

**Evaluation  
of the  
County of San Mateo's  
Private Defender Program**

**Submitted to the County of San Mateo**

**by**

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**Jan. 7, 2022**



January 7, 2022

Mike Callagy, County Manager  
County Manager's Office  
County of San Mateo  
400 County Center, 1st Floor  
Redwood City, CA 94063

Dear Mr. Callagy:

Harvey M. Rose Associates, LLC is pleased to present this *Evaluation of the County of San Mateo's Private Defender Program*.

This evaluation was conducted in accordance with *Government Auditing Standards, July 2018 Revision*, published by the U.S. Government Accountability Office, Comptroller General of the United States. It contains 6 principal findings with recommendations to improve the quality of indigent defense provided in San Mateo County. These findings cover data systems, caseload monitoring, and reporting; management oversight and quality of representation; training policies and requirements; sufficiency of staffing resources; sufficiency of overall funding and management salaries; public defender model comparisons and cost estimate; and, financial controls.

We appreciate being provided with the opportunity to serve the County of San Mateo. We are available to assist you further on this matter if there are outstanding questions.

Respectfully submitted,

A handwritten signature in black ink that reads "Fred Brousseau". The signature is fluid and cursive.

Fred Brousseau  
Principal

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## Executive Summary

### Evaluation Objective, Scope, and Methodology

The objective of this evaluation was to provide an independent assessment of the provision of legal services for indigent defendants by the San Mateo County Bar Association through its Private Defender Program and provide recommendations for improving indigent defense in San Mateo County.

### Summary of Evaluation Findings

This evaluation covered indigent defense counsel provided by the San Mateo County Bar Association's Private Defender Program (PDP) on behalf of the County of San Mateo. Overall, we found that the Private Defender Program provides sufficient representation of indigent defendants in a cost-effective manner for the County. While we identified six areas of deficiency, these do not currently warrant a move to a public defender office model in their own right.

If our evaluation recommendations are implemented, they would likely address many of the deficiencies identified and improve the quality of PDP representation further. Interviews with PDP leadership, evidence of recent changes to the PDP structure and management processes, and new initiatives launched indicate a strong willingness on PDP's behalf to work with the County to address these deficiencies and improve the quality of representation further. Alternatively, the County could consider discontinuing its private attorney model and creating a Public Defender's Office staffed with County employees. We provide an assessment of the costs and benefits of this option and an initial estimate of the funding needed to staff such an office compared to current PDP costs. The County should consider the costs and benefits of such a move against its objectives of providing indigent defense representation and the current level of quality provided by the PDP.

Our evaluation report includes six findings and 37 recommendations intended to improve the quality of indigent defense representation provided in the County of San Mateo, including:

- 1. Improving data systems, caseload monitoring, and reporting:** including enhancing performance data collected to align with best practices, improving management reports to facilitate case and workload monitoring, improving client complaint tracking and reporting, and expanding analytical capacity.
- 2. Increasing management oversight and the quality of representation:** including expanding processes and metrics used to supervise panel attorneys, increasing feedback

mechanisms, and ensuring adherence to contractual performance benchmarks and national best practices.

- 3. Strengthening and formalizing training policies and monitoring of compliance with training requirements.**
- 4. Expanding attorney supervision staffing and increasing the use of investigators across cases and panel attorneys.**
- 5. Reviewing and revising flat fee and client conference payments to improve incentives for panel attorneys to provide comprehensive high-quality representation and consistently communicate with clients.**
- 6. Reviewing and revising fee submission policies, data entry, and staff review procedures to address minor billing and invoicing inconsistencies.**

These findings and recommendations are discussed in more detail below.

## Overview of San Mateo’s Private Defender Program

Since 1968, San Mateo County has contracted with the San Mateo County Bar Association to provide representation for indigent defendants through the Private Defender Program (PDP) as part of the Constitutionally-required right to counsel. This model involves the County contracting with the San Mateo County Bar Association for the oversight, management, and payment of a panel of private attorneys, investigators, and experts to provide indigent defense in criminal, juvenile delinquency, conservatorship, and child support and family contempt cases.

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## Section 1: Data Systems, Caseload Monitoring, and Reporting

The Private Defender Program (PDP) has limited data and systems in place to track how many cases are being carried by an individual attorney, ensure that panel attorneys are not exceeding reasonable caseload standards, and ensure quality representation for indigent clients. These limitations impact PDP’s ability to systematically monitor, enforce, and report on critical performance measures required by the County and to adhere to best practices. PDP’s data systems and processes do not currently allow management to capture relevant information needed to effectively monitor attorney performance and the quality of representation including case progression and time to disposition, initial client visits, case and client outcomes, and attorney workload. Limited and inaccurate data inhibits effective oversight both within PDP and externally to San Mateo County officials and the wider public. PDP management is developing upgrades to its electronic data system and some of these concerns will be addressed but we

conclude that, even with those upgrades, there is further potential to enhance and improve use of the system for management oversight.

### **Recommendations**

The Board of Supervisors of San Mateo County should:

- 1.1 Approve funding for the PDP to hire or contract with a part-time Management Analyst to work on creating reports such as live dashboards or interactive tools for PDP and the County to ensure contract compliance and enhanced management review which inform performance or quality monitoring and decision-making.

The Chief Defender of the Private Defender Program should:

- 1.2 Request funding to hire or contract with a part-time Management Analyst to work on creating reports for contract compliance and management review which inform performance and quality monitoring and decision-making.
- 1.3 Enhance and expand data collected in Defender Data to collect key data points recommended by best practices, including:
  - a. case status,
  - b. case outcomes,
  - c. case complexity,
  - d. continuances requested by defender and case,
  - e. defendant characteristics: sex, race, and age,
  - f. case outcomes for defendants,
  - g. number of in-person visits per client,
  - h. number of phone conversations with client,
  - i. bail amount,
  - j. number of witnesses,
  - k. number of witnesses contacted and interviewed,
  - l. whether the investigator testified,
  - m. disposition: i.e. plea or if case went to trial,
  - n. sentence type and length: probation, prison, other, and
  - o. years of experience for each attorney.
- 1.4 Explore ways to integrate or pull data from other County criminal justice partners' data systems including the Superior Court's court records management system (for key case and disposition data).
- 1.5 Commission the development of new management reports which capture the following information:

- a. number of closed cases within a year,
  - b. time to close a case,
  - c. outcomes by case type and defendant characteristics,
  - d. attorney experience,
  - e. change in sentencing outcome from plea to sentencing when a trial takes place,
  - f. number and share of motions filed per attorney and case,
  - g. number and share of cases brought to trial overall and by attorney,
  - h. time from arraignment and case assignment to first client contact, and,
  - i. use of investigators by case type and attorney.
- 1.6 Work with San Mateo County to amend Section 2 of the San Mateo County Bar PDP agreement to reflect case types which match those used by the PDP within Defender Data or, at a minimum, ensure that there is a clear crosswalk between case types in the PDP agreement and Defender Data.
- 1.7 Consider updating Defender Data to use the “class types” for attorney experience used in PDP’s case assignment process for the case types to better reflect complexity of the cases.
- 1.8 Consider structuring case types in Defender Data and in the PDP agreement with the County to mirror those of the District Attorney to allow the County to compare caseloads between the two offices.
- 1.9 Add client conference fees for all case types and expand the fee to be chargeable for meeting with the client before each court event.
- 1.10 Ensure complaints related to attorney performance or representation (whether or not they lead to a change in attorney) can be linked to case management data in Defender Data so that PDP can systematically identify, monitor, and report complaints by attorney being complained against and by case type.
- 1.11 Enhance tracking of complaints to ensure that the assessment and final resolution of complaints is systematically recorded and can be easily analyzed and reported on to ensure the complaint process is functioning as set out in the PDP Contract.

## **Section 2: Management Oversight and Quality of Representation**

The PDP has limited management resources, processes, and controls in place to ensure attorney performance and workloads are consistent with reasonable standards and result in high quality representation for clients. Caseloads can vary significantly between attorneys because attorneys work on different case types and some work for PDP on a part-time basis. PDP management is responsible for monitoring and determining if any attorney is carrying too many cases based on case type and complexity.

From FY 2016-17 to 2020-21, an average of 12.5 percent of attorneys, or 28 individual attorneys, exceeded national caseload standards estimated by our weighted caseload model. Given the absence of internal caseload limits, national caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate approach. PDP should develop workload standards and procedures against which individual attorney performance should be monitored.

The PDP has not set a limit on the number of cases an attorney can carry. The PDP doesn't systematically record or monitor when attorneys first make contact with defendants or the frequency of their ongoing communications while they are representing them.

Although PDP management report that they place a high value on client communication and 93 percent of attorneys reported that management communicates this value, mechanisms for identifying poor quality representation, including feedback from clients, are not being fully utilized to assess and improve the quality of representation provided to PDP clients. PDP clients interviewed reported not receiving sufficient communication from their attorneys about their case. The PDP-provided brochures do not inform clients of their right to request a new attorney. Furthermore, the level of client feedback solicited by PDP and received through surveys is not sufficient to provide meaningful information on the quality of representation. PDP should expand the number and ways in which it solicits feedback on the quality of attorney representation provided.

### **Recommendations**

The Chief Defender and Assistant Chief Defender of the Private Defender Program should:

- 2.1 Develop maximum workload standards for attorney, investigator, and social worker panelists. This could be done using results from the time study of event-based fees currently being run by the PDP or, if needed to get sufficient data, by



- administering a further time study to include more fees from major case types and incorporating hourly data already collected on hourly fee types.
- 2.2 Create a standardized assignment process to keep from having a few attorneys overloaded with case assignments and limit the number of cases scheduled for the same day when assigning cases.
  - 2.3 Add information on how a client can request a change of attorney and the option for clients to fill out the client survey on attorney performance to the PDP client brochures handed out at arraignment.
  - 2.4 Update the PDP website to add return information for the PDP client survey or create an online form which automatically sends survey responses to the PDP for clients accessing the survey via the website.
  - 2.5 Implement and expand client feedback collection at county jails, prisons, and post-conviction service sites, through the use of focus groups and surveys.
  - 2.6 Increase the number of surveys mailed to clients with the goal of ensuring 10 percent of clients served by the Private Defender Program each year provide survey responses.
  - 2.7 Work with the Superior Court to set up a feedback mechanism for judges and other County criminal justice system stakeholders to regularly provide feedback on attorney performance to address systemic and individual attorney representation quality concerns.

The Adult and Juvenile Managing Attorneys of the Private Defender Program should:

- 2.8 Use the improvements to the Defender Data system currently being developed to track the number and type of open cases attorneys are assigned to inform case assignment decisions.
- 2.9 Generate and review monthly workload reports which reflect total assigned cases by type per attorney within the current fiscal year to maintain case limits per attorney within NAC standards or PDP set workload limits, whichever is lower.
- 2.10 Assuming adoption of Recommendation 1.9 to add the client conference fee to all case types, regularly analyze the number of cases where a client conference fee has been billed to determine whether clients are getting at least one meeting with their attorney. PDP should include the results of this analysis in its Annual Report to the County to fulfill its contractual obligation in Section 4.d.5.

- 2.11 Assuming adoption of Recommendations 1.10 and 1.11 (from Section 1) to improve complaint tracking and reporting by attorney, use complaint reports to identify attorneys who receive complaints from more than one client in order to inform supervisor decisions to intervene to improve attorney performance.

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## **Section 3: Training Policies and Requirements**

The Private Defender Program's (PDP) training requirements and practices are not aligned with those recommended by leading defense organizations. This could negatively impact the quality of representation provided to PDP clients. PDP lacks a comprehensive training program that is based on the specific needs of panel attorneys and is tailored to their skill levels. Training topics are developed primarily through informal feedback and conversations with attorneys. While PDP is in the process of developing tailored training plans, this work is primarily conducted by a single staff member with other management responsibilities and is not currently documented. The lack of a written training plan and concentration of development and implementation duties with a single senior manager increases the risk of delays.

PDP's methods of tracking compliance with training requirements are unreliable. The PDP tracks panel attorneys' compliance through self-reported training credits declared on an annual survey. However, information provided by PDP management and analysis of training attendance records confirmed that many attorneys do not accurately report their hours on the survey, with some incorrectly reporting their training hours relative to verifiable training records reviewed. PDP attorneys also reported difficulty in accessing and using individual education funds provided for external training.

### **Recommendations**

The Chief Defender of the Private Defender Program should:

- 3.1 Consider hiring a dedicated part-time staff person or contractor that will work with PDP management to design and oversee the implementation of formal training programs within PDP, develop and administer a regular training needs assessment, and verify compliance with PDP training requirements.
- 3.2 Reinstate the previous requirement for panel members who are within their first year of practice of criminal law to complete a minimum of 21 hours of relevant classes or equivalent training within their first year on the PDP panel, to align with the California State Bar's recommendations.

- 3.3 In coordination with the Adult Managing Attorney and Juvenile Managing Attorney, develop comprehensive overarching written training policies with clear objectives and processes that include how the formal training programs will operate (including the number of seminars, training topics, methods, and schedule), who will oversee the trainings, procedures for identifying outside trainers, how the training provided will be evaluated, and how training opportunities will be administered.
- 3.4 Improve panel attorneys' awareness of and accessibility to training funds by ensuring individual education funds can be used more flexibly, and providing attorneys with their individual account balances on an ongoing basis (potentially in an accessible database or spreadsheet, available at any time, or via regular email reports).
- 3.5 Develop a process for verifying training requirement compliance that does not rely solely on self-reported information, and require documentation from panel attorneys demonstrating compliance with training requirements (such as requiring submission of documentation after each training attended). Consider utilizing an automated sign-in process (such as DocuSign) for internal trainings to facilitate and simplify compliance tracking.

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## **Section 4: Resource Sufficiency – Staffing**

Ensuring there are enough attorneys, supervisors, managers, and other support staff to represent indigent clients effectively is critical to providing legal representation and due process afforded by the Constitution. This section assesses the Private Defender Program's (PDP) staffing levels through comparisons with peer county Public Defender offices. Seven peer jurisdictions were identified based on their similarity to San Mateo County in terms of the number of criminal filings and population size.

Based on our analysis, the PDP has a sufficient workforce of attorneys and managers compared to peer jurisdictions; however, PDP managing attorneys have the largest span of control compared to peer jurisdictions. PDP managing attorneys are responsible for supervising between 26.5 and 34.3 full-time equivalent attorneys each, around three to four times as many as the peer county average. The PDP should add two to five more assistant managing attorneys to supervise panel attorneys to ensure a sufficient quality of representation is provided to indigent clients.

Although the PDP has more investigators on its panel than recommended by best practices and peer jurisdictions, investigators were only assigned to 7.4 percent of PDP cases in Fiscal Year

2020-21. PDP should increase its monitoring of the use of investigators by attorneys and establish training and other procedures for increasing their utilization.

The PDP has recruited five social workers to the panel and plans to recruit five more. Not all of the positions will be full-time but, overall, the PDP should aim to have a workforce equivalent to at least 6.1 full-time equivalent social workers to handle case requests.

Attorneys report having access to ancillary staff such as paralegals and legal clerks, however, survey responses indicate that attorney use of paralegals and legal clerks is low. If the PDP were to pursue establishment of a legal clerk or paralegal panel, they should train attorneys on maximizing use of these services as it could lessen the current workload of attorneys, especially for complex cases.

### **Recommendations**

The Chief Defender of the Private Defender Program should:

- 4.1 Determine the number of full-time equivalent attorneys needed based on the PDP's forthcoming time study, or by conducting an extensive time study of major case types. Based on this analysis, request additional funding to add between 1.5 and 3.75 net full-time equivalent supervisor positions (around two to five Assistant Attorney Manager positions or similar with 75 percent of their time devoted to supervision) to the PDP so that the program achieves a ratio of approximately one supervisor for every ten full-time equivalent attorneys as recommended by national best practices and in line with peer counties' attorney to supervisor ratios.
- 4.2 If investigator use remains low based on the investigation reports in Recommendation 1.5.i, encourage investigations in all appropriate cases by establishing stronger requirements in the Private Defender Program manual around the use of investigators and requiring documentation in case files indicating that the attorney considered an investigation for their case.

The Supervising Social Worker of the Private Defender Program should:

- 4.3 Recruit at least an equivalent of 6.1 full-time social workers to the panel.
- 4.4 Evaluate the demand for social workers and case managers annually based on attorney requests and develop a recruitment plan to address the needs for the casework, including an evaluation of whether additional data on social worker need (i.e. mental health history/ homelessness prevalence among PDP clients) should be collected to inform social worker need and impact.

## **Section 5: Resource Sufficiency – Overall Funding, Public Defender Model Comparison, and Management Salaries**

Since 1968, San Mateo County has contracted with the San Mateo County Bar Association to provide representation for indigent defendants through the Private Defender Program (PDP). At the time, there were no best practices to inform which program, private or public, was best for the County. More recently, national studies generally report more favorable outcomes for indigent clients represented by an in-house public defender office for three reasons: (1) they have greater access to resources such as investigators and expert witnesses; (2) attorneys are generally compensated in a way that incentivizes comprehensive representation; and (3) attorneys work in teams that can provide each other assistance on cases. However, national best practices encourage a focus on ensuring the quality of representation rather than recommending a specific defense mode.

The PDP has processes and resources in place to provide access to investigators and experts as well as collaborative attorney teams. However, we found that the use of investigators was relatively low over the past five fiscal years and occurs more often on felony cases. Only 4.51 percent of cases from FYs 2016-17 through 2019-20 had investigators assigned to them. Additionally, the PDP's low flat-fee payment amounts may not provide sufficient compensation or incentive to ensure comprehensive representation of clients by panel attorneys. This could be worsened by the management oversight deficiencies identified in Section 2. However, the PDP also brings other advantages to a public defense system such as an ability to quickly scale up or down based on local needs and access to high-quality private attorneys that indigent clients might not be able to afford otherwise.

The alternative to using a Private Defender Program would be to establish a Public Defender's Office in San Mateo County. The annual estimated cost of an equivalently staffed Public Defender's Office would be between approximately \$29 to \$51 million annually, an increase of \$7.3 to \$29.3 million, or 34 to 135 percent, relative to current spending on the Private Defender Program. These costs do not include one-time costs for creating a new County department. Given the significant increase in costs associated with moving to a County Public Defender office model, the County should carefully consider the costs and benefits of such a move against its objectives for providing indigent defense representation and the current level of quality provided by the PDP. Based on our evaluation, the deficiencies identified with the PDP model are not currently sufficient to warrant a wholesale move away from this model. If the evaluation recommendations

are implemented, they would likely address many of the deficiencies identified and improve the quality of PDP representation further.

### **Recommendations**

The Chief Defender of the Private Defender Program should:

- 5.1 Review and revise the fee structure to ensure flat fees provide compensation that is equivalent to the preparation and in-court time needed to provide high-quality representation and sufficiently incentivizes panel attorneys to provide comprehensive representation for indigent clients.
- 5.2 Consider changing the current flat fees to be equal to an average hourly pay rate for each event-based fee using results from the time study of event-based fee cases and PDP management input, ensuring that the fees incentivize high-value activities that are linked to quality representation for indigent clients and improved case outcomes.

The San Mateo County Board of Supervisors should:

- 5.3 Assess the costs and benefits of keeping the Private Defender Program as it is, improving the Private Defender Program as recommended in this report, or moving to a Public Defender model.

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## **Section 6: Financial Controls**

While the San Mateo County Private Defender Program does not appear to have significant internal control deficiencies regarding the review and approval of attorney vouchers, a review of 9,241 flat fee vouchers and 2,061 special fee vouchers paid in FY 2020-21 shows that there are minor compliance concerns involving the timeliness of voucher submission, fee event data entry, and a requirement that flat fee cases only be billed after the case is closed. These minor compliance issues could be addressed through revision of existing financial policies, as well as possible modifications to the Defender Data case management system to reduce the incidence of billing errors.

### **Recommendations**

The Chief Defender of the Private Defender Program should:

- 6.1 Review current Fee Schedule policies to determine if work on flat fee cases could be further broken up by milestone or activities conducted before versus after conviction or acquittal, in order to allow for submission of vouchers prior to case

completion and to reduce the incentive to close cases quickly. Any changes should be considered alongside changes to flat fees proposed in Recommendation 5.1.

- 6.2 Consider including an additional level of staff review or requesting enhancements to the Defender Data system to flag vouchers that have been submitted after 90 days of case closure, in order to improve compliance with the PDP Fee Schedule Sec. I.12.C requirement that all vouchers be submitted within 90 days of case completion.
- 6.3 If the Fee Schedule is changed pursuant to Recommendation 6.1, PDP should ensure voucher review procedures or the Defender Data system provide effective monitoring and reporting of any time limits for voucher submission.

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## **Independence and Governance Oversight**

The primary operational oversight and governance for the Private Defender Program rests with the San Mateo County Bar Association (SMCBA) Board of Directors. The Chief Defender acts as the Executive Officer of the Private Defender Program and provides written and oral reports to the County Bar’s PDP Oversight Committee which is made up of 10 PDP panel attorney Bar Association members and a non-PDP Board Member who acts as a liaison to the Board of Directors.<sup>1</sup> The San Mateo County Manager’s Office also provides oversight over the PDP through regular (monthly) meetings with PDP leadership. The PDP does not regularly present information about its services or its annual report to the Board of Supervisors.

The PDP Oversight Committee is established and governed according to SMCBA Bylaws which include eight provisions related to PDP oversight and set out the purpose of the Committee as “to insure [sic] the efficient and just operation of the Association’s Private Defender Program relating to the representation of indigents accused of crime and the representation of others as may be entitled to the services of the Association.” The Committee is primarily tasked with providing advice to the Chief Defender and the Board of Directors on operations, expenditures and the initiation of new programs or policies. No specific powers or duties are assigned to the Board of Directors with respect to oversight or governance of the Private Defender Program in the SMCBA’s Bylaws. SMCBA Board of Directors meetings and the Private Defender Standing Committee are not open to the public and no information on these meetings is available publicly.

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<sup>1</sup> San Mateo County Bar Association Bylaws, Standing Committees, Sec. 19. (<https://www.smcba.org/about-smcba/bylaws/#Article%2013>)

Best practices on independence and governance of indigent defense mainly pertain to state-level oversight and provide limited guidance for local-level indigent defense governance. These best practices discuss the importance of ensuring independence from judicial interference and that a dedicated Board with attorneys and non-attorneys provide oversight over the indigent defense system.<sup>2</sup> Additionally, other than San Francisco's Public Defender being an elected official, we did not find any other large counties in California with independent oversight bodies or commissions for their Public Defender Offices, despite such commissions being common for other County agencies.

The lack of public and transparent oversight over the PDP could increase the perception of a lack of independent oversight and conflicts of interest since PDP members are tasked with providing oversight over a program they are contracted by and receive compensation from. This risk is heightened by the lack of external feedback that PDP has solicited and received from former clients and community members. Given these risks, PDP management, the San Mateo County Bar Association Board of Directors, and the County should discuss options for increasing external independent oversight and/or expanding mechanisms for current and former clients or their relatives to provide input on PDP operations. For example, this could be through an advisory committee or similar external body which includes both practicing attorneys and community representatives or former PDP clients.

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## **Benefits and Costs of Recommendations**

Many of the recommendations above can be implemented with existing staff resources. However, several recommendations would require an additional investment of County funds, including hiring additional attorney supervisor staff, a management analyst, training coordinator, and increasing flat fees paid to panel attorneys.

As shown in Exhibit A below, the cost of implementing all the recommendations in this report are estimated to be between \$0.5 to \$1.1 million annually. This does not include changes to the fee structure recommended in Section 5 which, according to our most conservative estimate, could cost up to an additional \$4.9 million per year, however, additional analysis by PDP would be needed to determine the exact cost. Based on our estimates of the annual cost to operate a

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<sup>2</sup> Ten Principles of a Public Defense Delivery System. American Bar Association. (2002); Standards for Criminal Justice. American Bar Association. (1992), Standard 5-1.3 (including commentary); Standards for the Administration of Assigned Counsel Systems. National Legal Aid and Defender Association. (1989), Standard 3.2.1 and 3.2.2; Guidelines for Legal Defense Systems in the United States. National Study Commission on Defense Services. (1976), Guideline 2.10.



Public Defender’s Office in San Mateo, implementing the recommendations would cost the County between \$6.8 to 28.2 million *less* than moving to a Public Defender model (this excludes the Section 5 costs related to a change in fee structure mentioned above). The estimated annual cost of establishing a Public Defender’s Office in San Mateo County with comparable staffing to the current Private Defender Program is between \$29.0 and \$51.0 million, or an increase of between \$7.3 to 29.3 million compared to projected FY 2021-22 County spending on indigent services of approximately \$21.6 million.

Implementation of the recommendations would likely result in an increase in the quality of representation provided to indigent clients as well as reduce the risk of lawsuits resulting from staff having high workloads or accusations of limited resources allocated to cases. Recent lawsuits regarding insufficient defense of clients served by an indigent defense system have resulted in settlements costing public agencies between \$2.7 million to \$4.5 million dollars.<sup>3</sup> Given the significant increase in costs associated with moving to a Public Defender model, the County should carefully consider the costs and benefits of such a move against its objectives for providing indigent defense representation and the current level of quality provided by the PDP. Appendix C provides a matrix of all recommendations and associated costs.

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<sup>3</sup> Wilbur v. City of Mount Vernon and Hurrell-Harring et al. v. State of New York.

### Exhibit A: Estimated Cost of Implementing All Recommendations Compared to Estimated PDO Budget

Recommendation	Estimated Cost	
	Minimum	Maximum
Defender Data Upgrades (Sec. 1)	\$60,000	\$60,000
Hire/ Contract for Management Analyst (Sec. 1)	\$52,500	\$52,500
Hire/ Contract for Training Coordinator (Sec. 3)	\$37,000	\$46,000
Hire Additional Assistant Managing Attorneys (Sec. 4)	\$368,250	\$920,625
<b>Total Estimated Cost of Recommendations</b>	<b>\$517,750</b>	<b>\$1,079,125</b>
<b>FY 2021-22 Budgeted Expenditures</b>	<b>\$21,648,544</b>	<b>\$21,648,544</b>
<b>Total PDP Budget Spending with Recommendations</b>	<b>\$22,166,294</b>	<b>\$22,727,669</b>

#### Comparison to Cost of Establishing a Public Defender's Office

Estimated PDO Budget	\$28,960,336	\$50,968,103
<i>Difference (compared to PDP with Recommendations)</i>	<i>\$6,794,042</i>	<i>\$28,240,434</i>
<i>Estimated Upper End Cost of Changing PDP Fees (Sec. 5)*</i>		<i>\$4,900,000</i>

Source: Harvey M. Rose Associates estimates of costs of implementing report recommendations.

\*Not included in estimate as final amount will not be determined until PDP completes an analysis of changes needed to current event-based fees.

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## Introduction

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### Evaluation Objectives

The objectives of this evaluation were to provide an independent assessment of the provision of legal services for indigent defendants by the San Mateo County Bar Association through its Private Defender Program and to provide recommendations for improving indigent defense in San Mateo County.

In particular, the evaluation assessed the Private Defender Program in the following areas:

- Independence and oversight
- Compliance with applicable standards of indigent representation
- Quality of indigent defense provided
- Staff workload
- Adequacy of resources (including investigators, experts, social workers, and other support staff)
- Sufficiency of funding
- Sufficiency of management staffing and administrative support
- Training
- Supervision and performance-tracking measures
- Quality and sufficiency of the electronic case management and other data systems
- Capacity to implement new programs, and improve or expand existing programs
- Capacity to research, apply for, and administer additional funding opportunities such as grants
- Capacity to regularly research, evaluate, and implement best practices in indigent defense programs.

### Evaluation Scope

The evaluation scope included Private Defender Program performance, staff, spending, and budgets from Fiscal Year (FY) 2016-17 to 2020-21, with a focus on FYs 2018-19 to 2020-21. Based on County funding and contracts with the San Mateo County Bar Association, the evaluation focused on indigent defense services provided in criminal, probate, Lanterman-Petris-Short (LPS) conservatorship, and juvenile delinquency cases.

### Methodology

We utilized a three-phased approach to the evaluation of the San Mateo County Private Defender Program (PDP) consisting of an Initial Risk Assessment (Phase I), Fieldwork and In-Depth Analysis (Phase II), and Reporting (Phase III). The evaluation was carried out in compliance with Generally Accepted Government Auditing Standards (“GAGAS”), as defined by the U.S. Government Accountability Office.

We began this evaluation with an entrance conference on May 12, 2021 with the County of San Mateo County Manager, Deputy Manager, and the Chief Defender of the PDP. We interviewed representatives of the San Mateo County Private Defender Program, including leadership, management, staff attorneys, and other administrative staff; County of San Mateo County Manager; Superior Court of San Mateo County judges; members of the San Mateo Board of Supervisors; the San Mateo County District Attorney and Chief Deputy District Attorney; the San Mateo County Chief of Probation; and the Executive Director of the Service League of San Mateo County. We also conducted three focus groups with 18 former PDP clients and administered a digital survey with PDP panel attorneys (n = 74) and PDP panel investigators (n = 22).

We obtained and reviewed detailed documents from the County and PDP, including contracts, PDP policies and procedures manuals, PDP fee schedules, PDP budgets and invoices, salary schedules, District Attorney staffing and budgets, management reports, PDP financial policies, PDP annual reports, PDP surveys of panel attorneys, complaint and discipline data, and other documents to evaluate the program. We also received and analyzed a data extract from the PDP's case management system, Defender Data, from the vendor, Justice Works, with case and invoice data for all PDP cases arraigned from July 1, 2016 to June 30, 2021. We followed up with PDP and other County staff to ensure an accurate understanding of the PDP's invoicing and caseload management systems.

We provided regular status updates to the County of San Mateo's Deputy County Manager. We submitted a confidential draft report to the County Manager, Deputy County Manager, and PDP Chief Defender on October 8, 2021, summarizing our findings and recommendations, and conducted a briefing and exit conference on the draft report on October 12, 2021 with these representatives and a subsequent detailed review with the PDP Chief Defender. Based on information and comments provided at these meetings, we revised our report and submitted a final report to the County of San Mateo County Manager and Deputy County Manager and PDP Chief Defender. The PDP Chief Defender provided a written response to our findings and recommendations, attached to this report.

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## Overview of San Mateo County's Private Defender Program

### Background and Structure

In its 1963 case ruling, *Gideon v. Wainwright*, the U.S. Supreme Court found that defendants facing serious criminal charges have a constitutional right to legal counsel at the public expense if they cannot afford one under the Fourteenth Amendment's Due Process Clause.<sup>1</sup> In California, legal counsel is provided directly by counties through a Public Defender office or through contracts or court appointments of private attorneys.

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<sup>1</sup> U.S. Courts, *Facts and Case Summary – Gideon v. Wainwright*. Accessed [online](#).

Since 1968, San Mateo County has contracted with the San Mateo County Bar Association to provide representation for indigent defendants through the Private Defender Program (PDP) to fulfill the Constitutionally-required right to legal counsel. This model involves the County contracting with the San Mateo County Bar Association for the oversight, management, and payment of private attorneys, investigators, and experts to provide indigent defense services in criminal, juvenile delinquency, conservatorship, and child support and family contempt cases. The San Mateo County Superior Court also contracts and provides funding to the County Bar Association for the provision of indigent defense for juvenile dependency cases.

San Mateo County is the only county in California with a population over 500,000 that does not have a county public defender office though contract panels are found in large jurisdictions elsewhere in the U.S. such as New York City and for conflict-of-interest cases within California. The initial creation of a private panel rather than a public defender office appears to have been based on the presumptions that: (1) demands for indigent defense pursuant to the 1963 Gideon case were likely to be relatively manageable with a small number of attorneys; and (2) given this expectation, a private panel would allow for private attorneys to provide indigent defense mainly as a supplement to existing private practices. At the time, there were no best practices to inform which program, private or public, was best for the County.

Currently the Private Defender Program functions as a standing committee of the San Mateo County Bar Association. While the Chief Defender and several other managers are employees of the Bar, the panel attorneys and other staff are independent contractors (though panel attorneys are also required to be County Bar members to join the panel). The Chief Defender is accountable to the Bar Association's Private Defender Program Standing Oversight Committee and its Board of Directors. Through its contract with the County, the Bar Association is accountable to the County in a similar way to other County contractors though, unlike other contractors, the Bar Association's PDP contract with the County makes up the vast majority of its income.

## Private Defender Program Costs

The County agreed to provide a budget of \$18.72 and \$19.47 million for Private Defender Program services in FYs 2019-20 and 2020-21, respectively. In addition to County funding, PDP also received funding of \$829,070 and \$923,000 from the Court for the provision of juvenile dependency defense representation<sup>2</sup> in FY 2019-20 and 2020-21, respectively, and \$266,715 and \$233,000 from dedicated State revenues (AB109) over this period.

As shown in Exhibit 1, in total, the PDP had approximately \$19.1 and \$20.6 million in expenditures budgeted for FY 2019-20 and 2020-21, respectively. The majority of PDP's budget in FY 2019-20 went to

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<sup>2</sup> PDP's juvenile dependency representation services were not included in the scope of this evaluation.

pay panel attorney fees (67 percent) and other case-related costs (16 percent) and the remainder was for PDP staff and operating costs (12 and 4 percent, respectively).

### Exhibit 1: Budgeted PDP Revenue and Expenditures, FY 2019-20 to 2021-22

Revenue/ Expenditure Item	2019-20 <sup>a</sup>	2020-21 <sup>b</sup>	2021-22 <sup>c</sup>
<b>Revenues</b>			
SM County Contract	\$18,720,000	\$19,468,800	\$21,902,136
Superior Court (Juvenile Dependency)	829,070	923,000	905,183
AB109 Revenue	266,715	233,000	242,320
Other Revenue Sources	292,053	3,800	5,000
<b>Total Revenue</b>	<b>\$20,107,838</b>	<b>\$20,628,600</b>	<b>\$23,054,639</b>
<b>Expenditures<sup>d</sup></b>			
<i>Case Costs</i>			
Attorney Fees	\$12,748,897	\$13,434,755	\$14,140,360
Investigator Fees	2,159,480	2,270,000	2,770,000
Experts & Related Services	1,016,166	1,450,000	1,850,000
<i>PDP Management &amp; Operating Costs</i>			
PDP Staff Costs (Salaries & Benefits)	2,367,099	2,652,000	3,344,063
Operating Expenses	787,820	821,845	950,216
<b>Total Case Costs</b>	<b>\$15,924,542</b>	<b>\$17,154,755</b>	<b>\$18,760,360</b>
<b>Total Management &amp; Operating Costs</b>	<b>\$3,154,919</b>	<b>\$3,473,846</b>	<b>\$4,294,279</b>
<b>Total Costs/ Expenditures</b>	<b>\$19,079,462</b>	<b>\$20,628,601</b>	<b>\$23,054,639</b>
<i>Net Surplus (Shortfall)</i>	<i>\$1,028,377</i>	<i>-</i>	<i>-</i>

Source: PDP Budget information provided by San Mateo County

<sup>a</sup> Actuals

<sup>b</sup> Final budget

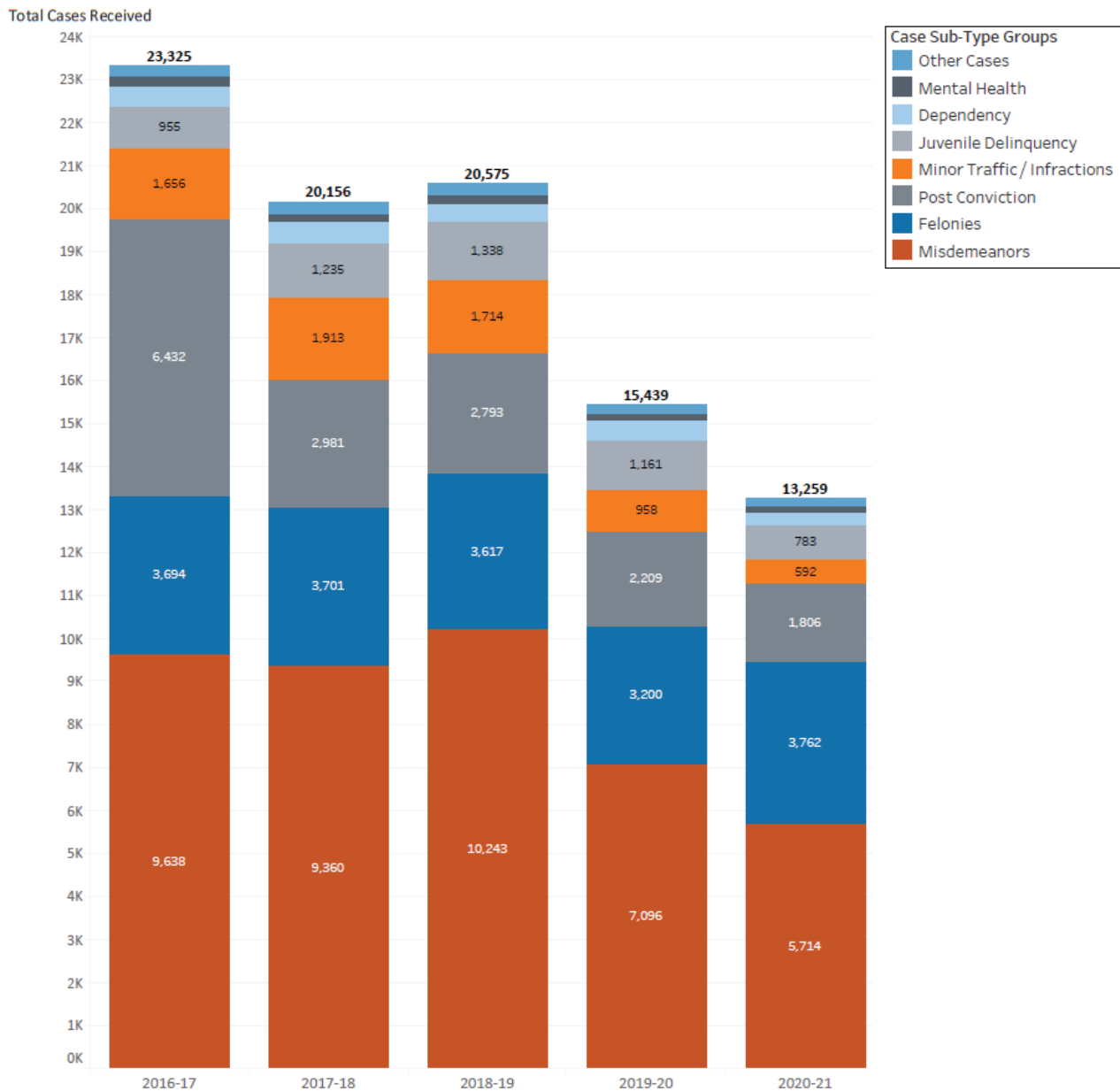
<sup>c</sup> Proposed budget

<sup>d</sup> Includes County and Superior Court-funded expenditures.

## Cases and Clients Served by the Private Defender Program

As of July 31, 2021 in FY 2020-21, the Private Defender Program was assigned 13,259 cases for representation across several case types, the most common being misdemeanors (43 percent) and felonies (28 percent), as shown in Exhibit 2. The number of cases assigned declined by 25 percent in FY 2019-20, likely due to the impact of the COVID-19 pandemic and related public health orders. Data on the number of cases since COVID-19 public health restrictions started to be lifted were not available at the time of the report but data from other counties indicates the number of cases will likely increase as court backlogs are cleared and restrictions on public activities are further relaxed.

**Exhibit 2: Total Cases Received by the PDP by Case Type, FY 2016-17 to 2020-21\***



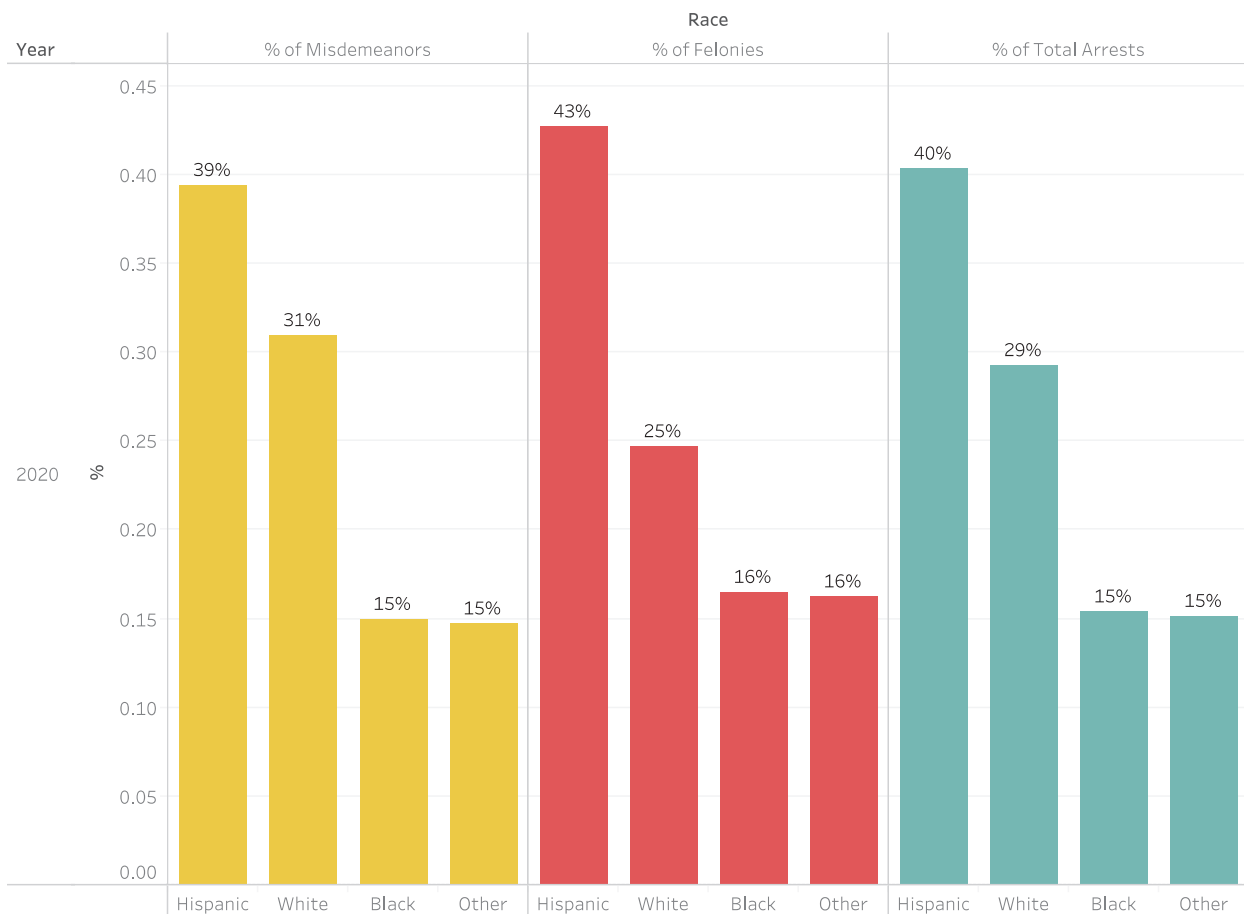
Source: Harvey M. Rose Associates analysis of data from the Private Defender Program’s Defender Data system as of July 31, 2021.

\*This case count omits the following case types which were not tied to court cases but recorded as cases in Defender Data: Calendar, Lineups, Mentor, Officer of the Day, Retention Fee, Special Assignment, & Special Project.

The San Mateo County Private Defender Program does not currently track or record information on the demographic characteristics of indigent clients. However, information on individuals arrested in San

Mateo County and referred to the District Attorney’s Office for prosecution (i.e., “a complaint was sought”) provides some insights on the characteristics of individuals in the criminal justice system. Based on this data, in 2020, individuals arrested in the County tended to be arrested for misdemeanors (72 percent), though these were down 34 percent on 2019. Additionally, as shown in Exhibit 3, 40 percent of all arrests where a complaint was sought involved Hispanic individuals, followed by 29 percent with a white individual and 15 percent each were Black or other, respectively (race and ethnicity is based on officer reporting). The share of Hispanic individuals was slightly higher among felonies at 43 percent in 2020. Additionally, around 81 percent of arrests involved a male (gender is based on officer reporting/identification).

**Exhibit 3: Arrests in San Mateo County by Race and Type of Offense, 2020**



Source: California Department of Justice

Additionally, data from the San Mateo County Sheriff’s Office indicates that mental health disorders are common among individuals incarcerated in County Jails. Data from June 2020, shows that of 524 inmates in custody, 64.6 percent of the inmate population had an open mental health case, and 21.5 percent were



receiving psychotropic medication for a mental health disorder.<sup>3</sup> While not all individuals in custody will be PDP clients, this provides an indication of acuity and service needs for individuals facing more serious charges or unable to post bail for release.

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## Independent Contractor Classification and Other Legal Issues Identified During the Evaluation Deemed Out of Scope

During our evaluation we received unsolicited information that was also reported to the San Mateo County Bar Association and the County of San Mateo. The information provided consisted of several allegations including that:

- 1) The County Bar Association (and by extension the Private Defender Panel attorneys) is not legally able to provide legal services to the County given its status as an Internal Revenue Code Section 501(c)(6) non-profit professional trade association;<sup>4</sup> and,
- 2) The County Bar Association, through the Private Defender Program, has misclassified its panel attorneys as independent contractors under existing California case law.<sup>5</sup>

Given the legal nature of these allegations, these were determined to be outside of the scope of our evaluation. We recommend that the County ask its County Counsel or an independent law firm to review these allegations and determine whether they have any merit and to ensure the County is sufficiently protected from the risk of any liability from these allegations.

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## Acknowledgements

We would like to thank the San Mateo County Private Defender Program Chief Defender, Assistant Chief Defender, Managing Attorneys, Assistant Managing Attorney, and administrative staff for their assistance in providing information, answering questions, and reviewing this report. Panel attorneys and investigators also took time for interviews in some cases and to complete a survey that we administered as part of this evaluation. We would also like to thank the County of San Mateo's Deputy County Manager for logistical support and connecting us to critical County stakeholders for interviews, focus groups, and additional information. We would also like to thank the San Mateo County District Attorney's staff, Superior Court judges, San Mateo County Chief of Probation, San Mateo County Sheriff's Office, San Mateo County Service Connect staff, and members of the Board of Supervisors for speaking with us and providing essential information for this report.

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<sup>3</sup> San Mateo County Sheriff's Office, Monthly Jail Statistics for July 2020 (July 18, 2020).

<sup>4</sup> 26 CFR § 1.501(c)(6) and Section 1.501(c)(6)-1 of the Income Tax Regulations

<sup>5</sup> In particular *Dynamex Operations West v. Superior Court of Los Angeles* and *Jimenez v. U.S. Continental Marketing, Inc.*, 41 Cal.App.5th 189 (2019).

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## 1. Data Systems, Caseload Monitoring, and Reporting

The Private Defender Program (PDP) has limited data and systems in place to track how many cases are being carried by an individual attorney, ensure that panel attorneys are not exceeding reasonable caseload standards, and ensure quality representation for indigent clients. These limitations impact PDP's ability to systematically monitor, enforce, and report on critical performance measures required by the County and to adhere to best practices. PDP's data systems and processes do not currently allow management to capture relevant information needed to effectively monitor attorney performance and the quality of representation including case progression and time to disposition, initial client visits, case and client outcomes, and attorney workload. Limited and inaccurate data inhibits effective oversight both within PDP and externally to San Mateo County officials and the wider public. PDP management is developing upgrades to its electronic data system and some of these concerns will be addressed but we conclude that, even with those upgrades, there is further potential to enhance and improve use of the system for management oversight.

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### Limited Case Management Data & Reporting

The Private Defender Program (PDP) uses a case management system, Defender Data, to report attorney caseloads and officewide case counts. Defender Data is primarily used by panel attorneys to charge hourly or flat fees based on the case type and task associated with the case. Defender Data is PDP management's main source for collecting case progress information from attorneys entering their fees.

The PDP has limited data and systems in place to track how many cases are being carried by an individual attorney, ensure that that none are exceeding reasonable caseload standards, and ensure quality representation for indigent clients. These limitations impact PDP's ability to systematically monitor, enforce, and report on critical performance measures required by the County and to adhere to best practices. PDP's data systems and processes do not currently allow it to capture relevant information needed to effectively monitor attorney performance and the quality of representation including case progression and time to disposition, initial client visits, case and client outcomes, and attorney workload. Additionally, there are inconsistencies in how case types are reported and tracked within Defender Data and reports given to the County showing cases received in Defender Data.

Currently, PDP office staff receive notification of new case assignments, look the case up in the Court's electronic record system (Odyssey), and copy the client's name and case information, and next hearing date into Defender Data before assigning the case to an attorney. After that, case data is not systematically updated by PDP staff other than notes regarding expert invoice approvals; any additional data gathered comes from invoices and surveys conducted outside of Defender Data. The PDP should work with the County, the Superior Court, the District Attorney, and other criminal justice stakeholders to determine the feasibility of integrating or developing data exchanges between their respective data systems. Such integration or data exchanges could provide a significant amount of case information without requiring additional input from panel attorneys (i.e. court hearing dates, charges at each phase

of a case, disposition outcomes, etc.). This data could also be provided to panel attorneys within Defender Data so as to increase the functionality and incentive for attorneys to use this system for case management. Similar data integration projects have been implemented in other larger jurisdictions (i.e. San Francisco) but require significant investment and commitment from all criminal justice stakeholders to be successful.

## Inconsistent Tracking and Reporting by Case Type

The contract in place with the County requires the PDP to publish the caseloads of each Private Defender Program attorney by type of case, as well as the average caseloads for the Private Defender Program as a whole in its annual report, to ensure attorney caseloads do not impact the quality of representation. The contract also requires the PDP to provide the County with summary and detailed reports on case counts and related costs on a quarterly basis alongside payment requests. Specifically, the PDP is required to provide the following reports to the County on a quarterly basis:<sup>1</sup>

- Expenditures by Attorney;
- Expenditures per Court Case Number, Case Type and Sub-Type;
- Expenditures by Fee Type;
- Expenditures by Administrative Expense Type;
- Case Count by Type and Sub-Type (with case number details); and
- All fees and costs which are, or may be, subject to reimbursement by the State or Federal governments, or which may be eligible for funding from another agency or organization.

The PDP currently provides the County with the following reports which address the contract requirements: (1) monthly cases assigned to the PDP by case type; (2) monthly expenditures by attorney, investigator, and expert; (3) annual budget documents outlining program expenditures on salaries and benefits for program staff; (4) monthly expenditures per Court Case Number, case type and sub-type; and (4) annual budget revenue from State and Federal funding. The PDP does not provide quarterly reports for expenditures by administrative expense type, or fees and costs which may be eligible for reimbursement by State, Federal or other agencies. The PDP should ensure they are meeting or exceeding the quarterly reporting requirements set out in the contract.

Even with the information reported, the PDP still needs to accurately track and measure caseload for the program and panel members using case assignments within Defender Data. This is needed to avoid assigning excessively large or complex workloads to individual attorneys which may interfere with providing quality representation and has the potential to lead to a breach of professional obligations.<sup>2</sup> The contract between the San Mateo County Bar Association and the County for the PDP states cases shall be defined as A, B, C, and E type cases. Definitions for the case types are as follows:

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<sup>1</sup> Private Defender Program Agreement, 2019-2021. Section 4.b.3. (2019).

<sup>2</sup> American Bar Association, Standing Committee on Legal Aid and Indigent Defendants, *Securing Reasonable Caseloads* (2011).

- **Type A:** A single Superior Court matter involving one accusatory pleading including an indictment, information, or certification under Penal Code section 859(a);
- **Type B:** A single Municipal Court matter involving one complaint or accusatory pleading, alleging a misdemeanor or a felony, or a single court matter involving a petition, certification, or other Municipal or Superior Court proceeding;<sup>3</sup>
- **Type C:** Any Case initiated pursuant to the Lanterman-Petris-Short Act or Developmental Disability laws set forth in the California Welfare and Institutions Code; and,
- **Type E:** Any matter in the Juvenile Court brought pursuant to the juvenile delinquency statutes of the State of California.

The PDP reports case data to the County using the case types and case sub-types shown above. The report shows A, B, C, D, E, and X as the case types. Though not included in the case type definitions in its contract with the County, PDP also reports a case type D for juvenile dependency cases and a case type X for other services not associated with cases (for example, officer of the day or special assignments). There are several case sub-types covering felonies, misdemeanors, probate, juvenile delinquency, dependency, and mental health cases among other case sub-types. Separately, the PDP has also identified “practice levels” for attorneys which are used for assigning cases, according to the PDP Manual for panel attorneys. Practice levels are determined by attorney qualifications and are as follows for the Adult Trial Panel: (1) Misdemeanors, (2) Low Level Felonies, (3) Serious Felonies, (4) Violent Felonies, (5) Homicide and Complex Sex Assault Cases, (6) Death Penalty Cases, (7) the Juvenile Delinquency Panel, and (8) the Juvenile Dependency Panel.

The case groupings identified in the contract and PDP Manual significantly vary from those used within Defender Data. In Defender Data there are 8 case types as follows: (1) criminal, (2) criminal municipal court, (3) conversion, (4) criminal superior court, (5) civil, (6) grand jury, (7) juvenile, and (8) private defender cases. Additionally, there are 96 case sub-types in Defender Data matching those in the report the PDP gives to the County showing case counts.

The County and the PDP should explore other methods of organizing case count data which mitigates the issue of double counting cases and provides consistency with how cases are assigned and handled by the Court. The PDP should institute consistent case types across the contract with the County and within Defender Data to make data tracking consistent between the County and PDP when data is reported.

### Data Collected in Defender Data is Limited

The PDP currently collects a limited number of data points related to case progression and case outcomes in its case management system. These limitations impair PDP management’s ability to effectively manage cases and oversee panel attorneys’ workload. PDP administrative staff open cases in Defender Data by

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<sup>3</sup> Though the Municipal Court no longer exists due to consolidation with the Superior Court, the case type terminology for PDP has been retained from when the County’s court system was divided into Municipal and Superior Courts, with misdemeanors and infractions generally assigned to the Municipal Court and felonies and more serious offense cases generally assigned to the Superior Court.

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## 1. *Data Systems, Caseload Monitoring, & Reporting*

entering the following information: (1) client first and last name, (2) type of case, (3) file type, (4) arraignment date and time, (5) Court Case Number, (6) assigned attorney, (7) charges, and (8) next court appearance. Attorneys can later charge fees to the case which allows management to see when and what type of motions were filed on a case. As part of its monthly expense reports to the County, the PDP currently reports a listing of all cases by type showing the lead attorney assigned but does not show overall case counts per attorney or investigator. The PDP also produces reports showing total cost by attorney and investigator per month.

The PDP does not track the majority of data points recommended by best practices such as those from the National Legal Aid & Defender Association (NLADA). NLADA recommends tracking the following data points within an indigent defense office's case management system:

- number of closed cases within a year;
- time to close a case;
- continuances requested by defender per case;
- defendant characteristics: sex, race, and age;
- case outcomes for defendants;
- number of in-person visits per client;
- number of phone conversations with client;
- bail amount;
- number of witnesses;
- number of witnesses contracted and interviewed;
- whether the investigator testified;
- plea;
- length of probation;
- sentence length; and
- years of experience for each attorney.

The PDP cannot currently reliably track or report the above recommended data points within Defender Data. However, PDP management is currently working with the NLADA to improve performance and outcomes tracking. Defender Data currently does not reliably track the number of cases by case phase, continuances or closure which means it cannot monitor for potential delays in case progression caused by its panel attorneys or ensure attorney workload is accurately reflected in caseload reports pulled from Defender Data. The PDP caseload reports used by management currently do not reflect active assignments by attorney due to difficulty tracking case closures within Defender Data. Additionally, panel attorneys responding to our survey reported using varying methods for tracking active cases and case progress and most reported using methods other than Defender Data (including physical files, the Court electronic case management system, and electronic files).<sup>4</sup> This makes case progress harder to track.

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<sup>4</sup> 74 Panel Attorneys responded to a survey conducted by Harvey M. Rose Associates as part of the evaluation.

The PDP is working with the Defender Data vendor, Justice Works, to increase data captured in the case management system. Information the PDP is seeking to incorporate into Defender Data includes: (a) attorney requests for investigators, expert witnesses, social workers, and paralegal support for cases; (b) Officer of the Day call log and complaint tracking; and, (c) attorney-provided case closure information when attorneys submit their invoices for payment, including whether a case has been closed, which must be reported each time an invoice is submitted.

These improvements should provide the PDP with more data to improve case tracking, workload management, and case outcomes. Even with these improvements some gaps will remain in terms of data recommended by best practices and required by the County contract, including data on case progression, client characteristics, and client visits. The PDP will also have to increase its analytical and reporting capabilities to ensure expansions to data input into Defender Data are used to inform performance or quality monitoring and decision-making by hiring or contracting with a part-time Management Analyst to analyze the new data being collected and develop operationally relevant reports or dashboards.

### Case Complexity & Time to Close Cases Not Reliably Tracked

The PDP doesn't adjust total case numbers for complexity or time needed or have a set limit on total cases or total cases by type a single attorney can carry at a time. The importance of limiting attorney workload to ensure quality representation for indigent clients is highlighted in multiple national best practices and criminal defense standards and has been the subject of several recent lawsuits.<sup>5</sup> At a minimum, available national standards indicate that attorney caseloads should be limited to no more than 150 felony, 400 misdemeanor, 200 juvenile, 200 mental health, or 25 appeals cases per year.<sup>6</sup> In Section 2, our analysis shows that 8 to 17 PDP panel attorneys exceeded National Advisory Committee on Criminal Justice Standards and Goals (NAC) caseload standards from FYs 2016-17 to 2020-21. The PDP Manual states the Chief Private Defender is responsible for monitoring caseloads; however, PDP management has not set maximum overall or case type-specific limits for attorneys to handle. Management reports from Defender Data showing when attorneys have exceeded NAC or internal caseload limits are critical to effective and systematic caseload monitoring.

PDP management reports that they meet regularly to go over attorney caseload numbers and review the types of cases they are handling, but the PDP has difficulty tracking when a case has been closed. Reports used by PDP management to monthly assess active workload for attorneys do not always reflect if a case has been closed and can count a case under more than one case type due to the case classification system set up between the County and the PDP. This issue stems from how the contract with the County and PDP dictates cases be counted and reported to the County. Furthermore, the reports used appear to only have monthly counts of active cases per attorney rather than yearly assignments to confirm attorneys have not exceeded NAC limits within PDP case assignments.

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<sup>5</sup> American Bar Association, *Securing Reasonable Caseloads*. (2011); *Wilbur v. City of Mount Vernon*. (2013); & *Phillips v. State of California*. (2020).

<sup>6</sup> Guidelines from the National Advisory Commission on Criminal Justice Standards and Goals (NAC) (1975).

Using Defender Data, it is difficult to know which cases are active and which have been closed. Without such information, PDP management cannot assess the efficiency of its panel attorneys and whether cases are taking longer than necessary, resulting in clients remaining incarcerated longer than necessary. Currently, Defender Data does not ask the attorney to update the status of their cases from open to closed. The implementation of the case closure check when attorneys submit their fees in Defender Data will be through a questionnaire when an attorney submits their fees in the system. The attorney will be asked if the case is now closed, and, if it is, they will be asked to provide what the closing event was and the date of the event. When the PDP implements their case closure data entry module for attorneys in Defender Data, measuring time to close for cases should become more accurate. The PDP should also include sentencing information in this questionnaire to compare outcomes between similar cases as well as attorney performance.

## Performance & Quality Measures

PDP management has indicated that the number of motions filed, use of investigators, taking cases to trial, and client communications are key indicators of quality representation by indigent defense attorneys. Initial client contact is also a performance benchmark in the PDP's contract with the County. According to our survey of 74 PDP panel attorneys, over 50 percent of respondents agreed that PDP management communicated the importance of these indicators to them. Our analysis of records in the Defender Data system, not readily available to PDP management at this time, demonstrates how the system could be used to track these key measures of quality representation.

### *Filing Motions*

As shown in Exhibit 1.1 below, motions were filed on only 2.1 percent of cases arraigned from FY 2016-17 through FY 2020-21 despite being identified as an important indicator of quality by PDP management. Currently, PDP management asks panel attorneys about the number of motions filed and to provide sample motions as part of the Program's annual evaluation survey of panel attorneys. PDP management should use motions invoice data they collect to run reports on the number of attorneys regularly filing motions, which attorneys file motions, and which cases had motions filed as one measure of monitoring attorney performance. Motions are not relevant in all cases but using information available in Defender Data would enable PDP management to better assess whether attorneys are filing motions at similar rates across similar case types and identify attorneys who file motions infrequently.

**Exhibit 1.1: Motions Charged for Cases Arraigned from FYs 2016-17 to 2019-20**

	2016-17	2017-18	2018-19	2019-20	2020-21 <sup>b</sup>	Total
Total Cases with Motions Filed	490	483	423	357	187	1,940
Total Cases <sup>a</sup>	23,325	20,156	20,575	15,439	13,259	92,754
<b>% of Cases with Motions</b>	<b>2.1%</b>	<b>2.4%</b>	<b>2.1%</b>	<b>2.3%</b>	<b>1.4%</b>	<b>2.1%</b>

Source: Harvey M. Rose Associates analysis of data from the Private Defender Program’s Defender Data system as of July 31, 2021.

<sup>a</sup> This is less than the total case assignments within Defender Data. We excluded cases where motions would not have been filed; Officer of the Day case counts, for example, were excluded from this count. Additionally, this does not include motions for Special Fee cases (i.e., cases that carry a life sentence, 3 strikes, etc.).

<sup>b</sup> The San Mateo County Superior Court did not schedule hearings on motions outside of trials during most of FY 2020-21 due to COVID-19 public health restrictions.

### *Use of Investigators*

As discussed in Section 4, even though the PDP has less than three attorneys for every investigator, exceeding performance guidelines from the NLADA, investigators were assigned to only 7.4 percent of all cases in FY 2020-21. Investigators were assigned to 16.5 percent of felony cases during that same time. As shown in Exhibit 1.2 below, only 4.9 percent of cases arraigned from FYs 2016-17 to 2020-21 had investigators assigned to them. However, the use of investigators on all cases increased from 3.9 percent in FY 2016-17 to 7.4 percent in FY 2020-21. PDP management should use the team assignment data they collect to run reports which show the use of investigators by case type and attorney. As with filing motions, discussed above, investigations are not needed on all cases. However, they are an important tool in defending indigent clients and PDP management should track whether certain attorneys are not using this tool regularly or at all, particularly for case types that would generally benefit from this type of support.

**Exhibit 1.2: Cases with Investigators Assigned from FYs 2016-17 to 2019-20**

	2016-17	2017-18	2018-19	2019-20	2020-21	Total
Total Cases with Investigators	903	938	844	834	967	4,486
Total Cases*	23,129	19,960	20,390	15,284	13,123	91,886
<b>% of Cases with Investigators</b>	<b>3.9%</b>	<b>4.7%</b>	<b>4.1%</b>	<b>5.4%</b>	<b>7.4%</b>	<b>4.9%</b>

Source: Harvey M. Rose Associates analysis of data from the Private Defender Program’s Defender Data system as of July 31, 2021.

\*Investigators did not work on Appeals, Contempt Cases, Probate Cases, Witness Representations or Restitution during this time. Those case types were omitted from the total.

### *Taking Cases to Trial*

PDP does not systematically track the outcomes of cases in Defender Data and is therefore unable to assess how many and which cases are going to trial and which attorneys are bringing cases to trial. Only 737, or 0.8 percent, of all 92,754 cases assigned to the PDP had fees indicating the case went to trial from FYs 2016-17 to 2020-21, an average of 147 cases each fiscal year. Among felony cases assigned to PDP during the period, 1.6 percent, or 283 out of 17,974, had fees indicating the case went to trial. PDP



management has started collecting information on cases brought to trial from panel attorneys as part of the annual evaluation report through a new informal attorney survey regarding trials.

In FY 2020-21, of the 103 panel attorneys assigned cases, 28 attorneys, or 27 percent, participated in PDP management's informal trial survey and provided responses for 39 cases. The trial survey is separate from information collected in Defender Data. The trial survey was sent out to panel attorneys on July 1, 2020, with response dates ranging from October 21, 2020, through June 19, 2021 and asked several questions about the cases that went to trial, including how investigators were used, details about the trial, judge, and prosecution, as well as whether the trial outcome was more favorable than any plea deals offered.

Of the 39 cases included in the survey responses, 16, or 41 percent, received an outcome that was more favorable than the plea offer, and one case received the same deal as the plea offer. Investigator use for cases going to trial was high at 30 out of 39 cases, or 77 percent of cases. Of the 39 cases, 13, or 33 percent, had a request for acquittal of one or more of the offenses charged because the evidence was insufficient to sustain conviction (1118.1 Motion). Additionally, attorneys charge fees in Defender Data for taking a case to a jury or court trial. There were 149 cases with trial fees charged in FY 2020-21, 77, or 52 percent, were felony cases. Of the 149 cases that went to trial in FY 2020-21, only 26 percent were captured in the new trial form.

While the trial survey information collected outside of Defender Data is insightful and appears to show some of the benefits of taking cases to trial, it provides only a partial picture of all cases that go to trial and likely imposes additional data collection burdens on panel attorneys whose time might be better used. The data does not provide complete information on whether panel attorneys overall are bringing cases to trial as encouraged by PDP management.

PDP management should track this trial survey information through Defender Data by creating a new data entry screen asking attorneys whose cases are going to trial to collect information in Defender Data that is currently collected through the trial form survey. If the PDP can explore ways to integrate or pull data from other County criminal justice partners including the Superior Court, attorneys may not need to enter this information into the system when billing; therefore, saving attorneys time. The PDP should create modules in Defender Data to have attorneys' input trial outcomes and plea offers for the case when they are charging a trial fee on an invoice. The PDP should use this data to create reports analyzing trial outcomes compared to initial plea deals, by case type and attorney.

#### *Client Contact*

The PDP is required by its contract with the County to devise a system to monitor the occurrence of early interviews of incarcerated clients, taking into account the factors that affect the ability of Private Defender Program lawyers to make early jail visits. The contract outlines that the PDP must require attorneys to conduct a client interview as soon as practical after being appointed by the Court, to obtain information necessary to provide quality representation in the early stages of the case and to provide the client with information concerning the lawyer's representation and the course criminal cases take in the San Mateo County Superior Court.

The PDP doesn't systematically monitor when attorneys first make contact with defendants or the frequency of their ongoing communications while they are representing them. Defender Data does not require attorneys to input information regarding the date of their first visit or phone call with their clients. As discussed in Section 2, Defender Data has one fee event, added in July 2021, for a client conference fee. Attorneys can only charge one fee per client for a conference prior to the first hearing.

During our focus groups with clients, while some participants were positive about the services they received, a common theme voiced by participants was a lack of communication with PDP attorneys. In particular:

- 16 out of 18 clients reported having issues getting in contact with their attorney or meeting with their attorney;
- 11 out of 18 reported not meeting their attorney in person before a court appearance;
- five reported calling their attorney multiple times to get answers to questions about their cases, and;
- five reported their attorney missed one or more court appearances, with one reported having to spend additional time in jail due to her assigned counsel missing a court appearance.

The PDP should expand the client conference fee to all case types and allow attorneys to charge the client conference fee before each court event in order to allow for and encourage attorneys and clients to meet and discuss case updates. Furthermore, the PDP should require attorneys to input dates of phone calls and meetings with their clients in Defender Data. Finally, the PDP should also incorporate tracking of PDP attorney requests for continuances on their cases within Defender Data to ensure cases are not being unnecessarily delayed by panel attorneys.

### Client Complaints Not Recorded in Defender Data

The contract with the County requires the PDP to have an Officer of the Day who takes, records, and investigates complaints from PDP attorney clients. The Officer of the Day must follow a written procedure to handle client complaints including logging the complaint in a centralized database and noting any actions taken by the Officer of the Day or administrative staff including investigative actions.

The PDP provides a pamphlet to clients at arraignment which describes the process for asking questions or raising complaints about a PDP-assigned attorney, the complaint tracking process, and complaint appeal options. Despite providing this pamphlet to clients, 17 out of 18 clients in our focus groups reported having some sort of issue with their attorney. Furthermore, only 3 out of 18 clients interviewed reported being aware that the PDP had a process through which they could complain about their lawyer. Of the 18 clients in our focus group, 11 were aware they could request a new lawyer; however, only two made such a request and were assigned a new lawyer.

Identifying attorneys with multiple complaints related to poor performance is critical information for PDP management but the current complaint tracking system does not easily allow the identification of complaints by attorney. Currently, inquiries and complaints are recorded in notes within a separate Justice

Works system which cannot be easily tied to client cases and is not connected to the PDP's Defender Data case management system. The Officer of the Day creates a new case for that day's calls and inputs them into Defender Data's case information tab and the notes screen. This causes the Officer of the Day to constantly go back and forth between the two screens. Any notes the Officer of the Day inputs which may be related to a case are not flagged to that case in Defender Data. Client complaint data collected by the Officer of the Day and PDP management is not systematically recorded or analyzed and tracking appears inconsistent across different Officers of the Day. Tracking of complaint follow up and provision of information about appeal options to complainants appears inconsistent. Complaint information is only added to the Defender Data case management system if the complaint results in an attorney change. Additionally, the number of complaints against specific attorneys is not systematically tracked or analyzed which reduces the ability of PDP management to identify attorneys with repeat complaints.

The PDP is working with Justice Works to integrate Officer of the Day call information in Defender Data to better track inquiries and complaints while tying them to client cases. These changes should streamline data entry for the Officer of the Day and improve the search and reporting of calls and complaints. Furthermore, case relevant complaints or inquiries will be easily tied to the case in Defender Data so that the assigned attorney may see any complaints or inquiries their client may have.

The PDP should ensure complaints related to attorney performance or representation (whether or not they lead to a change in attorney) can be linked to case management data in Defender Data so that PDP can systematically identify, monitor, and report complaints by attorney being complained against. The tracking of complaints should also be enhanced to ensure that the assessment and final resolution of complaints is systematically recorded and can be easily analyzed and reported on to ensure the complaint process is functioning as set out in the PDP Contract. According to PDP management, the latter has been added to the planned Defender Data improvements.

## Conclusion

The PDP's data systems and processes do not currently allow it to capture relevant information needed to effectively monitor attorney performance and the quality of representation. Limited and inaccurate data inhibits effective oversight both within PDP and externally to San Mateo County and the public. These limitations can reduce the ability of PDP management to systematically and objectively track case processing, case and client outcomes, time to disposition, quality of representation, and attorney workload. The PDP's limited data and reporting puts it at risk of assigning too many cases to panel attorneys which could reduce the amount of time attorneys spend on indigent cases and communicating with clients, two key indicators of attorney quality, and ultimately, could negatively impact case outcomes.

The PDP is working with the Defender Data vendor, Justice Works, to increase data captured in the case management system to address some of the current limitations. However, other deficiencies remain, including that there are no set limits for attorney caseloads, no tracking of case complexity, and no reporting on performance measures which PDP management values in attorneys. These issues put the

program at risk of lawsuits resulting from panel attorneys providing poor quality representation due to high workloads or not providing full due diligence in representing clients due to insufficient use of investigators and experts.

In addition to the improvements PDP is currently developing with Justice Works, the PDP needs to improve the tracking of attorney caseloads, client contact, motions filed, investigations, client complaints, and when a case goes to trial. The PDP should also consistently track case types across documents and databases, create a case weighting system to adjust for case complexity, set maximum overall or case type limits for attorneys to handle, and increase its analytical and reporting capabilities. To ensure data collection and system upgrades to Defender Data are used to inform performance or quality monitoring and decision-making, the PDP should hire a part-time quantitative management analyst or contract for these services.

In addition to current improvements that aim to address data gaps by increasing data collected from panel attorneys, the PDP should also work with the County, the Superior Court, and the District Attorney to determine the feasibility of integrating or developing data exchanges between their respective data systems. Such integration or data exchanges could provide a significant amount of case information without requiring input from panel attorneys (i.e. court hearing dates, charges at each phase of a case, disposition outcomes, etc.). This data could also be provided to panel attorneys within Defender Data so as to increase the functionality and incentive for attorneys to use this system for case management. Similar data integration projects have been implemented in other larger jurisdictions (i.e., San Francisco) but require significant investment and commitment from all criminal justice stakeholders to be successful.

## Recommendations

The Board of Supervisors of San Mateo County should:

- 1.1 Approve funding for the PDP to hire or contract with a part-time Management Analyst to work on creating reports such as live dashboards or interactive tools for PDP and the County to ensure contract compliance and enhanced management review which inform performance or quality monitoring and decision-making.

The Chief Defender of the Private Defender Program should:

- 1.2 Request funding to hire or contract with a part-time Management Analyst to work on creating reports for contract compliance and management review which inform performance and quality monitoring and decision-making.
- 1.3 Enhance and expand data collected in Defender Data to collect key data points recommended by best practices, including:
  - a. case status,
  - b. case outcomes,

- c. case complexity,
  - d. continuances requested by defender and case,
  - e. defendant characteristics: sex, race, and age,
  - f. case outcomes for defendants,
  - g. number of in-person visits per client,
  - h. number of phone conversations with client,
  - i. bail amount,
  - j. number of witnesses,
  - k. number of witnesses contacted and interviewed,
  - l. whether the investigator testified,
  - m. disposition: i.e., plea or if case went to trial,
  - n. sentence type and length: probation, prison, other, and
  - o. years of experience for each attorney.
- 1.4 Explore ways to integrate or pull data from other County criminal justice partners' data systems including the Superior Court's court records management system (for key case and disposition data).
- 1.5 Commission the development of new management reports which capture the following information:
- a. number of closed cases within a year,
  - b. time to close a case,
  - c. outcomes by case type and defendant characteristics,
  - d. attorney experience,
  - e. change in sentencing outcome from plea to sentencing when a trial takes place,
  - f. number and share of motions filed per attorney and case,
  - g. number and share of cases brought to trial overall and by attorney,
  - h. time from arraignment and case assignment to first client contact, and,
  - i. use of investigators by case type and attorney.
- 1.6 Work with San Mateo County to amend Section 2 of the San Mateo County Bar PDP agreement to reflect case types which match those used by the PDP within Defender Data or, at a minimum, ensure that there is a clear crosswalk between case types in the PDP agreement and Defender Data.
- 1.7 Consider updating Defender Data to use the class types for attorney experience used in PDP's case assignment process for the case types to better reflect complexity of the cases.
- 1.8 Consider structuring case types in Defender Data and in the PDP agreement with the County to mirror those of the District Attorney to allow the County to compare caseloads between the two offices.

- 1.9 Add client conference fees for all case types and expand the fee to be chargeable for meeting with the client before each court event.
- 1.10 Ensure complaints related to attorney performance or representation (whether or not they lead to a change in attorney) can be linked to case management data in Defender Data so that PDP can systematically identify, monitor, and report complaints by attorney being complained against and by case type.
- 1.11 Enhance tracking of complaints to ensure that the assessment and final resolution of complaints is systematically recorded and can be easily analyzed and reported on to ensure the complaint process is functioning as set out in the PDP Contract.

## Benefits and Costs

Implementation of the changes to Defender Data would cost up to \$60,000 one time through PDP's contract with Justice Works assuming no additional negotiation is needed to add these changes alongside their current Defender Data updates. However, the PDP will need to work with Justice Works to establish a scope of work and cost estimate given the requirements of the data collection recommended. Based on PDP budget estimates submitted to the County of San Mateo, the cost of creating a Management Analyst position could annually cost the program up to \$52,500. A contractor may have a higher hourly rate but could be scaled back after the initial time spent creating new data collection methods and reporting. Additionally, PDP will need to work with the County and other justice system partners to implement changes to track case types consistently and accurately across databases and reports.

Limited and inaccurate data inhibits effective oversight both within PDP and externally to San Mateo County and the public. These limitations can reduce the ability of PDP to systematically and objectively track case processing, case and client outcomes, quality of representation and attorney workload. Implementing these recommendations would reduce risk of lawsuits resulting from staff having high workloads or accusations of limited resources allocated to cases in terms of paralegal or investigator tasks. Recent lawsuits regarding insufficient defense of clients served by an indigent defense system have resulted in settlements costing public agencies between \$2.7 million to \$4.5 million dollars.<sup>7</sup>

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<sup>7</sup> Wilbur v. City of Mount Vernon and Hurrell-Harring et al. v. State of New York.

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## 2. Management Oversight and Quality of Representation

The PDP has limited management resources, processes, and controls in place to ensure attorney performance and workloads are consistent with reasonable standards and result in high quality representation for clients. Caseloads can vary significantly between attorneys because attorneys work on different case types and some work for PDP on a part-time basis. PDP management is responsible for monitoring and determining if any attorney is carrying too many cases based on case type and complexity.

From FY 2016-17 to 2020-21, an average of 12.5 percent of attorneys, or 28 individual attorneys, exceeded national caseload standards estimated by our weighted caseload model. Given the absence of internal caseload limits, national caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate approach. PDP should develop workload standards and procedures against which individual attorney performance should be monitored.

The PDP has not set a limit on the number of cases an attorney can carry. The PDP doesn't systematically record or monitor when attorneys first make contact with defendants or the frequency of their ongoing communications while they are representing them.

Although PDP management reports that they place a high value on client communication and 93 percent of attorneys reported that management communicates this value, mechanisms for identifying poor quality representation, including feedback from clients, are not being fully utilized to assess and improve the quality of representation provided to PDP clients. PDP clients interviewed reported not receiving sufficient communication from their attorneys about their case. The PDP-provided brochures do not inform clients of their right to request a new attorney. Furthermore, the level of client feedback solicited by PDP and received through surveys is not sufficient to provide meaningful information on the quality of representation. PDP should expand the number and ways in which it solicits feedback on the quality of attorney representation provided.

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### Management Oversight of Defense Representation Quality

In their agreement with San Mateo County, the San Mateo County Bar's Private Defender Program (PDP) is required to publish the caseloads of each PDP attorney by type of case and average caseloads for the Private Defender Program as a whole in its annual report provided to the County. The purpose of monitoring and reporting this measure is to ensure attorney caseloads are not so high that they impact the quality of representation. Furthermore, the agreement outlines that the PDP must require attorneys to conduct a client interview as soon as practical after being appointed by the Court in order to obtain information necessary to provide quality representation in the early stages of the case and to provide the client with information on the criminal case process in the San Mateo County Superior Court. Finally, the agreement also requires the PDP to have an Officer of the Day who, among other duties, takes, records, and investigates complaints from PDP attorney clients.

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## 2. Management Oversight & Quality Representation

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Clients of the PDP are entitled to a speedy trial without undue delays.<sup>1</sup> Undue delays can be caused by a high level of workload for supervisors, attorneys, investigators, or social workers as delays among one of these professionals can impact the others due to their interconnected nature. It is the obligation of PDP management to monitor staff workload to avoid assigning excessively large or complex workloads which may interfere with providing quality representation and may potentially lead to a breach of professional obligations.<sup>2</sup> The PDP is made up of contracted attorneys, investigators and social workers who are monitored by PDP management staff. The number of PDP management staff positions are limited by the total budget available in PDP's contracts with the County and Superior Court.

Cities, counties, and states have been sued by former defense clients as a result of case delays due to high staff workloads that resulted in alleged violations of constitutional due process rights and poorer case outcomes. In New York State, defendants did not receive legal counsel even though they were assigned to the Public Defender.<sup>3</sup> The State reached a settlement, agreeing to spend \$4 million over two years on improving Public Defender services, increasing staff trainings, and allowing regular supervision of the changes by the plaintiff. The ACLU sued the Cities of Mount Vernon and Burlington, Washington, where attorneys were carrying over 1,000 cases annually because the system was underfunded, causing an inadequate defense system for clients.<sup>4</sup> The court required Burlington and Mt. Vernon to hire a supervisor to ensure their defense systems comply with constitutional standards, and it kept jurisdiction over the case for three years while the Public Defender offices implemented the reforms. The ACLU also brought a lawsuit against the State of California and Fresno County because the County was failing to adequately fund their Public Defender's Office, limiting attorneys' ability to provide competent and effective representation for each case, denying clients their right to meaningful legal representation.<sup>5</sup> Fresno County and the state reached a settlement agreement with the ACLU in which Fresno County agreed to increase their budget for the Public Defender Office by \$214,338 for FY 2020-21 and by \$714,338 for the following fiscal year. Additionally, the settlement requires that Fresno County have their attorney supervisors meet with attorneys twice a year to discuss issues concerning their workload.

From FY 2016-17 through 2020-21, the PDP received 92,754 cases for 43,302 clients, or an average of 18,856 cases for 11,524 clients per year. Exhibit 2.1 shows the breakdown of these cases by fiscal year and case sub-type. Case sub-types were grouped into similar categories; for example, the felonies category represents regular felonies, felonies without superior court review, felonies with superior court review, and serious felonies (i.e. murder and sexual assault cases). The number of cases received by the PDP decreased in FYs 2019-20 and 2020-21 from previous years; this is likely related to the COVID-19 pandemic and associated public health orders.

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<sup>1</sup> American Bar Association, Speedy Trial and Timely Resolution of Criminal Cases. (2006).

<sup>2</sup> American Bar Association, Securing Reasonable Caseloads. (2011).

<sup>3</sup> Hurrell-Harring et al. v. State of New York. (2007).

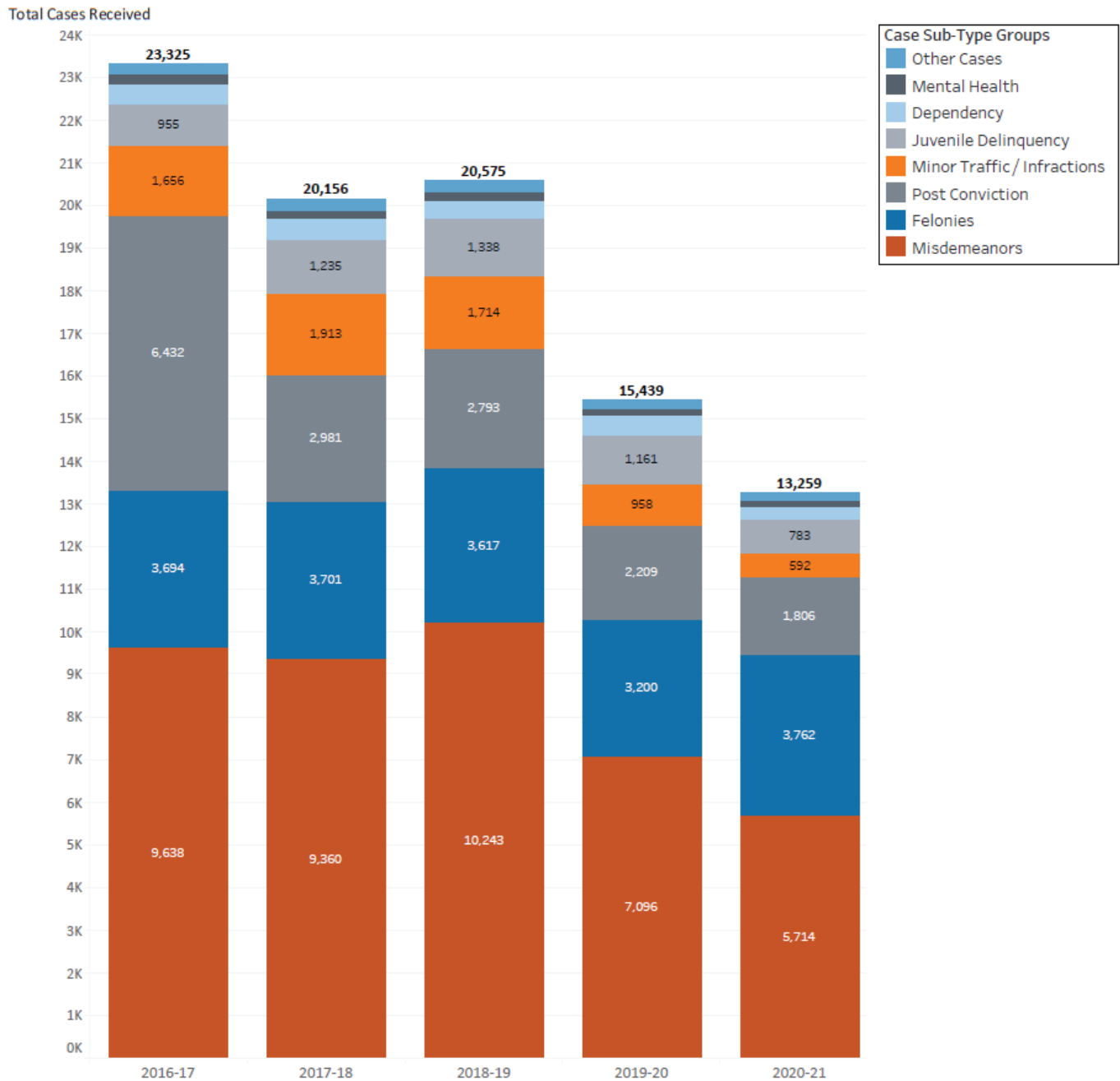
<sup>4</sup> Wilbur v. City of Mount Vernon. (2013).

<sup>5</sup> Phillips v. State of California. (2020).



## 2. Management Oversight & Quality Representation

**Exhibit 2.1: Total Cases Received by the PDP by Case Type, FY 2016-17 to 2020-21 \***



Source: HMR Associates analysis of data from the Private Defender Program's Defender Data system as of July 31, 2021.

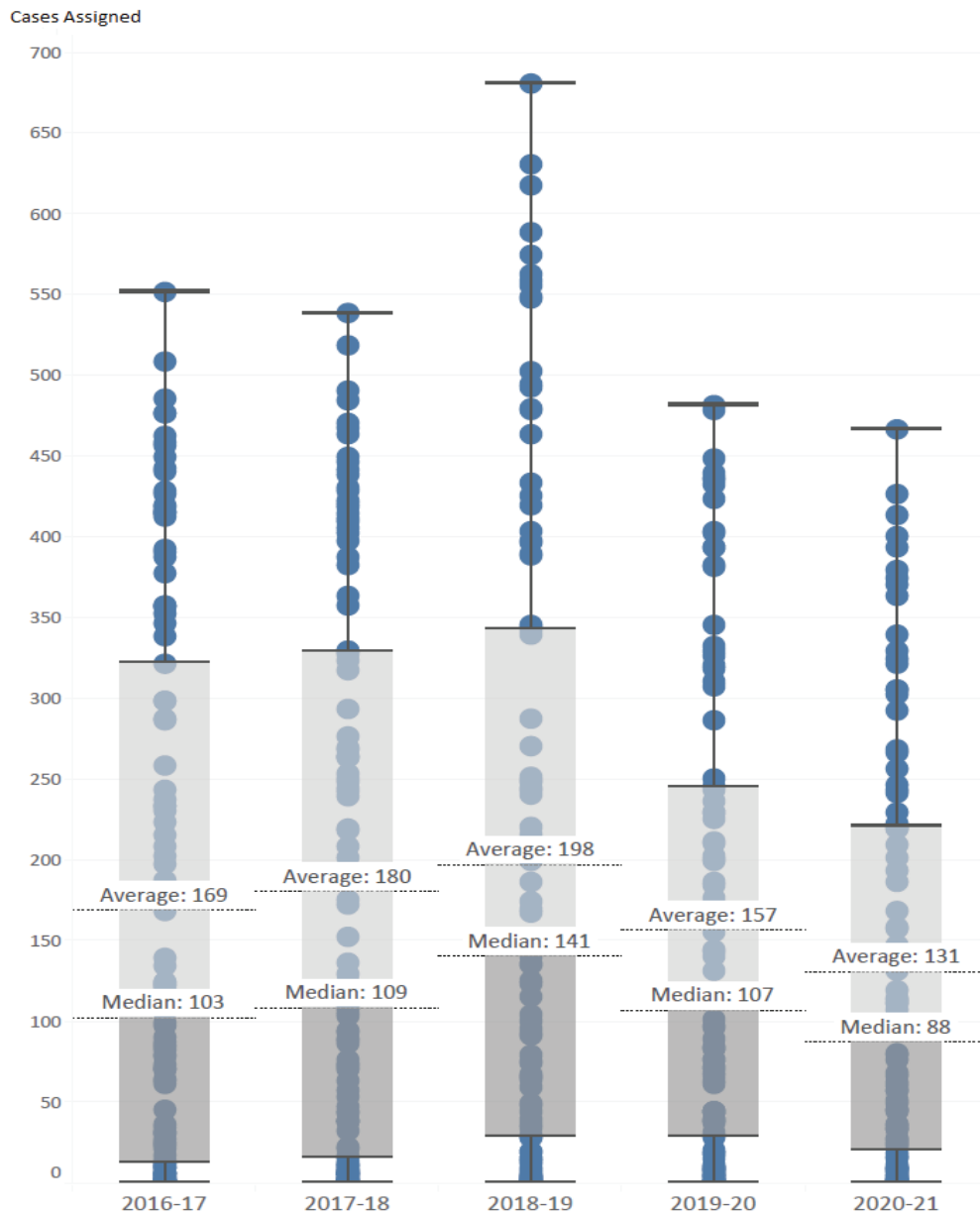
\*This case count omits the following case types which were not tied to court cases but recorded as cases in Defender Data: Calendar, Lineups, Mentor, Officer of the Day, Retention Fee, Special Assignment, & Special Project.

## Attorney Caseloads Exceed National Standards

According to PDP management, the program currently has 103 attorneys on the adult and juvenile panels, though many work on a part-time basis. According to the PDP's case management system, Defender Data, the PDP has had 144 distinct attorneys in the program from FYs 2016-17 through 2020-21. Panel attorney managers and assistant managers cannot ensure quality representation due to the high number of attorneys they are responsible for supervising. As discussed in Section 4, San Mateo PDP has the fewest number of managing or assistant managing attorneys serving in a supervisorial capacity to PDP attorneys compared to seven peer county Public Defender Offices.

As shown in Exhibit 2.2, attorney caseload varies significantly between attorneys from 1 up to 681 cases per year. The distribution of cases was also highly concentrated in just a small group of panel attorneys over this period. For example, from FY 2016-17 to FY 2020-21, 25 percent of panel attorneys were responsible for between 62 and 58 percent of all cases assigned per year, respectively. The average number of total cases assigned to each attorney has gone down since FY 2018-19 from 198 to 131 in FY 2020-21.

**Exhibit 2.2: Distribution of Attorney Caseloads by Fiscal Year, FY 2016-17 to 2020-21\***



Source: Harvey M. Rose Associates analysis of data from the Private Defender Program’s Defender Data system as of July 31, 2021.

This box plot shows the distribution of total case assignments for each attorney within each fiscal year. Each fiscal year has a box and whisker plot. The “whiskers” are the upper and lower lines identifying the minimum and maximum case assignments to an attorney. The “box” shows the interquartile range, i.e. the top of the box is the 75<sup>th</sup> percentile value, the bottom of the box is the 25<sup>th</sup> percentile value, and the median, the line in the middle of the box, represents the value in the middle of the distribution when arranged from smallest to largest. The blue dots represent actual attorney caseloads.

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## 2. Management Oversight & Quality Representation

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\* This caseload count is based on all arraignment dates in the year. It omits the following case types: Calendar, Lineups, Mentor, Officer of the Day, Retention Fee, Special Assignment, & Special Project. One attorney's caseload for FY 2016-2017 with 3,241 cases was excluded from this distribution as it was considered an outlier/ error.

Caseloads can vary significantly between attorneys because attorneys work on different case types. PDP management is responsible for monitoring and determining if any one caseload is too high for an attorney based on case type and complexity. Attorney workload is controlled to ensure a high quality of representation is provided to indigent clients.<sup>6</sup> An attorney's workload, including appointed and other work, should never be so large as to interfere with the quality of representation or lead to a breach of ethical obligations. Before agreeing to act as counsel or accepting a court appointment, the attorney has an obligation to make sure that they have available sufficient time, resources, knowledge, and experience to offer quality representation to a defendant in a particular matter. If at any point an attorney is unable to offer quality representation in the case, they should move to withdraw from representing the case.

In order to ensure caseloads are manageable, the American Bar Association (ABA) and others recommend caseload standards and maximum caseloads be adopted by defense counsel organizations. In particular, the ABA has recommended minimum caseload standards for defense counsels to use as a baseline. These standards, based on Guidelines from the National Advisory Commission on Criminal Justice Standards and Goals (NAC), a 1973 U.S. Department of Justice-funded initiative, recommend limiting attorney workload to no more than 150 felony, 400 misdemeanor, 200 juvenile, 200 mental health, or 25 appeals cases per year.<sup>7</sup> The standards do not distinguish between different felony types.<sup>8</sup> Based on our analysis, we identified five PDP attorneys who exceeded these caseload standards within a single case type in FY 2018-19 and 2020-2021.

Since the NAC does not explicitly set out standards that account for attorneys carrying multiple case types (e.g., misdemeanors and felonies), we developed a model to evaluate if attorneys with multiple case types were assigned more cases than recommended by the NAC standards. Using the NAC standards, we divided each case type standard by the total maximum number of typical full time work hours within a year (2,080 hours), to get an implied total number of hours needed per case type.<sup>9</sup> For example, if an attorney were to work on only non-traffic related Misdemeanors, they would be limited to 400 cases a year and 5.2 hours per case in a year.<sup>10</sup> We multiplied every attorney's case count by case type by these implied hours

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<sup>6</sup> Ten Principles of a Public Defense Delivery System. American Bar Association. (2002).

<sup>7</sup> [National Advisory Commission, Standard 13.12.](#)

<sup>8</sup> In the PDP's case management system there are 4 felony groups: regular felonies, felonies without superior court review, felonies with superior court review, and serious felonies. We have assumed the NAC felony caseload standard applies to all of these groups.

<sup>9</sup> This assumes a full-time attorney works 40 hours per week for 52 weeks in a year. This is a conservative estimate as it doesn't account for holidays, vacation, or sick leave. Given the NAC standards were intended to guide public defender offices, we believe this approach is reasonable and aligned with the NAC methodology.

<sup>10</sup> Appendix A provides additional information on the implied hours estimated from NAC standards. However, note that for this comparison we used 2,080 hours (i.e. 40 hours per week times 52 weeks) as we assumed PDP panel attorneys were more likely to be able to work more hours than a standard salaried employee given their independent contractor status.

## 2. Management Oversight & Quality Representation

standards and estimated the total hours needed across all their case types to determine if they were working more than 2,080 hours within a year. This model excludes case types which did not have applicable NAC standards and does not account for other non-case PDP assignments, like Officer of the Day, which may take up some of their time. Additionally, this model does not account for cases that may go on longer than one year. These estimates therefore likely underestimate the number of attorneys exceeding NAC standards due to the limited scope of case types in this analysis and recent workload estimates which indicate that attorneys likely spend more time on each case than suggested by NAC standards. Additionally, in our own survey of panel attorneys, estimated hours to complete each case type were even higher than the implied NAC hours per case.

Exhibit 2.3 shows, on average, 12.5 percent of attorneys have exceeded our model standard for NAC limits from FYs 2016-17 through 2020-21. Additionally, 36 out of 137 distinct attorneys, 26 percent, have exceeded the weighted NAC standards at least once and many have done so more than once. Around 19 percent of attorneys in the panel, and almost three quarters of attorneys who exceeded the weighted standards at least once, exceeded the limit for two or more years in the five year period. Occurrences of attorneys exceeding these limits fell in FYs 2019-20 and 2020-21, likely due to a reduction in overall cases related to the COVID-19 pandemic.

**Exhibit 2.3: Attorneys Exceeding National Caseload Standards, FY 2016-17 to 2020-21**

	2016-17	2017-18	2018-19	2019-20	2020-21
Attorneys Exceeding Limit	15	16	17	8	8
Total Panel Attorneys	116	104	102	95	93
<b>% of Attorneys Exceeding Limit</b>	<b>13%</b>	<b>15%</b>	<b>17%</b>	<b>8%</b>	<b>9%</b>
Estimated # of Affected Cases	1,716	2,377	3,362	1,734	2,006
Estimated # of Affected Clients	1,966	1,909	2,090	823	663

Source: Harvey M. Rose Associates analysis of data from the Private Defender Program's Defender Data system as of July 31, 2021; National Advisory Commission on Criminal Justice caseload standards.

This analysis suggests attorneys with high caseloads may be working fewer hours than suggested on these NAC case types and over 2,080 hours a year, the equivalent of a full-time employee without taking any vacation, sick leave, or other paid time off. The implications of panel attorneys exceeding these limits are significant for their clients. Using the number of cases and clients assigned to attorneys who exceeded the weighted caseload standards, this could mean 11,646 cases and 5,334 clients, or 12.5 percent of clients and cases, were assigned to attorneys with excessive caseloads from FYs 2016-17 to 2020-21. Additionally, the analysis above does not take into account the fact that PDP panel attorneys are contract attorneys who may have other cases as part of their private practice and many take time off for vacations, sick leave, and other types of leave. PDP currently relies on panel attorneys to self-monitor and decline cases if their total caseload would impact their ability to provide effective representation.

### No Limits on Attorney Caseload or Workload

The PDP has not set a limit on the number of cases an attorney can carry and the process for assigning cases is not systematic. While PDP management meets quarterly to review and discuss caseloads and case

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## 2. Management Oversight & Quality Representation

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assignments, there are no fixed limits on the number of cases an attorney can carry or a clear method for assigning new cases. As discussed in Section 1, the PDP has difficulty tracking when a case has been closed and reports used monthly by PDP management to assess active workload for attorneys do not always reflect case counts correctly. However, the PDP is working on improvements in Defender Data to collect case closure data.

National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is recommended by best practices as a more accurate approach to ensuring defense attorneys are not overloaded.<sup>11</sup> The case limits established by the NAC have been criticized as being outdated and members of the criminal justice community have conducted workload studies which suggest caseload limits should be lower or at least adjusted for certain circumstances. The American Bar Association has worked to develop weighted caseload studies to set appropriate caseload limits.<sup>12</sup> The report identifies common steps to set workload limits:

- 1) Select case types of interest for a weighted caseload study.
- 2) Defenders and private contract lawyers meet to determine relevant workload factors and tasks associated with effective representation in each type of case.
- 3) Train lawyers on how to track and record time within the case management system.
- 4) Have attorneys record time spent on case-related and non-case-related activities for six weeks.

The PDP is conducting a time study which requires attorneys charging flat fees to track the time it takes over a six-week period to perform the tasks required to determine if fees are commensurate with the time expended. This method could be used to determine the estimated amount of time needed to close cases of certain types. Although six weeks is a short time span, if the office has many attorneys with a high level of participation in the study, it could allow for a valid and reliable measurement to develop case weights for certain case types. The PDP should use this information to create workload estimates, set quality standards for tasks needed for certain case types, determine the number of supervisor positions needed, and set workload limits per attorney to avoid assigning a single attorney too many cases. If the forthcoming time study does not provide enough hourly estimates across all major case types, the PDP should conduct a further time study to include other flat fee tasks for all major case types (i.e. felonies, post-conviction, juvenile delinquency, and mental health cases).

### No Standard Case Assignment Process

PDP attorney managers and administrative staff assign cases to attorneys when the PDP is appointed as counsel by the court. The PDP Office Manager and their staff assign routine adult cases. Cases determined to be serious, violent, or complex are assigned by the Chief Defender or their designees who will review

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<sup>11</sup> Hanlon, S., M. Brink. & N. Lefstein. (2021). Use of Delphi Method in ABA SCLAID Public Defense Workload Studies: A Report on lessons Learned. American Bar Association: Standing Committee on Legal Aid and Indigent Defense.

<sup>12</sup> Ibid.

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and assign the case. Juvenile delinquency, juvenile dependency, SB 203, Probate, Lanterman-Petris-Short, Department of Child Support Services contempt cases, Family Law contempt matters, and Misdemeanor Appeals are assigned by the Juvenile Office at the discretion of the Juvenile Managing Attorney or their designee. The PDP Policy and Procedure Manual states, “Cases are assigned to attorneys based on their assigned practice level, an assessment of the attorney’s current caseload, and other factors at the discretion of the Chief Defender or their designee.”

Based on our interviews with PDP staff responsible for assigning cases, the tracking and monitoring of panel attorney availability is informal and appears to rely on staff judgment. Additionally, office staff track the vacations of attorneys in spreadsheets to know who is available for a case assignment. The process for assigning cases for managers is to call the “best” attorney for the given case type and ask if they are available for the case. PDP administrative staff handle lower-level felonies and misdemeanor case assignments for the Adult Office. One of the office staff members prepares and distributes a weekly report of current attorney case counts. Based on the number shown on the report, availability and level of experience, they determine who to call for each new case. This report is used all week for assigning incoming cases to panel attorneys (even though cases can be assigned multiple times in the same week). If their experience allows, attorneys are offered cases because they have the lowest count of active cases within the report. At least some panel attorneys surveyed reported not understanding PDP’s case assignment process, with 16.7 percent indicating they did not understand the process and 13.3 percent of 74 respondents neither agreeing nor disagreeing that they understood the assignment process.

The assignment processes using the weekly report can lead to attorneys having cases with multiple court hearings on the same day. For FY 2020-21, we looked at lead attorneys’ case counts by the day of the next scheduled court event. On average, attorneys were assigned 1.8 cases with the same date for the next court event. One attorney had a maximum of 14 cases with the same court date. Omitting days where attorneys only had one case going to court, attorneys were assigned on average 3.2 cases with the same court date.

In interviews, County criminal justice system partners have indicated that having too many court appearances scheduled on the same day can lead to continuances because the attorney cannot prepare for all the scheduled hearings. Sometimes the attorney might also have to travel to different courthouses to attend hearings. Continuances can result in the rescheduling of a client’s preliminary hearing, typically 30 days after the original date. If the client is in-custody, this could mean the client would remain in jail for a longer period of time waiting for trial or a plea deal. There were 135 out of 739 occurrences, or 18 percent, where an attorney was assigned more than two cases with the same court date in FY 2020-21. There are no best practices or standards for how many cases are too many to be preparing for a day in court; however, attorneys should not be assigned so many cases on the same day so as to cause unnecessary continuances.

The PDP should set an internal standard to limit the number of cases scheduled for the same date based on case type, number of clients, and ability to prepare for the court hearings for that date. Additionally, the PDP should create a standardized assignment process to keep from having a few attorneys overloaded

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with case assignments and communicate this standard to all panel attorneys through a combination of the PDP Procedures Manual and direct communications to panelists.

### Limited Supervision of Panel Attorney Quality

The current ratio of PDP managers and supervisors to panel attorneys does not allow PDP to effectively monitor and supervise the quality of representation provided. PDP management has indicated that the number of motions filed, use of investigators, taking cases to trial, and client communications are indicators of quality representation among attorneys. Based on our survey of PDP panel attorneys, more than half of respondents also confirmed that PDP management communicates these as important values. However, as discussed in Section 1, from FYs 2016-17 to 2020-21 attorneys filed motions on only 4.4 percent of cases, used investigators on only 4.9 percent of cases, and only 27 percent had taken at least one case to trial.

Our interviews with PDP management and criminal justice partners also indicated that observation in court is a critical mechanism for evaluation attorney performance and preparedness. However, 47 percent of 74 panelists attorneys responding to our survey reported they had not been observed in court by their PDP manager, 30 percent reported that they were not sure if they had been observed in court, and 23 percent agreed they had been observed in court.

#### Exhibit 2.4: PDP Attorney Responses to Survey Questions on Management Supervision

*Survey Question: Indicate your level or agreement with the following statement:*

	<b>Managers Help Strategize on Cases</b>	<b>Managers Conduct Court Observations</b>	<b>Managers Give Feedback on Court Observations</b>
Agree	48	17	50
Neutral	9	22	10
Disagree	17	35	11
<b>% of Attorneys Agreeing</b>	<b>65%</b>	<b>23%</b>	<b>70%</b>
<b>% of Attorneys Disagreeing</b>	<b>23%</b>	<b>47%</b>	<b>15%</b>
<i>Number of Respondents</i>	74	74	71

Source: Harvey M. Rose Associates Survey of PDP Panel Attorneys.

As discussed further in Section 4, the ratio of Managing Attorneys and Assistant Managing Attorneys to attorneys is low, making it difficult to regularly conduct court observations of the full panel. PDP management should develop a plan to have managers and assistant managers assigned to attorneys, or attorney groups by case type, to observe them in court, provide feedback, and oversee client complaint resolution. PDP management indicated that they plan to increase court observations given the recent hiring of an assistant managing attorney for the Adult panel.



### Client Communication with Attorneys is Limited

The National Legal Aid and Defense Association (NLADA) client communication performance guidelines state that attorneys are obliged to keep the client informed of the progress of the case whenever possible and that the attorney has the duty to conduct an in-depth interview of the client as soon as possible.<sup>13</sup> Further, in its agreement with the County, the PDP is required to devise a system to monitor the occurrence of early interviews of incarcerated clients, taking into account the factors that affect the ability of Private Defender Program lawyers to make early jail visits, including but not limited to the number of days between arraignment and the next court appearance and the speed of assignment of cases to individual lawyers.<sup>14</sup> The contract outlines that the PDP must require attorneys to conduct a client interview as soon as practical after being appointed by the Court, in order to obtain information necessary to provide quality representation in the early stages of the case and to provide the client with information concerning the lawyer's representation and the course criminal cases take in the San Mateo County Superior Court.

Currently, the PDP doesn't systematically monitor when attorneys first make contact with defendants or the frequency of their ongoing communications while they are representing them. PDP's data system, Defender Data, also does not require attorneys to input information regarding the date of their first visit or phone call with their clients. However, the PDP did add a new \$50 client conference fee for misdemeanor cases to its Fee Schedule that became effective July 1, 2021. This fee can only be charged once per case and only once if multiple cases for the same client are scheduled on the same day. Given that this is a new fee and the structure of the fee payment data we received, we were unable to analyze the use of this fee since its implementation.

Although PDP management reports stressing the value of client communications and 93 percent of attorneys reported that management communicates the value of such communications to them, PDP clients we interviewed reported not receiving sufficient communication from their attorneys about their case. During focus groups with clients, 16 out of 18 clients reported having issues getting in contact with their attorney or meeting with their attorney; 11 out of 18 reported not meeting their attorney in person before a court appearance, five reported calling their attorney multiple times to get answers to questions about their cases, and five reported their attorney missed one or more court appearances. If PDP adds the client conference fee to all case types, PDP management should regularly analyze the number of cases with the client conference fee associated to determine whether clients are getting at least one meeting with their attorney. PDP should include the results of this analysis in its Annual Report to the County to fulfill its contractual obligation in Section 4.d.5.

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<sup>13</sup> Performance Guidelines for Criminal Defense Representation. Guideline 1.3(c) and 4.1.(b)(2). National Legal Aid & Defender Association.

<sup>14</sup> Private Defender Program Agreement, 2019-2021. Section 4.d.5. (2019).

### Requesting a New Lawyer is Difficult

The PDP's Policy and Procedure Manual states, "cases will not be reassigned because of conflicts with the attorney's schedule, for instance, if a client elects to have a speedy trial, without direct approval from the Chief Defender. [...] The PDP reserves the right to reassign a case, if the Chief Defender or their designee believe it is in the best interest of the client." As discussed in Section 1, inquiries and complaints are recorded in notes within Defender Data but these cannot be easily tied to client cases. The PDP is working on improvements for this issue, and, once available, management should regularly check for attorneys receiving multiple complaints and requests for a new attorney.

PDP clients interviewed reported limited awareness of the PDP complaint process, appeal options, and the option to request a new lawyer. Only 3 out of 18 focus group clients reported being aware they could call the PDP to open a complaint against their attorney even though the brochures handed to clients at arraignment outline this process. However, the PDP-provided brochures do not inform clients of their right to request a new attorney. While 61 percent of client focus group members were aware they could make this request (mainly from other sources), only 2 out of 18 client focus group attendees reported having success with changing lawyers although 17 out of 18 reported having issues with their attorney in some capacity. The PDP should add information on how a client can request an attorney change to the PDP client brochures which are handed out at arraignment.

### Client Feedback Collection is Inconsistent

Since 2013, the PDP has been conducting a client survey to obtain feedback on the quality of its services from indigent clients served. The PDP mails out a client survey to former PDP clients at random to ask for feedback concerning the attorneys. The survey mailing does not follow a deliberate or systematic approach to collect feedback from clients. The survey includes a stamped envelope addressed to the PDP for the client to easily return the survey. Additionally, the survey is available on the PDP website (PDF copy only), the PDP Office lobby, and Juvenile Court Lobby. The survey asks the following questions about the attorney:

- Did your attorney return phone calls?
- Did you have a chance to meet with the attorney before your first court appearance?
- Did you have enough time with your attorney to discuss your case?
- Did your attorney explain what was going on with your case?
- Did your attorney appear to be prepared in court?
- Was your attorney on time for meetings with you?
- Were you satisfied with the overall representation of your attorney?

While responses to these questions from clients would be a valuable source of feedback on the quality of representation provided by PDP panel attorneys, the PDP arraignment pamphlets do not mention that clients can fill out a survey on the quality of their attorney's representation. Adding this to the pamphlets may increase client participation for the survey. The online version of the survey is a PDF copy of the one they mail out to clients, and it does not give any information about how to return the survey to the PDP.

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The PDP should update their website to add return information for the PDP Client survey or create an online form which automatically sends survey responses to the PDP for clients accessing the survey via the website.

Exhibit 2.5, below, shows the rate at which the PDP mails out surveys, the survey response rate, and total clients likely served within the past four fiscal years. In the PDP Annual Report for FY 2019-20, the PDP reported mailing out 397 surveys to clients, around 4.1 percent of all clients arraigned in that year. The response rate improved to 8.2 percent in FY 2020-21 survey results, and the percentage of surveys sent to clients served within the year went up from 4.1 percent to 5.5 percent. Additionally, the percentage of clients actually responding to the surveys represented just 0.3 to 0.6 percent of total clients arraigned per year over this period.

### Exhibit 2.5: Annual Report Client Survey Responses Compared to Total Arraigned Clients

#### FYs 2018-19 to 2020-21

	2018-19	2019-20	2020-21
Total Survey Responses	35	22	35
Total Surveys Sent Out	386	397	426
Total Clients Arraigned	12,538	9,768	7,702
<b>Survey Response Rate (%)</b>	<b>9.1%</b>	<b>5.5%</b>	<b>8.2%</b>
<b>% of Surveys Sent to Arraigned Clients</b>	<b>3.1%</b>	<b>4.1%</b>	<b>5.5%</b>
<b>Survey Responses as a % of Arraigned Clients</b>	<b>0.3%</b>	<b>0.6%</b>	<b>0.5%</b>

Source: Annual Survey Client Survey reported counts and Defender Data distinct client counts by arraignment date for each fiscal year.

While clients provided generally positive responses for their attorney's performance for surveys from FYs 2018-19 through 2020-21 the percentage of the client population offered the survey each year was low, averaging 4.2 percent of clients. As a rough guide, the PDP should aim to survey at least 10 percent of the client population served each fiscal year to achieve a more robust sample. The PDP could increase survey participation and the number of surveys sent out by implementing client feedback collection at jails, prisons, and post-conviction service sites. Additionally, the PDP should conduct focus groups with former clients to identify system-wide issues affecting clients such as limited attorney contact, which may be caused by the fee schedule. This could be done by partnering with other County agencies or community-based organizations who work or have contact with the client group (i.e. Service Connect, San Mateo Service League, etc.).

### Limited Feedback from County Stakeholders

County departments that are part of the Criminal Justice community meet once a month with the PDP at the County's Criminal Justice Working Group. These meetings are not available to the public and focus on system-wide issues and reform. Although judges can and have called PDP management to highlight individual attorney issues or address system-wide issues affecting the court, the Superior Court of San Mateo County does not have a means to regularly provide feedback on performance issues or high performing attorneys to the PDP. Although there are no best practices stating the PDP should seek

feedback from the Superior Court judges or other criminal justice stakeholders, the PDP should engage with the Superior Court to identify a mechanism or forum to collect high-level feedback on PDP panel attorney performance related to knowledge of court rules and preparedness. This could complement increased in-court observation and expanded client feedback engagement efforts.

## Conclusion

National best practices and standards highlight the link between ensuring defense attorney workloads are manageable and maintaining the quality of client representation provided. PDP management is responsible for monitoring and determining if any one attorney's caseload is too high based on case type and complexity. However, we found that, on average, 12.5 percent of attorneys, or 28 individual attorneys, exceeded our weighted NAC caseload standards 64 times from FYs 2016-17 through FY 2020-21. Additionally, 26 out of 36 attorneys, or three quarters of those who exceeded the weighted standards at least once, exceeded the limit for more than two years during this period. The PDP has not set a limit on the number of cases an attorney can carry and the process for assigning cases is not systematic.

The PDP doesn't systematically monitor when attorneys first make contact with defendants and the frequency of their ongoing communications while they are representing them. Defender Data does not require attorneys to input information regarding the date of their first visit or phone call with their clients. Although PDP management instills the value of client communication and 93 percent of attorneys reported that management communicates the value of client communication to them, PDP clients interviewed report not receiving sufficient communication from their attorneys about their case. PDP clients interviewed reported limited awareness of the PDP complaint process, appeal options, and the option to request a new lawyer. The PDP-provided brochures do not inform clients of their right to request a new attorney. Furthermore, the percentage of clients sent surveys and client participation in surveys is low; the PDP should aim for ten percent of served clients to participate each fiscal year.

## Recommendations

The Chief Defender and Assistant Chief Defender of the Private Defender Program should:

- 2.1 Develop maximum workload standards for attorney, investigator, and social worker panelists. This could be done using results from the time study of event-based fees currently being run by the PDP or, if needed to get sufficient data, by administering a further time study to include more fees from major case types and incorporating hourly data already collected on hourly fee types.
- 2.2 Create a standardized assignment process to keep from having a few attorneys overloaded with case assignments and limit the number of cases scheduled for the same day when assigning cases.

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- 2.3 Add information on how a client can request a change of attorney and the option for clients to fill out the client survey on attorney performance to the PDP client brochures handed out at arraignment.
- 2.4 Update the PDP website to add return information for the PDP client survey or create an online form which automatically sends survey responses to the PDP for clients accessing the survey via the website.
- 2.5 Implement and expand client feedback collection at county jails, prisons, and post-conviction service sites, through the use of focus groups and surveys.
- 2.6 Increase the number of surveys mailed to clients with the goal of ensuring 10 percent of clients served by the Private Defender Program each year provide survey responses.
- 2.7 Work with the Superior Court to set up a feedback mechanism for judges and other County criminal justice system stakeholders to regularly provide feedback on attorney performance to address systemic and individual attorney representation quality concerns.

The Adult and Juvenile Managing Attorneys of the Private Defender Program should:

- 2.8 Use the improvements to the Defender Data system currently being developed to track the number and type of open cases attorneys are assigned to inform case assignment decisions.
- 2.9 Generate and review monthly workload reports which reflect total assigned cases by type per attorney within the current fiscal year to maintain case limits per attorney within NAC standards or PDP set workload limits, whichever is lower.
- 2.10 Assuming adoption of Recommendation 1.9 to add the client conference fee to all case types, regularly analyze the number of cases where a client conference fee has been billed to determine whether clients are getting at least one meeting with their attorney. PDP should include the results of this analysis in its Annual Report to the County to fulfill its contractual obligation in Section 4.d.5.
- 2.11 Assuming adoption of Recommendations 1.10 and 1.11 (from Section 1) to improve complaint tracking and reporting by attorney, use complaint reports to identify attorneys who receive complaints from more than one client in order to inform supervisor decisions to intervene to improve attorney performance.

## Benefits and Costs

Implementation of the proposed recommendations would have a minimal unquantified cost to the PDP. However, given PDP's limited management capacity, the Program may need to expand staffing to implement these recommendations. Section 4 covers issues regarding the number of management

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positions and makes a recommendation to increase the number of assistant managers within the PDP to increase oversight for PDP panel attorneys.

Regularly analyzing reports on client communications with attorneys and taking measures to increase client participation in providing PDP feedback will help to evaluate individual attorney performance and allow for PDP management to address shortfalls in communication with clients. Tracking workload effectively and accurately would make the department more efficient in assigning tasks to staff. Furthermore, the timeliness and quality of defense counsel may increase if the PDP can evenly distribute workload among panel attorneys and maintain reasonable annual assignments for attorneys that remain within the NAC standards.

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### 3. Training Policies and Requirements

The Private Defender Program's (PDP) training requirements and practices are not aligned with those recommended by leading defense organizations. This could negatively impact the quality of representation provided to PDP clients. PDP lacks a comprehensive training program that is based on the specific needs of panel attorneys and is tailored to their skill levels. Training topics are developed primarily through informal feedback and conversations with attorneys. While PDP is in the process of developing tailored training plans, this work is primarily conducted by a single staff member with other management responsibilities and is not currently documented. The lack of a written training plan and concentration of development and implementation duties with a single senior manager increases the risk of delays.

PDP's methods of tracking compliance with training requirements are unreliable. The PDP tracks panel attorneys' compliance through self-reported training credits declared on an annual survey. However, information provided by PDP management and analysis of training attendance records confirmed that many attorneys do not accurately report their hours on the survey, with some incorrectly reporting their training hours relative to verifiable training records reviewed. PDP attorneys also reported difficulty in accessing and using individual education funds provided for external training.

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#### PDP's Training Approach is not Sufficiently Meeting the Needs of all Panel Attorneys

PDP's overall training approach could be improved to better meet the training needs of panel attorneys and to ensure that indigent clients are receiving high quality representation from well-trained attorneys. A lack of comprehensive training programs tailored to organizational needs, combined with less stringent requirements for training could result in lower quality legal representation for PDP clients.

There is currently no formal requirement for investigators to obtain a specific number of training hours. While some other public defender offices require investigator training, we did not identify any contractual or legal training requirements for PDP investigators or best practices to this effect. A survey of PDP Panel Investigators that we conducted found that they completed an average of 17 hours of training per year though this varied significantly across respondents. PDP should consider adding a minimum annual number of training hours required of panel investigators.

#### PDP Training Offerings do Not Fully Meet State Bar Requirements or Recommended Best Practices

The PDP requires panel attorneys to complete more training hours than the State Bar of California requires but has not offered enough training to fully meet specific State Bar requirements or best practices. Panel attorneys are required to complete 15 hours of training per year, or 45 hours every three years, through either attending trainings provided by PDP or third-party training organizations and vendors.

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### 3. Training Policies and Requirements

The State Bar of California requires that members obtain 25 hours of minimum continuing legal education (MCLE) every three years to maintain their law license, or fewer than the 45 hours every three years that PDP requires. However, the Bar also has specific topic requirements that PDP requirements and trainings do not include. The State Bar’s Guidelines on Indigent Defense Services Delivery Systems recommend that indigent defense organizations require training to support attorneys’ ongoing legal education beyond the minimum required, and training should include a nexus to criminal law rather than only MCLE’s generic requirements.<sup>1</sup> Similarly, the National Legal Aid & Defender Association (NLADA) recommends that defender organizations offer training and develop materials specifically on ethics and professional responsibility, particularly as they relate to intended learning objectives.<sup>2</sup>

PDP has offered enough trainings for panel attorneys to meet the organization’s 15 hours per year training requirement through attending only PDP seminars for the past two out of three years, however, these have not fully met State Bar requirements or recommended best practices in terms of the more specialized issues and topics identified above. PDP provides several annual recurring seminars on the same topics each year (specifically on immigration and new laws) that are well-attended. However, in addition to the 25 MCLE hours every 3 years, the State Bar also requires a certain number of training hours specifically in legal ethics, competence issues, and recognition and elimination of bias in the legal profession.

In FY 2020-21, PDP provided seminars that met the State Bar’s “elimination of bias” requirement but did not provide any seminars that met either the “competence” or “ethics” requirements.<sup>3</sup> Exhibit 3.1 below shows the number of MCLE hours provided by PDP each year, and the number of hours that contributed to meeting the specific State Bar requirements. This table shows that PDP has not offered enough relevant trainings to help panel attorneys meet specific State Bar requirements for FYs 2017-18 to 2019-20.

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<sup>1</sup> The State Bar of California’s Guidelines on Indigent Defense Services Delivery Systems (2006).

<sup>2</sup> National Legal Aid & Defender Association (NLADA). “Defender Training and Development Standards (Black Letter).”

<sup>3</sup> “Competence” trainings typically address issues that could negatively impact lawyer competence, such as burnout, substance abuse, addiction, and mental health issues. Source: California Lawyers Association, [“Avoiding the Common Pitfalls of MCLE Creation.”](#)



**Exhibit 3.1: Number of Training Hours Provided by PDP in State Bar-required Topics, FYs 2017-18 - 2019-20**

Fiscal Year	Total Offered	Competence Trainings	Bias Trainings	Ethics Trainings	Avg. Hours Completed*
2017-2018	20.5	-	4	-	NA
2018-2019	12	1	1	-	19.4
2019-2020	20.5	-	-	-	17.6
<b>Total</b>	<b>53</b>	<b>1</b>	<b>5</b>	<b>0</b>	<b>18.5</b>

Source: List of training seminars received from PDP and analysis of PDP annual evaluation survey responses

\*Hours are self-reported; FY 2017-18 survey data not available

According to PDP management, the low number of training hours offered may be the result of a shift in the structure of the training committee. While PDP did provide enough training hours for panel attorneys to meet its 15 hours requirement in both FYs 2017-18 and 2019-20 (20.5 total in each year), in order to further assist attorneys with fulfilling their MCLE requirements and align with NLADA recommended practices, PDP could directly provide or recommend external trainings in each of the State Bar required areas with an additional emphasis on ethics and professional responsibility. This would provide greater assurance that all panel members meet the State Bar training subject requirements and that the training meets PDP quality standards.

### PDP's Training Development and Coordination are Largely Informal

The training schedule and additional topics for PDP trainings are decided by PDP management and are informed by questions posed by panel attorneys on a PDP listserv and informal feedback. While the number of available trainings has increased over time, there is evidence that training quality could be further improved. According to our survey of PDP panel attorneys, 53 percent of attorneys who had previously worked in another Public Defender or District Attorney office (19 out of 36 respondents total) answered that their previous agency provided higher quality training than PDP. Additionally, four respondents out of 74 total, 5.4 percent, answered that PDP had not provided sufficient training or support for determining the best course of action when a client has disclosed a history of mental illness that may be relevant to their case. Several Superior Court judges interviewed as part of the evaluation also highlighted a lack of knowledge of court and evidence rules and processes among a contingent of PDP attorneys.

PDP could improve trainings by following the National Legal Aid & Defender Association's (NLADA) recommendation to conduct regular formal needs assessments to identify attorneys' current levels of competencies in certain areas and highlight areas for improvement, and develop the organizational curriculum based on needs assessment findings with specific learning objectives for all employees. Feedback from stakeholders such as San Mateo County judges and the District Attorney and Probation Department could also be solicited for areas where some PDP attorneys may be deficient.

While PDP is in the process of developing training plans that are tailored to varying experience levels and specialized areas of law (including specific programs for capital cases and juvenile attorneys), these efforts are mostly in the planning stages (with the exception of a training program targeting new lawyers, which

is currently being piloted) and there are no written protocols for how these training plans are being prioritized or developed.<sup>4</sup> PDP would benefit from the development of a clear overarching written training plan, as recommended by NLADA, with specific goals and objectives that further address how these formal programs will be developed and specifies how the inclusion of feedback from both panel attorneys and external stakeholders could be used to inform training offerings on an ongoing basis. As recommended by the State Bar of California, PDP should also develop a mandatory orientation program to be attended by all new attorneys, and require entry-level training for all new attorneys (unless an attorney's prior experience merits an exception).<sup>5</sup> While PDP does have a mentorship program that pairs experienced panel members with attorneys new to the program, mentorship can vary in quality and time based on the mentor, whereas a standardized training program for PDP attorneys would ensure a consistent orientation for new attorneys.<sup>6</sup> The State Bar recommends requiring additional training for first-year lawyers (21 hours total for the first year). This was required in the previous 2010 PDP Policies and Procedures Manual but was removed in the updated 2021 version. PDP should reinstate this requirement alongside their formal training program for new attorneys when it is complete.

PDP's new training initiatives are primarily led by the Managing Attorney for Adult cases and have not yet been codified into an overarching organization-wide plan.<sup>7</sup> Codification of the training plan would reduce the risk that ongoing training development work would be stalled or lose momentum if the employees overseeing these efforts were to leave the organization. In addition to codifying and structuring the division of training-related responsibilities in a written training plan, PDP could also consider following NLADA's recommended best practice to hire a part-time training director or contractor to work with PDP's management team to administer and coordinate training efforts, conduct a regular training needs assessment, and verify panel members' compliance with training requirements.

## Current Methods for Verifying Compliance with Training Requirements are Inefficient and Unreliable

Current methods for determining compliance with MCLE requirements are difficult to validate, which results in increased risk of inaccuracy and inefficient use of PDP management staff resources. Panel

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<sup>4</sup> Some panel members also attend specialized training programs external to PDP, particularly in juvenile defense and capital defense.

<sup>5</sup> An orientation program introduces new employees to their organizational responsibilities, performance expectations, policies & procedures, and training resources, among other aspects of their role.

<sup>6</sup> All new Private Defender Program attorneys are assigned mentor attorneys. The role of the mentor includes (but is not limited to): helping the mentee attorney move up to assume responsibility for different or more serious cases; introduce the mentee attorney to judges, Deputy District Attorneys and court staff; familiarize the mentee attorney with the fee schedule and billing procedures; accompany the mentee to visit custody clients before the first few custody Pretrial Conferences; introduce the mentee attorney to the Chief Investigator and explain the process for obtaining expert/ancillary services; and other responsibilities. Source: Private Defender Program of the San Mateo County Bar Association, Mentor Program Manual. (2009).

<sup>7</sup> The Managing Attorney for Juvenile cases develops and organizes trainings for juvenile panel attorneys specific to juvenile law.

attorneys are asked to self-report the total number of MCLE hours earned over the course of the fiscal year as part of PDP's annual survey of its panel attorneys. 23 panel attorneys in FY 2018-19 and 40 panel attorneys in FY 2019-20 reported completing less than the 15 annual MCLE hours required by PDP (as per PDP's Policies and Procedures Manual). However, when we compared the number of hours reported on the survey to PDP training attendance records for these attorneys, we found that five attorneys in FY 2018-19 and six in FY 2019-20 had earned more hours than they reported.

PDP currently does not require panel attorneys to submit documentation verifying attendance for external trainings. While PDP does have sign-in sheets for all internal trainings, these sign-in sheets aren't used for verification. Instead, PDP relies on self-reported hours in the annual panel attorney survey, which could be inaccurate. Additionally, PDP only requires panel attorneys to list PDP trainings attended even though PDP and non-PDP training hours are both required to be reported. While our analysis found that attorneys who didn't meet the PDP training requirement tended to under-report their hours, we did not verify whether attorneys who met the requirement reported their hours correctly or overstated them.

According to PDP management, the Assistant Chief Defender follows up individually with each respondent who indicated they earned less than the required 15 MCLE hours and gives them six months to comply. For FYs 2018-19 and 2019-20, the 15 hours requirement was suspended. However, from FY 2015-2016 through FY 2017-2018, between 10 – 16 lawyers were not in compliance each year, which represents an approximate 10 to 15 percent non-compliance rate. Nearly all of the attorneys (excluding one, who achieved compliance one month after the six-month grace period) who were initially out of compliance did come into compliance within a six-month follow up period after being provided notice.

To improve accuracy and ease of verification, PDP should require that all panel attorneys submit their State Bar MCLE training documentation each year to PDP management to demonstrate compliance, rather than rely on self-reported figures. This documentation should include certification from the trainer and the following data, based on the California Bar Association MCLE log: the name and date of each course attended, the name of the provider, total CPE hours completed, whether the training hours comply with legal ethics, elimination of bias or competence issues requirements, and subject matter.<sup>8</sup> This could also enable PDP to remove the training question in the Annual Survey which requires attorneys to list the courses they attended.

## Changing Training Requirements Associated with Fewer Hours of Training Completed

PDP has eliminated and suspended certain mandatory training requirements over time, which could negatively impact the quality of the legal representation provided by PDP panel attorneys. Due to difficulties posed by the COVID-19 pandemic and concerns around the legal ability of PDP management to impose training requirements, the PDP management team suspended the 15-hour annual training

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<sup>8</sup> [MCLE Personal Log](#), California State Bar.

requirement for FY 2018-2019 and FY 2019-20.<sup>9</sup> For FY 2019-20, the PDP management team still checked whether all panel attorneys were in good standing with the State Bar (which requires proof of compliance with the minimum State Bar MCLE training requirements of 25 hours over 3 years).

However, according to PDP management, the exemption of lawyers from recent state legislation that codified the new classification test for independent contractors (AB5) assuaged concerns regarding the legality of imposing requirements on independent contractors. Starting in FY 2021-22, PDP will return to enforcing the requirement of 15 training hours per year.

## Lack of Clarity and Flexibility with Accessing PDP Education Funds

Procedures for accessing the \$750 in funding that PDP makes available to each panel attorney each year are not clear to all panelists, and many attorneys have not been able to spend their full budget for varying reasons, according to PDP's annual survey of panel members. Each panel attorney has access to an individual education account, in an amount determined by the Chief Defender for each fiscal year, which can be used for Continuing Legal Education "relevant to the representation of clients through the Private Defender Program," according to the 2021 Private Defender Program Manual. Requests for approval to draw funding from the account must be submitted to the Managing Attorney for payment directly to the education provider or for reimbursement. However, an analysis of PDP's FY 2019-20 annual survey of panel attorneys found that:

- 63 percent, 55 out of 87 panel attorneys who responded to the survey, didn't use the full training budget available.
- Of the 55 respondents who didn't use all of their training budget in FY 2019-20, nine respondents (16 percent) said it was because they forgot they had a budget, didn't know they had one, didn't know how to access it, or didn't think they qualified for the training budget.
- Of the 55 respondents who didn't spend all of their training budget, five respondents (9 percent) requested a way to more easily check the balance of their training account.

In FY 2019-20, PDP's total education budget of \$54,000 was underspent by \$10,071, or 19 percent though it was slightly overspent in the prior year, FY 2018-19. It should be noted that this budget only provides full funding for a total of 72 of the PDP's approximately 103 panel attorneys. According to PDP management, annual education budgets are based on prior year expenditures and the budget for FY 2021-22 increased by 3 percent from FY 2020-21 (from \$54,000 to \$56,000). Funding from individual education accounts can normally only be used to pay for training seminars and cannot be used to cover costs associated with attendance of seminars (such as hotel stays, per diems, etc.) or other training materials. However, due to the cancellation of many more costly in-person seminars over the last two years due to the pandemic and the increased availability of free online trainings, PDP relaxed restrictions and allowed

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<sup>9</sup> In particular, the 2018 California Supreme Court ruling in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* significantly changed the criteria for when independent contractors must be classified as employees, and therefore be entitled to labor protections and benefits required for employees.

panel attorneys to use their education account to pay for training materials. Additionally, according to PDP management, any unspent funds from PDP's overall educational budget do not roll over and instead must be returned to the County.

Given that there was some remaining balance this previous fiscal year, as well as the high number of attorneys who have been unable use all of their training budget, PDP could consider further relaxing requirements and allow use of the individual education funds to be used towards other training-related costs, as well as consider providing attorneys with their individual account balances on a more regular basis.

## Conclusion

While PDP management is in the process of developing new training programs, they do not currently have comprehensive training policies with clear objectives that are based on organizational needs. PDP also does not have an accurate method of verifying compliance with training requirements and has fewer requirements than are recommended by national criminal defense organizations. A lack of consistent requirements, confusion regarding current PDP requirements and inability to accurately verify compliance can result in increased risk of non-compliance among attorneys and an inefficient use of management resources.

## Recommendations

The Chief Defender of the Private Defender Program should:

- 3.1 Consider hiring a dedicated part-time staff person or contractor that will work with PDP management to design and oversee the implementation of formal training programs within PDP, develop and administer a regular training needs assessment, and verify compliance with PDP training requirements.
- 3.2 Reinstate the previous requirement for panel members who are within their first year of practice of criminal law to complete a minimum of 21 hours of relevant classes or equivalent training within their first year on the PDP panel, to align with the California State Bar's recommendations.
- 3.3 In coordination with the Adult Managing Attorney and Juvenile Managing Attorney, develop comprehensive overarching written training policies with clear objectives and processes that include how the formal training programs will operate (including the number of seminars, training topics, methods, and schedule), who will oversee the trainings, procedures for identifying outside trainers, how the training provided will be evaluated, and how training opportunities will be administered.
- 3.4 Improve panel attorneys' awareness of and accessibility to training funds by ensuring individual education funds can be used more flexibly, and providing attorneys with their individual account

balances on an ongoing basis (potentially in an accessible database or spreadsheet, available at any time, or via regular email reports).

- 3.5 Develop a process for verifying training requirement compliance that does not rely solely on self-reported information, and require documentation from panel attorneys demonstrating compliance with training requirements (such as requiring submission of documentation after each training attended). Consider utilizing an automated sign-in process (such as DocuSign) for internal trainings to facilitate and simplify compliance tracking.

## Benefits and Costs

Hiring an additional staff person or contractor to assist with training-related duties will allow the PDP management team to recover time spent verifying and enforcing compliance with annual training requirements. Development of a compliance verification process that requires panel attorneys to submit verification of training attendance would allow PDP management to better ensure compliance with training requirements. Additionally, the development and implementation of an organization-wide training needs assessment will allow PDP to better identify and address potential gaps in the panel attorneys' legal skill sets. Establishing policies for how training will be administered, as well as measurable objectives (to be developed upon completion of the needs assessment) will allow PDP to improve the quality of training opportunities and further reflect the organization's consistent commitment to training as integral to PDP's mission.

Implementation of these recommendations would require staff or contractor time to develop a comprehensive training plan and conduct an organization-wide needs assessment, as well as ongoing funding to hire additional training staff or a contractor. If PDP hired additional staff to coordinate training and compliance efforts as recommended, we estimate this could cost between \$37,000 to \$46,000 for a half-time training coordinator.<sup>10</sup>

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<sup>10</sup> This is based on the current salary for a full-time Program Coordinator I, as per San Mateo's classification and compensation database, which has a salary range of \$73,778 - \$92,248 (<https://www.governmentjobs.com/careers/sanmateo/classspecs/779239>).

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## 4. Resource Sufficiency – Staffing

Ensuring there are enough attorneys, supervisors, managers, and other support staff to represent indigent clients effectively is critical to providing legal representation and due process afforded by the Constitution. This section assesses the Private Defender Program's (PDP) staffing levels through comparisons with peer county Public Defender offices. Seven peer jurisdictions were identified based on their similarity to San Mateo County in terms of the number of criminal filings and population size.

Based on our analysis, the PDP has a sufficient workforce of attorneys and managers compared to peer jurisdictions; however, PDP managing attorneys have the largest span of control compared to peer jurisdictions. PDP managing attorneys are responsible for supervising between 26.5 and 34.3 full-time equivalent attorneys each, around three to four times as many as the peer county average. The PDP should add two to five more assistant managing attorneys to supervise panel attorneys to ensure a sufficient quality of representation is provided to indigent clients.

Although the PDP has more investigators on its panel than recommended by best practices and peer jurisdictions, investigators were only assigned to 7.4 percent of PDP cases in Fiscal Year 2020-21. PDP should increase its monitoring of the use of investigators by attorneys and establish training and other procedures for increasing their utilization.

The PDP has recruited five social workers to the panel and plans to recruit five more. Not all of the positions will be full-time but, overall, the PDP should aim to have a workforce equivalent to at least 6.1 full-time equivalent social workers to handle case requests.

Attorneys report having access to ancillary staff such as paralegals and legal clerks, however, survey responses indicate that attorney use of paralegals and legal clerks is low. If the PDP were to pursue establishment of a legal clerk or paralegal panel, they should train attorneys on maximizing use of these services as it could lessen the current workload of attorneys, especially for complex cases.

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### Staffing Standards

Clients of the Private Defender Program (PDP) are entitled to a speedy trial without undue delays.<sup>1</sup> Undue delays can be caused by excessive workloads for supervisors, attorneys, investigators, or social workers since delays among one of these professionals can impact the others as their work products are interdependent. PDP management is responsible for monitoring staff workload to avoid assigning excessively large or complex workloads which may interfere with providing quality representation and may have significant potential to lead to a breach of professional obligations.<sup>2</sup>

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<sup>1</sup> American Bar Association, Speedy Trial and Timely Resolution of Criminal Cases. (2006).

<sup>2</sup> American Bar Association, Securing Reasonable Caseloads. (2011).

This section focuses on comparisons between the Private Defender Program and peer county Public Defender Offices. Seven jurisdictions were determined to be similar to San Mateo County based on the number of criminal filings and population size. We collected data on total attorney, management, supervisor, investigator, and social worker staff to create comparisons for San Mateo County's PDP staffing levels. Attorney counts for peer jurisdictions were inflated by six percent to account for the fact that the PDP handles conflict cases, whereas peers would outsource these to separate conflict offices.<sup>3</sup>

Given the PDP uses a panel model for its attorneys and other staff where attorneys may work less or more than full-time, we developed two models to estimate the number of full-time equivalent PDP staff. Based on our analysis, the PDP has an attorney workforce equivalent to 41 - 79.6 full-time employees (FTE) on the panels covering all cases and tasks required by the PDP. The lower end of the estimate is based on the minimum implied hours needed per case derived from national caseload standards. As discussed in detail in Section 2, yearly caseload standards used are from the National Advisory Commission on Criminal Justice Standards and Goals (NAC). The upper estimate of 79.6 attorneys is based on PDP attorney reported percentage of time spent on PDP cases for Fiscal Year 2019-20 in PDP's Annual Report survey. All comparative staffing estimations presented in exhibits throughout this section are calculated using a total attorney count of 79.6 full-time employees. Appendix A presents the methodology used for these full-time attorney estimates.

## Attorneys

According to the PDP, the program currently has 103 individual attorneys on its panel. According to PDP's case management system, Defender Data, the PDP had 144 attorneys in the program from FYs 2016-17 through 2020-21. Based on our survey of panel attorneys, 77 percent of attorneys were on the Adult Criminal Panel, 11 percent were on the Juvenile Panel, and 12 percent were on both panels. As stated above, we estimate that the PDP has an attorney workforce equivalent to 41 to 79.6 full-time employees.

As discussed in Section 2, PDP management is responsible for monitoring and determining if any one caseload is too high for an attorney based on case type and complexity to ensure clients are provided with high quality representation.<sup>4</sup> An attorney's workload, including appointed and other work, should never be so great as to interfere with the provision of quality representation or lead to a breach of ethical obligations to provide such representation.

In Exhibit 4.1, we compare filled full-time attorney positions within a jurisdiction to the total criminal filings within that jurisdiction to assess overall staffing levels between jurisdictions. Total criminal filings exceed the total number of cases any jurisdiction's defense office would have been assigned to, as not all criminal defendants qualify for or use indigent defenders, but provides a basis for comparable attorney staffing levels between jurisdictions. The PDP has a range of average filings per attorney of between 144

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<sup>3</sup> An outsourcing for conflict of interest cases of 6 percent was assumed based on the proportion of cases outsourced by Santa Clara County during Fiscal Year 2019-20.

<sup>4</sup> Ten Principles of a Public Defense Delivery System. American Bar Association. (2002).



and 186 which is 37 to 19 percent lower than the average number of filings per attorney in peer county Public Defender Offices of 229, respectively.

**Exhibit 4.1: Population, Criminal Filings, and Attorney Comparisons for Peer Jurisdictions**

Jurisdiction	Population (2019)	Total Attorneys <sup>a</sup>	Total Criminal Filings (FY 2019-20) <sup>b</sup>	Criminal Filings per 100,000 Population	Average Filings per Attorney
Alameda	1,671,329	114	23,642	1,418	207
Contra Costa	1,153,526	93	11,252	978	121
Fresno	999,101	86	26,447	2,666	308
San Francisco	881,549	110	11,931	1,355	108
San Joaquin	762,148	53	27,819	3,697	525
Santa Clara	1,927,852	140	33,005	1,708	236
Ventura	846,006	65	17,602	2,075	272
<b>Peer County Average</b>	<b>1,177,359</b>	<b>94</b>	<b>21,671</b>	<b>1,841</b>	<b>229</b>
<b>SM PDP (Unweighted)</b>	<b>766,573</b>	<b>103</b>	<b>14,842</b>	<b>1,931</b>	<b>144</b>
<b>SM PDP (Weighted)<sup>c</sup></b>	<b>766,573</b>	<b>79.6</b>	<b>14,842</b>	<b>1,931</b>	<b>186</b>

Source: Harvey M. Rose Associates analysis of U.S. Census Bureau, American Community Survey; California Department of Justice Law Enforcement & Criminal Justice Personnel Census; and, the Judicial Council of California's Statewide Caseload Trends for FY 2019-20.

<sup>a</sup> The number of attorneys in peer jurisdictions was collected from the 2020 California Department of Justice Law Enforcement & Criminal Justice Census and inflated by 6 percent to account for the fact that the PDP handles conflict cases where peers would outsource these to conflict offices.

<sup>b</sup> Total Criminal filings exclude infractions and traffic filings.

<sup>c</sup> Weighted PDP attorney count is based on PDP attorney responses to the PDP annual report survey question on the proportion of their time they spend working on PDP cases.

Based on our modelled attorney FTE estimates and comparison to peer counties, the PDP has adequate numbers of attorneys and attorney workforce on the panel relative to total criminal case filings. Additionally, given not all PDP panel attorneys currently work full-time and many indicated they would be willing to take on more work in our survey, PDP could expand staffing further if needed. However, as discussed in Section 2, the PDP does not have a clear assignment process and on average 12.4 percent of attorneys have exceeded our model standard for NAC limits from Fiscal Year 2016-17 through Fiscal Year 2020-21.

## Management and Supervision

The PDP has a six-person management and supervision team who are responsible for overall program management and supervision of panel independent contractors. The management and supervision team includes a Chief Defender, an Assistant Chief Defender, one Adult Managing Attorney, one Juvenile Managing Attorney, one Assistant Adult Managing Attorney, and a Chief of Investigations. The Chief Defender and Assistant Chief Defender positions are comparable to other management positions in peer

jurisdictions, such as Public Defender and Assistant Defender. The roles of the Managing and Assistant Managing Attorneys include both management and supervision functions but are more comparable to supervising attorneys in peer jurisdictions. The Chief of Investigations receives attorney requests for investigators and assigns investigators to cases.

## PDP Management

The PDP has two full-time management positions: the Chief Defender and the Assistant Chief Defender. They are responsible for approving attorney vouchers, assigning complex felony cases, directing program staff, and regularly reporting quality assurance and financial information to San Mateo County, among other tasks. Exhibit 4.2, below, shows that, on average, peer jurisdictions have a ratio of 25.0 attorneys to each manager. Currently, the PDP actual and weighted ratios are significantly higher at 39.8 to 51.5 attorneys to each manager depending on how PDP attorney FTEs are counted. However, as shown, two other counties among the peer jurisdictions have higher ratios than the PDP: San Francisco with 52.0 attorneys to each manager, and Contra Costa with 44.0 attorneys to each manager.

**Exhibit 4.2: Peer Jurisdiction Comparison: Average Number of Attorneys per Attorney Manager**

Jurisdiction	Total Managers*	Total Attorneys	Average Attorneys per Manager	Rank
Fresno	7	81	11.6	1
Ventura	3	61	20.3	2
Alameda	5	108	21.6	3
San Joaquin	2	50	25.0	4
Santa Clara	4	132	33.0	5
<b>SM PDP (Weighted)</b>	<b>2</b>	<b>79.6</b>	<b>39.8</b>	<b>6</b>
Contra Costa	2	88	44.0	7
<b>SM PDP (Unweighted)</b>	<b>2</b>	<b>103</b>	<b>51.5</b>	<b>8</b>
San Francisco	2	104	52.0	9
<b>Peer Average:</b>	<b>3.6</b>	<b>89.1</b>	<b>25.0</b>	
<b>Ideal for PDP:</b>	<b>3.2</b>	<b>79.6</b>	<b>25.0</b>	

Source: Harvey M. Rose Associates analysis of staff levels reported by jurisdictions or obtained from budget reports and salary ordinances. Number of attorneys does not include an adjustment for contracted conflict cases.

\*Manager counts include Public Defenders, or the Chief Defender, and other attorney manager positions.

In terms of upper management, the PDP has one of the highest number of attorneys overseen by upper management at 51.5 attorneys to one manager when using PDP management reported attorney counts. Applying the average ratio of attorneys to managers from the peer jurisdictions would indicate the need for just over three managers in the PDP, or one more than currently in place. However, given that some management functions are also performed by the PDP’s Assistant Managing Attorneys, we conclude that the PDP has enough managers given its current functions and staffing. If PDP hires additional supervisors (discussed below), this would likely free up more time for managers. Further, in county public defender

offices in other jurisdictions, managers perform other functions not necessary for the PDP such as overseeing administrative and support functions, overseeing support staff, and participating in various County initiatives. For all these reasons, we conclude that PDP has a sufficient number of managers compared to peer county jurisdictions.

### Supervising Attorneys

A defense office requires proper supervision of attorney staff. The National Legal Aid & Defender Association guidelines recommend that for every ten full-time attorneys, the office have one full-time or two part-time supervisors.<sup>5</sup> PDP managing attorneys and assistant managing attorneys cannot currently provide the level of supervision needed to ensure quality representation due to the high number of attorneys they oversee. This can be seen in the fact that 47.3 percent of panelists reported that they have not been observed in court by their manager in our survey of PDP panel attorneys and 29.7 percent reported that they were unsure if they had been observed in court. Additionally, 22.9 percent of attorneys reported that PDP managers do not help them strategize for their cases.

The PDP has the fewest number of supervisors per attorney among seven peer counties. The PDP has two managing attorneys and one assistant managing attorney who are responsible for direct oversight of 103 panel attorneys, or the equivalent of an estimated 79.6 full time employees according to our analysis. One manager and one assistant manager oversee adult cases (103 attorneys) and one manager oversees juvenile cases (15 attorneys). The low level of supervision may be related to the historical structure of the PDP as a private panel model, with the assumption that independent contractors would require only minimal supervision given their experience in criminal defense. However, 38 out of 74, or 51 percent, of panel attorneys who responded to our survey reported working on PDP cases full time and 18 out of 74, or 24.3 percent, of attorneys reported having less than 5 years' experience working as a PDP panel attorney. This suggests additional supervision is needed given the changing nature of the PDP relative to its original conception.

As shown in Exhibit 4.3, with three attorney supervisors on staff, the PDP has an average of 26.5 to 34.3 attorneys for each supervisor while the other seven counties have an average of 8.0 attorneys for each supervisor. PDP had the highest numbers of attorneys per supervisor among the peer counties. When taking the separation of the PDP panels into adult and juvenile groups into account, the two adult panel supervisors have approximately 51.5 attorneys they each oversee while the juvenile supervisor has 15.

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<sup>5</sup> Guidelines for Legal Defense Systems in the United States. Guideline 4.1. National Legal Aid & Defender Association.

**Exhibit 4.3: Peer Jurisdiction Comparison: Average Attorneys per Attorney Supervisor**

Jurisdiction	Total Attorney Supervisors	Total Attorneys	Average Attorneys per Supervisor	Rank
Alameda	26	108	4.2	1
Fresno	16	81	5.1	2
San Francisco	12	104	8.7	3
Contra Costa	8	88	11.0	4
Santa Clara	11	132	12.0	5
Ventura	3	61	20.3	6
San Joaquin	2	50	25.0	7
<b>SM PDP (Weighted)</b>	<b>3<sup>a</sup></b>	<b>79.6</b>	<b>26.5</b>	<b>8</b>
<b>SM PDP (Unweighted)</b>	<b>3<sup>a</sup></b>	<b>103</b>	<b>34.3</b>	<b>9</b>
<b>Peer Average:</b>	<b>11.1</b>	<b>89.1</b>	<b>8.0</b>	
<b>Ideal for PDP: <sup>b</sup></b>	<b>8.0</b>	<b>79.6</b>	<b>10</b>	

Source: Harvey M. Rose Associates analysis of staff levels reported by jurisdictions or obtained from budget reports and salary ordinances. Number of attorneys does not include an adjustment for contracted conflict cases.

<sup>a</sup> Supervisor counts for the PDP include managing and assistant managing attorneys as their responsibilities closely resemble those of attorney supervisors.

<sup>b</sup> Based on NLADA recommended ratio of 10 attorneys per supervisor.

Ideally the PDP would need a total of 8 full-time supervisors to oversee the equivalent of 79.6 full-time attorneys based on the NLADA's best practice recommendation. Using our lowest end estimate of PDP attorney staffing (i.e., 41 full-time attorneys), a total of four supervisors would be needed. However, managing 103 attorneys on the panel, with varying caseloads and involvement with the PDP, may not be equivalent to managing 79.6 full-time *equivalent* employees because it involves more individuals, many of them part-time.

Given that our estimate of full-time equivalent positions is based on self-reported hours per case by panel attorneys, the PDP should first get a more accurate and systematic count of FTEs from its forthcoming time study. Then, based on that, it can make the determination of the exact number of supervisor positions needed. These supervisors could also carry cases but not on a full caseload. The supervisors could potentially be selected from existing panel members with more experience and who have been observed performing at a higher level.

Once the number of supervisors is determined, the PDP should request funding for likely between two and five more assistant attorney manager positions to cover in-court observations of attorneys, provide feedback and strategic assistance on case work, and review reports on lawyer complaints to address issues. Given that these individuals would also be expected to carry cases for about 25 percent of their time, the likely net increase in staffing would be between 1.5 and 3.75 FTEs (75 percent of our estimated increase in supervisors of between two and five full-time positions) indicating that some of the cost of the new positions would be offset by reducing the use of PDP panel attorneys.

## Investigators

The attorney has a duty to conduct an independent investigation regardless of the client's admissions or statements to the attorney of the facts of the case.<sup>6</sup> The attorney should seek assistance from an investigator for witness interviews,<sup>7</sup> fact investigations, and information collection for pre-trial release.<sup>8</sup> A minimum of one investigator should be employed for every three attorneys in an office, according to national best practice guidelines.<sup>9</sup> As shown in Exhibit 4.4, each investigator at the PDP serves fewer attorneys than in the peer jurisdictions (4.3 attorneys per investigator on average) and at 2.9 weighted attorney positions per investigator (2.8 unweighted) is even slightly better than national best practice guidelines. None of the peer jurisdictions meet the national standards. We do not believe that more investigator positions are needed at PDP.

**Exhibit 4.4: Peer Jurisdiction Comparison: Average Attorneys per Investigator**

Jurisdiction	Total Investigators	Total Attorneys	Average Attorneys per Investigator	Rank
<b>SM PDP (Unweighted)</b>	<b>37</b>	103	<b>2.8</b>	<b>1</b>
<b>SM PDP (Weighted)</b>	<b>27.5</b>	79.6	<b>2.9</b>	<b>1</b>
San Joaquin	17	50	2.9	2
Ventura	17	61	3.6	3
Fresno	22	81	3.7	4
Santa Clara	34	132	3.9	5
San Francisco	22	104	4.7	6
Alameda	19	108	5.7	7
Contra Costa	13	88	6.8	8
<b>Peer Average:</b>	<b>21.0</b>	89.1	<b>4.3</b>	
<b>Ideal for PDP:*</b>	<b>26.5</b>	<b>79.6</b>	<b>3</b>	

Source: Harvey M. Rose Associates cross tabulation of total attorneys and investigators from Department of Justice Law Enforcement & Criminal Justice Personnel Census.

\* Based on NLADA best practices of 1 investigator for every 3 attorneys.

Despite the high number of investigators on the panel, utilization of investigators across cases is low. PDP management has stated the use of investigators on cases is an indication of quality representation and they strongly suggest panel attorneys request their help on cases. According to our survey of panel attorneys, 86 percent of PDP attorneys responding noted that management expressed the use of

<sup>6</sup> Performance Guidelines for Criminal Defense Representation. Guideline 4.1. National Legal Aid & Defender Association. (2006).

<sup>7</sup> Performance Guidelines for Criminal Defense Representation. Guideline 4.1.(b)(3). National Legal Aid & Defender Association. (2006).

<sup>8</sup> Guidelines for Legal Defense Systems in the United States. Guideline 1.3. National Legal Aid & Defender Association.

<sup>9</sup> Guidelines for Legal Defense Systems in the United States. Guideline 4.1. National Legal Aid & Defender Association.

investigators as something they value.<sup>10</sup> Additionally, 94 percent of attorneys responded that the PDP investigations quality is the same or better than previous agencies they have worked for.

However, only 4.51 percent of cases from FY 2016-17 through 2019-20 had investigators assigned to them (see Section 1, Exhibit 1.2). Exhibit 4.5, below, shows the utilization of investigators on cases was higher in FY 2020-21 than in the previous four fiscal years, with 7.38 percent utilization of investigators on cases. However, utilization of investigators varied significantly across case types with 4.3 percent of misdemeanor cases being assigned an investigator compared to 16.4 percent of felony cases. While we would expect more investigations for more serious cases, the lower rate for misdemeanors and other types of cases merits further review by PDP management.

While many criminal cases result in a plea agreement soon after arraignment, these rates indicate that the NLADA’s recommendation for every case to be independently investigated, regardless of admission of guilt, may not be being adhered to. This was further supported by several former PDP clients who participated in our focus groups who felt their case was rushed by their PDP attorney and no investigation was undertaken unless specifically requested. PDP could encourage investigations in all appropriate cases by requiring documentation in case files indicating that the attorney considered an investigation for the case but decided it was not in the best interests of the client or the client did not want an investigation.

**Exhibit 4.5: PDP Attorney Use of Investigators by Case Type for Fiscal Year 2020-21**

Case Sub-Type Group	Total Cases	Total Cases Assigned to Investigators	Total Investigators Assigned	% of Cases with Investigators	Average Cases per Investigator
Misdemeanors	5,714	248	31	4.3%	8.0
Felonies	3,762	619	38	16.5%	16.3
Post-Conviction	1,806	18	11	1.0%	1.6
Minor Traffic/Infractions	592	6	3	1.0%	2.0
Juvenile Delinquency	783	57	19	7.3%	3.0
Dependency	277	16	10	5.8%	1.6
Mental Health	162	2	2	1.2%	1.0
<b>Total*</b>	<b>13,098</b>	<b>967</b>	<b>45</b>	<b>7.4%</b>	<b>21.5</b>

Source: Harvey M. Rose Associates analysis of data from the Private Defender Program’s Defender Data system as of July 31, 2021.

\* Investigators did not work on Appeals, Contempt cases, Probate cases, Witness Representations or Restitution during this time. Those case types were omitted from the total.

Attorneys are aware they have access to investigators: 95 percent of 74 attorneys responding to our survey said getting access to investigators was easy and the remaining 3 attorneys had no opinion on ease of access to investigators. This could indicate some other factor for the low use of investigators, including insufficient incentives to fully investigate cases (e.g. due to flat fees for closing cases that do not go to

<sup>10</sup> There were 74 respondents to the survey.

trial, more time needed to review investigations that may not be compensated, and long delays in receiving payment if a case does go to trial). Additionally, while the PDP has the most investigators per attorney among peer jurisdictions reviewed, PDP's investigators may not be working full-time as they are contracted panelists for the program (we have attempted to adjust for this with our weighing of the number of positions, as shown in Exhibit 4.4).

As stated in Section 1, PDP management should use the team assignment data they collect to run reports which show the use of investigators by case type and attorney. The PDP should use these reports to determine if the panel needs to recruit more investigators, because they are unavailable to work on more cases, or if the PDP needs to promote the use of investigators more with trainings on what services investigators could provide to attorneys, or through other means, including the annual evaluation process. If investigator use remains low based on those reports, the PDP should encourage investigations in all appropriate cases by establishing stronger requirements in the Private Defender Program manual around the use of investigators and requiring documentation in case files indicating that the attorney considered an investigation for their case.

## Social Workers

The PDP is in the process of establishing a panel of social workers to support indigent clients and recently hired a manager to oversee the panel. Previously, panel attorneys could request for experts to serve as case managers and social workers. PDP management is planning to recruit ten panelists to serve as social workers or case managers for mental health and diversion programs and has already recruited five. As displayed in Exhibit 4.6 and based on the current number of social workers on the panel, there is one social worker for every 15.9 to 20.6 panel attorneys (depending on whether attorneys are counted by our weighted or unweighted number). This means that PDP has more attorneys assigned to each social worker than the peer counties as the PDP ratio is more than the average of 13.0 attorneys for each social worker in the seven peer county Public Defender offices for which we collected staffing information.

**Exhibit 4.6: Peer Jurisdiction Comparison: Average Attorneys per Social Worker**

Jurisdiction	Total Social Workers	Total Attorneys	Average Attorneys per Social Worker	Rank
Fresno	15	81	5.4	1
Ventura	6	61	10.2	2
San Joaquin	4	50	12.5	3
San Francisco	8	104	13.0	4
Contra Costa	6	88	14.7	5
<b>SM PDP (Weighted)</b>	<b>5</b>	<b>79.6</b>	<b>15.9</b>	<b>6</b>
Alameda	6	108	18.0	7
<b>SM PDP (Unweighted)</b>	<b>5</b>	<b>103</b>	<b>20.6</b>	<b>8</b>
Santa Clara	3	132	44.0	9
<b>Peer Average:</b>	<b>6.8</b>	<b>89.1</b>	<b>13.0</b>	
<b>Ideal for PDP:</b>	<b>6.1</b>	<b>79.6</b>	<b>13.0</b>	
<b>SM PDP Planned Recruitment:</b>	<b>10</b>	<b>79.6</b>	<b>8.0</b>	<b>2</b>

Source: Harvey M. Rose Associates analysis of staff levels reported by jurisdictions or obtained from budget reports and salary ordinances.

If PDP were to recruit 10 full-time equivalent social workers to the panel, they would have approximately 8.0 full-time attorneys to each social worker, or fewer attorneys per social workers than the average in the peer counties (i.e. PDP would be much better staffed in terms of social workers than peer counties). The PDP needs to evaluate how much time the five new panel social workers plan to dedicate to PDP cases to determine how many full-time equivalent social workers the panel has and if it needs to add more to achieve our recommended level of 6.1 full-time equivalent social workers, or slightly more than half of the number of social workers PDP is planning. With 6.1 full-time equivalent social workers, PDP would be comparable to the average ratio of attorneys per social worker among peer jurisdictions. Additionally, the PDP Supervising Social Worker, working as the social worker panel supervisor, should evaluate the demand for social workers and case managers annually based on attorney requests and develop a recruitment plan to address the needs for the casework. This should include an evaluation of whether additional data on social worker need (i.e. mental health history/ homelessness prevalence among PDP clients) should be collected to inform social worker need and impact.

### District Attorney Staffing Comparison

We also compared PDP staffing levels to equivalent District Attorney staffing levels for comparable functions. Comparisons between PDP and DA staffing are important for questions of equity of resources between opposing counsel, but such comparisons are complicated by the different functions of both parties. While the District Attorney and Private Defender Program overlap in many of the services they provide, they are also responsible for distinct functions and duties within the justice system. To account for some of these differences, we obtained information from the San Mateo County District Attorney's Office on the number of managers, supervisors, attorneys, and investigators/inspectors that provide



similar functions as the PDP, i.e., primarily related to the staffing of criminal cases.<sup>11</sup> Given the nature of the PDP’s panels we were unable to isolate staffing for functions distinct to PDP, i.e., representation provided for juvenile dependency, Lanterman-Petris-Short conservatorship, and DCSS/family contempt cases. However, some of the DA staffing also includes time spent on activities which the PDP would not be responsible for (i.e. reviewing and filing police citations, responding to officer-involved shootings and homicides, etc.).

Overall, as shown in Exhibit 4.7, the PDP had a higher number of attorneys and investigators, fewer managers, and an equal number of supervisors compared to the District Attorney’s Office (DA). The PDP had an equivalent attorney workforce of 79.6 FTEs compared to 43 FTEs at the DA’s office; this difference is lower if we consider our lower-end estimate of 41 FTEs discussed above. However, when comparing the staffing ratios (i.e., to account for the difference in attorneys), the PDP had more attorneys per manager and per supervisor than the DA’s office, as shown in Exhibit 4.8. This would indicate an under-staffing of these oversight positions relative to the DA. PDP had more investigators per attorney (three investigators per attorney compared to six per attorneys in the DA’s office) though the DA may rely more on local law enforcement investigations compared to the PDP. The difference in the attorney to supervisor ratio supports an expansion of this staffing in a similar magnitude as implied by the peer county public defender comparisons.

**Exhibit 4.7: Staffing Levels for the District Attorney and Private Defender Program, FY 2020-21**

Staffing Type	San Mateo Co. PDP	SM PDP - Weighted	San Mateo Co. DA
Management & Leadership	2	2	5
Supervisors	3	3	3
Attorneys	103	79.6	43
Inspectors/Investigators	37	27.8	7
<b>Total</b>	<b>145</b>	<b>113</b>	<b>58</b>

Source: Harvey M. Rose Associates analysis of information provided by the San Mateo County District Attorney’s Office.

<sup>11</sup> Functions excluded from DA staffing includes staff responsible for cases involving Brown Act/political corruption, consumer protection/fraud/environmental issues. In total, 5 Deputy District Attorney FTEs, 1 Deputy-in-Charge (Supervising Attorney) FTE, and 6 investigators were excluded from the comparison. 2 vacant Deputy District Attorney positions were also excluded as PDP does not have vacant positions.

### Exhibit 4.8: Ratio of Attorneys per Manager, Supervisor, and Investigator for the San Mateo County District Attorney's Office and Private Defender Program, FY 2020-21

Organization	Attorneys per Manager	Attorneys per Supervisor	Attorneys per Investigator
PDP (Unweighted)	52	34	3
PDP (Weighted)	40	27	3
<b>District Attorney</b>	<b>22</b>	<b>14</b>	<b>6</b>

Source: Harvey M. Rose Associates analysis of information provided by the San Mateo County District Attorney's Office.

## Ancillary Staff

We were unable to assess any potential need for additional paralegal and other ancillary staff given most attorneys appear to use their own paralegals when needed. Throughout our survey interviews and written surveys, there was no mention of lack of access or unmet need for these staff. Additionally, attorneys responding to our survey responded to questions about ease of access to legal clerks and paralegals as well as whether the PDP was superior, the same, or worse than previous agencies they worked at in terms of accessibility of ancillary services. Based on the survey, 20 out of 36 attorneys, 56 percent, responded that the PDP gave them superior access to ancillary services compared to previous public defense agencies they had worked for. Questions about ease of getting legal clerks and paralegals assigned to a case were optional for attorneys. If the PDP were to pursue making a legal clerk or paralegal panel, they should train attorneys on services provided as it may lessen the current workload of attorneys, especially for complex cases. Additionally, if a legal clerk or paralegal panel were to come to fruition, the PDP should evaluate the demand for legal clerks or paralegals annually based on attorney requests and develop a recruitment plan to address the needs for the casework.

## Conclusion

The PDP was not set up to mirror the Public Defender office model which the seven peer jurisdictions analyzed follow. Panel attorneys are contractors and are expected to manage their own workload and cases. However, the PDP should and does seek to meet indigent defense standards and implement best practices to ensure quality representation. Additionally, as outlined in Section 2, some attorneys are exceeding national caseload standards. Supervising caseloads and quality of representation are key to improving legal outcomes for indigent defendants. Panel managers and assistant managers cannot ensure quality representation because the PDP has an average of 26.5 up to 34.3 attorneys for each supervisor while the other seven counties have an average 12.3 attorneys for each supervisor. A defense office

requires proper supervision for attorney staff. Best practices indicate that for every ten full-time attorneys, there should be one full-time or two part-time supervisors.<sup>12</sup>

Although the PDP has more investigators than suggested by best practices, only 7.38 percent of cases had investigators assigned to them in FY 2020-2021 despite a high degree of awareness among attorneys that they have access to investigators. Use of investigators may be low due to other factors, including insufficient incentives to fully investigate cases due to a fee schedule which may not be commensurate with the hours required to provide comprehensive investigation and representation.

The PDP has recruited five social workers to the panel, therefore, there is one social worker for between every 15.9 to 20.6 attorneys on the panel. If PDP were to recruit 10 full-time equivalent social workers to the panel they would have approximately 8 full-time attorneys to each social worker which is many more than found in seven peer counties. The social worker panel is currently being implemented and demand for social work on cases is currently being realized by the PDP.

## Recommendations

The Chief Defender of the Private Defender Program should:

- 4.1 Determine the number of full-time equivalent attorneys needed based on the PDP's forthcoming time study, or by conducting an extensive time study of major case types. Based on this analysis, request additional funding to add between 1.5 and 3.75 net full-time equivalent supervisor positions (around two to five Assistant Attorney Manager positions or similar with 75 percent of their time devoted to supervision) to the PDP so that the program achieves a ratio of approximately one supervisor for every ten full-time equivalent attorneys as recommended by national best practices and in line with peer counties' attorney to supervisor ratios.
- 4.2 If investigator use remains low based on the investigation reports in Recommendation 1.5.i, encourage investigations in all appropriate cases by establishing stronger requirements in the Private Defender Program manual around the use of investigators and requiring documentation in case files indicating that the attorney considered an investigation for their case.

The PDP Chief Defender, with support from the Supervising Social Worker of the Private Defender Program, should:

- 4.3 Recruit at least 6.1 full-time equivalent social workers to the panel.
- 4.4 Evaluate the demand for social workers and case managers annually based on attorney requests and develop a recruitment plan to address the needs for the casework, including an evaluation of

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<sup>12</sup> Guidelines for Legal Defense Systems in the United States. Guideline 4.1. National Legal Aid & Defender Association.

whether additional data on social worker need (i.e. mental health history/homelessness prevalence among PDP clients) should be collected to inform social worker need and impact.

## Benefits and Costs

Implementation of the proposed recommendations would require an increase in the PDP's budget of between \$368,250 to \$920,625 in salary, benefits, and projected employer tax costs for the suggested additional assistant attorney manager positions (approximately \$245,500 per position). This estimate assumes savings in PDP panel attorney spending from shifting some panel attorney cases to the new assistant attorney managers. All other recommendations have little to no cost associated with them for implementation.

Increasing funding for more assistant manager positions would mitigate the potential risk from having insufficient supervision of attorney panelists. Given the PDP is currently well above the recommended ratio of attorneys to one supervisor,<sup>13</sup> the PDP could be at risk for civil litigation if attorneys are not supervised to ensure quality representation and contractual client contact requirements are not met.

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<sup>13</sup> Guidelines for Legal Defense Systems in the United States. Guideline 4.1. National Legal Aid & Defender Association.

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## 5. Resource Sufficiency: Overall Funding, Public Defender Model Comparison, and Management Salaries

Since 1968, San Mateo County has contracted with the San Mateo County Bar Association to provide representation for indigent defendants through the Private Defender Program (PDP). At the time, there were no best practices to inform which program, private or public, was best for the County. More recently, national studies generally report more favorable outcomes for indigent clients represented by an in-house public defender office for three reasons: (1) they have greater access to resources such as investigators and expert witnesses; (2) attorneys are generally compensated in a way that incentivizes comprehensive representation; and (3) attorneys work in teams that can provide each other assistance on cases. However, national best practices encourage a focus on ensuring the quality of representation rather than recommending a specific defense mode.

The PDP has processes and resources in place to provide access to investigators and experts as well as collaborative attorney teams. However, we found that the use of investigators was relatively low over the past five fiscal years and occurs more often on felony cases. Only 4.51 percent of cases from FYs 2016-17 through 2019-20 had investigators assigned to them. Additionally, the PDP's low flat-fee payment amounts may not provide sufficient compensation or incentive to ensure comprehensive representation of clients by panel attorneys. This could be worsened by the management oversight deficiencies identified in Section 2. However, the PDP also brings other advantages to a public defense system such as an ability to quickly scale up or down based on local needs and access to high-quality private attorneys that indigent clients might not be able to afford otherwise.

The alternative to using a Private Defender Program would be to establish a Public Defender's Office in San Mateo County. The annual estimated cost of an equivalently staffed Public Defender's Office would be between approximately \$29 to \$51 million annually, an increase of \$7.3 to \$29.3 million, or 34 to 135 percent, relative to current spending on the Private Defender Program. These costs do not include one-time costs for creating a new County department. Given the significant increase in costs associated with moving to a County Public Defender office model, the County should carefully consider the costs and benefits of such a move against its objectives for providing indigent defense representation and the current level of quality provided by the PDP. Based on our evaluation, the deficiencies identified with the PDP model are not currently sufficient to warrant a wholesale move away from this model. If the evaluation recommendations are implemented, they would likely address many of the deficiencies identified and improve the quality of PDP representation further.

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### Comparing Public versus Private Defender Systems

Since 1968, San Mateo County has contracted with the San Mateo County Bar Association to provide representation for indigent defendants through the Private Defender Program (PDP). San Mateo County is the only county in California with a population over 500,000 that does not have a county Public Defender Office (PDO) though contract panels are found in large jurisdictions elsewhere in the U.S. such as New

## 5. Resource Sufficiency: Overall Funding, Public Defender Model Comparison, & Management Salaries

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York City and for conflict of interest cases within California. The initial creation of a private panel rather than a public defender office appears to have been based on the presumptions that: (1) demands for indigent defense pursuant to the 1963 Gideon case were likely to be relatively manageable with a small number of attorneys; and (2) given this expectation, a private panel would allow for private attorneys to provide indigent defense mainly as a supplement to existing private practices. At the time, there were no best practices to inform which program, private or public, was best for the County. While several best practices and national standards have been established since, most of these focus on ensuring the quality of representation rather than whether that representation is provided by a public or private defender's office.

The American Bar Association's 1992 Criminal Justice Standards state the objective in providing indigent defense counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel. Each jurisdiction providing defense services should provide for the services of a full-time defender organization when population and caseload are sufficient to support such an organization. Additionally, every system should include the active and substantial participation of the private bar; that participation should be through a coordinated assigned-counsel system and may also include contracts for services.<sup>1</sup> Additionally, the American Bar Association published Ten Principles of a Public Defense Delivery System in 2002 which states that: "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."<sup>2</sup> The American Bar Association does not explicitly recommend which indigent defense delivery system is best for a jurisdiction to implement.

The Santa Cruz County Board of Supervisors recently approved a plan to transition to a Public Defender Office from a contracted panel attorney model by July 2022. Currently, they plan to fund their county PDO at the same funding level provided to their contract indigent defense office, \$13 million annually. As shown in Exhibit 5.5 below, the budget for a PDO in San Mateo County would likely need to be higher than any current budget allocation for a contracted program. Santa Cruz County staff noted in a report that their transition also offered an opportunity to invest in services, integrate with other county services, provide more in-depth case management and supportive services to clients, and increase access to ancillary staff on cases.

### Benefits & Drawbacks of a Public versus Private Defender Model

Studies conducted at the state and national level of several indigent defense offices generally report more favorable outcomes for indigent clients represented by a PDO for three reasons: (1) they have greater access to resources such as investigators and expert witnesses; (2) attorneys are generally compensated in a way that minimizes incentives to not maximize effort; and (3) attorneys work in teams which can provide each other assistance on cases and reduce the likelihood of faulty legal strategies and/or poor

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<sup>1</sup> Standards for Criminal Justice Providing Defense Services. American Bar Association. (1992).

<sup>2</sup> Ten Principles for a Public Defense Delivery System. American Bar Association. (2002).

## 5. Resource Sufficiency: Overall Funding, Public Defender Model Comparison, & Management Salaries

outcomes.<sup>3</sup> There are also several other considerations which should be factored in when comparing public versus private defender models in terms of the flexibility to adjust staffing to local need and mechanisms to ensure consistent and high quality representation.

### 1. Access to Resources

Based on results of the survey we conducted as part of this evaluation, 64 of 74 attorney respondents, or 87 percent, reported use of investigators as an important value that PDP management communicates to the panel attorneys and 55 respondents, or 74 percent, responded similarly about the use of expert witnesses. Additionally, attorneys were asked to compare accessibility of experts and ancillary services as well as the quality of investigations between the PDP and any previous criminal justice defense agency for which they worked. Overall, just under half of attorneys had previous criminal justice experience and most ranked the PDP as being superior in these three areas, as shown in Exhibit 5.1.

### Exhibit 5.1: PDP Attorney Responses to Survey Questions Comparing Prior Criminal Justice Agency to PDP regarding Experts, Ancillary Services, and Investigations

*Survey Question: Which Office was Superior in the Following Areas?*

	Accessibility of Experts	Accessibility of Ancillary Services	Investigations Quality
About the Same	10	13	15
PDP Superior	25	20	19
Previous Agency Superior	1	3	2
<b>Percentage Reporting PDP Superior</b>	<b>70%</b>	<b>56%</b>	<b>53%</b>
<i>Number of Respondents</i>	36	36	36

Source: Harvey M. Rose Associates, LLC, Survey of Panel Attorneys.

As reported in Section 4 of this report, the PDP has the highest number of full-time equivalent investigators to attorneys of the peer counties reviewed for the evaluation with one investigator for around every three attorneys; however, PDP attorney use of investigators is limited. As also discussed in Section 4 of this report, only 4.5 percent of cases from Fiscal Year 2016-17 through 2019-20 have had investigators assigned to them. The utilization of investigators on cases was higher in FY 2020-21 than in the previous four fiscal years, with 7.2 percent utilization of investigators on cases. Additionally, only 1,084 out of 91,886 total cases, or just 1.2 percent, had fees billed for an expert from FY 2016-17 through 2020-21. Attorneys are aware they have access to investigators and experts, but the actual use of investigators appears low and indicates the NLADA's recommendation for every case to be independently investigated, regardless of admission of guilt, may not be being adhered to (see Section 4 for more on these issues).

<sup>3</sup> Anderson, J. M., & P. Heaton. Measuring the Effect of Defense Counsel on Homicide Case Outcomes. National Institute of Justice. (2012). & Delivery System Reform Models: Planning Improvements in Public Defense. Michigan Indigent Defense Commission. (2016).

## 2. *Compensation Incentives*

Since the PDP assigns cases to attorneys who contract with the program, conflicts are easily addressed by reassigning cases to other panel attorneys since the panel attorneys as a whole do not make up an “office,” and are unlikely to have a conflict with other panel attorneys. The fee schedule for attorneys seems adequate, in the sense that it does not appear to be a barrier to recruiting panelists. Based on our survey, 15 out of 36 panel attorneys, or 42 percent, indicated PDP’s salary and income was superior to their previous agency. However, PDP’s fee schedule has many flat fees for case tasks that may adversely impact case outcomes as flat case fees may not be commensurate with hours needed to ensure quality representation. In particular, attorneys may be incentivized to close cases as fast as possible rather than pursuing every avenue and maintaining regular communications with their clients since their pay is the same for these services regardless of the amount of time they commit to the case.

A PDO may be more effective in incentivizing quality representation as attorneys are salaried and may be better compensated than attorneys paid by case or per hour as contract workers. This means attorneys in a PDO are less likely to have disincentives to best serve their clients because they receive predictable compensation for providing legal services.<sup>4</sup> The PDP could mitigate part of this issue by using their forthcoming time study of cases with event-based fees to increase flat fees to equal an average hourly pay rate for each event-based fee. The time study requires attorneys charging flat fees to track the time it takes them to perform the tasks required to charge the fee. This information, coupled with PDP management and other expert input, could help determine the number of hours, and commensurate compensation, needed to provide comprehensive representation.

Unlike in other jurisdictions, the PDP does pay attorneys for trial preparation with a flat fee for the full day; however, the trial preparation fee per day is extremely low at \$280, or \$35 per hour assuming an eight-hour day. The fee for contested hearing preparation is \$120 for a half day, or \$30 per hour assuming a four-hour day. This compares to an average attorney hourly rate of \$119 based on other hourly based fees included in the PDP’s fee schedule. Although the fee schedule states these flat fees are for a day and half day, attorneys may not be incentivized to work the full day or half a day because they are being paid equal to 2.3 hours and 1 hour, respectively, for each fee event compared to the overall PDP average hourly fee.

The PDP does allow their panel attorneys to request additional payment through “administrative fees” but this requires the attorney to prepare a justification for why the case merits additional compensation beyond the fee schedule and review by both PDP staff and a special fee committee. This review process, while important for ensuring exceptions are warranted, may discourage attorneys from seeking compensation beyond the flat fees included in the fee schedule. The PDP should re-evaluate and potentially revise flat preparation fees to either pay a higher flat fee, equivalent to hourly pay for a day or

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<sup>4</sup> Anderson, J. M., & P. Heaton. Measuring the Effect of Defense Counsel on Homicide Case Outcomes. National Institute of Justice. (2012).



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half day, or pay per hour for preparation of trial and contested hearings. This could improve attorney performance and the quality of representation, especially if coupled with improved oversight by management as recommended in Section 2 of this report.

Overall, the PDP's structure lends itself to significant cost savings for indigent defense. However, the PDP fee schedule may be adversely affecting case representation quality. When analyzing costs per case by type using the PDP fee schedule and charges per case, we estimated that the PDP paid panel attorneys the equivalent of 39.45 full-time employees in the form of fees for casework;<sup>5</sup> however, we estimate the attorney panel is equivalent to at least 79.6 full time employees when calculated based on attorney responses on the annual PDP survey regarding the percentage of their time they dedicated to PDP work. The PDP should consider increasing its flat fees to equal the time expended multiplied by the relevant average hourly pay rate for each event-based fee using results from its forthcoming time study of event-based fee cases. Sections 1 and 2 cover client conference fees which should be expanded to incentivize more client contact. The PDP should evaluate and analyze their fee schedule to determine if all flat fees should be increased to match the time it takes to complete a case.

### 3. Attorney Teams

The PDP has a mentor program and assigns lead and assistant attorneys to complex cases to mitigate the issue of not having attorney teams like in a PDO. PDOs often organize attorneys into teams around major case types, such as misdemeanors, domestic violence, immigration, special trials, mental health, juvenile justice, post-conviction, felony, probation violations, and homicides. Teams can also cover important stages in a case which need to be fulfilled by the office, such as the arraignment calendar and research. Team assignments determine the work assigned to an attorney by the supervisor of their team. Based on studies conducted of PDOs, attorney teams can help improve the quality of representation by creating groups of peer attorneys working on the same types of cases. The PDP mitigates this by assigning more than one attorney to complex cases and through the mentor program. Newer PDP attorneys can have a more experienced mentor attorney assigned to their case to answer questions, and help on case work. Mentor attorneys are compensated for their time by the PDP by submitting a voucher for the mentor fee. Furthermore, PDP management make themselves available to PDP attorneys to discuss case strategies and help problem solve.

### Additional Considerations

There are several additional benefits and drawbacks for implementing a PDO versus the PDP which are outlined in Exhibit 5.2 Given the limited extent of best practice guidance and mixed research findings on whether public or private defense systems deliver better outcomes, switching to a county public defender office model would not necessarily increase the quality of services provided currently by the PDP. Instead,

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<sup>5</sup> This is slightly lower than the 41 FTE panel attorney estimated in Section 4 as the 39.45 FTE was estimated based on using the total attorney fees charged for PDP cases divided by the average hourly rate in the PDP's fee schedule for attorneys. The low end estimate of 41 FTE discussed in Section 4 was estimated using the implied NAC national caseload standards.

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the choice of indigent defense model should be guided by principles recommended for any indigent defense system such as maintaining the quality of attorney representation, public management principles such as cost-effectiveness, as well as balancing other operational benefits and drawbacks between the two defense models. A summary of these benefits and drawbacks is presented in Exhibit 5.2.

Exhibit 5.2: Benefits & Drawbacks of Private versus Public Defender's Offices

	Benefits	Drawbacks
<b>Private Defender Program</b>	<ul style="list-style-type: none"> <li>Flexibility in adjusting staffing (can increase/decrease based on demand/need).</li> <li>Allows access to private attorneys who may not be affordable to indigent clients otherwise.</li> <li>No additional conflicts panel or office needed.</li> <li>Lower cost due to the use of independent contractors, lower benefits costs than county, &amp; flat fee payment structure.</li> <li>Tends to attract more experienced attorneys with their own practices.</li> </ul>	<ul style="list-style-type: none"> <li>Less frequent client contact due to fee structure.</li> <li>Attorneys' independent contractor status makes it harder to monitor quality of representation and case outcomes.</li> <li>Attorneys may build up a retained clientele and stop accepting cases.*</li> <li>New attorneys must develop their own forms, pleadings, and briefs.</li> </ul>
<b>Public Defender's Office</b>	<ul style="list-style-type: none"> <li>Supervisory staff and structure common practice in public defender offices.</li> <li>On-staff supervisors are expected to oversee attorneys and ancillary staff for quality assurance in indigent representation.</li> <li>Develop and share model forms, pleadings, and briefs which saves time for attorneys and improves consistency of representation.</li> <li>Public defender offices often have resources for initiatives to pursue criminal justice advocacy and promote alternatives to incarceration and measures which reduce recidivism.</li> <li>Have more periodic case review for in-custody defendants.</li> </ul>	<ul style="list-style-type: none"> <li>Must fund one or more additional offices to handle conflicted cases.</li> <li>Less flexibility in adjusting staffing and resources in response to changes in offending/prosecution.</li> <li>Caseloads can be high as there are a fixed number of staff attorney positions.</li> <li>New attorneys may move on to private practice after receiving training and experience.*</li> </ul>

Source: Harvey M. Rose Associates observations of the Private Defender Program & research comparing Private versus Public Defense Offices.

\*In both models attorneys may retire or move away from indigent defense service.

Most of the drawbacks related to maintaining the PDP, listed in Exhibit 5.2, could likely be addressed through recommendations offered within this report, such as the low use of investigators on cases and client contact issues (see Sections 1, 2, & 4). However, the nature of the program has panel attorneys working as independent contractors which makes the management role of tracking the quality of representation and outcomes challenging. PDP management relies on the information from the Superior Court in Odyssey and information input by attorneys in Defender Data, the annual survey, motions, and

## 5. Resource Sufficiency: Overall Funding, Public Defender Model Comparison, & Management Salaries

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the trial survey to monitor quality of representation. As addressed in Section 1 of this report, the PDP wants to collect more data on quality of representation; however, panel attorneys have not shown a willingness to input data into Defender Data and tend to input information only for the purposes of submitting a voucher to be paid for their work. However, the PDP is developing new systems within Defender Data for attorneys to input case closure information and investigator requests into Defender Data to help track case progress and services (see Section 1).

The PDP can also more quickly respond to the changing needs of the community by using its independent contractor panel structure. This allows for greater or fewer attorneys to be called on as needed without having to hire or terminate permanent staff. The PDP may need to request funding from the Board of Supervisors when changes require increases in staffing, resources, or services. However, the PDP can easily recruit more attorneys, investigators, and social workers to their panels to respond to any potential increase in demand for their services. This helps the program effectively respond to incoming cases and case needs quicker than a PDO would be equipped to do. This is also true for reductions in the number of cases requiring representation, which would potentially require layoffs in a public defender's office to reduce staffing levels.

### Estimated Cost of Funding a Public Defender Office in San Mateo County

We created two estimates of the cost to run a Public Defender Office in San Mateo County: a baseline scenario and a high staffing scenario. The baseline staffing scenario assumes the number of attorneys employed is equal to the total number of attorneys implied by the National Advisory Commission on Criminal Justice Standards and Goals (NAC), 41 attorneys, to meet the caseload demands for FY 2020-21. The baseline staffing assumption would need to change as caseloads increase for the office to meet minimum national standards for staffing cases on a yearly basis. The baseline staffing scenario assumes that no staffing enhancement recommendations from this evaluation are implemented, so staffing would remain the same as it is within the PDP currently. The high staffing scenario assumes all staffing recommendations throughout this report have been implemented (i.e. additional supervising attorneys) and assumes a higher number of attorneys in the office: 80 total attorneys. This is based on our estimate of 79.6 full-time equivalent attorney positions, rounded and calculated from attorney responses to the PDP annual survey regarding the percentage of their time they dedicate to PDP cases (see Appendix A). For the baseline and high staffing scenarios, we assume the current ratio of three attorneys to each investigator is maintained as is the current set up in the PDP; therefore, there are 14 and 27 investigators allocated in the baseline and high staffing scenarios, respectively. Appendix B details the methodology and assumptions behind both funding scenarios.

As shown in Exhibit 5.3, the estimated annual cost for a Public Defender's Office with comparable staffing to the current PDP is between \$29.0 and \$51.0 million. This would be an increase of between \$7.3 to \$29.3 million compared to projected FY 2021-22 County spending on indigent services of \$21.6 million, or an increase of 34 to 135 percent. These models include annual ongoing costs only and do not include any one-time costs associated with setting up or transitioning from the Private Defender Program to a Public

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Defender’s Office. These costs could include temporary staff as well as staff time from other County agencies needed to recruit executive staff and develop new position classifications, policies and procedures, information technology setup, etc. Salaries used for both models reflect equivalent DA classification salaries, except the PDO would not have inspectors and instead would have investigators.<sup>6</sup> An allocation of County overhead costs is not included in the estimates since these costs would largely be unchanged with the creation of a public defender office though a new portion of these costs would be allocated to the office for accounting purposes.

**Exhibit 5.3: Estimated Annual Budget for Establishing a Public Defender’s Office, Baseline and High Staffing Scenarios**

Budget Item	Baseline Staffing Scenario	High Staffing Scenario
Salaries	\$17,024,497	\$29,465,293
Benefits <sup>a</sup>	\$7,661,024	\$13,259,382
Operating Costs <sup>b</sup>	\$4,937,104	\$8,544,935
Additional Expenses <sup>c</sup>	\$493,710	\$854,493
Revenue <sup>d</sup>	(\$1,156,000)	(\$1,156,000)
<b>Total Budget</b>	<b>\$28,960,336</b>	<b>\$50,968,103</b>
County PDP Spending (FY 2021-22)	\$21,648,544	\$21,648,544
<b>Difference</b>	<b>\$7,311,792</b>	<b>\$29,319,559</b>

Source: Harvey M. Rose Associates estimates using Fiscal Year 2020-21 District Attorney classification salaries and benefits, and other cost inputs. See Appendix B for additional detail on methodology behind each scenario.

<sup>a</sup> Benefits were calculated as 45 percent of each position’s salary.

<sup>b</sup> Operating costs were derived from a model developed by the Texas Fair Defense Act and published by the Michigan Indigent Defense Commission in 2016 to determine the approximate cost of rent, supplies, postage, copies, etc. Operating costs are calculated as 20 percent of staff salaries and benefits.

<sup>c</sup> Additional Expenses include contingencies and reserve funds which is based on the San Mateo County DA formula calculated as 10 percent of operating costs.

<sup>d</sup> Revenue is current PDP income from AB 109 and the Superior Court.

For FY 2020-21 and 2021-22, the County budgeted \$19.5 and \$21.6 million for PDP appropriations, respectively. For San Mateo County to hire an equivalent workforce in full-time employees as the PDP for

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<sup>6</sup> Investigators for an indigent defense office are not required to be certified as law enforcement; therefore, their salary is estimated to be 7.1 percent less than that of an inspector (a sworn DA investigator), with a maximum annual pay of \$139,897 per investigator. This is based on the pay differential observed in other peer counties.

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a PDO, salaries would cost anywhere from \$17.0 to \$29.5 million and benefits would cost \$7.6 to \$13.3 million depending on recommendation implementation and benefit rates per staff member.

### Budget Comparisons

The PDP currently has a lower annual cost to the County than the Baseline Staffing scenario estimated cost for a PDO, as shown in Exhibit 5.4 below. Costs per case would also increase for a PDO compared to a contracted program: the PDP currently has an average cost per case of \$1,012 while a PDO would cost between \$1,420 to \$2,500 per case. Funding a new PDO would be equivalent to the current funding for the DA.

**Exhibit 5.4: Budget Comparisons for Private Defender Program, Alternative Public Defender’s Office, and District Attorney**

Budget	Private Defender Program (FY 2020-21)	PDO Baseline Staffing Scenario	PDO High Staffing Scenario	SM District Attorney
Salary Cost	\$19,095,336 <sup>a</sup>	\$17,024,497	\$29,465,293	\$19,244,508
Salaried Positions	16	112	176	141
Benefits Cost	\$549,849	\$7,661,024	\$13,259,382	\$15,643,616
Average Benefits Cost per Position	\$34,366	\$68,402	\$75,337	\$110,948
Average Cost per Case <sup>b</sup>	\$1,012	\$1,420	\$2,500	\$2,169
<b>Total Budget</b>	<b>\$20,628,600</b>	<b>\$28,960,336</b>	<b>\$50,968,103</b>	<b>\$45,565,641</b>

Source: Harvey M. Rose Associates analysis of Private Defender Program and District Attorney budgets, staffing, and case numbers.

<sup>a</sup> Includes FY 2020-21 total fees budgeted for the program to PDP salaried staff, contract attorneys, investigators, and other support staff and experts from the PDP Budgets.

<sup>b</sup> Based on estimate from the District Attorney’s Office for 2019 of 21,000 cases. Case counts were standardized to Fiscal Year 2018-19, but used Fiscal Year 2020-21 budgets for comparison. This accounts for future case counts returning to normal as the coronavirus pandemic ends. The PDP had 20,390 cases in Fiscal Year 2018-19 and 13,123 cases in Fiscal Year 2020-21.

The major differences in funding between the PDP and the DA are caused by the panel model used to contract with attorneys and investigators for the PDP and the use of flat-fee payment structures for many case types. These features significantly reduce the cost per case paid by PDP and the County as panel attorneys are not salaried and handle their own overhead and benefit costs. The PDP also holds a contract with the Superior Court to provide representation for dependency cases. Accounting for differences in staffing and responsibilities between the PDP and DA, the DA budget can be reduced to \$21.3 million which is comparable to the \$20.6 million budget spending for the PDP.

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The PDP benefits from the panel model because they pay attorneys to work on the cases they agree to take and panel attorneys retain the flexibility to determine their workload. We conducted a survey of the PDP panel attorneys and 36 out of 74 responded that they had previously worked for a public criminal justice office. All 36 attorneys responded that the PDP is superior in the work flexibility it offers them. Attorneys often choose to join the panel after they have gained experience in criminal defense litigation and are also working their own private practice or because of the schedule flexibility that contract work offers them.

It is important to note that although the difference in funding between the PDP and the baseline PDO budget is \$8.3 million annually, this amount is not enough to cover the standards referenced in Section 4 in terms of the number of attorneys to supervisors or investigators. Additionally, the County would still require a contract with an outside entity to take cases where there are multiple defendants because a PDO can only take one defendant for such a case. This could cost an additional \$4.8 up to \$8.2 million annually.<sup>7</sup>

### Management Salary Comparisons

We also compared the salary of PDP management to other peer counties and the San Mateo County District Attorney's Office. The PDP is not a County department, so the County is under no obligation to pay PDP management at parity with the DA or other PDOs. It is up to the San Mateo County Bar Association (SMCBA) as a contractor to charge rates that allow them to attract and retain talent to effectively run the PDP while still being cost-effective. Unlike most contractors, SMCBA does not have other clients, therefore revenue received from the County would be the main source for making salary adjustments for PDP staff.

### Public Defender Comparisons

PDP attorney managers and leadership are paid at a competitive rate when compared to the pay of those in peer jurisdictions with similar position responsibilities. Exhibit 5.5 shows that, on average, peer jurisdictions pay their Public Defender, attorney management, and supervisors just under the salaries PDP management receives. Santa Clara and Alameda Counties pay their Public Defenders, management, and supervisors higher salaries than the PDP, however, PDP management is better paid than San Francisco, Contra Costa, Napa, Marin, Sonoma, Solano, San Joaquin, and Fresno County Public Defender management positions. These comparisons are for salaries only and do not include benefits that can be considered part of total compensation. It is likely that benefit rates for peer counties are higher than the PDP based on our knowledge of public sector benefit levels.

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<sup>7</sup> Average cost for contacting with conflicts indigent defense office was calculated based on the peer jurisdiction average cost as a percentage of their total indigent defense budget. The average percentage of a peer jurisdiction budget spent on a conflicts contract was 16 percent.

5. Resource Sufficiency: Overall Funding, Public Defender Model Comparison, & Management Salaries

Exhibit 5.5: Annual Salary Comparison of Peer Indigent Defense Offices

Jurisdiction	Chief Defender	Management	Supervisor*	Ranking of Highest Pay Rates
Santa Clara	\$319,300	\$294,161	\$249,960	1
Alameda	\$286,322	\$262,933	\$243,443	2
<b>San Mateo PDP</b>	<b>\$272,950</b>	<b>\$251,114</b>	<b>\$216,310</b>	<b>3</b>
San Francisco	\$255,086	\$225,940	\$202,774	4
Contra Costa	\$252,604	\$233,532	\$204,246	5
Napa	\$251,410	\$207,844	\$188,542	6
Marin	\$238,066	\$206,835	\$193,752	7
Sonoma	\$221,141	\$193,789	\$176,132	8
Solano	\$219,940	\$196,643	\$186,814	9
<b>Bay Area County Average (excluding PDP)</b>	<b>\$255,484</b>	<b>\$227,710</b>	<b>\$205,708</b>	
<b>% Difference (PDP vs Average)</b>	<b>7%</b>	<b>10%</b>	<b>5%</b>	
Ventura	\$280,904	\$199,576	\$186,004	3
San Joaquin	\$195,990	\$166,886	\$162,156	10
Fresno	\$183,326	\$171,912	\$156,286	11
<b>All Peer Counties Average (excluding PDP)</b>	<b>\$245,826</b>	<b>\$214,550</b>	<b>\$195,464</b>	
<b>% Difference (PDP vs Average)</b>	<b>11%</b>	<b>17%</b>	<b>11%</b>	

Source: Harvey M. Rose Associates, LLC, analysis of peer county salaries for positions equivalent to PDP Management positions.

\*For this analysis, the average San Mateo Supervisor salary was calculated using Managing and Assistant Managing Attorney Salaries for the PDP.

### PDP and District Attorney Office Salary Comparisons

PDP Management salaries were also compared to counterparts at the San Mateo County District Attorney's office. As shown in Exhibit 5.6, on average PDP management was paid 15 percent less than their DA counterparts in FY 2020-21.<sup>8</sup> The Chief Defender earned 8.8 percent less whereas other PDP managers earned between 16 to 19 percent less than their DA counterparts. This difference does not take into account benefits paid to DA managers, such as health insurance and retirement, which were on average 2.2 times more generous than benefits paid to PDP counterparts.

<sup>8</sup> Given the District Attorney is an elected position with oversight over a large County department, we assumed the Chief Defender equivalent in the District Attorney's position to be the Chief Deputy District Attorney. This position was also assumed to be the equivalent for the Assistant Chief Defender.



**5. Resource Sufficiency: Overall Funding, Public Defender Model Comparison,  
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**Exhibit 5.6: Comparison of Management Compensation between San Mateo Private Defender Program and District Attorney’s Office, FY 2020-21**

SM Private Defender Program <sup>1</sup>			SM District Attorney <sup>2</sup>			Difference: PDP vs. DA (\$)	
SM PDP Position	Salary	Benefits	Comparable DA Position	Salary	Benefits	Salary	Benefits
Chief Defender	\$272,950	\$69,058	Chief Deputy District Attorney <sup>3</sup>	\$299,270	\$134,672	(\$26,320)	(\$65,614)
Assistant Chief Defender	\$251,114	\$78,751	Chief Deputy District Attorney <sup>3</sup>	\$299,270	\$134,672	(\$48,156)	(\$55,921)
Managing Attorney (Adult)	\$221,450	\$35,930	Assistant District Attorney	\$272,064	\$122,429	(\$50,614)	(\$86,499)
Managing Attorney (Juvenile)	\$228,480	\$45,745	Assistant District Attorney	\$272,064	\$122,429	(\$43,584)	(\$76,684)
Assistant Managing Attorney <sup>4</sup>	\$205,000	NA	Deputy District Attorney IV - (Deputy in Charge)	\$246,938	\$111,122	(\$41,938)	NA
<b>Average</b>	<b>\$235,799</b>	<b>\$57,371</b>	<b>Average</b>	<b>\$277,921</b>	<b>\$125,065</b>	<b>(\$42,122)</b>	<b>(\$71,180)</b>
<b>% Difference (Average)</b>						<b>-15%</b>	<b>-54%</b>

Source: Private Defender Program; San Mateo County Manager’s Office (based on budget and salary ordinance information)

Notes: <sup>1</sup> PDP salaries as of June 1, 2020

<sup>2</sup> District Attorney Office salaries are for the highest salary step (“E” step) as of April 20, 2020 due to bargaining and Board of Supervisors wage-setting process. DA wages have not changed since April 20, 2020.

<sup>3</sup> Chief Deputy District Attorney salary reflects a 6% experience pay bonus for those with the County for more than 25 years of \$17,956 per annum. The Chief Deputy District Attorney also receives a 3.6% transportation allowance (worth \$10,842 annually) which is not reflected in the salary above.

<sup>4</sup> Assistant Managing Attorney position was hired in FY 2021-22, budget estimate for FY 2020-21 used.

As a comparison, we also looked at the salary difference between District Attorney and Public Defender management in two similarly-sized counties. In one county, San Joaquin, DA managers were paid on average 11 percent more than Public Defender counterparts, however, in Ventura County, managers in both offices were paid the same. As discussed above, as an independent contractor, it is up to the San Mateo County Bar Association to determine salaries and benefits necessary to retain and attract high-quality staff.

## Conclusion

The PDP’s structure lends itself to significant cost savings for indigent defense. The PDP currently has a lower annual cost to the County than the estimated cost for an equivalently-staffed Public Defender’s Office. Additionally, the PDP has the lowest average cost per case at just over \$1,000 compared to the DA and PDO estimates from \$1,420 to \$2,500. Funding a PDO would be equivalent to the current funding for the DA’s Office. However, the PDP fee schedule and use of relatively low flat fee payments, which keeps PDP costs down, may be adversely affecting representation quality by not incentivizing sufficient preparation and effort.

A Public Defender model may be better equipped to ensure the quality of services provided by staff in that staff would directly report to supervisors rather than being independent contractors. However, the PDP can more quickly respond to the changing needs of the community and case levels. The PDP may need to request funding from the Board of Supervisors when changes require increases in staffing, resources, or services. However, the PDP can easily recruit more attorney, investigator, and social worker resources to the panels to respond to any potential increase in demand for their services. This helps the program effectively scale up or down to incoming cases and case needs quicker than a PDO would be equipped to.

Given the significant increase in costs associated with moving to a Public Defender model, the County should carefully consider the costs and benefits of such a move against its objective of providing high quality indigent defense representation. Based on our evaluation, the deficiencies identified with the PDP model are not currently sufficient to warrant a wholesale abandonment of the program. If the evaluation recommendations are implemented, they would likely address many of the deficiencies identified and improve the quality of PDP representation further. Additionally, a Public Defender model could bring a different set of challenges or deficiencies and should be carefully weighed against improving the current system. However, the County should consider the issues identified in this evaluation, the potential benefits and costs of implementing a Public Defender's Office, and other County and community priorities in determining which indigent defense model would best serve its residents.

## Recommendations

The Chief Defender of the Private Defender Program should:

- 5.1 Review and revise the fee structure to ensure flat fees provide compensation that is equivalent to the preparation and in-court time needed to provide high-quality representation and sufficiently incentivizes panel attorneys to provide comprehensive representation for indigent clients.
- 5.2 Consider changing the current flat fees to be equal to an average hourly pay rate for each event-based fee using results from the time study of event-based fee cases and PDP management input, ensuring that the fees incentivize high-value activities that are linked to quality representation for indigent clients and improved case outcomes.

The San Mateo County Board of Supervisors should:

- 5.3 Assess the costs and benefits of keeping the Private Defender Program as it is, improving the Private Defender Program as recommended in this report, or moving to a Public Defender model.

## Benefits and Costs

Implementation of the proposed recommendations would likely increase the quality of services provided by the PDP and allow the County to use the information to determine if the PDP remains the best choice

## **5. Resource Sufficiency: Overall Funding, Public Defender Model Comparison, & Management Salaries**

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for indigent defense in the County going forward. Given the complexity of estimating the impact of changes to the fee schedule and uncertainty of its impact on billing behavior, we have not provided a specific estimate for Recommendation 5.1. However, to provide an indication of the magnitude of this change, at the extreme, increasing all fee payments to attorneys by 50 percent would cost an additional \$4.9 million annually in attorney fees. This would increase the PDP budget to \$25.5 million from \$20.6 million, still lower than the estimated cost for establishing a PDO. However, the PDP only needs to increase fees for flat event-based fees in order to incentivize client contact, putting in work outside the courtroom, and entering quality data into Defender Data. The PDP should evaluate the findings of their ongoing time study to determine which event-based fees, like pre-trial preparation, should be increased based on the average time to complete each event-based item where they can charge a fee. Paying attorneys a higher amount for events may result in attorneys putting in more time than is otherwise currently incentivized by the pre-trial preparation fees and would likely cost less than switching to a fully staffed PDO model.

As shown in Exhibit 5.4, the estimated annual cost to the County of operating a Public Defender's office with comparable staffing to the current PDP would be between \$29.0 and \$51.0 million. This would be an increase of between \$7.3 to \$29.3 million compared to projected FY 2021-22 County spending on indigent services of \$21.6 million, or an increase of 34 to 135 percent. Additional one-time set up costs for creating a new County Department would also have to be considered. Exhibit 5.7 below shows the cost of increasing the PDP budget to implement the recommendations within this report would be \$0.5 to \$1.1 million. The budget for the PDP would still be \$6.8 to \$28.2 million less than moving to a PDO model.

**5. Resource Sufficiency: Overall Funding, Public Defender Model Comparison,  
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**Exhibit 5.7: Estimated Cost of Implementing All Recommendations Compared to Estimated  
PDO Budget**

Recommendation	<i>Estimated Cost</i>	
	Minimum	Maximum
Defender Data Upgrades (Sec. 1)	\$60,000	\$60,000
Hire/ Contract for Management Analyst (Sec. 1)	\$52,500	\$52,500
Hire/ Contract for Training Coordinator (Sec. 3)	\$37,000	\$46,000
Hire Additional Assistant Managing Attorneys (Sec. 4)	\$368,250	\$920,625
<b>Total Estimated Cost of Recommendations</b>	<b>\$517,750</b>	<b>\$1,079,125</b>
<b>FY 2021-22 Budgeted Expenditures</b>	<b>\$21,648,544</b>	<b>\$21,648,544</b>
<b>Total PDP Budget Spending with Recommendations</b>	<b>\$22,166,294</b>	<b>\$22,727,669</b>
 <b><i>Comparison to Cost of Establishing a Public Defender’s Office</i></b>		
Estimated PDO Budget	\$28,960,336	\$50,968,103
<i>Difference (compared to PDP with Recommendations)</i>	<i>\$6,794,042</i>	<i>\$28,240,434</i>
<i>Estimated Upper End Cost of Changing PDP Fees (Sec. 5)*</i>		<i>\$4,900,000</i>

Source: Harvey M. Rose Associates estimates of costs of implementing report recommendations.

\*Not included in estimate as final amount will not be determined until PDP completes an analysis of changes needed to current event-based fees.

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## 6. Evaluation of Internal Financial Controls

**While the San Mateo County Private Defender Program does not appear to have significant internal control deficiencies regarding the review and approval of attorney vouchers, a review of 9,241 flat fee vouchers and 2,061 special fee vouchers paid in FY 2020-21 shows that there are minor compliance concerns involving the timeliness of voucher submission, fee event data entry, and a requirement that flat fee cases only be billed after the case is closed. These minor compliance issues could be addressed through revision of existing financial policies, as well as possible modifications to the Defender Data case management system to reduce the incidence of billing errors.**

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### Previous PDP Financial Control Findings

A Fiscal Year 2014-2015 San Mateo County Civil Grand Jury report found that there had not been consistent formal evaluations of the San Mateo Private Defender Program (PDP). In response, the County undertook an evaluation in late 2015 that did not entail any financial auditing but recommended, among other things, that a periodic, independent review of PDP's finances should be conducted either by County personnel or an outside auditor.

In September 2016, a County of San Mateo Controller's Office report analyzing a sample of 593 vouchers (out of approximately 189,000 total submitted) found that 25 percent (148 total) had errors that resulted in the issuance (by the San Mateo County Bar Association) of incorrect payments. The Controller's Office also found that from July 2013 through February 2016, accounting policies and procedures were not documented. The report found that PDP vouchers (invoices) for services often had errors in fee amounts, billing units, and were not compliant with voucher policies. Further, the Controller found that vouchers were often not in compliance with the fee schedule and that overall there was inadequate financial management and oversight. Since the 2016 report was issued, an additional four audits between September 2016 and June 2020 were conducted. By June 2020, the Controller found that the San Mateo County Bar Association was in compliance with contractual recommendations made regarding internal accounting controls.

### Financial Controls Testing Approach

Given previous internal control findings and remediation actions, we reviewed the PDP's current financial policies and procedures, selected a small random sample of vouchers, submitted since the last San Mateo County Controller's audit, for compliance testing and analyzed the timeliness of voucher submission. From our review, there was no indication that PDP was out of compliance with critical accounting procedures for payment and issuance of invoices or errors in vouchers approved for payment. However, we did identify minor compliance issues which could be addressed to reduce the risk of incorrect payments being made.

## Methodology

To assess the risk of errors and non-compliance in PDP's voucher submission and invoicing process, we randomly selected a sample of vouchers paid to panel attorneys by the PDP in FY 2020-21 to review for compliance with PDP's fee schedule and internal accounting procedures. The sample was selected from a sample frame of vouchers paid in FY 2020-21 because a prior audit conducted by the County Controller showed no significant findings as of June 2020. The sample frame was further limited to vouchers paid for criminal cases only, with a representative distribution of case types included in the sample (i.e., Criminal - other<sup>1</sup>, Criminal Superior Court, and Criminal Municipal Court).<sup>2</sup> Additionally, due to the extra levels of verification required for special fee cases (cases paid by the hours of service), we also included special fee vouchers in our sample. Administrative fee vouchers were excluded from the sample frame because they comprised only a small percentage of the total (under 2 percent or 186 out of all non-special fee vouchers), and did not appear to present a high risk given their relatively low total dollar value.<sup>3</sup> We further limited the sample frame to vouchers paid to attorneys only. Overall, 40 flat fee (event-based) vouchers and 10 special fee (hourly pay) vouchers were randomly selected and reviewed from the sample frame. Additional documentation from Defender Data for the special fee sample vouchers was also reviewed.<sup>4</sup>

## Voucher Sample Information

The flat fee vouchers were randomly selected from a sample frame of 9,241 vouchers with flat (event-based) fees, and the special fee vouchers were selected from a sample frame of 2,061 vouchers with special hourly fees. The samples selected represent 0.4 percent of flat fee vouchers and 0.5 percent of special fee vouchers in the respective sample frames. Small samples were selected given the assessed low risk of non-compliance based on recent audits by the County Controller's Office and new internal controls implemented by the PDP. Of the flat fee vouchers reviewed, 39 were closed cases and one was still open. For the special fee vouchers, nine were for open cases and one was for a closed case.

Exhibit 6.1 shows a summary of event-based and special fee vouchers submitted by attorneys in FY 2020-21 by type of case. Approximately 84 percent of flat fee vouchers paid in FY 2020-21 and in the sample were Criminal Municipal Court (CM) cases, 16 percent were Criminal Superior Court (CS) cases, and .003 percent were other Criminal cases. Approximately 52 percent of special fee vouchers paid in FY 2020-21 were Criminal Superior Court cases and 48 percent were Criminal Municipal Court Cases. In the Special Fee sample, 50 percent were Criminal Municipal and 50 percent were Criminal Superior.

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<sup>1</sup> Includes criminal appeals, criminal contempt, lineups, lineups/ special assignment, witness representation, and writs according to Private Defender Program staff.

<sup>2</sup> Though the Municipal Court no longer exists due to its consolidation with the Superior Court, the case type terminology for PDP has been retained from when the County's court system was divided into Municipal and Superior Courts, with misdemeanors and infractions generally assigned to the Municipal Court and felonies and more serious offense cases generally assigned to the Superior Court.

<sup>3</sup> \$150,024 in Administrative Fees were charged in FY 2020-21.

<sup>4</sup> The PDP pays for services provided by attorneys as either predetermined event-based fee amounts (flat fees), administrative fees requested when the flat fee amount is considered insufficient, or special fee cases (e.g. life imprisonment, three strikes, etc.), which are billed by the hour based on approved hourly rates.

**Exhibit 6.1: Summary of Vouchers by Case Type, FY 2020-21\***

Case Type	Total Flat Fee Vouchers	Total Special Fee Vouchers	Vouchers in Flat Fee Sample	Vouchers in Special Fee Sample
Criminal Municipal Court	7,763	990	33	5
Criminal Superior Court	1,449	1,071	6	5
Criminal – Other	29	0	1	0
<b>Total</b>	<b>9,241</b>	<b>2,061</b>	<b>40</b>	<b>10</b>

Source: HMR analysis of data from the Private Defender Program’s case management & invoice system.

\* The total number of vouchers charged exceeds the total number of cases, since there can be multiple vouchers charged per case.

**Exhibit 6.2: Number of Cases by Case Type and Voucher Type, FY 2020-21**

Case Type	Flat Fee Vouchers	Special Fee Vouchers	Flat & Special Fee Vouchers (Total)
Criminal Municipal Court	6,617	434	7,051
Criminal Superior Court	1,219	233	1,452
Criminal – Other	11	0	11
<b>Total</b>	<b>7,847</b>	<b>667</b>	<b>8,514</b>

Source: HMR analysis of data from the Private Defender Program’s case management & invoice system.

Exhibit 6.2 shows the number of cases by case type represented within both groups. The flat fee voucher sample includes vouchers submitted for 6,617 Criminal Municipal type cases, 1,219 Criminal Superior type cases and 11 Criminal-Other type cases. The Special Fee sample includes vouchers submitted for 434 Criminal Municipal type cases and 233 Criminal Superior type cases. It is important to note that the cases included in Exhibit 6.2 likely have vouchers that were not included in the sample, and therefore do not represent the full scope of costs for those cases.

## Voucher and Case Costs

Exhibit 6.3 shows that, on average, the special fee case vouchers in our sample were more expensive than the flat fee vouchers in our sample. Overall, in FY 2020-21, the average cost per case was \$851. The average cost of flat fee cases in our sample frame is \$484, and the average cost of special fee cases in our sample frame is \$5,165. Since our samples were drawn at the voucher level (and not at the case level), cost information at the case level is not available for our sample of 40 vouchers (since there are typically multiple vouchers per case, and there would likely be vouchers for these cases not included in the sample). The average cost per voucher is \$431 for our flat fee sample, \$1,043 for the special fee sample, and \$613 for all vouchers in the sample. Total voucher costs submitted by attorneys for criminal cases for FY 2020-21 (excluding administrative fees) were approximately \$7.2 million.

**Exhibit 6.3: Average Cost per Case and Voucher for All FY 2020-21 Vouchers and Sample**

Voucher Type	Total Costs Submitted	Average Cost per Case	Average Amount Charged Per Voucher	
			Sample Only	All Vouchers
Flat Fee Vouchers	\$ 3,802,082	\$ 484	\$ 431	\$ 411
Special Fee Vouchers	\$ 3,445,214	\$ 5,165	\$ 1,043	\$ 1,672
<b>All Attorney Vouchers</b>	<b>\$ 7,247,296</b>	<b>\$ 851</b>	<b>\$ 613</b>	<b>\$ 641</b>

Source: HMR analysis of data from the Private Defender Program's case management & invoice system.

Exhibit 6.4 below shows that the maximum cost for both a case and a single voucher in FY 2020-21 was \$30,230.<sup>5</sup> Of the 40 flat fee vouchers reviewed, the costliest was \$1,680. Among the special fee sample vouchers reviewed, the highest cost voucher was for \$3,094. For both the \$17,366 flat fee case cost and the \$30,230 special fee case cost, there was only one voucher submitted for the entire case.

**Exhibit 6.4: Average Cost per Case and Voucher for All FY 2020-21 Vouchers and Sample**

Voucher Type	Maximum Cost per Case	Maximum Amount Charged Per Voucher	
		Sample Only	All Vouchers
Flat Fee Vouchers	\$ 17,366	\$ 1,680	\$ 17,366
Special Fee Vouchers	\$ 30,230	\$ 3,094	\$ 30,230
<b>All Attorney Vouchers</b>	<b>\$ 30,230</b>	<b>\$ 3,094</b>	<b>\$ 30,230</b>

Source: HMR analysis of data from the Private Defender Program's case management & invoice system.

## Testing Results and Findings

Based on our sample, there was no indication that PDP was out of compliance with critical accounting procedures for payment and issuance of invoices or errors in vouchers approved for payment. However, we did identify minor compliance issues which could be addressed to reduce the risk of incorrect payments being made. These include instances of non-compliance with Fee Schedule requirements that all cases be billed within 90 days of case completion, and that all Special Fee cases be billed monthly.

### Timeliness of Fee Billing

According to the fee schedule, all non-special/hourly fee cases must be billed within 90 days of case completion, including restitution and completion of certain court orders.<sup>6,7</sup> Analysis of all flat fee vouchers submitted in FY 2020-21 in the sample frame shows that the average length of time between the final fee

<sup>5</sup> The most expensive case only included the single voucher (\$30,230)

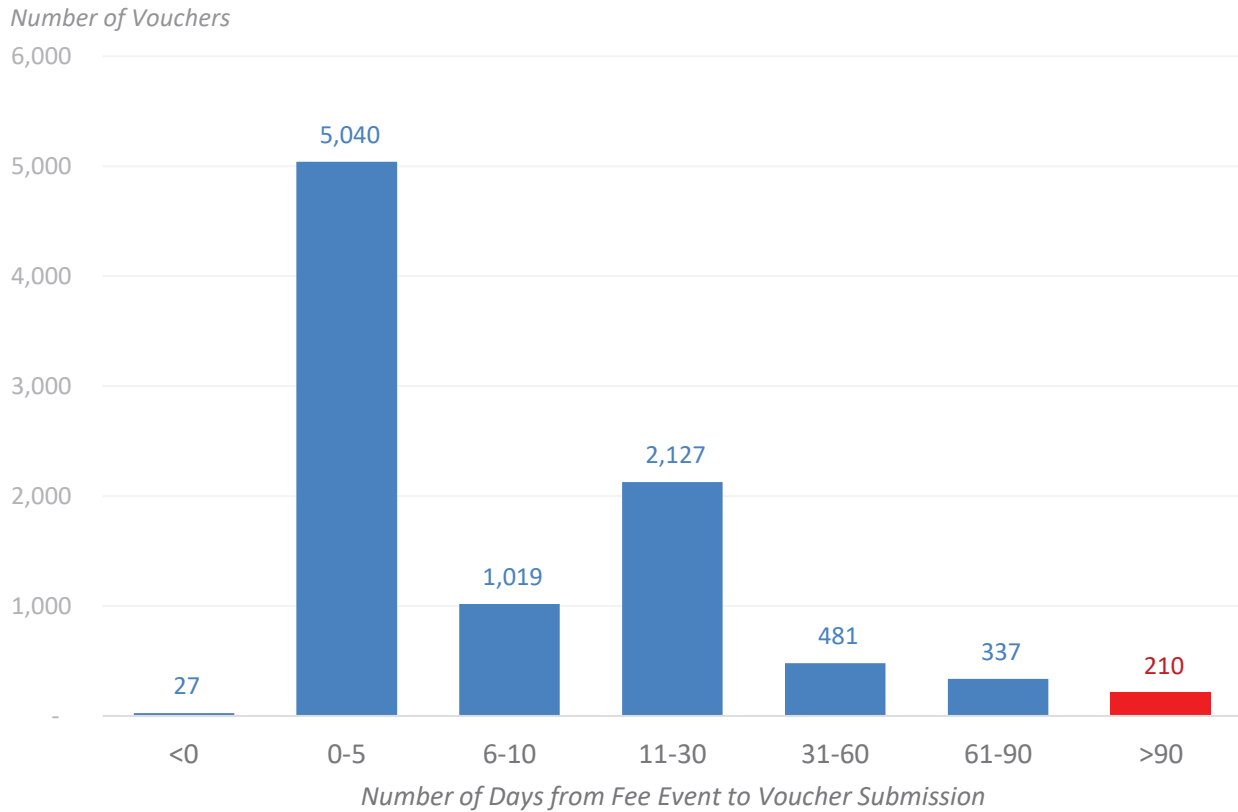
<sup>6</sup> PDP July 2021 Fee Schedule, Sec. I. 12.C.

<sup>7</sup> PDP Financial Policies & Procedures Manual Sec. 3.2.1.



event and the date of submission for flat fee vouchers was 16 days, with a range from 0 – 833 days.<sup>8</sup> Further, 5,040 (55 percent) of the 9,241 vouchers in the FY 2020-21 sample were submitted within 5 days of the last fee event, and 8,213 (89 percent) were submitted within 30 days. However, as shown in Exhibit 6.5 below, a small proportion (210, or 2.3 percent) of the FY 2020-21 flat fee vouchers were submitted more than 90 days after the last fee event.

**Exhibit 6.5: Distribution of Flat Fee Vouchers by Number of Days from Fee Event to Voucher Submission, FY 2020-21 Sample Frame**



Source: HMR analysis of data from the Private Defender Program’s case management & invoice system.

Note: \*27 vouchers are shown to have less than 0 days between the last fee event and voucher

As shown in Exhibit 6.6 below, vouchers submitted more than 90 days after the last fee event represented around \$99,281 in fees submitted or 2.6 percent of the total voucher amount submitted for criminal case flat-fee vouchers in FY 2020-21. Submitting fees beyond the 90 day limit can increase the risk of inaccurate billing and increase the difficulty in validating invoices. The majority of vouchers in terms of the value of fees submitted were submitted fewer than 90 days after the last fee event (97.4 percent), as required by the PDP’s Fee Schedule.

<sup>8</sup> According to PDP management, the case close date in Defender Data is not reliably entered. We therefore used the last “fee event” entered into the system as a proxy for the case closure date. Given that attorneys must bill fees based on specific hearings and case events, the last fee event should be a reasonable approximation of case closure.

Additionally, there were 27 flat fee vouchers with a voucher submission date before the final fee event, totaling approximately \$9,400. Most of these vouchers (22 total) had a submission date of only one day before the final fee event, however, one voucher shows a submission date 206 days prior to the final fee event, and another shows 96 days before. Further review of the higher-value vouchers (exceeding \$300 each) in this group showed most of these inconsistencies were due to incorrect entry of fee event dates and minor inconsistencies in billing.<sup>9</sup>

**Exhibit 6.6: Number and Value of Flat Fee Vouchers by Number of Days from Fee Event to Voucher Submission, FY 2020-21 Sample Frame**

# of Days from Fee Event to Voucher Submission	Number of Vouchers	Value of Vouchers	% Value of Total
<0	27	\$9,400	0.2%
0-5	5,040	\$2,108,993	55.5%
6-10	1,019	\$428,519	11.3%
11-30	2,127	\$848,739	22.3%
31-60	481	\$184,540	4.9%
61-90	337	\$122,611	3.2%
>90	210	\$99,281	2.6%
<b>Grand Total</b>	<b>9,241</b>	<b>\$3,802,082</b>	<b>100.0%</b>

Source: HMR analysis of data from the Private Defender Program’s case management & invoice system.

Exhibit 6.7 below shows that of the vouchers exceeding 90 days between the final fee event and voucher submission date, 175 (83 percent) were Criminal Municipal Court type cases, 34 (16 percent) were Criminal Superior Court type cases and 1 (0.5%) was an Other Criminal case type. Of the 89 vouchers exceeding 180 days, 79 (89%) were Criminal Municipal type cases and the remaining 10 (11%) were Criminal Superior type cases.

<sup>9</sup> Of the 11 higher-value vouchers in this group analyzed, two included fee events that were potentially underbilled (ex: the fee type charged was a Case Fee where a preliminary hearing wasn’t held, however, the San Mateo County Superior Court’s Online Case Records Portal showed that a hearing was held within one day of the fee event date and would therefore be billed at a higher rate). The other vouchers had fee events which were inconsistent with hearing event dates in the Superior Court’s Online Case Records Portal, however, these Court record hearing events occurred prior to the voucher submission date reflected in Defender Data.

**Exhibit 6.7: Flat Fee Vouchers Exceeding 90 and 180 Days between Fee Event and Voucher Submission, FY 2020-21 Sample Frame**

Case Type	90+ Days	180+ Days
Criminal - Municipal	175	79
Criminal - Superior	34	10
Criminal – Other	1	0
<b>Total</b>	<b>210</b>	<b>89</b>

Source: HMR analysis of data from the Private Defender Program’s case management & invoice system.

We also found that 144 of the flat fee vouchers (approximately 2 percent of the sample frame, representing \$65,828 total) were submitted for open cases, which is not consistent with PDP’s Fee Schedule policy.<sup>10</sup> Of the 143 vouchers submitted for open cases, 105 (73 percent) were for Criminal Municipal Court type cases and the remaining 39 (27 percent) were for Criminal Superior Court type cases. This policy may result in an increase in billing errors due to the requirement to wait until case completion to submit vouchers, as well as potentially incentivizing an overly quick resolution of cases in order to receive a payment.

Exhibit 6.8 below shows that more than 1 in every 10 cases are not billed until at least a year and a half (540+ days) after arraignment, which may negatively impact the accuracy of the submitted voucher. Exhibit 6.8 shows a breakdown of the number of days between the arraignment date and the voucher submission for FY 2020-21 flat fee vouchers. For 4,104 (44 percent) of the FY 2020-21 flat fee vouchers, cases were resolved and vouchers submitted in 3 months or less. However, for 1,239 vouchers (13 percent of the total), the time between arraignment and voucher submission exceeded 18 months (540 days).

**Exhibit 6.8: Length of Time between Arraignment and Voucher Submission for Flat Fee Vouchers, FY 2020-21**

Number of Days	Number of Vouchers	Percent
< 90	4,104	44%
90 - 180	1,147	12%
180 - 270	1,096	12%
270 - 360	706	8%
360 - 450	511	6%
450 - 540	438	5%
540 +	1,239	13%
<b>Total</b>	<b>9,241</b>	<b>100%</b>

Source: HMR analysis of data from the Private Defender Program’s case management & invoice system.

<sup>10</sup> July 2021 Fee Schedule, Sec. I. 12.D

## Special fee cases must be billed monthly

According to the PDP's Fee Schedule, all special fee/hourly cases must be billed monthly.<sup>11</sup> Of the vouchers reviewed in the Special Fee sample, there was only one instance of a fee event exceeding the 30-day limit (between the date of the fee event and submission of the voucher, and only by one day).

## Conclusion

Although there was no indication of significant compliance issues regarding PDP's billing practices, the PDP could take steps to improve existing financial policies and procedures to reduce the risk of billing errors and strengthen the internal control environment.

## Recommendations

The Chief Defender of the Private Defender Program should:

- 6.1 Review current Fee Schedule policies to determine if work on flat fee cases could be further broken up by milestone or activities conducted before versus after conviction or acquittal, in order to allow for submission of vouchers prior to case completion and to reduce the incentive to close cases quickly. Any changes should be considered alongside changes to flat fees proposed in Recommendation 5.1.
- 6.2 Consider including an additional level of staff review or requesting enhancements to the Defender Data system to flag vouchers that have been submitted after 90 days of case closure, in order to improve compliance with the PDP Fee Schedule Sec. I.12.C requirement that all vouchers be submitted within 90 days of case completion.
- 6.3 If the Fee Schedule is changed pursuant to Recommendation 6.1, PDP should ensure voucher review procedures or the Defender Data system provide effective monitoring and reporting of any time limits for voucher submission.

## Benefits and Costs

Implementation of the recommendations above could be accomplished within existing staff resources with minimal staff time. Any changes to the PDP Fee Schedule should be considered in relation to other recommendations made in this report and using information from the time study PDP is currently conducting.

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<sup>11</sup> Private Defender Program, July 2021 Fee Schedule, Sec. IV. 3C.

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# **San Mateo County Private Defender Program Chief Defender's Written Response**

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October 27, 2021

Fred Brousseau  
Harvey M. Rose Associates, LLC  
1390 Market Street, Suite 1150  
San Francisco, CA 94102

Dear Mr. Brousseau,

Thank you for the opportunity to respond to the draft report of the *Evaluation of the County of San Mateo's Private Defender Program*. As previously discussed, the Private Defender Program is in the process of implementing changes that will address each of the areas covered in the report. Our program provides high quality representation that serves our clients well. I am confident that implementing additional ways to oversee, track and report attorney performance and case outcomes will demonstrate that.

The Report identifies six areas for improvement. Each of those recommendations will be discussed below.

### **Section 1: Data Systems, Caseload Monitoring and Reporting**

The Program is in the middle of a significant upgrade to our case management system, Defender Data by Justice Works, designed to allow for increased data tracking and reporting, as recommended in The Report. In building this new system the main objective is to increase the capacity for oversight in the areas mentioned in The Report, i.e., workload, client visits, case progression and case and client outcomes, as well as the ability to report on the findings.

It is important to note here that our tracking and oversight does not rely only on our case management system. There are other ways we currently track and oversee this information, such as court oversight, surveys, and access to the Court's case management system, Odyssey, which provides access to case documents and motions, progression, and outcomes. We are nevertheless committed to an upgrade of Defender Data as well as other efforts that will allow for improved tracking.

### **Response to Enumerated Recommendations:**

1.1 We agree the County should approve funding for a Management Analyst position.

1.2 We will seek funding to hire a Management Analyst to assist with creating reports for contract compliance and that inform performance, caseload and quality monitoring and decision making.

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1.3 We will continue to upgrade our system to collect key data points such as those listed in The Report.

1.4 We are seeking to develop APIs to integrate with other justice partner systems to increase access to information that will further allow the monitoring of the above objectives as well as create a more efficient system within our office for entering information into our system and for creating our own reports. Discussions in this regard are underway with the Court and County.

1.5 We agree with the recommendation for increased reporting that will not only allow us to monitor attorney performance and case outcomes, but it will also improve our ability to track spending on certain case types and advocate for resources as needed and budget responsibly moving forward.

1.6 We would be happy to work with the County to amend the contract and/or adjust our Defender Data case types to be more consistent and easier to track. This would require some conversations that may have broader impacts and should only be done in cooperation with all the parties that may be affected by such a transition.

1.7 We will consider ways to use the Defender Data system to better track attorneys according to their practice levels. If it is determined that Defender Data is not the best place to track this, we will implement another system.

1.8 We will work with the County on this issue.

1.9 An improved system for tracking client complaints is in the process of being developed and will be integrated into the main case management system as part of the upgrade underway.

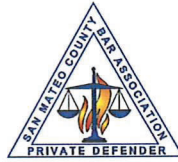
1.10 The enhancement of this feature will allow for better tracking and reporting of complaints for analysis of attorney performance.

## **Section 2: Management Oversight and Quality of Representation**

The PDP is committed to quality representation through manageable caseloads and to improving our program and systems toward that commitment. Per The Report, in 2020-2021, 91% of our attorneys' caseloads were below the national caseload limit standards. This is an exceptional feat in the world of indigent defense where large caseloads are the norm. This score improved from 83%, 85%, and 87% in prior years. We welcome the opportunity to reach toward 100% as we continue to implement improvements to our programs consistent with The Report's recommendations.

The PDP is also committed to panel attorney quality. We are heartened to see that 65% of respondent attorneys agree that our managers help strategize on cases and note the lower percentage for court

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observation and feedback. Consistent with our commitment to panel attorney quality, we have expanded our management team this year to add an Assistant Managing Attorney and will continue to expand as appropriate to meet the recommendations.

The PDP also values client communication as reported by 93% of panel attorneys. We welcome the recommendations to better track client communication and increase feedback. Improved tracking and feedback will provide us with the data we need to enhance and demonstrate quality representation and to improve our ability to identify any client communication issues that need to be addressed.

### **Response to Enumerated Recommendations:**

2.1 The Program is working on developing maximum workload standards and we are currently in the middle of a time-study project in which 13 attorneys are tracking their time on cases that are paid based on certain events, rather than hourly. We will be using the results of that study to consider whether our current event-based fees adequately compensate the attorneys for their work.

2.2 There is an ongoing effort to regularly review attorney caseloads and consider them when making new assignments. Management receives weekly case counts listing each attorney and the number of cases they have been assigned for the fiscal year. We also meet quarterly for more in-depth discussions about the workloads of every attorney on the panel and adjust where appropriate.

2.3 This suggestion can be easily implemented by adding a paragraph to the existing brochures.

2.4 We are in the process of creating a position that will include responsibility for updates to the website. Adding a feature that allows for return of client surveys will be part of the job responsibilities.

2.5 We will seek ways to increase client feedback.

2.6 We will increase the number of surveys mailed to clients with a goal of 10 percent providing responses.

2.7 Feedback from criminal justice partners is welcome and received on a regular basis through meetings with members of the bench as well as members of the District Attorney's office.

2.8 We intend to use the Defender Data improvements to increase our access to attorney caseloads and use that information to inform assignment decisions.

2.9 Regular reports are created and used currently, however, the upgrades will make them more accessible and informative.



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2.10 We will expand compensation for client conferences in all event-based fee cases.

2.11 We will gladly track this feature and include it in our Annual Report

2.12 We plan on using the improved client complaint tracking system to help identify attorneys that are the subject of more complaints than average and address the situation appropriately.

### **Section 3: Training Policies and Requirements**

The Program is committed to an expansion of our training efforts with an eye towards diversifying the training modalities. We have been working to increase learning opportunities to include case conferencing, roundtable discussions on current issues, and trainings that bring in speakers specializing in areas of change and growth within our criminal practices. Our most recent training covered an overview of new criminal justice legislation that will take effect January 1, 2022. And we have an upcoming roundtable training designed to give our lawyers a deeper dive into a specialized area of practice. Lastly, over the last year, we have implemented a training curriculum that was designed specifically for new panel attorneys who are in their first year of criminal practice.

In addition to these training methods, we are currently reviewing our mentorship program and considering alternative ways to provide educational support to our panel. For example, with our implementation of SB384, we provided the panel, not only with a training from a leading expert on the topic, but with access to a folder of written legal resource materials and templates collated from defenders statewide. We expect these alternative methods to continue to grow with the addition of staff who can work on building a digital library of resources and directories that will be accessible to our panel of attorneys, investigators, and social workers.

Panel members also enjoy attending off-site training seminars and there are several annual conferences that provide a great opportunity to obtain more specialized MCLE credits and a chance to catch up with colleagues from other programs throughout the state. We provide funds to pay for these seminars and encourage attendance.

We agree with the report that formalizing and further developing our training program will benefit our panel and program and expect that such an implementation will position us as a model training program state-wide. We have begun working on this already.

### **Response to Enumerated Recommendations:**

3.1 Creating a specific position to design and oversee the implementation of formal training programs is a great idea. Rather than a part-time position or contractor position though, I believe expanding management

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and staff duties for this, and all training related recommendations would allow us to develop a sustainable, comprehensive, and responsive training program such as the one described in the report.

3.2 We will reinstate the requirement for panel members within their first year of practice to complete 21 hours of MCLE training.

3.3 We are in the process of developing new training policies. These policies will include efforts to diversify the training to target specific needs of attorneys at different points in their careers and the type of cases they are handling. We are also planning to track and encourage attendance at outside trainings offered by organizations that present statewide on topics of common interest for defense practitioners. We have begun to partner with other defense organizations to maximize the use of resources, to bring in good speakers, and reach a greater number of lawyers.

3.4 We will find ways to encourage attorneys to take advantage of their education budget, such as sending the attorneys periodic reminders about the availability of education funds and suggestions for how to use those funds. We are also interesting expanding the allowable ways to use the funds which would be supportive of the attorneys.

3.5 As we begin to develop more standardized trainings offered by The Program, attendance will be easier to track by way of sign-ins and the issuance of MCLE certificates. We will continue tracking the attendance of lawyers at outside trainings as well.

#### **Section 4: Resource Sufficiency - Staffing**

The PDP values the opportunity to expand our managing/supervisory team to provide additional oversight and support to our panel members and enhance the quality of representation to exceed indigent defense standards and best practices. As noted by the report, the PDP, like many of its peers, continues to work towards these standards.

The report also recognizes that the PDP values the use of investigators. We are proud that each investigator at the PDP serves fewer attorneys than is found in peer jurisdictions and that our numbers exceed National Standards. The statistic showing that only 7.4% of PDP cases were assigned investigators makes me wonder if consideration was given to the fact that our "cases" for purposes of tracking include calendar assignments, expungements, violations of probation or parole, the vast majority of which would not benefit from an investigator. Also, each felony case that goes through our system is assigned two case numbers, one on the complaint and a second on the information. Even though there are two case numbers, since it is the same case, only one investigator is assigned to it. Therefore, on felony cases where an investigator is assigned, the assignment would only show up on one of the case numbers, making it appear as though fewer cases have an

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investigator. This is a good example of how using a more consistent method to track case data would lead to a more favorable, and accurate, report.

We also note that the usage of investigators has increased over the last year.

The PDP also appreciates the report's recognition of variables like case types and early resolution, especially since many cases across the case types resolve early under circumstances where the attorney believes an investigation is contrary to the client's interests and/or the client elects a resolution over investigation. A client should never be rushed to enter into a plea agreement. It is important to note here that many settlement offers are time limited and panel attorneys do not set the time limits on plea offers. All that considered, it remains that the usage of investigators needs to increase and the evaluation and recommendations in The Report will assist the PDP in developing measures to address this. As such, the PDP will increase and vary our continued efforts to encourage Panel Attorneys to use of investigators as appropriate in PDP cases.

The PDP is also proud of our initiative to build a panel of social workers. Panel Attorneys can retain social workers to support clients with a holistic defense and with issues that contributed to their system involvement such as mental health, substance abuse, joblessness, and homelessness.

#### **Response to Enumerated Recommendations:**

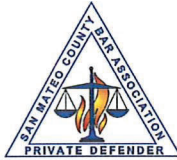
4.1 The Report suggests that the Program would benefit from the addition of more managing/supervising attorneys. Adding additional management positions would allow for more oversight, feedback, and meaningful assistance to our lawyers. Figuring out the right number of managers to add will require some conversations about current trends in workloads. This is something we will be discussing in-depth at our strategic planning session.

4.2 The use of investigators is on the rise, and I expect this trend to continue. We have seen an increase in the use of both investigators and paralegals. This trend makes sense considering the discovery being provided has become more extensive and difficult to manage. We will continue to encourage the use of investigators and paralegals in as many cases as deemed appropriate.

4.3 The number of social workers recruited to work as independent contractors on the panel is currently at 10, with a plan to add up to 5 more. As of the writing of this response, we have seen social workers added to 53 cases to assist lawyers with various client needs.

4.4 We will continue to monitor the demand and adjust the number of social workers accordingly.

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## **Section 5: Resource Sufficiency**

It is important to note here the benefits and drawbacks of the Private versus Public Defender models. Several of the benefits attributed to the public defender model can also be attributed to the private defender model. For example, the PDP does facilitate the collection and development of shared legal resources including model forms, pleadings, and briefs. Also, the PDP management team and members participate in various criminal justice advocacy efforts both within and outside of their PDP work. For example, we are represented on county committees, subcommittees, and working groups. Members of our management team and panel are also members of criminal justice organizations, boards, and committees.

Also, some of the drawbacks listed can be and will be mitigated by the recommendations. This includes making changes to our fee structure and case management system to incentivize and track quality representation, such as increased client contact. Also, the recommended additional resources and management to the PDP in the report will make it possible for the program to expand our criminal justice advocacy.

### **Response to Enumerated Recommendations:**

5.1 A review and revision of the fee schedule will be underway in the immediate future. Adding additional fees to incentivize lawyers to spend more time with clients and perform more work on their cases is a great way to improve services.

## **Section 6: Financial Controls**

We note your finding that there are no significant compliance issues and will take steps to address the minor issues described in the Report.

### **Response to Enumerated Recommendations:**

6.1 A review of the fee schedule will occur soon to determine the most effective ways to provide the lawyers with more opportunities to earn additional fees by performing important work on their cases.

6.2 Management will continue to carefully monitor the vouchers being processed for payment. Assuming a larger management staff, adding an additional level of review will make sense. With our current staffing levels, a two-level review system seems adequate and reasonable.

6.3 Several of the upgrades in the new Defender Data system are designed to improve internal financial controls.

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Another area addressed by the report is the ***Independence and Governance Oversight***.

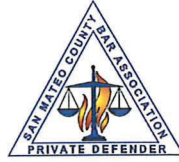
The report describes the oversight as coming from the San Mateo County Board of Directors. It should state that oversight comes from the San Mateo County Bar Association's Board of Directors, a 15-member board made up of lawyers from a variety of different practice areas. Within the Board of Directors there is an Executive Committee made up of the President, Vice-president, Treasurer and Secretary. The Chief Defender meets with the Executive Committee each month as well as the entire Board of Directors. At each of those meetings a written and oral report are provided. Additionally, the Chief Defender meets with the PDP oversight committee, an 8-member committee including a Board liaison who is a non-PDP lawyer, to discuss operations, workload, and budget matters. The liaison then reports back to the Board about the details of that meeting.

In addition to providing monthly detailed reports to the County of costs associated with running the Program, the Chief Defender meets bi-weekly with Iliana Rodriguez of the County Manager's office to discuss matters such as workloads and budget. We also meet with the North Peninsula chapter of the ACLU, staff from Silicon Valley Debug and the San Mateo County Coalition for Immigrant Rights. Our office is staffed each day with an experienced attorney to field calls from the various correctional institutions as well as from out of custody clients, concerned family members, friends, and interested citizens. We strive to receive and respond to as much feedback as we are provided.

In summary, I appreciate the time and effort the evaluators put into preparing this report. However, it does not provide a complete picture as it relates to the management oversight or the Program's work overall. The evaluation focuses largely on ways to improve the tracking of performance. Understanding that tracking and reporting information is an appropriate method for monitoring performance, we are willing to implement systems that will allow for more of it. However, I feel it is important to note that the lack of certain methods of tracking does not mean that high-quality representation is not happening.

The Private Defender Program serves this community by providing outstanding indigent defense. We have a panel of dedicated, hard-working attorneys, investigators, paralegals, and social workers, all of whom are committed to providing the best representation for our clients possible. Where there is room for improvement, we are willing to make those adjustments. In the end, I am confident that increased tracking will serve to demonstrate what I already know, that we are providing excellent representation and our clients are being well-served.

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Please feel free to reach out to me if you have any questions.

Sincerely,

Lisa Maguire  
Chief Defender  
San Mateo County Private Defender Program  
(650)298-4047

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## Appendix A: Methodology for Estimating the Full-Time Employee Equivalent Attorney Workforce for the San Mateo Private Defender Program

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In order to estimate the equivalent full-time employee (FTE) workforce the Private Defender Program (PDP) has on its attorney panels, we created an upper and a lower range based on maximum caseload standards and the share of time spent by panel attorneys on PDP cases, respectively. Using this approach, we estimated the PDP’s contract attorney workforce on the panel is equivalent to 40.9 to 79.6 FTEs.

For the lower range, 40.9 FTEs, we used implied hours for case limits set by the National Advisory Commission.<sup>1</sup> Exhibit A.1. sets out steps used to estimate full-time employees based on national caseload standards.

### Exhibit A.1: High-Level Steps Used to Estimate Attorney FTEs based on National Standards (Lower Range Estimate)

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Step	Calculations
1 <b>Calculate implied hours by case type based on national caseload limits.</b>	<ul style="list-style-type: none"> <li>• Divide the number of cases within each case type by the total number of working hours for one employee in a year. We used 1,810 full-time working hours assuming a normal FTE employee would take 270 hours out of 2,080 hours available each year for leave for vacation, sickness, and training each year (i.e., 87% productive time).</li> <li>• Exhibit A.2, below, shows the case limits by case type and the calculated implied hours.</li> </ul>
2 <b>Calculate required FTEs based on the total number of cases for each case type.</b>	<ul style="list-style-type: none"> <li>• Multiply the implied hours for each case type by the total number of cases received by the PDP in FY 2020-21.</li> </ul>
3 <b>Sum estimated FTEs required by national standards for each case type.</b>	<ul style="list-style-type: none"> <li>• Sum implied FTEs for each case type to get PDP-wide estimated FTEs based on national standards.</li> </ul>

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<sup>1</sup> Standard 13.12, Guidelines from the National Advisory Commission on Criminal Justice Standards and Goals (NAC) (1975). Accessed [online](#).

Exhibit A.2, below, shows the breakdown of implied hours based on national caseload limits assuming each attorney FTE works 1,810 hours a year.

**Exhibit A.2: National Caseload Limits and Implied Work Hours by Case Type**

Case Type	National Caseload Limit (NAC) <sup>1</sup>	Implied Hours per Case Type
Felonies	150	12.1
Misdemeanors (non-Traffic)	400	4.5
Juvenile	200	9.1
Mental Health Act	200	9.1
Appeals	25	72.4

Source: Guidelines from the National Advisory Commission on Criminal Justice Standards and Goals (NAC) (1975) and Harvey M. Rose Associates analysis.

The upper range estimate, 79.6 FTEs, is based on PDP panel attorney reported percentage of time spent on PDP cases for FY 2019-20 from PDP’s Annual Report survey. Exhibit A.3 shows the steps we used to estimate the upper range estimate.

**Exhibit A.3: High-Level Methodology Used to Estimate Attorney FTEs based on PDP Annual Attorney Survey Responses (Upper Range Estimate)**

Step	Calculations
1 <b>Determine how many attorneys responded to the annual survey.</b>	<ul style="list-style-type: none"> <li>There were 83 responses to the survey.</li> </ul>
2 <b>Estimate average percentage of time spent on PDP cases for all respondents.</b>	<ul style="list-style-type: none"> <li>Average percentage of time spent on PDP cases was 77 percent.</li> </ul>
3 <b>Assign average time spent on PDP cases to attorneys who did not respond to the survey.</b>	<ul style="list-style-type: none"> <li>If an attorney did not respond to the survey, we imputed their percent of time spent on PDP cases (and therefore our FTE estimate) based on the average of attorneys who did respond to equal 103 estimations for attorney time spent on PDP cases (see Step 2).</li> </ul>
4 <b>Calculate the total number of FTEs based on attorney reported and average time spent on PDP cases.</b>	<ul style="list-style-type: none"> <li>If an attorney reported spending 100 percent of their time on PDP cases, they were counted as 1 FTE.</li> <li>Sum all estimated attorney FTEs to calculate total FTE employee estimate.</li> </ul>



## Key Assumptions Made and Rationale

Any model-based estimates depend on assumptions made relative to the actual value being estimated. The key assumptions made as part of the model estimates above include:

- **National caseload standards are valid and accurate for PDP cases:** to estimate hours needed per case annually we divided case standards by 1,810 hours. Attorney caseloads should be limited to no more than 150 felony, 400 misdemeanor, 200 juvenile, 200 mental health, and 25 appeals cases per year based on Guidelines from the National Advisory Commission on Criminal Justice Standards and Goals (NAC), a 1973 U.S. Department of Justice-funded initiative, referenced within American Bar Association Principles. This model assumes caseload remains the same and is not carried over from one year to the next. The complexity of cases has reportedly increased since these limits were set; therefore, our hourly estimations based on this are likely a minimum amount of time needed per case. This also assumes the implied hours per case also covers the arraignment calendar for each case.
- **Full-Time Equivalent Productive Work Hours are reflective of assumptions made in national caseload standard estimates:** to estimate the number of hours needed per case, we assumed an FTE employee would be unavailable to work for around 13 percent of total available hours (around 270 hours or 33.8 working days). This is based on the typical number of public holidays, sick leave entitlements, etc.
- **Attorney-reported time spent on PDP cases is accurate:** the PDP annual conducts a survey of their attorneys, one of the questions asks attorneys to report the percentage of their time they spend working on PDP cases. When responding to such a question, attorneys may not accurately recall, and report, the percentage of their time they spend on PDP casework. Additionally, we assume attorney responses include the time they spend covering the arraignment calendars.

## Appendix B: Methodology for Estimating the Cost of Funding a Public Defender Office in San Mateo County

In order to estimate the baseline staffing and high staffing cost scenarios for funding a Public Defender Office (PDO), we used the following steps:

### Exhibit B.1: High-Level Methodology Used to Estimate the Cost of Funding a Public Defender Office (PDO) in San Mateo County

	Step	Calculations / Assumptions
1	<b>Narrow down which classifications would be included in a PDO based on District Attorney (DA) staffing.</b>	<ul style="list-style-type: none"> <li>Using the DA's Fiscal Year 2020-21 Master Salary Ordinance, we determined which classifications would also be included in a PDO.</li> <li>We excluded the following classifications because they provide services specific to the DA: <ul style="list-style-type: none"> <li>Victim Advocate</li> <li>Supervising Victim Advocate</li> <li>Victim Programs Services Manager</li> </ul> </li> </ul>
2	<b>Confirm classification salaries would be consistent between the DA and a PDO and adjust salaries as needed.</b>	<ul style="list-style-type: none"> <li>Salaries for most positions use the same compensation of that from the District Attorney's Office (DA) budget for Fiscal Year 2020-21 except for the Public Defender Investigator position because the DA inspector position is a sworn officer; the PD would not and the PDP does not require investigators to be sworn officers.</li> <li>PD investigators in Santa Clara County are paid 7.1 percent less than their DA sworn officer counterparts, so the San Mateo County PD investigator salary estimate is equal to 7.1 percent of the DA inspector position.</li> </ul>
3	<b>Determine how many ancillary staff the PDO would need.</b>	<ul style="list-style-type: none"> <li>Staff counts for accountants, administrative staff, legal clerks, office assistants, management analyst, paralegals, chief investigator, chief deputy public defender, and assistant public defenders are the same as the DA.</li> <li>See Appendix A for a breakdown of how attorney baseline and high staffing scenarios were calculated.</li> <li>See Exhibit B.2, below, for a breakdown of staffing variations between the two scenarios. Staffing variations are the current PDP staffing</li> </ul>

		for baseline and Section 4: recommended staffing levels for the high staffing scenario. For investigators we assume a ratio of three attorneys to every investigator will remain from the PDP if switching to the PDO across both budget scenarios.
4	<b>Calculate total salary cost for each scenario.</b>	<ul style="list-style-type: none"> <li>• Multiply each position salary by the total number of budgeted positions and sum all position costs to get total estimated salary budget.</li> </ul>
5	<b>Calculate benefits cost based on estimated staffing levels.</b>	<ul style="list-style-type: none"> <li>• DA staff receive an equivalent of 45 percent of their salary as benefits (i.e. health insurance, retirement, etc.). The PDO's estimated benefits were calculated as 45 percent of total salary spending.</li> </ul>
6	<b>Calculate operating costs.</b>	<ul style="list-style-type: none"> <li>• Operating costs include rent, supplies, postage, copies, etc.</li> <li>• Operating costs were calculated as being 20 percent of the cost of salaries and benefits based on a model developed by Texas Fair Defense Act and published by the Michigan Indigent Defense Commission in 2016 to determine the approximate cost of rent, supplies, postage, copies, etc.</li> </ul>
7	<b>Account for additional expenses the PDO would have to cover.</b>	<ul style="list-style-type: none"> <li>• Additional expenses including contingency and reserve funds.</li> <li>• The DA's contingency and reserve funds are 10 percent of their rental costs. Additional expenses for the PDO were calculated as 10 percent of operating costs; this is a slight over estimation because the cost of supplies are also included in operating costs.</li> </ul>
8	<b>Account for revenues the PDO would receive to offset expenditures.</b>	<ul style="list-style-type: none"> <li>• The PDP received \$233,000 in AB 109 funding and \$923,000 in Superior Court funding for dependency case representation in FY 2020-21 for a total of \$1.156 million.</li> <li>• We included \$1.156 million in revenue in both PDO budget scenarios.</li> </ul>
9	<b>Calculate total budget for a PDO for the baseline and high staffing scenarios.</b>	<ul style="list-style-type: none"> <li>• Sum salary, benefits, operating costs, and additional expenses, and subtract revenues to get the total budget for each scenario.</li> </ul>

Exhibit B.2, below, shows the breakdown of staffing counts which vary between the two models. In order to estimate the equivalent full-time employee (FTE) workforce the Private Defender

Program (PDP) has on its attorney panels, we created an upper and a lower range based on maximum caseload standards and the share of time spent by panel attorneys on case attorneys, respectively. Using this approach, we determined the PDP’s contract attorney workforce on the panel is equivalent to 40.9 to 79.6 FTEs. For the lower range, 40.9 FTEs, we used implied hours for case limits set by the National Advisory Commission.<sup>1</sup> The upper range estimate, 79.6 FTEs, is based on PDP panel attorney reported percentage of time spent on PDP cases for FY 2019-20 from PDP’s Annual Report survey. The methods used to produce these estimates are discussed in Appendix A.

### Exhibit B.2: Differences in Full-Time Employee Allocations between Staffing Scenarios

Position	Baseline Staffing Scenario	High Staffing Scenario
Deputy Attorney I through IV	40.9	79.6
Deputy Attorney IV (Supervisor)	1	8
Investigators	14	27
Social Worker I through III	1	6
<b>Total Positions in Estimation*</b>	<b>112</b>	<b>176</b>

\* Total includes other positions not listed in the table including various support and leadership positions.

### Key Assumptions Made and Rationale

Any model-based estimates depend on assumptions made relative to the actual value being estimated. The key assumptions made as part of the model estimates above include:

- Attorney staffing scenarios used are reflective of actual need and staffing:** staffing levels used are based on staffing estimates from current PDP-provided staffing. Appendix A includes a discussion of the methodology and assumptions underlying the attorney estimates for the upper and lower range used here. Additionally, a new Public Defender Office’s may choose to staff the office differently from the current PDP model. However, we believe the current staffing represents an upper estimate of attorney staffing given the comparisons with other counties (except for supervising managers which are reflected in the “High Staffing Scenario”) and implied staffing from national caseload standards. There is greater uncertainty around ancillary staff as a public defender office may have different needs from the District Attorney’s Office.
- A public defender office will maintain a ratio of three attorneys for each investigator on staff as observed in the PDP:** as recommended by the National Legal Aid and Defender Association: a minimum of one investigator should be employed for every three attorneys in

<sup>1</sup> Standard 13.12, Guidelines from the National Advisory Commission on Criminal Justice Standards and Goals (NAC) (1975). Accessed [online](#).

an office.<sup>2</sup> The PDP already meets this standard; therefore, we assume it would be continued if a PDO model were to be implemented.

- **Some staffing will remain the same from the PDP model if switching to the baseline staffing scenario:** the baseline staffing scenario assumes staffing for supervisors, management, and social workers will remain the same even though current staffing does not align with best practices and recommendations from Section 4.
- **District Attorney staff costs are reflective of a Public Defender Office's staff costs:** we used DA staff salaries and benefit levels given the similarity of functions and classifications to what would be needed for a Public Defender's Office, however, a compensation analysis could provide more accurate estimates of competitive salaries and benefits for public defender staffing. Paying DA and PDO staff at the same levels could reduce the risk of allegations that public prosecution and defense functions in the County are not equally resourced.

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<sup>2</sup> Guidelines for Legal Defense Systems in the United States. Guideline 4.1. National Legal Aid & Defender Association.

## Appendix C: Recommendations Matrix

The table below sets out the recommendations identified as part of the Evaluation of the San Mateo Private Defender Program (PDP).

#	Recommendation	Directed to:	Cost (If applicable/ estimated)
<b>Section 1</b>			
1.1	Approve funding for the PDP to hire or contract with a part-time Management Analyst to work on creating reports such as live dashboards or interactive tools for PDP and the County to ensure contract compliance and enhanced management review which inform performance or quality monitoring and decision-making.	Board of Supervisors	\$52,500
1.2	Request funding to hire or contract with a part-time Management Analyst to work on creating reports for contract compliance and management review which inform performance and quality monitoring and decision-making.	Chief Defender of the PDP	-
1.3	Enhance and expand data collected in Defender Data to collect key data points recommended by best practices, including: <ul style="list-style-type: none"> <li>a. case status,</li> <li>b. case outcomes,</li> <li>c. case complexity,</li> <li>d. continuances requested by defender and case,</li> <li>e. defendant characteristics: sex, race, and age,</li> <li>f. case outcomes for defendants,</li> <li>g. number of in-person visits per client,</li> <li>h. number of phone conversations with client,</li> <li>i. bail amount,</li> <li>j. number of witnesses,</li> </ul>	Chief Defender of the PDP	\$60,000* *applies to all data/ Defender Data system recommendations in this section

**Appendix C: Recommendations Matrix**

#	Recommendation	Directed to:	Cost (If applicable/ estimated)
1.4	<p>k. number of witnesses contacted and interviewed,  l. whether the investigator testified,  m. disposition: i.e., plea or if case went to trial,  n. sentence type and length: probation, prison, other, and  o. years of experience for each attorney.</p> <p>Explore ways to integrate or pull data from other County criminal justice partners' data systems including the Superior Court's court records management system (for key case and disposition data).</p>	Chief Defender of the PDP	-
1.5	<p>Commission the development of new management reports which capture the following information:</p> <ol style="list-style-type: none"> <li>number of closed cases within a year,</li> <li>time to close a case,</li> <li>outcomes by case type and defendant characteristics,</li> <li>attorney experience,</li> <li>change in sentencing outcome from plea to sentencing when a trial takes place,</li> <li>number and share of motions filed per attorney and case,</li> <li>number and share of cases brought to trial overall and by attorney,</li> <li>time from arraignment and case assignment to first client contact, and,</li> <li>use of investigators by case type and attorney.</li> </ol>	Chief Defender of the PDP	*
1.6	<p>Work with San Mateo County to amend Section 2 of the San Mateo County Bar PDP agreement to reflect case types which match those used by the PDP within Defender Data or, at a minimum, ensure that there is a clear crosswalk between case types in the PDP agreement and Defender Data.</p>	Chief Defender of the PDP	-

**Appendix C: Recommendations Matrix**

#	Recommendation	Directed to:	Cost (If applicable/ estimated)
1.7	Consider updating Defender Data to use the class types for attorney experience used in PDP's case assignment process for the case types to better reflect complexity of the cases.	Chief Defender of the PDP	*
1.8	Consider structuring case types in Defender Data and in the PDP agreement with the County to mirror those of the District Attorney to allow the County to compare caseloads between the two offices.	Chief Defender of the PDP	*
1.9	Add client conference fees for all case types and expand the fee to be chargeable for meeting with the client before each court event.	Chief Defender of the PDP	-
1.10	Ensure complaints related to attorney performance or representation (whether or not they lead to a change in attorney) can be linked to case management data in Defender Data so that PDP can systematically identify, monitor, and report complaints by attorney being complained against and by case type.	Chief Defender of the PDP	-
1.11	Enhance tracking of complaints to ensure that the assessment and final resolution of complaints is systematically recorded and can be easily analyzed and reported on to ensure the complaint process is functioning as set out in the PDP Contract.	Chief Defender of the PDP	*
<b>Section 2</b>			
2.1	Develop maximum workload standards for attorney, investigator, and social worker panelists. This could be done using results from the time study of event-based fees currently being run by the PDP or, if needed to get sufficient data, by administering a further time study to include more fees from major case types and incorporating hourly data already collected on hourly fee types.	Chief Defender and Assistant Chief Defender of the PDP	-



**Appendix C: Recommendations Matrix**

#	Recommendation	Directed to:	Cost (If applicable/ estimated)
2.2	Create a standardized assignment process to keep from having a few attorneys overloaded with case assignments and limit the number of cases scheduled for the same day when assigning cases.	Chief Defender and Assistant Chief Defender of the PDP	-
2.3	Add information on how a client can request a change of attorney and the option for clients to fill out the client survey on attorney performance to the PDP client brochures handed out at arraignment.	Chief Defender and Assistant Chief Defender of the PDP	-
2.4	Update the PDP website to add return information for the PDP client survey or create an online form which automatically sends survey responses to the PDP for clients accessing the survey via the website.	Chief Defender and Assistant Chief Defender of the PDP	-
2.5	Implement and expand client feedback collection at county jails, prisons, and post-conviction service sites, through the use of focus groups and surveys.	Chief Defender and Assistant Chief Defender of the PDP	-
2.6	Increase the number of surveys mailed to clients with the goal of ensuring 10 percent of clients served by the Private Defender Program each year provide survey responses.	Chief Defender and Assistant Chief Defender of the PDP	-
2.7	Work with the Superior Court to set up a feedback mechanism for judges and other County criminal justice system stakeholders to regularly provide feedback on attorney performance to address systemic and individual attorney representation quality concerns.	Chief Defender and Assistant Chief Defender of the PDP	-
2.8	Use the improvements to the Defender Data system currently being developed to track the number and type of open cases attorneys are assigned to inform case assignment decisions.	Adult and Juvenile Managing Attorneys of the PDP	-

**Appendix C: Recommendations Matrix**

#	Recommendation	Directed to:	Cost (If applicable/ estimated)
2.9	Generate and review monthly workload reports which reflect total assigned cases by type per attorney within the current fiscal year to maintain case limits per attorney within NAC standards or PDP set workload limits, whichever is lower.	Adult and Juvenile Managing Attorneys of the PDP	-
2.10	Assuming adoption of Recommendation 1.9 to add the client conference fee to all case types, regularly analyze the number of cases where a client conference fee has been billed to determine whether clients are getting at least one meeting with their attorney. PDP should include the results of this analysis in its Annual Report to the County to fulfill its contractual obligation in Section 4.d.5.	Adult and Juvenile Managing Attorneys of the PDP	-
2.11	Assuming adoption of Recommendations 1.10 and 1.11 (from Section 1) to improve complaint tracking and reporting by attorney, use complaint reports to identify attorneys who receive complaints from more than one client in order to inform supervisor decisions to intervene to improve attorney performance.	Adult and Juvenile Managing Attorneys of the PDP	-
<b>Section 3</b>			
3.1	Consider hiring a dedicated part-time staff person or contractor that will work with PDP management to design and oversee the implementation of formal training programs within PDP, develop and administer a regular training needs assessment, and verify compliance with PDP training requirements.	Chief Defender of the PDP	\$37,000 – 46,000
3.2	Reinstate the previous requirement for panel members who are within their first year of practice of criminal law to complete a minimum of 21 hours of relevant classes or equivalent training within their first year on the PDP panel, to align with the California State Bar’s recommendations.	Chief Defender of the PDP	-
3.3	In coordination with the Adult Managing Attorney and Juvenile Managing Attorney, develop comprehensive overarching written training policies with clear objectives and processes that include how the formal training programs will operate (including the	Chief Defender of the PDP	-

**Appendix C: Recommendations Matrix**

#	Recommendation	Directed to:	Cost (If applicable/ estimated)
	number of seminars, training topics, methods, and schedule), who will oversee the trainings, procedures for identifying outside trainers, how the training provided will be evaluated, and how training opportunities will be administered.		
3.4	Improve panel attorneys' awareness of and accessibility to training funds by ensuring individual education funds can be used more flexibly, and providing attorneys with their individual account balances on an ongoing basis (potentially in an accessible database or spreadsheet, available at any time, or via regular email reports).	Chief Defender of the PDP	-
3.5	Develop a process for verifying training requirement compliance that does not rely solely on self-reported information, and require documentation from panel attorneys demonstrating compliance with training requirements (such as requiring submission of documentation after each training attended). Consider utilizing an automated sign-in process (such as Docusign) for internal trainings to facilitate and simplify compliance tracking.	Chief Defender of the PDP	-
<b>Section 4</b>			
4.1	Determine the number of full-time equivalent attorneys needed based on the PDP's forthcoming time study, or by conducting an extensive time study of major case types. Based on this analysis, request additional funding to add between 1.5 and 3.75 net full-time equivalent supervisor positions (around two to five Assistant Attorney Manager positions or similar) to the PDP so that the program achieves a ratio of approximately one supervisor for every ten full-time equivalent attorneys as recommended by national best practices and in line with peer counties' attorney to supervisor ratios.	Chief Defender of the PDP	\$368,250 – \$920,625
4.2	If investigator use remains low based on the investigation reports in Recommendation 1.5.i, encourage investigations in all appropriate cases by establishing stronger requirements in the Private Defender Program manual around the use of investigators	Chief Defender of the PDP	-

#	Recommendation	Directed to:	Cost (If applicable/ estimated)
	and requiring documentation in case files indicating that the attorney considered an investigation for their case.		
4.3	Recruit at least 6.1 full-time equivalent social workers to the panel.	Supervising Social Worker of the PDP	-
4.4	Evaluate the demand for social workers and case managers annually based on attorney requests and develop a recruitment plan to address the needs for the casework, including an evaluation of whether additional data on social worker need (i.e. mental health history/homelessness prevalence among PDP clients) should be collected to inform social worker need and impact.	Supervising Social Worker of the PDP	-
<b>Section 5</b>			
5.1	Review and revise the fee structure to ensure flat fees provide compensation that is equivalent to the preparation and in-court time needed to provide high-quality representation and sufficiently incentivizes panel attorneys to provide comprehensive representation for indigent clients.	Chief Defender of the PDP	(1)
5.2	Consider changing the current flat fees to be equal to an average hourly pay rate for each event-based fee using results from the time study of event-based fee cases and PDP management input, ensuring that the fees incentivize high-value activities that are linked to quality representation for indigent clients and improved case outcomes.	Chief Defender of the PDP	(1)

(1) See discussion of potential cost in Section 5.

**Appendix C: Recommendations Matrix**

#	Recommendation	Directed to:	Cost (If applicable/ estimated)
5.3	Assess the costs and benefits of keeping the Private Defender Program as it is, improving the Private Defender Program as recommended in this report, or moving to a Public Defender model.	Board of Supervisors	-
<b>Section 6</b>			
6.1	Review current Fee Schedule policies to determine if work on flat fee cases could be further broken up by milestone or activities conducted before versus after conviction or acquittal, in order to allow for submission of vouchers prior to case completion and to reduce the incentive to close cases quickly. Any changes should be considered alongside changes to flat fees proposed in Recommendation 5.1.	Chief Defender of the PDP	-
6.2	Consider including an additional level of staff review or requesting enhancements to the Defender Data system to flag vouchers that have been submitted after 90 days of case closure, in order to improve compliance with the PDP Fee Schedule Sec. 1.12.C requirement that all vouchers be submitted within 90 days of case completion.	Chief Defender of the PDP	-
6.3	If the Fee Schedule is changed pursuant to Recommendation 6.1, PDP should ensure voucher review procedures or the Defender Data system provide effective monitoring and reporting of any time limits for voucher submission.	Chief Defender of the PDP	-