



Our Public Defender System

Anticipating Structural Change

Summary

Anticipating that Santa Cruz County's [contract public defenders](#) will not continue to practice law forever, the Board of Supervisors on June 12, 2018 approved amendments to the existing public defender contracts that include a plan to transition the public defender function to a new model beginning in the 2021-22 fiscal year (2018 Amendments). The new model will likely involve an in-house [public defender's office](#). Establishing a public defender's office would raise a host of issues including, most significantly, budgeting and performance evaluation.

The County has never collected data to measure the quality of public defender performance. Its evaluation has always been subjective, based on the observations of the judiciary and other departments that interact with the public defenders. The 2018 Amendments give the County three fiscal years before the transition in which to begin to collect data on the contract public defender system's performance.

This report examines salient characteristics of the County's contract public defender system. It then recommends that the County determine what data the County requires to measure the performance of public defenders and start collecting that data beginning in the 2019-20 fiscal year. Measurements of contract public defender performance will then be available as benchmarks against which to evaluate future public defender performance.

Background

Existing Structure of the County's Public Defender System

The Job of a Public Defender

When the Santa Cruz County District Attorney brings criminal charges against a person who cannot afford an attorney, a judge of the County's Superior Court ([Court](#)) will appoint an attorney to represent the person at the County's expense.^[1] The same is true when the County brings certain civil matters, such as involuntary commitment proceedings or establishing paternity, against a person who cannot afford an attorney.^[2]

The Biggam Firm

In most cases, the Santa Cruz County Superior Court will appoint the law firm of Biggam, Christensen and Minsloff (Biggam Firm) as counsel for a person who cannot afford an attorney. The Biggam Firm's practice is to assign one or more of its attorneys to be present in each arraignment court.^[3]^[4] An arraignment court is any court in which a judge first informs a defendant of the charges against them and asks the defendant to enter a plea of guilty or not guilty.^[5] If a defendant does not already have counsel, the defendant may complete Form SUPCR 1127 to establish financial eligibility and, if able to do so, pay a \$50 fee.^[6]^[7] The Court then appoints the Biggam Firm as the defendant's counsel. The defendant may immediately confer with the Biggam Firm attorney who is present. That attorney may continue to represent the defendant or arrange for another Firm attorney to take over the representation. A slightly different procedure applies if the Biggam Firm has a conflict.

According to its website, the Biggam Firm is also available to advise before arraignment with respect to a police interrogation or line-up.^[8]

What If a Conflict Arises?

A conflict arises when two or more defendants are charged in the same matter. An attorney who would represent more than one of them is said to have a conflict. The defendants might blame each other, face different consequences as a result of conviction, or choose different defense strategies. Their interests may therefore conflict with each other. Other conflicts can also arise. When a conflict exists, the Court will appoint a different law firm or independent attorney for each defendant.^[9]^[10]

The County has contracted with two law firms, Page & Dudley (formerly Page, Salisbury & Dudley) and Wallraff & Associates (each a [Conflicts Counsel](#)), as the first choice to represent those defendants with whom the Biggam Firm has a conflict.^[11] The two Conflicts Counsel both have active civil and private criminal litigation practices in addition to their public defender assignments. Neither Conflicts Counsel routinely staffs the arraignment courts, but their attorneys are often present in the arraignment courts or elsewhere in the courthouse and can be available on short notice when a conflict with the Biggam Firm arises.^[12]

When the Biggam Firm and both Conflicts Counsel all have a conflict, the Court contacts the County’s Criminal Defense Conflict Program (CDCP). County Counsel administers the CDCP panel, which consists of approximately 26 independent attorneys and law firms. The CDCP administrator is often able to identify an attorney who is available to appear before the Court for appointment on the same day as requested.^[13]

Attorney Autonomy

As used in this report, “public defender” refers to any attorney whom the Court has appointed to represent a defendant who cannot afford an attorney.

Santa Cruz County’s public defenders are autonomous. No governmental or non-governmental body in Santa Cruz County dictates what actions the County’s contract public defenders should take or not take on behalf of their clients.^[14]

Although people sometimes refer to Lawrence P. Biggam, the founder of the Biggam Firm, as the Public Defender, Mr. Biggam is not a County officer and has no authority or power to establish policies that apply to all public defenders. He has no ability to regulate or supervise attorneys except with respect to subordinate attorneys in his own firm.^[15]

Tenure of the Current Public Defenders

Mr. Biggam organized the Biggam Firm in 1975 to submit a proposal to provide public defender services to the County. The County has not since solicited proposals for public defender services.^[16] Page & Dudley and Wallraff & Associates have provided public defender services to the County since 1979 and 1989, respectively.^[17] The County last solicited competitive bids for conflicts services in 1999.^[18]

Santa Cruz County Will Change Its Public Defender System By 2022

Under the 2018 Amendments, the County commits to transition to a new model as follows:^[19]

In July 2019, the COUNTY will begin planning efforts to transition the Public Defender function to a new model as follows:

<u><i>Fiscal Year</i></u>	<u><i>Deliverable</i></u>
<i>2019-20</i>	<i>Study models and costs</i>
<i>2020-21</i>	<i>Develop transition plan</i>
<i>2021-22</i>	<i>Implement transition plan</i>

In the United States, public defender systems typically involve a combination of:

- a public defender’s office
- an assigned counsel system in which the court schedules cases for participating private attorneys
- a contract system in which private attorneys contractually agree to take on a specified number of [indigent](#) defendants or indigent defense cases^[20]

The existing model is a contract system supplemented with the CDCP, which is a form of assigned counsel system. A new model would therefore likely involve a public defender's office.

A system including an in-house public defender's office would still need something like a Conflicts Counsel. It would have the same potential conflicts as the Biggam Firm does. Santa Clara County addressed this issue by establishing an in-house Alternate Defender Office that is ethically separate from the public defender's office.^[21] If Santa Cruz County were to adopt a similar model, the County would terminate (or not renew) the contracts with the Conflicts Counsel. The transition language quoted above appears in the amendments to the Conflicts Counsel contracts as well as in the amendment to the Biggam Firm's contract.

Scope

In the course of its investigation, the Grand Jury reviewed the following documents:

- Reports of the 1991-92, 1994-95, 2009-10, and 2013-14 Grand Juries and the County's responses to the 1994-95, 2009-10, and 2013-14 reports
- The Biggam Firm's quarterly caseload reports for the past two fiscal years and the first half of the current fiscal year
- Published reports, listed in [Appendix A](#), of the American Bar Association, the California State Bar, the National Legal Aid & Defenders Association, the National Association for Public Defense, and various governmental and academic bodies

The Grand Jury interviewed representatives of the County Administrative Office, the County Auditor-Controller, the District Attorney's Office, County Counsel's Office, the Court, and the Biggam Firm. The Grand Jury also conducted internet research.

Investigation

Indicators of Public Defender System Performance

Caseload

Although caseload is the focus of most published public defender reports, it is only an indirect measure of public defender system performance. An attorney can have a manageable caseload and still provide poor service. High caseloads, however, make it difficult for public defenders to have enough time with their clients to build trust, explain the system and the charges, and make decisions with their clients regarding their defense.^[22] Excessive caseloads result in insufficient time available to provide reasonably effective assistance of counsel to all clients.^[23]

To evaluate the Biggam Firm's caseload, the Grand Jury turned to the 1973 *Report of the Task Force on the Courts*.^[24] Standard 13.12 of that Report (NAC Standards) provides that the caseload of a public defender office should not exceed a specified number of cases per year.

In 2015, the National Association for Public Defense (NAPD) issued a statement in which it observed that the ever-increasing complexity in criminal practice, procedure, and sentencing laws, among other things, has “drastically increased” the time it takes to effectively represent a client. The NAPD concluded, however, that the NAC Standards remain “useful” as “absolute maximums” of acceptable public defense caseload standards.^[25]

To compare the Biggam Firm’s average annual caseload to the NAC Standards, the Grand Jury reviewed the Biggam Firm’s quarterly caseload reports for the past two fiscal years and the first half of the current fiscal year. The Grand Jury calculated the Biggam Firm’s annual caseload by adding the cases reported in the quarterly reports for the applicable fiscal year and annualizing the sum from the first two quarters of fiscal 2018. This methodology double counted (or triple or quadruple counted) cases that straddled quarters, and to that extent it overestimated the Biggam Firm’s annual caseload. [Table 1](#) divides the annual caseload by 20. The current contract requires the Biggam Firm to have 20 full-time equivalent (FTE) attorneys. The 2018 Amendments require the Biggam Firm to employ a minimum of 21 FTE attorneys.^[26]

Table 1: NAC Standards vs. the Biggam Firm’s Reported Caseload

	NAC Standards Annual Caseload per Attorney	Biggam Firm Annual Caseload per Attorney		
		Fiscal Year 2016	Fiscal Year 2017	Fiscal Year 2018 (annualized)
Felonies	150	109	111	109
Misdemeanors	400	317	339	305
Juvenile	200	39	19	18
Mental Health Act	200			
Appeals	25			
Other		34	33	34

Based on this analysis, the Biggam Firm’s caseload is comfortably within the NAC Standards. Grand Jury interviews confirmed that current public defender caseloads are manageable. Thus, the Biggam Firm’s caseload should not hinder the firm’s ability to render effective assistance of counsel.

Defense Counsel Is Available At Arraignment

One available measure of public defender system performance is the speed with which defense attorneys are available to meet with their clients. The Biggam Firm assigns one

or more of its attorneys to be present in each arraignment court, so that every defendant who cannot afford an attorney has a chance to consult counsel before a plea is entered.

In the many jurisdictions nationwide where a public defender is not available at the time of arraignment, an innocent defendant may plead guilty to a minor offense simply to avoid having to wait in jail until an attorney is available.^[27] Without immediate counsel, defendants might be unaware that a guilty plea could make them ineligible for educational or other benefits or subject to deportation or be something they have to disclose on future employment applications.^{[28] [29]}

Unrepresented defendants who do not plead guilty are likely to be kept in jail before trial or disposition because they cannot afford bail. They often do not know what factors might influence the Court to reduce bail. When public defenders are available to advocate for affordable bail or dismissal of charges, employed defendants can continue to support themselves and their dependents and the County is spared the expense of pre-conviction incarceration.^{[30] [31] [32]}

According to its website, the Biggam Firm also makes itself available to render advice before arraignment with respect to police interrogations and line-ups.

No contract, regulation, or rule of court requires the Biggam Firm to staff the arraignment courts or give advice before an arraignment. The Biggam Firm does so even though the practices do not directly increase the firm's compensation.

The Clean Slate Program

The Biggam Firm instituted the County's Clean Slate Program in 2014. Under this program, the Biggam Firm represents eligible persons who wish to take advantage of the exoneration provisions of Penal Code section 1203.4, reduce a felony conviction to a misdemeanor as permitted by Proposition 47, or have a marijuana case reduced or dismissed under Proposition 64.^[33] The 2018 Amendments require the County to pay the Biggam Firm to provide these services, although the Board of Supervisors voluntarily provided grants to underwrite the program in fiscal years 2017 and 2018.

A New Perspective on Public Defender Cost and Performance

When, on several occasions in the past 48 years, the County renegotiated the cost of contract public defender services, the relevant questions were whether the County was getting the best price available and whether the cost of contracting was less than the estimated cost of an in-house public defender's office. Four previous Grand Jury reports on the cost of the County's contract public defender services all focused on the County's decisions not to solicit competitive bids for public defender services and on the County's attempts to determine the cost of a public defender's office.^{[34] [35] [36] [37]} Those questions will not be relevant if the new system involves a public defender's office. By then, the County should be measuring the performance and monitoring trends of the public defender's office as the basis for future budget decisions and performance evaluation.

A History of Evaluating Without Measuring

So far as the Grand Jury has been able to determine through interviews and document requests, the County has never collected data to measure the quality of public defender performance. Its evaluation has always been subjective, based on the observations of the judiciary and other departments that interact with the public defenders. In Grand Jury interviews and public statements, opinions of public defender performance have historically ranged from satisfactory to superior. All of the name partners of the Biggam Firm and the two Conflicts Counsel have been described as capable and most of them are described as role models. Evaluations of other attorneys vary, but all are positive. The County's public defenders are described as prompt, prepared, organized, collegial, and effective advocates for their clients. When a case has potentially grave consequences for the defendant, they are prepared to take the case to trial.^[38] Despite the absence of performance data, the Biggam Firm's practice of voluntarily staffing the arraignment courts and its initiative in starting the Clean Slate Program at its own expense demonstrate the firm's commitment to its mission.

The Time is Now to Start Measuring Performance

Even though the County has no present concerns about the quality of public defender performance, now is the time to begin measuring that performance. Obtaining data on how the contract public defender system works now will provide a baseline for making future budget decisions. It will also be a good way to ensure that a future public defender system will continue to perform as effectively as the contract public defender system has performed. If the data show that the quality of the new system is not up to contract public defender system standards, the County can then consider whether to increase funding or take other actions to improve performance.

The window of opportunity for collecting data on contract public defender performance is likely to close quickly, however. The 2018 Amendments end the current public defender system in four years. Even a short delay in implementing a data collection program will significantly reduce the amount of data available to collect under that plan.

Collecting Better Data From the Public Defenders

Currently, the County's public defender contracts only require the public defenders to submit quarterly caseload reports. Raw caseload reports provide little if any information the County can use to evaluate the quality or efficiency of public defender services. However, the contracts also require the public defenders to provide other reports "as may be requested from time to time by the County Administrative Officer." If necessary, the County can use these provisions as the contractual basis for obtaining new data.

Possible Measurements

There are a number of variables the County can measure to track the performance of public defenders. As an example, [Appendix B](#) includes a set of goals, a statement of the objectives each goal is intended to satisfy, and examples of the kinds of statistics that

can indicate whether the goals are achieved. Similarly, [Appendix C](#) includes recommendations for measuring the amount of time a [controllable defense task](#) actually requires.

Public Participation in the Measurement Project

Because the County does not have any history of collecting data on public defender performance, it may need some help deciding what data to collect. For example, the input of existing public defenders can help ensure that the data collection process is workable. The input of private criminal defense counsel can help to ensure that the data measured are representative of the quality of the representation.^{[39] [40]} The input of community organizations that serve the non-legal needs of defendants and their dependents can help ensure that the data measured are relevant to the needs of the population that the public defender serves.

Findings

- F1.** Santa Cruz County has not chosen to quantitatively measure contract public defender performance to ensure adequate representation for defendants who cannot afford an attorney, and therefore has no experience in doing so.
- F2.** Without measuring the performance of the current contract public defender system, Santa Cruz County will not be able to meaningfully compare the result of transitioning to a different public defender system.

Recommendations

- R1.** The Board of Supervisors should establish a commission that includes qualified stakeholders to identify performance measures the County should collect with respect to public defender performance. (F1, F2)
- R2.** The County should begin to collect performance data on contract public defender performance, ideally within one year, so that the County has a baseline on which to measure future public defender performance. (F2)

Required Response

<i>Respondent</i>	<i>Findings</i>	<i>Recommendations</i>	<i>Respond Within/ Respond By</i>
Santa Cruz County Board of Supervisors	F1, F2	R1, R2	90 Days September 19, 2018

Requested Response

<i>Respondent</i>	<i>Findings</i>	<i>Recommendations</i>	<i>Respond Within/ Respond By</i>
Santa Cruz County Administrative Officer	F1, F2	R1, R2	90 Days September 19, 2018

Definitions

- **Conflicts Counsel:** one of two law firms that acts as the public defender when the Biggam Firm is unable to do so
- **Contract public defender:** an attorney or law firm that the County of Santa Cruz hires as an independent contractor to represent indigent defendants
- **Controllable defense task:** a case-related task over which an attorney has some control (as opposed to time in court, traveling, training, and administrative time)
- **Court:** the Superior Court of the State of California in and for the County of Santa Cruz or a judge of that court
- **Indigent:** a person who cannot afford an attorney; “indigent” does not necessarily mean unemployed, penniless, or homeless
- **Public defender's office:** attorneys whom the County employs as employees, and not as independent contractors, to represent indigent defendants

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National Association for Public Defense: <http://www.publicdefenders.us/>

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Appendix B

Key Indigent Defense System Performance Indicators^[41]

Goal	Objectives	Performance Measures/Indicators
A Defendant's Constitutional Right to an Attorney Is Preserved	Access to attorney is real	<ol style="list-style-type: none"> 1. % of defendants who waive counsel the first time they appear before a judge (in court or by remote appearance) 2. % of defendants who waive counsel and plead guilty the first time they appear before a judge (in court or by remote appearance) 3. % of waivers made on the record
	Access to attorney is timely enough to preserve constitutional rights	<ol style="list-style-type: none"> 1. # of days between arrest and appointment of counsel 2. # of days between arrest and first client interview with attorney by type of contact (in-person, video conference, telephone)
Best Possible Outcomes for Clients	The direct consequences of a criminal case are as beneficial to the client as possible	<ol style="list-style-type: none"> 1. Case Outcomes: determination of guilt, sentence, sentence type (active, intermediate, community), sentence length, and financial costs (court fees, fines, and restitution) by type of case 2. % of convictions resulting in alternatives to incarceration
	Clients are not incarcerated before conviction (pretrial release) and bond amounts are justified	<ol style="list-style-type: none"> 1. # of days defendant incarcerated pretrial 2. Average bond amounts by type of case 3. Breakdown of conditions of release, e.g., released on own recognizance, secured bond, unsecured bond, etc. 4. Failure to appear rates by type of case
	Cases are resolved in a timeframe least harmful to the client	<ol style="list-style-type: none"> 1. # of days between arrest and resolution of the case 2. # of continuances per case by case type 3. % of cases resolved within X days by type of case

Goal	Objectives	Performance Measures/Indicators
Best Possible Outcomes for Clients (continued)	Procedural injustices are mitigated	<ol style="list-style-type: none"> 1. # of days of lost work by type of case 2. # and % of clients who lost job pretrial by offense 3. # and % of defendants without active sentences who lost job, housing, driving privileges, scholarships, professional licenses, or were deported, or were required to register as sex offenders, etc
	Clients are aware of the collateral consequences of a criminal case and steps are taken to mitigate those consequences whenever possible	<ol style="list-style-type: none"> 1. % of cases with collateral consequences attached to charged offenses by type of collateral consequence and type of case 2. % of cases with collateral consequences attached to convicted offense by type of collateral consequence and type of case
	Disentangle client from criminal justice system	<ol style="list-style-type: none"> 1. Recidivism rates 2. Probation failure rates 3. # and % of clients referred for evaluation or treatment for underlying dysfunction
	Clients are satisfied with attorney	<ol style="list-style-type: none"> 1. Client satisfaction survey scores
Indigent Defense System Is Accountable to Taxpayers	Use taxpayer money as efficiently as possible	<ol style="list-style-type: none"> 1. Cost per case by type of case 2. % of cases ending in failure to appear
Defendant's Receive the Same Quality Representation Regardless of Race, Gender, Ethnicity, or Income	A system without racial, gender, ethnic, or economic disparities	<ol style="list-style-type: none"> 1. Analyze all indicators by race, gender, ethnicity, and income

Appendix C

A Note on Public Defender System Requirements^[42]

(from The Missouri Project, Appendix 13)

Time Entry System

The public defender system should have a time entry (or time log) system meeting the following minimum requirements:

- Ability to track:
 - Attorneys' case related time by Case Type and Case Task
 - Attorneys' non-case related time
 - Time in increments no greater than a quarter of an hour
- Case Type and Case Task classification consisting of:
 - 15 – 25 case-related (attorney controllable) tasks
 - Case-related (uncontrollable) tasks
 - Non-case related tasks
 - At least 10 unique Case Types
- Time entry system should be:
 - Mandatory system-wide
 - Consistent across public defender system's offices
 - Able to track all attorney time
 - Fully deployed for at least six-months prior to commencement of study
 - Consistent with the Case Management System

Case Management System

The public defender system's case management system should meet the following minimum requirements:

- Case Management System Case Types are identical to Time Log System Case Types
- Consist of at least twelve-months of system-wide case information
- Have a case identifier also used in Time Log System
- Consistent across public defender system's offices

In addition, it would be beneficial (but not part of the minimum requirements) if other factors such as language barriers, mental health issues, and other complexity factors can be captured in the case management system.

Commitment to Permanent Time Keeping

Permanent time keeping is a critical component to the implementation, ongoing study, and refinement of attorney workload standards. In addition, it can be an invaluable management and analysis tool for a public defender system independent of the need for workload standards. Therefore, we believe it is critical that the public defender system commits to continuous time keeping.