

A REPORT BY
THE 2015-2016 CONTRA COSTA COUNTY GRAND JURY
725 Court Street
Martinez, California 94553

Report 1610

**Contra Costa County Office of the
Public Defender**

Who Is Entitled to Public Legal Representation?

APPROVED BY THE GRAND JURY:

Date: May 24, 2016

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Who Is Entitled To Public Legal Representation?

TO: Contra Costa County Board of Supervisors

SUMMARY

The Sixth Amendment of the United States Constitution entitles persons charged with a crime to legal counsel. However, what happens when a person cannot afford an attorney? In such cases in Contra Costa County, the Public Defender provides legal counsel to those individuals. (As used in this report, the term "Public Defender" refers to the Contra Costa County Office of the Public Defender, the attorneys and other staff members in the office, rather than any particular individual.)

In Contra Costa County, the Public Defender provides legal counsel for criminal defendants who cannot afford their own attorneys. The cost of this legal representation is borne by the County of Contra Costa through the collection of taxes.

Defendants seeking defense counsel provided by the Public Defender must first inform the court of their inability to afford their own legal counsel. The Court may choose to have a defendant fill out a financial disclosure form or have the County gather information to determine eligibility. In Contra Costa County, the Public Defender determines the defendant's financial eligibility.

This Grand Jury report finds a potential for public abuse of the Office of the Public Defender when a defendant provides financial information that is neither attested under penalty of perjury nor vetted for accuracy.

METHODOLOGY

The Grand Jury examined the policies, procedures and financial criteria by which a person charged with a criminal offense in Contra Costa County, qualifies for representation by the Public Defender.

BACKGROUND

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

However, individuals charged with crimes have not always been entitled to have counsel provided at no charge. The following timeline describes efforts by individuals and case law that finally guarantee the right to counsel for all individuals.

- (1893) at the Chicago World's Fair, California's first female attorney, Clara Shortridge Foltz, proposed the idea of a public defender.
- (1914) the Board of Supervisors for Los Angeles County appointed Walton J. Wood to be the first public defender in the United States.
- (1921) California Legislature extended the public defender system to courts throughout the state.
- (1932) *Powell v. Alabama*, 287 U.S. 45, the United States Supreme Court held that the indigent defendants, unable to afford their own attorneys and accused of a capital crime, had the right to a court appointed attorney.
- (1942) *Betts v. Brady*, 316 U.S. 455, the Supreme Court ruled that an indigent defendant, even in a capital case, had no right to court appointed counsel unless the defendant was illiterate, of low intelligence generally, or caught up in a particularly complicated trial.
- (1963) *Gideon v. Wainwright*, 372 U.S. 335, which overruled *Betts v. Brady* in part, guaranteed legal representation in criminal cases to defendants who are unable to afford to pay their own attorneys.

Not all counties in California use a public defender to represent those who cannot afford their own legal representation. For example, San Mateo County has a private defender program, which contracts with the San Mateo County Bar Association to provide indigent criminal defense.

The Contra Costa County Office of the Public Defender mission statement reads:

"The Contra Costa County Office of the Public Defender is dedicated to ensuring justice for indigent persons accused of crimes in Contra Costa County. Our overriding goal is to serve the best interests of our clients in

everything that we do. We dedicate all available resources to our clients' cases, thereby ensuring that they receive excellent, individualized representation. Justice can only be served when the most vulnerable among us are treated with the same attention, dignity and respect as the most powerful. The Contra Costa County Office of the Public Defender strives to uphold this principle in everything that we do."

In the cases of conflict of interest, the accused indigent can also avail himself of the services of the Alternate Defender Office and the Criminal Conflict Panel.

The staff of both the Public Defender and the Alternate Defender are employees of Contra Costa County. The Contra Costa Bar Association provides attorneys for the Criminal Conflict Panel through a contract with the County. Attorney fees for the Criminal Conflict Panel are also a County expense.

The Alternate Defender Office

The Alternate Defender Office falls under the umbrella of the Office of the Public Defender, but is a separate division, separated by an ethical firewall. The offices are independently supervised, and neither side shares information with the other. The Alternative Defender represents those who cannot afford their own attorney when conflicts of interest prevent the Public Defender from representing a defendant. Multiple defendants charged in the same case is one of the more common conflicts that arise. In such cases, the Alternate Defender will represent one of the defendants.

Criminal Conflict Panel

The Criminal Conflict Panel is an independent body of attorneys that represents defendants when the Public Defender and Alternate Defender cannot. The services of the Criminal Conflict Panel often are called upon when three or more defendants are charged in the same case. A referral to the Criminal Conflict Panel may also occur when both the Public Defender and Alternate Defender are operating at capacity or are overburdened (overloaded) with cases and are unable to accept additional clients. The Contra Costa County Bar Association works under contract with Contra Costa County to administer the Criminal Conflict Panel.

DISCUSSION

A public defender is an attorney, licensed by the State Bar of California, appointed by the court to provide legal representation to those financially unable to afford a private attorney. The mission of the Contra Costa County Office of the Public Defender is to ensure justice for indigent persons by providing an attorney to those persons charged with a crime.

The Contra Costa County Office of the Public Defender represents adults charged with crimes (misdemeanor or felony) or violations of probation. It also represents minors (persons under 18 years of age) charged in juvenile or adult court. Additionally, the court often appoints the Public Defender to represent persons in proceedings relating to involuntary civil mental health commitments under the Lanterman-Petris-Short Act (LPS). The Public Defender does not represent persons accused of traffic violations or any code infraction, which cannot result in a jail sentence. The Public Defender also does not represent persons involved in civil, family law, or immigration cases.

The eligibility standards for the services of the Public Defender in Contra Costa County are generally in-line with the eligibility standards of other counties. Even persons who are only being questioned by the police, who have not been arrested or charged with a crime, may request the services of the Public Defender. The court will refer persons who are out of custody to the Public Defender at their first court appearance (arraignment) when they inform the court of their inability to afford their own attorney. At that time, the court provides the defendant with a date to return to court with an attorney from the Public Defender. For a person who is in custody, the court provides sufficient time to permit a representative of the Public Defender to visit the person before the next court date. During the initial client interview, a paralegal, law clerk, or attorney will inquire as to the client's ability to afford his or her own counsel. The interview is used to:

- Determine financial eligibility
- Discuss the client's background
- Explain the overall process
- Discuss the specifics of the client's case

Determining Financial Eligibility

Subdivision (c) of California Penal Code section 987 states in part:

"In order to assist the court in determining whether a defendant is able to employ counsel in any case, the court may require a defendant to file a financial statement or other financial information under penalty of perjury with the court or, in its discretion, order a defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to employ his or her own counsel. If a county officer is designated, the county officer shall provide to the court a written recommendation and the reason or reasons in support of the recommendation. The determination by the court shall be made on the record. Except as provided in Section 1214, the financial statement or other financial information obtained from the defendant shall be confidential and privileged and shall not be admissible in evidence in any criminal proceeding except the prosecution of an alleged offense of perjury based upon false material contained in the financial statement."

Subdivision (c) of California Penal Code section 987 further states as follows:

“The financial statement shall be made available to the prosecution only for purposes of investigation of an alleged offense of perjury based upon false material contained in the financial statement at the conclusion of the proceedings for which the financial statement was required to be submitted. The financial statement and other financial information obtained from the defendant shall not be confidential and privileged in a proceeding under Section 987.8.”

In other words, this latter part of Section 987(c) provides that perjury charges can be brought against persons who provide false information on the financial statement.

The Contra Costa County courts have delegated the duty of inquiring into a defendant's ability to employ legal counsel to the Public Defender. The Public Defender considers several factors in determining the defendant's financial eligibility for representation:

- Financial information regarding employment (See Appendix for eligibility form)
- Assets
- Money owed to creditors
- Family size
- Other sources of income
- The nature and severity of the charges

A staff member of the Public Defender completes the eligibility questionnaire with information provided by the client. The client is required to sign the questionnaire, but is not required to do so under penalty of perjury. Supervising or senior attorneys answer the client's questions regarding financial eligibility. The Public Defender neither requires clients to provide documentation supporting the accuracy of the information nor does the Public Defender conduct an independent financial fact check or inquiry.

The Public Defender's current policy on this subject states:

“While it is difficult to quantify financial eligibility, if a single person has a net monthly income of \$4,000 or more and/or owns a home with equity in excess of \$150,000, eligibility should be reviewed by a Supervising or senior attorney. (The interviewer can add \$300 per each dependent before seeking review.) The income of other persons in the home related to the client should be taken into account. The client should be informed that at the end of the case, attorneys' fees will be assessed by the court. These fees are not collected by our office.”

Financial screening is not required for minors, nor are the financial circumstances of the parents or legal guardian taken into consideration. The policy of the Public Defender states:

"If the parent is present, the parent should be told that the court, not our office, may assess attorney's fees and other costs at the end of the case."

The court referred 16,955 new clients to the Public Defender during 2015. The Public Defender rejected thirty-four of these cases (0.2%) for not qualifying as indigent. The Public Defender and Alternate Defender handled 14,360 of all qualifying cases. The remaining 2,561 cases (15.1% of the total cases) were handled by the Criminal Conflict Panel. Of the 2,561 cases referred to the Criminal Conflict Panel, 82.2% or 2,105 of the cases were referred to the Panel because the Public Defender and Alternate Defender lacked the capacity to handle additional cases.

Conclusion

The Office of Public Defender refers many cases to the Criminal Conflict Panel. The vast majority of these referrals are because the Office of Public Defender is working at capacity and, thus, does not have the ability to take on another case.

Defendants may be more likely to underreport financial resources to qualify for the services of the Public Defender, because financial information is neither signed under penalty of perjury nor verified. This abuse of the right to defense, by ineligible defendants, detracts from the Public Defender's capacity to carry out its mission to provide a defense to those indigent defendants who have no alternative. In addition, abuse by ineligible defendants using the Office of Public Defender, Alternate Defender, or Criminal Conflict Panel taxes the resources of Contra Costa County and, ultimately detracts from the County's ability to provide its citizens with other services.

The County can minimize the potential for defendants fraudulently qualifying for the Public Defender's services. Such changes might result in:

- Fewer cases taken on by the Office of Public Defender resulting in fewer cases referred to the Criminal Conflict Panel.
- Defendants eligible for public representation receiving even better representation.
- A financial savings to Contra Costa County.

FINDINGS

- F1. The Office of Public Defender is dedicated and committed to providing the best legal defense possible to those defendants who qualify for its services.
- F2. Persons applying for the services of the Public Defender do not sign the financial screening questionnaire under penalty of perjury.
- F3. The Public Defender does not verify the financial information provided by individuals applying for its services.
- F4. The Public Defender refers some potential clients to the Criminal Conflicts Panel because the Public Defender is operating at capacity.
- F5. Without verifying financial eligibility it is impossible to ascertain an individual has fraudulently obtained representation from the Office of the Public Defender.
- F6. Section (c) of California Penal Code section 987 contemplates that a defendant may be prosecuted for perjury based upon false material contained in the financial statement.

RECOMMENDATIONS

- R1. The Public Defender should require the potential client referred by the court to attest under penalty of perjury to the accuracy of the information provided to the Public Defender.
- R2. To verify the information provided on the financial eligibility questionnaire form. The Public Defender should develop guidelines concerning when documentation of financial circumstances is required and the type of such documentation, such as prior year tax return, employment pay stubs or advices, utilization of credit services, etc.

REQUIRED RESPONSES

	<u>Findings</u>	<u>Recommendations</u>
Contra Costa County Board of Supervisors	F1 – F5	R1, R2

These responses must be provided in the format and by the date set forth in the cover letter that accompanies this report. An electronic copy of these responses in the form of a Word document should be sent by e-mail to: epant@contracosta.courts.ca.gov and a hard (paper) copy should be sent to:

Civil Grand Jury – Foreperson

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