

Ventura County Grand Jury 2009 - 2010



Final Report

**Indigent Representation
by the
Public Defender**

May 20, 2010

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Indigent Representation by the Public Defender

Summary

The 2009-2010 Ventura County Grand Jury (Grand Jury) initiated an investigation into the Ventura County (County) Public Defender's (PD) office to determine whether representation is being provided at County expense to individuals who do not qualify as indigents. The investigation was initiated in response to a complaint; however, no substantiation or corroboration was found for allegations raised in the complaint.

Another issue had been raised by a newspaper article expressing concern that the PD was strained for personnel resources. The article stated that the PD is "close to the edge" in being able to handle the increased number of applications for indigent representation resulting from economic conditions.

Lastly, reports from another county's grand jury voiced strong concerns about that county's lack of effort to determine whether there could be recovery of costs related to representations. Interviews with concerned public officials in several counties yielded strong opinions, pro and con, regarding proposed legislation for cost recovery.

The Grand Jury recommends that, should such similar legislation be re-introduced, the Ventura County Board of Supervisors (BOS) consider it independently for its applicability to this County. Further, the Grand Jury recommends that the PD continue to maintain a record of costs for representation and to submit these costs to the courts on as regular a basis as allowed by the courts.

Background

The Sixth Amendment to the Constitution of the United States of America guarantees the right of assistance of counsel to defendants in our courts. In each California county, a Public Defender is either elected or appointed to provide defense representation for individuals who are unable to pay, or otherwise provide, for their own defense. [Ref-01]

A complaint was received by the Grand Jury alleging that the PD routinely accepts representation of non-indigent defendants who do not qualify for County-funded representation by the PD.

Methodology

The Grand Jury investigated a complaint.

The Grand Jury observed arraignment procedures in the Superior Court for defendants charged with criminal offenses. Observations were compared, reviewed, and discussed by members of the Grand Jury.

The PD provided to the Grand Jury "Guidelines and Financial Standards for Representation by the Ventura County Public Defender" dated July, 2008.

The PD met with the Grand Jury on three occasions to discuss the application of the guidelines and the procedures of his office.

The Grand Jury examined a representative sampling of copies of the Personal Data form number PD 102 (commonly called a “green sheet”), redacted to preserve confidentiality and anonymity, which had been completed by defendants. Each form PD 102 was accompanied by a corresponding charge sheet describing the alleged offense.

The Grand Jury reviewed publications regarding guidelines on indigent defense and standards for recovery of costs of representation by the PD.

The Grand Jury conducted telephone interviews with the legislative director for a California state assemblyman, the public defenders of several California counties, and the legislative advisors for public defenders of additional counties.

The Grand Jury reviewed the 2005-2006 and 2006-2007 reports of the County of San Bernardino Grand Jury and the respective responses.

Findings

F-01. The Sixth Amendment of the Constitution of the United States guarantees the right of a defendant to have the assistance of counsel for his defense. [Ref-01]

F-02. In July 2008, the PD issued Policy Number B-2 titled “Guidelines and Financial Standards for Representation by the Ventura County Public Defender.” In reference to defendants seeking representation by reason of indigence, this document states in part: [Ref-02]

- “Prior to undertaking representation of a client (applicant), a determination must be made as to whether that person is financially eligible for Public Defender services.”
- “The determination should be made at the time of first contact with the client.”
- “Wherever feasible, and without exception as to defendants on bail, the office green form entitled PERSONAL DATA is to be completed. Each attorney shall review all information contained in that form with the client, and shall add or cause to be added such supplemental information as is necessary to insure that the form depicts a complete and accurate representation of the client’s current financial status. The green form must be signed by the applicant.”
- “The principal test of legal indigency is that of whether an experienced private attorney, competent to handle the complexities of this particular case, would undertake representation for all purposes of defendant in his or her present economic circumstances. (*Still v. Justice Court* (1971) 19 Cal.App.3d 815, 818).”

- "The standard itself is a flexible one and contemplates such factors as employment, income, bank account, ownership of a home, car or other personal property, whether tangible or intangible, the number of dependents and the cost of necessary food, clothing, shelter for defendant and his or her dependents."
- "If, upon review of the Personal Data financial form, or based upon allegations in the complaint or indictment (e.g. theft of a large amount), an attorney questions an applicant's qualification for Public Defender services and it appears a deeper inquiry is needed, the attorney should request the applicant be referred to the Court Financial Officer (in Collections) for a determination on whether the applicant qualifies for appointed counsel."
- "A defendant in custody who states that he or she cannot make bail or employ counsel is presumptively eligible for public defender services."
- "Application of the test requires careful inquiry regarding an applicant's financial situation, including his or her assets, debts and reasonable subsistence requirements. Issues such as seriousness of the charges and attorney competency and fee arrangements must be considered. Assets include any cash or income, or any real or personal property which might reasonably provide a source of payment of attorneys' fees."
- "Home ownership alone does not make an applicant financially ineligible. In applying this test, if an applicant has a full paid-for house, or substantial equity, and a small income, he or she may be eligible depending upon other available assets. When a substantial home equity exists and could be encumbered without significant risk to the ownership interest, in order to hire a private attorney, such factor should be considered in determining eligibility."
- "The Public Defender is authorized to request that the Court put a lien on real property or other assets subject to attachment (Penal § 987.8). This procedure is used only in cases for which substantial Public Defender resources will be expended."
- "All legally enforceable obligations existing against the defendant must be considered in appraising the ability to employ counsel."
- "The court has delegated the determination of financial eligibility for appointed counsel in the first instance, to the Public Defender."

F-03. The PD has the authority to determine indigence in accordance with the law. [Ref-02]

F-04. The PD stated that, considering overall economic conditions and resulting budget constraints, the office is able to maintain its responsibilities to the required professional and ethical standards.

- F-05.** While PD Policy B-2 shows guidelines, it is flexible to allow consideration of the severity of the charges in estimating the potential defense costs and a defendant's ability to pay. [Ref-02]
- F-06.** At the conclusion of a trial, the PD may submit to the court a statement of costs generated in the defense for recovery from the defendant. The court may consider this submission and may direct the defendant to pay all or some portion of the costs. The Superior Courts are State of California (State) bodies and do not report to the respective counties. [Ref-03]
- F-07.** The PD maintains a record of costs of indigent representation for each case, but must rely upon the courts request in order to submit them for recovery.
- F-08.** The PD stated that a representative sampling of requests for indigent representation indicated that the costs of a formal accounting procedure for this purpose probably would not be justified by the potential for recovery.
- F-09.** Less than one percent of the indigents filing for representation would be ineligible, according to the PD.
- F-10.** Judicial Council of California in its *Guidelines and Standards for Cost Recovery* states, "Penal Code section 1463.07 provides the standards by which a court or county may recover the costs of operating a comprehensive collection program. Costs may be recovered from the collection of delinquent court-ordered fees, fines, forfeitures, penalties, and assessments before revenues are distributed to another government entity." [Ref-04]
- F-11.** The 2006-2007 Grand Jury of the County of San Bernardino (SB) reported:
- "The San Bernardino Superior Court is no longer a County department. This Grand Jury does not have jurisdiction to make recommendations to the Court or the judges who are State employees. The Superior Court, however, still sets the requirements for contract attorneys and awards contracts for all adult indigent defense attorneys. These contracts are paid with County funds."
- "A state agency is awarding county contracts and spending County funds."
- "A possible conflict exists when defense attorneys appear before judges who award the indigent fee contracts." [Ref-06]
- F-12.** The 2006-2007 SB Grand Jury Report further stated, "The Treasurer/Tax Collector, in their response (#06-41), indicated that 'The County lost \$2 million of possible reimbursement for public defender fees due to Courts not ordering fees as recommended'." [Ref-06]
- F-13.** In response to the 2005-2006 SB Grand Jury's recommendation which said, "Direct the Treasurer-Tax Collector to proceed with the Indigent

Defense Fees Collection Program,” the SB Treasurer-Tax Collector replied:

“The Treasurer-Tax Collector (TTC) with the approval of Courts developed a unique program to determine ability to pay. Realizing the extremely large caseload confronting the Court and the number of man hours it would take to individually review each defendant’s financial statement to determine ability to pay, the TTC developed a system based on a review of a defendant’s credit score and real property ownership and applied a sliding scale.

“Initially it was estimated that the implementation of this program would result in \$3.5 million in fees ordered annually. The program was approved by the Courts and implemented in October 2004. Implementation of the questionnaires at Courts, Collection review of credit reports, real property searches, and recommendation back to the courts was implemented smoothly. However, as data was tracked comparing amounts recommended by Central Collections vs. Amounts ordered by Courts, it became evident that the Judges were not acting on the recommendations of Collections. Thus, in January 2006, the program was temporarily suspended.

“During the life of the program Collections reviewed 15,776 cases.

- Collections recommended that the defendant had the ability to pay in 10,870 representing \$3 million. That would mean that in 68% of the cases, the defendant was determined to have some ability to pay.
- Collections found the defendants had no ability to pay in approximately 32% of the cases.
- A total of 14,418 cases had been concluded (disp’d) by the court at the time of our review.
- Collections sampled 6,790 cases between March 2005 and November 2005 and found that the Court ordered public defender fees ‘as recommended’ 634 times or 9% of the time.
- During the life of the program, \$2.7 million were recommended to be ordered for payment of public defender fees. The Court only ordered \$623,976. These figures are for concluded cases only as there is no resulting order for cases that aren’t concluded.
- The county lost \$2 million of possible reimbursement for public defender fees due to courts not ordering fees as recommended.”

F-14. All of the public defenders interviewed contended that the costs of detailed record-keeping and cost analyses of representation expenses would not significantly increase recovery of the expenses and, therefore, would not warrant the additional effort.

F-15. California State Assemblyman Brian Nestande (R-Riverside, 64th Assembly District) introduced a bill, AB 447, in February 2009. This bill would amend § 987 *et seq* of the State Penal Code which would *require*

the courts to determine the ability of an individual requesting counsel to pay. Present law *authorizes*, but does not *require*, the courts to make such determination.

- F-16.** According to the legislative director for Assemblyman Nestande, AB 447 was withdrawn from committee in 2009 due to opposition.
- F-17.** Assemblyman Nestande intends to introduce similar legislation in the next session of the California Assembly, according to his legislative director.
- F-18.** The District Attorney of the County of Riverside stated that he intends to encourage and support the proposed legislation.
- F-19.** The Public Defender of the County of Riverside opposed AB 447 when it was in committee and would not support the introduction of a similar bill.
- F-20.** The Public Defender of the County of San Bernardino stated that she is not interested in making it mandatory for the courts to determine the ability to pay.
- F-21.** The Legislative Policy Advisor for the Public Defender of the County of Los Angeles stated that the Public Defender is opposed to legislation similar to AB 447.
- F-22.** The County of Orange Public Defender, Alternate Defender, said that she would not be in favor of the proposed legislation.
- F-23.** The County of Santa Barbara Public Defender indicated no opinion, but would carefully analyze an introduction of legislation similar to AB 447.

Conclusions

- C-01.** There is no basis to sustain the complainant's allegations. (F-01, F-02)
- C-02.** The Grand Jury concurs with the PD's conclusion that his office is staffed adequately to meet required standards. (F-04)
- C-03.** The County of San Bernardino Grand Jury and public officials interviewed believe that the courts, which are State agencies, have shown little enthusiasm for the additional hearings required to determine reimbursement of costs of indigent representation to the counties. (F-11 through F-13 and F-17 through F-23)
- C-04.** While it is appropriate to maintain records of representation expenses, the Grand Jury concludes that the cost-benefit consideration does not warrant further in-depth evaluation of potential cost recovery. (F-06 through F-09, F-13, F-14)
- C-05.** There are strong differing views among the public officials interviewed as to the merits of the proposed Nestande legislation which would require the courts to determine indigents' ability to pay. (F-17 through F-23)

Recommendations

- R-01.** The PD should continue to maintain a record of costs for representation and to submit these costs to the courts on as regular a basis as allowed by the courts. (C-04)
- R-02.** Should legislation *requiring* judicial determination of the ability to pay by individuals requesting counsel be introduced, the County of Ventura Board of Supervisors should make an independent determination in conjunction with the PD as to whether to offer support for such legislation. (C-03 and C-05)

Responses

Responses Required From:

Board of Supervisors, County of Ventura (R-02)

Responses Accepted From:

Public Defender, County of Ventura (R-01)

References

- Ref-01.** Sixth Amendment to the Constitution of the United States of America.
<http://caselaw.lp.findlaw.com/data/constitution/amendment06/>
- Ref-02.** "Guidelines and Financial Standards for Representation by the Ventura County Public Defender", Law Offices Ventura County Public Defender Policies and Practices. July 2008. Policy B-2.
<http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf>
- Ref-03.** County of San Bernardino Grand Jury Report 2005-2006 and Response.
<http://www.courtinfo.ca.gov/jc/>
- Ref-04.** *Guidelines and Standards for Cost Recovery*, Judicial Council of California.
<http://www.courtinfo.ca.gov/jc/>
- Ref-05.** County of San Bernardino Grand Jury Report 2006-2007 and Response.
http://www.co.san-bernardino.ca.us/grandjury/pdf/report0607/20070702_grand_jury_final_report.pdf
http://www.co.san-bernardino.ca.us/grandjury/pdf/20070927_gj_response.pdf
- Ref-06.** *Ventura County Star* article "Public Defender's Office Close to Edge" July 19, 2009.

<http://www.vcstar.com/news/2009/jul/19/public-defenders-office-close-to-edge/>

Ref-07. "Guidelines on Independent Defense Services Delivery Systems, (2006)", the State Bar of California.

<http://calbar.ca.gov/calbar/pdfs/comcom/Indigent-Services-Guidelines.pdf>

Ref-08. United States Department of Justice National Advisory Commission (2006) guidelines for caseload for defense counsels.

http://searchjustice.usdoj.gov/search?q=guidelines+for+caseload+for+defense+counsels&sort=date%3AD%3AL%3Ad1&output=xml_no_dtd&ie=iso-8859-1&oe=UTF-8&client=default_frontend&proxystylesheet=default_frontend&site=default_collection&btnG.x=22&btnG.y=6