\$52,435,056

The most recent Superior Court records (for 2007-08) indicate about 78% of Riverside's criminal defendants are represented at public expense. The total amount allocated to indigent defense this year is 49% of the \$107,133,605 budget of the District Attorney's Office.

Costs per Case

A very simple comparison between contract costs and the LOPD can be made by dividing the total cost by the number of cases handled. This, however, does not take into account differences in the types of cases handled; degree of investigation; pay differences among felony, juvenile and misdemeanor attorneys; number of cases taken to trial; and differences in the way cases are counted. In general, adults face harsher penalties than juveniles convicted of the same crime, and their cases normally involve more time and expense to defend. Juvenile trials don't involve juries and are short, meaning costs are much lower than adult trials.

As a result, an "apples-to-apples" comparison is difficult to make. A basic comparison follows, for the fiscal year most recently completed:

FY 2007-08	Criminal Cases Opened¹	Total cost	Average Cost per Case	% Adult felonies
Law Offices of the Public Defender ²	40,416	\$35,972,350	\$890	39%
Conflict Defense Lawyers	5,169	\$7,822,504	\$1,513	58%
Desert Conflict Panel	2,393	\$1,820,924	\$761	51%
Juvenile Defense Panel	1,410	\$629,440	\$446	0%
Total Contracts	8,972	\$10,272,868	\$1,145	47%
Court-appointed Counsel for Misdemeanor Appeals ³	58	\$109,829	\$1,894	0%
Court-appointed Investigators for Adult Felonies (self-represented)	48	\$132,458	\$2,760	100%

The current year cost of the LOPD is likely to be about \$1 million higher, with a similar number of cases, making the per-case cost higher. Some conflict panel costs will be higher in 2008-09 also.

¹ Felonies and misdemeanors only; does not include violations of probation or other miscellaneous cases. Reflects some differences in the way that LOPD and conflict panels count cases, especially regarding misdemeanors.

² Opened cases does not include those for which the LOPD declared a conflict.

³ Technically, these appeals are civil cases, but all are in response to criminal verdicts.

As shown in the chart above, the caseloads of two of the conflict panels include significantly more adult felonies than the LOPD. Even with considerably more adult felonies (51% vs. LOPD's 39%), the Desert Conflict Panel achieved a per-case cost of \$129 less.

Because of the conflict panels, the Court rarely appoints outside counsel for adult felony defendants. The Court, does, however, appoint investigators for defendants representing themselves and for those who became indigent after retaining counsel. The average investigative cost in these cases was much higher (154-210%) than the combined attorney and investigative costs for those represented by the conflicts panels or LOPD. The cost of court-appointed counsel for misdemeanor appeals was \$809-1,004 more per case than the conflict panels or LOPD. Although the Court-approved rate for outside counsel is \$65 per hour, and for investigation is \$32 per hour, judges do not always adhere to these rates.

Organizational Structure

In deciding how to structure an APD, there are many examples to consider. Other California counties with Alternate Public Defender's Offices include:

County	PD Budget, FY 2008/09	Alternate PD Budget	APD as a percent of PD Budget
Orange ⁴	\$66,056,416	n/a	
Sacramento	25,975,206	10,160,206	39%
Santa Clara	37,636,571	6,828,476	18%
San Diego	56,857,144	16,979,135	30%
Los Angeles	181,060,000	53,918,000	30%
AVERAGE			29%
		Estimated APD Budget at average %	
Riverside	\$37,545,604	\$10,888,225	

It is difficult to effectively compare the costs of these offices, as each county has a different approach to providing the services. Los Angeles, for example, has a Public Defender, and an Alternate Defender, which are separate county departments. In Orange, the Alternate Public Defender and Associate Public defender are part of one department headed by the Public Defender. In Sacramento, the alternate defense office is in the Countywide Services Agency and the attorneys are not county employees although the department head is. If the Santa Clara model is truly the most cost-effective, as indicated in the chart above, it may be the one on which

⁴ The Public Defender, Alternate Public Defender and Associate Defender in Orange County have one combined budget.

to base a model for Riverside, and should be examined further. For example, if Riverside could fund an APD for 18% of the LOPD, the annual cost would be \$6.75 million, a savings of \$3.35 million per year over contracting out. If the cost were 29% of the LOPD, it would be nearly \$1 million more than maintaining the current contracts.

Establishing an APD

Administrators in the LOPD made detailed calculations of the costs of implementing an APD here. Summarized below are their totals:

	FY 10-11	FY 11-12
# of Staff Needed	74	76
Startup Costs	\$2,379,237	\$0
Operating Costs	\$10,138,221	\$11,856,057
Annual Cost	\$12,517,548	\$11,856,057

The above analysis assumed the following:

- o The APD would take approximately 2,400 felony and 900 misdemeanor cases per year, as well as miscellaneous cases not currently counted by the LOPD.
- o The LOPD would be fully staffed.
- o Office space would be leased in Riverside and Southwest; the APD in Indio would occupy County-owned space.
- o Office space needs would be consistent with county standards.
- o Startup costs would include computers, copiers, furniture, tenant improvements, investigative tools, office supplies, etc.
- o First-year staffing would be phased-in over many months, with about one-quarter of the staff being hired partway through the year.
- o The number of courtrooms available for criminal cases will not change.

Based on these assumptions, the per-case costs for FY 2010-11 would be these:

FY 2010-11	Estimated Opened Cases	# of Employees	Estimated Operating Costs ⁵	Cost per Case
LOPD (fully staffed to preclude declaring unavailable)	40,000	333	\$44,737,981	\$1,118
Alternate PD	3,308	74	\$11,000,119	\$3,325
Savings from 8 DP Cases not assigned to outside counsel			-\$1,430,400	
APD, net savings	3,308		\$9,569,719	\$2,893
Conflict Panels (3 rd level conflicts)	1,000		\$1,200,000	\$1,200
Other cases	4,700		undetermined	undetermined

⁵ Assumes 10% cuts in compensation for all staff.

The above analysis assumed that about 1,000 cases (30% of 3,300) would continue to be handled by conflict panels. These numbers need further refinement, as the panels take about 9,000 cases now, and the LOPD estimated an APD would take only about 3,300. This leaves a gap of 4,700 cases. It is unclear whether these are lesser matters that the APD could absorb into its caseload, or more significant matters for which additional counsel would be required. The definition of "case" contained in the conflict panel contracts is very specific, but the LOPD counts cases differently. However, the above analysis seems to indicate that the per-case cost of an APD would be significantly higher than either the LOPD or the conflict panels.

In addition to operating costs, there would be startup costs to consider. To recruit staff, acquire equipment and locate office space for APDs for the three courthouses would require a minimum of 90 days.

Death Penalty Cases

By Court and County policy, legal representation for a death penalty (DP) defendant costs \$105,000 to \$195,000 if two outside attorneys are appointed at public expense (one current case is being compensated at \$300,000). About one-third of the current defendants are represented this way, while another third are provided with a public defender and one-fourth are included in the conflict panels' caseload. A very few retain private counsel.

At present, the costs to represent the first three death penalty defendants in the Western County and the first three in the Eastern County each fiscal year are covered by existing contracts with conflict panels. There is no per-case cost for these detailed in those contracts, but the assumption is made here that it averages \$148,800 for attorneys and \$30,000 for investigation and experts. Between the panels and the LOPD, death penalty cases were handled within budget until 2007, when the prosecution began seeking the death penalty more frequently. In FY 2007-08, an unbudgeted \$202,176 was paid to death-penalty attorneys; in FY 2008-09, the amount will be at least \$678,368.

The LOPD assumes there would be a 17-person Death Penalty Unit in a newly-created APD. The estimated direct cost of this is \$1,946,885 for staff plus \$400,000 (an average of \$50,000 per case, or \$25,000 per case per year) for outside investigative expenses and experts, in addition to administrative overhead and non-personnel costs (estimated at 30%). If we assume that salary and benefit costs for APD employees will be reduced to 90% of the current levels, the personnel cost becomes \$1,752,197 and the total cost is \$2,677,855. The PD projects that this DP Unit would take 8 new defendants per year, with a maximum of 16 open DP cases at any one time. Comparing this to the current approach reveals the following:

	Maximum # of new DP Cases per year	Concurrent DP Cases Open <i>(assumes each DP case is open for 2 years)</i>	Annual Cost for DP Counsel & Investigation	Avg Cost per Case <i>(annual cost / new cases)</i>	Average Cost per Case per Year
APD as proposed	8	16	\$2,930,951	\$366,369	\$183,184
APD w/ 10% salary cuts	8	16	\$2,677,855	\$334,732	\$167,366
Conflict Panels	6	12	\$1,072,800	\$178,800	\$89,400
Appointed Counsel	unlimited	unlimited	\$190,125 per case	\$190,125	\$95,063

The higher average cost for an APD to handle death penalty cases can be attributed primarily to administrative overhead and investigative costs. With an APD taking these cases, the costs are constant regardless of the number of open cases. By appointing outside counsel as needed for DP defendants there is no "idle capacity" covered at public expense. Investigative and expert costs for DP cases handled by court-appointed counsel appear to be averaging about 20% of the attorney costs, although these are hard to determine because access to those records is restricted by the Court.

Conclusion

Criminal defense of indigents is a highly reactive function, subject to decisions made and implemented by law enforcement, prosecutors, and the courts. Activity in these areas drives the need for public defenders and makes it difficult to predict and contain costs of indigent defense.

There are several advantages to splitting defense work between a public defender agency and a panel of contract attorneys:

- The perceived competition between the both factions may cause each to operate more efficiently.
- When staffing levels drop in the public defender's office, the panel can quickly take on extra cases.
- Panels can be responsive to changes in filing policies or available bench officers.
- A cohesive public defender's office can ensure consistency countywide and devote attention to larger issues affecting defendant rights.

The above analyses seem to indicate that conflict panels are more cost-effective than an APD would be, especially when defending those charged with an offense

subject to the death penalty. However, the assumptions used to make the analysis drive that conclusion, and all of these assumptions should be re-examined carefully before a final decision is made. At this time, even assumptions about future public defender compensation are difficult to make.

A bid process would require that all parties base estimates on the same data, and is needed to ensure an equitable comparison. In addition, a bid process can determine whether certain types of cases (felonies, juvenile, death penalty, etc.) are more economical when handled internally or externally, and contracts can be let in the areas where savings would be best achieved.

The lowest per-case cost appears to be in the existing LOPD. It is important to note that the LOPD has not been fully staffed (to the authorized level) in recent years. Typically the office carries 30 vacancies (9%), and often many more. This increases the likelihood of the LOPD becoming unavailable and referring more cases to the panels...at an added cost to the County. With full staffing, the need for an APD or conflict panels might be reduced.

There will always be some cases, because of potential conflicts of interest, that cannot be handled by either the LOPD or APD. Reliable conflict attorneys will always provide an essential function to the Court and the County.

Recommendations

Based on the above analysis, it is recommended that:

- 1) The LOPD submit an analysis for an APD, with and without a death-penalty unit, as part of the competitive indigent defense bid process in early 2010.
- 2) The Executive Office further investigate APDs in other counties, particularly the APD model of Santa Clara County, which appears to be more cost-effective than others.
- 3) The Executive Office investigate further the options available for containing the costs of death penalty defense.