



**COUNTY OF LOS ANGELES  
DEPARTMENT OF AUDITOR-CONTROLLER**

KENNETH HAHN HALL OF ADMINISTRATION  
500 WEST TEMPLE STREET, ROOM 525  
LOS ANGELES, CALIFORNIA 90012-3873  
PHONE: (213) 974-8301 FAX: (213) 626-5427

WENDY L. WATANABE  
AUDITOR-CONTROLLER

MARIA M. OMS  
CHIEF DEPUTY

ASST. AUDITOR-CONTROLLERS

ROBERT A. DAVIS  
JOHN NAIMO  
JUDI E. THOMAS

June 15, 2010

TO: Supervisor Gloria Molina, Chair  
Supervisor Mark Ridley-Thomas  
Supervisor Zev Yaroslavsky  
Supervisor Don Knabe  
Supervisor Michael D. Antonovich

FROM: Wendy L. Watanabe  
Auditor-Controller

SUBJECT: **TRIAL COURT OPERATIONS – INDIGENT DEFENSE COST REVIEW  
(BOARD AGENDA ITEM #5, JUNE 22, 2009)**

On June 22, 2009, your Board directed the Chief Executive Officer (CEO) to transfer \$14.4 million<sup>1</sup> of the Trial Court Operations (TCO) budget into the Provisional Financing Uses (PFU) budget unit until the Board received an audit report on the TCO. Prior to the Board motion, the CEO requested a formal review of the TCO by the Auditor-Controller. The \$14.4 million represents the projected over-expenditure in the TCO for indigent defense for Fiscal Year (FY) 2009-10. Upon the issuance of this report and its review, the CEO plans to request Board approval to transfer the \$14.4 million from the PFU to the TCO.

We completed the requested audit of the TCO indigent defense expenditures. We reviewed expenditures and workload from FY 2005-06 through FY 2009-10 and determined the reasons for the cost increases in those years. Our review included analyzing the following three expenditure categories which represented approximately 70% of the total indigent defense costs:

- Criminal Cases
- Family Law
- Expert Witness

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<sup>1</sup> The original motion cited \$15.7 million in projected over-expenditures. The CEO subsequently provided clarification and amended the amount to \$14.4 million.

### **Background**

The County is financially responsible for indigent defense costs, as required under the Lockyer-Isenberg Trial Court Funding Act of 1997 (AB 233). Statutorily, the Court is required to provide counsel, if a defendant is unable to employ counsel, in Criminal, Family Law, Probate, Mental Health and Juvenile Delinquency cases. For example, in a criminal case, when the Public Defender (PD) and Alternate Public Defender (APD) are unable to represent an indigent defendant, due to unavailability or conflict of interest, the Court appoints a panel attorney. These panel attorneys are from the County's contract with the Los Angeles County Bar Association's (LACBA) Indigent Criminal Defense Appointments program (ICDA or *panel attorneys*). ICDA provides qualified attorneys in the defense of indigent criminal defendants. For other types of cases (i.e., Family Law, Probate, Mental Health and Juvenile Delinquency), the Court appoints a private attorney if a defendant is unable to employ one. The costs for all types of cases noted above are charged to the indigent defense TCO budget.

Indigent defense expenditures increased from \$37.8 million in FY 2005-06 to \$61.7 million (63%) in FY 2008-09. While the budget remained fairly constant from \$44.6 million in FY 2005-06 to \$48.4 million in FY 2008-09, the actual expenditures went from 15% below budget at (\$6.7 million) to 28% over budget at \$13.3 million for the same fiscal years. In FY 2009-10, total projected expenditures of \$58.7 million will exceed the indigent defense budget by \$12 million (26%). (See Attachment I – Table 1.)

### **Summary of Findings**

We determined that the increase in indigent defense costs was due primarily to an increase in cases assigned to Court-appointed attorneys (e.g., panel attorneys, etc.). The higher workload resulted from changes in legislation that were enacted during the last five years. For example, due to legislative changes related to Jessica's Law (Proposition 83) and the DNA Database (Proposition 69), the Public Defender declared itself unavailable in more cases by reallocating resources to comply with these legislative changes. The number of cases where the PD declared conflict of interest also increased. The PD declares conflict of interest in multiple defendant cases, since they can only represent one defendant, and if a currently represented client is a witness against the defendant. The PD and APD gave no specific reasons for the increase in conflict of interest cases.

These workload increases resulted in a larger number of cases assigned to panel attorneys, thereby increasing total indigent defense expenditures. In addition, panel attorney and expert (i.e., doctors) rates increased by 10% and up to 67%, respectively, in 2008. We also noted other areas during our review which contributed to the increase in indigent defense costs.

The reasons for the increase in costs are summarized below and explained in more detail on Attachment I. Some of these areas require County management action to better control costs.

**Workload Increase** – Court-appointed attorney workload increased for both criminal and Family Law case types. The higher workload, primarily due to recent changes in legislation, contributed to the increase in indigent defense expenditures.

- Criminal Cases – Total cases in which the PD declared itself unavailable increased from 8,095 to 23,606 (192%) cases between FY 2005-06 and 2007-08. (See Attachment I – Table 2.) The PD declared unavailability in more cases because it reallocated resources to comply with legislative changes. The PD also declared conflict of interest in more cases, from 17,896 in FY 2005-06 to 19,899 in FY 2008-09, an 11% increase. As indicated above, the PD and APD gave no specific reasons for the increase. Although the APD handled a portion of these cases, the overflow was assigned to panel attorneys.

It should be noted that the PD did not declare itself unavailable in any cases in FY 2009-10 (see Attachment I – Table 2). Additional PD staff resources and a lower workload helped eliminate the declarations of unavailability. As a result, panel attorney workload decreased in FY 2009-10. However, the projected expenditures only decreased slightly for the year. This is primarily due to on-going billings for panel attorney cases assigned from the prior years – case proceedings and the related expenditures can carryover into multiple fiscal years. The recent decrease in panel attorney workload should impact subsequent years' expenditures.

- Family Law – The use of Court-appointed attorneys in Family Law cases also increased from 1,392 to 2,444 (76%) cases between FY 2006-07 and 2008-09. As a result, Family Law expenditures have more than doubled from \$2.9 million to \$6.2 million for the same fiscal years. (See Attachment I – Table 5.)

Expenditures for minor's counsel (i.e., attorneys representing the interest of children in family/custody cases) accounts for approximately 85% of the total Family Law expenditures. The Family Law Supervising Judge identified the adoption of California Rules of Court 5.240 as a significant change in law which directly contributed to the increase in minor's counsel expenditures since more attorneys were appointed to cases. Court staff also indicated that custody cases have become more complex, there is greater attention on domestic violence issues that affect children, etc.

To control costs, the Family Law Supervising Judge issued a court order in October 2009 which 1) sets the attorney compensation hourly rate at \$125 per

hour and \$100,000 per fiscal year, 2) requires claims to be submitted for payment within 90 days of the date the services were rendered, etc. Although we noted some exceptions, the explanations appear reasonable. The Court plans to strictly enforce the court order beginning July 2010.

**Rate Increase** – The County contracts with Los Angeles County Bar Association's Indigent Criminal Defense Appointments (ICDA) program to provide qualified attorneys in the defense of indigent criminal defendants. In June 2008, the Board of Supervisors approved a 10% hourly rate increase for panel attorneys.

In addition, expert rates increased. Attorneys use experts (e.g., doctors, investigators, etc.) in preparing the defense of their clients. The Court approved a rate increase up to 67% for some experts (i.e., doctors) in 2008. For example, the rate for doctors increased from \$350 to \$500 per examination/evaluation, an increase of 43%. This rate had not changed in almost a decade. The Court expressed concerns about maintaining a qualified panel of doctors under the old rate.

**Bypassed County Attorneys (Order of Appointment)** – APD cited an incident where the Court bypassed the APD in eight cases and appointed panel attorneys directly to the cases in one day. The oversight occurred while the APD was handling matters in other courts. If the order of appointment is not followed, there is potentially an unnecessary increase in indigent defense costs; the Court is required to utilize the services of the PD, the APD, panel attorneys and private counsel, in that order. To determine when the established protocol is not followed (i.e., panel attorneys are unnecessarily appointed to cases), we recommend that the PD and APD review appointment reports periodically. Unnecessary use of panel attorneys increases indigent defense expenditures. Since appointment orders cannot be reversed once issued by the Court, it is important that the established protocol is followed. Therefore, we recommend that the County (i.e., Board of Supervisors or CEO) request that the Court ensure attorneys are appointed in accordance with the appointment order.

**Outdated Fixed Fee Compensation** – In three of eight capital cases reviewed, panel attorney compensation exceeded the fixed fee rates by \$1.4 million as of March 2010. Attorneys appointed to capital cases receive a fixed fee compensation under the existing MOU between the County and the ICDA. In these cases, the Court approved an additional 42% of expenditures beyond the established MOU rates. The Court indicated that the MOU fixed fee rates are outdated and should be revised. We recommend that the County CEO, in conjunction with the Court and ICDA, review and revise the MOU, as appropriate.

**Expert Witness Use Increase** – Expert witness appointments increased from 3,751 to 5,823 (55%) between FY 2005-06 and 2008-09. (See Attachment I – Table 4.) As a result, expenditures increased from \$3.7 to \$5.4 million (45%) in those fiscal years.

(See Attachment II.) The Court, PD and APD cite an increase in the use of mitigation experts in capital cases as a contributor to the increase in expenditures. Mitigation experts have the clinical skills to analyze a defendant's development and behavior and provide guidance in formulating a defense strategy. We recommend that the County request that the Court closely evaluate requests for resources and ensure only essential services are approved and provided.

### **Review of Report**

On May 12, 2010, we met with Superior Court, CEO, PD, APD and ICDA management to discuss the results of our review. All parties generally agree with all the findings and recommendations contained in the report and will provide a detailed response to your Board within 45 days, including a strategy to implement the recommendations.

We thank both management and staff for their cooperation and assistance throughout our review. If you have any questions, please call me or your staff may call Jackie Guevarra at (213) 253 0198.

WLW:MMO:JTG  
Indigent Defense Report.doc

c: William T Fujioka, Chief Executive Officer  
Jackie White, Deputy Chief Executive Officer  
Superior Court  
Charles W. McCoy, Jr., Presiding Judge  
William H. Mitchell, Deputy Executive Officer  
Michael P. Judge, Public Defender  
Janice Fukai, Alternate Public Defender  
Steve Cooley, District Attorney  
Ezekiel Perlo, Director, Indigent Criminal Defense Appointments Program  
Sachi A. Hamai, Executive Officer  
Public Information Office  
Audit Committee

## TRIAL COURT OPERATIONS – INDIGENT DEFENSE

### COMMENTS AND RECOMMENDATIONS

#### Background

The County is financially responsible for indigent defense costs, as required under the Lockyer-Isenberg Trial Court Funding Act of 1997 (AB 233). Statutorily, the Court is required to provide counsel, if a defendant is unable to employ counsel, in Criminal, Family Law, Probate, Mental Health and Juvenile Delinquency cases. For example, in criminal cases, when the Public Defender (PD) and Alternate Public Defender (APD) are unable to represent an indigent defendant in a criminal case, due to unavailability or conflict of interest, the Court appoints a panel attorney. The Court appoints panel attorneys from the County's contract with the Los Angeles County Bar Association's (LACBA) Indigent Criminal Defense Appointments program (ICDA or panel attorneys). ICDA provides qualified attorneys in the defense of indigent criminal defendants. For other types of cases (i.e., Family Law, Probate, Mental Health and Juvenile Delinquency), the Court appoints a private attorney, if a defendant is unable to employ one. The costs for all types of case noted above are charged to the Trial Court Operation's (TCO) indigent defense budget.

As indicated on Table 1 below, indigent defense expenditures increased from \$37.8 million in FY 2005-06 to \$61.7 million (63%) in FY 2008-09. While the budget remained fairly constant from \$44.6 million in FY 2005-06 to \$48.4 million in FY 2008-09, the actual expenditures went from 15% below budget at (\$6.7 million) to 28% over budget at \$13.3 million for the same fiscal years. Total projected expenditures of \$58.7 million for FY 2009-10 will exceed the indigent defense budget by \$12 million (26%).

<b>Indigent Defense Costs Over/(Under) Expenditure Summary (Table 1)</b>				
<b>Fiscal Year</b>	<b>Final Budget (1)</b>	<b>Actuals (eCAPS)</b>	<b>Over/(Under) Expenditure</b>	<b>% of Final Budget</b>
FY 2005-06	\$ 44,565,000	\$ 37,829,957	\$ (6,735,043)	(15%)
FY 2006-07	\$ 46,054,000	\$ 47,204,568	\$ 1,150,568	3%
FY 2007-08	\$ 46,665,000	\$ 58,121,559	\$ 11,456,559	25%
FY 2008-09	\$ 48,404,000	\$ 61,712,399	\$ 13,308,399	28%
FY 2009-10 <i>Projected (2)</i>	\$ 46,704,000	\$ 58,739,496	\$ 12,035,496	26%

*(1) Includes Supplemental Budget.*

*(2) Based on July 2009 through April 2010 actual expenditures.*

**Purpose**

We analyzed indigent defense expenditures to determine the reasons for the cost increases. As part of our review, we interviewed various Superior Court (i.e., Criminal Law, Family Law and Financial Services), Chief Executive Office (CEO), PD, APD, District Attorney (DA) and ICDA staff. Since the amount of indigent defense expenditures is driven by workload levels, we reviewed workload reports to identify changes in panel attorney workload over the last five years.

We also reviewed three specific categories of eCAPS expenditures: Criminal, Family Law, and Expert Witness to ensure 1) claims for services were adequately reviewed and approved, and 2) the rates billed are in accordance with approved amounts. These three expenditure categories represented approximately 70% of the total cost of indigent defense since FY 2005-06 (see Attachment II).

**Panel Attorney Workload**

In accordance with Penal Code §987.2, the Court is required to utilize the services of the PD, the APD, panel attorneys and private counsel, in that order. For example, when the PD and APD are unable to represent an indigent defendant in a criminal case due to a legal conflict of interest (conflict) or unavailability, the Court appoints a panel attorney to the case. As the panel attorney workload increases, there is a corresponding increase in total indigent defense costs. Both a change in law and/or staffing can affect the workload, thereby increasing expenditures. Any increase in contracted rates also contributes to a higher total cost.

<b>Workload Summary (Number of Cases)</b>					
<b>(Table 2)</b>					
	<b>FY 2005-06</b>	<b>FY 2006-07</b>	<b>FY 2007-08</b>	<b>FY 2008-09</b>	<b>FY 2009-10 (2)</b>
<b>PD Workload</b>	495,133	495,847	489,981	439,045	435,827
<b>PD Total Unavailable</b>	8,095	8,330	23,606	9,673	0 (3)
<b>PD Total Conflicts</b>	17,896	18,514	18,933	19,899	17,933
<b>Total Unavailable/Conflict</b>	25,991	26,844	42,539	29,572	17,933
<b>APD Workload</b>	36,241	37,188	36,483	39,221	34,739
<b>ICDA Workload</b>	6,290 (1)	19,499	30,996	21,121	11,950
<p>(1) In late 2005, ICDA implemented an electronic case tracking system. The total workload shown for FY 2005/06 represents only a portion of the annual workload. Actual workload for the year is higher than 6,290.</p> <p>(2) Annual projection is based on data from July 2009 through May 2010.</p> <p>(3) PD workload reports show that the PD declared itself unavailable in zero cases in FY 2009-10 (as of February 2010).</p>					

**Changes in Law**

Recent changes in legislation (i.e., Jessica's Law and DNA Database) impacted the PD and APD's workload. Between FY 2005-06 and 2007-08 total cases in which the PD declared itself unavailable increased from 8,095 to 23,606 (192%) (see Table 2). The PD declared unavailability in more cases because it reallocated resources to comply with these legislative changes. Although the APD handled a portion of the PD unavailable cases, the case overflow was assigned to panel attorneys.

- In 2006, Jessica's Law (Proposition 83), also known as the Sexually Violent Predator (SVP) law passed. Jessica's Law changed the length of a SVP involuntary commitment (i.e., from 2 years to an indefinite term) and increased the number of individuals eligible for a SVP involuntary commitment. It also required convicted sex offenders to register with local authorities (Penal Code §3003.5) and prohibited registered sex offenders from living within 2,000 feet of schools and parks where children gather. The PD indicated that these changes increased the number of new SVP petitions filed in FY 2007-08 and substantially increased PD workload.
- The DNA Database law (Proposition 69) was passed in November 2004. Proposition 69 expanded the collection of DNA to include all felons convicted of any felony offense (e.g., sex offense, arson, etc.), felons attempting to commit such offenses, as well as individuals arrested for certain offenses. The expanded DNA collection resulted in increased investigations. In addition, Penal Code §1405 which authorizes any person convicted of a felony to file a motion demanding DNA testing of evidence collected in their case, was enacted in FY 2006/07. Under Penal Code §1405, the Court shall appoint counsel to investigate and represent the indigent person solely for the purpose of obtaining DNA testing under the Code. Changes related to Proposition 69 and Penal Code §1405 also increased the PD's workload.

**Recommendation**

**None**

**Staffing**

Since the ICDA workload increases when the PD and APD declare conflict or unavailable in cases, it is imperative that adequate staffing is maintained by the PD and APD. The PD and APD indicated that they are currently staffed to handle the workload without declaring unavailable in cases. In FY 2007-08, the PD hired 26 additional attorneys. After the requisite on-the-job training, the attorneys were able to handle more cases, thereby reducing the PD's unavailability beginning in FY 2008-09. However, any potential increase in workload as a result of either changes in law or staffing will likely result in 1) the PD declaring itself unavailable in more cases, 2) a higher panel attorney workload and 3) an increase in indigent defense costs.



For example, the constitutionality of certain provisions of Jessica's Law was challenged (i.e., E.J. 47 Cal 4th 1258) upon its passage. In February 2010, the Supreme Court returned the issue to the local trial courts to handle. The trial courts must now conduct evidentiary hearings, on a case by case basis, to determine whether the restrictions on where someone can live are reasonable. According to the APD, the litigation will be complex and likely involve the substantial use of experts. The PD and APD anticipate a higher caseload as a result of the required hearings. Therefore, the PD and APD should work with the CEO and the Board to ensure that appropriate staffing levels are maintained to handle their respective workloads. This would minimize or eliminate declarations of unavailability, which impact the number of cases assigned to panel attorneys.

**Recommendation**

- 1. The PD and APD work with the CEO and the Board to ensure that appropriate staffing levels are maintained to handle their respective workloads.**

**Rate Increases**

In June 2008, the Board of Supervisors (Board) approved a 10% hourly rate increase for panel attorneys appointed through the ICDA program. As indicated above, the County contracts with LACBA for qualified attorneys to represent indigent criminal defendants, when the PD and APD are unable to represent them. In accordance with County contract policy, the rate increase was based upon similar increases in County employee compensation and provides panel attorneys with a reasonable compensation for defense services. The aggregate increase covers an estimated cost of \$2.2 million annually.

In addition, the Court approved a rate increase up to 67% for some experts (i.e., doctors) in 2008. For example, the rate for doctors increased from \$350 to \$500 per examinations/evaluations, an increase of 43%. This rate had not changed in almost a decade. The Court expressed concerns about maintaining a qualified panel of doctors under the old rate. Attorneys use experts (e.g., doctors, investigators, etc.) in preparing a defense of their clients.

**Recommendation**

**None**

**Order of Attorney Appointments**

As indicated above, the Court is required to utilize the services of the PD, the APD, panel attorneys and private counsel, in that order. During the review, the APD indicated that there was an incident where the Court bypassed the PD and APD, and appointed panel attorneys directly to a case. The PD and APD did not declare either conflict or unavailability in these incidents.

According to the APD, on December 21, 2009 the Court bypassed the APD in at least eight cases at the Compton courthouse. The APD attorney assigned to the courthouse discovered the oversight, which occurred while the attorney was handling matters in other courts. The APD indicated that the Court should have contacted the PD and the APD on-site supervisors to confirm their availability for any of the cases before directly appointing panel attorneys to those cases. The PD and APD Head Deputies immediately met with staff at the Compton courthouse to discuss and resolve the oversight.

The PD, APD and the Court concur that judges generally appoint attorneys in accordance with the appointment order. The Court also indicated that Supervising Judges meet monthly to discuss Court matters, such as the Compton courthouse incident, and that reminders on the order of appointment are sent out to the bench. The Court is investigating the Compton incident and will address the situation, as appropriate. However, the example given above indicates that the order of appointment is not always followed. If the order of appointment is not followed, there is potentially an unnecessary increase in indigent defense costs. Therefore, the County should request that the Court ensure that attorneys are appointed in accordance with Penal Code §987.2. In the event that the PD and/or APD attorney is not present in court at the time of appointment, the Court should make every effort to contact those offices to confirm their availability prior to assigning the case to a panel attorney.

### Recommendation

- 2. The County request the Court to ensure that attorneys are appointed in accordance with the Penal Code §987.2 appointment order. In the event that the PD and/or APD attorney is not present in court at the time of appointment, the Court should make every effort to contact those offices to confirm their availability prior to assigning the case to a panel attorney.**

Currently, there is no formal mechanism in place to verify if and/or when the PD and APD were bypassed for appointments. Unless the PD or APD expressly discover occurrences similar to the Compton courthouse incident, appointments not in accordance with Penal Code §987.2 go unnoticed. The Court, in conjunction with the PD and APD, agreed to develop<sup>1</sup> and periodically (e.g., quarterly) provide reports on panel attorney appointments to PD and APD for review.<sup>2</sup> The PD and APD should review the reports noted above to determine if and/or when the order of appointment is not followed (i.e., panel attorneys are unnecessarily appointed to cases). Since appointment orders cannot be reversed once issued by the Court, it is important that the Court ensure the appointment order is followed. Incidents where the PD and APD are bypassed should be referred to the Supervising Judge for corrective action.

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<sup>1</sup> Given the limitations of the Professional Appointee Court Expenditures (PACE) system, as discussed later in the report, the Court will initially research the feasibility of generating such a report from PACE.

<sup>2</sup> The PD and the APD indicated that an electronic report (rather than hard copy) would facilitate their review process.

**Recommendations**

3. **The County request the Court work with the PD and APD to develop an electronic report on panel attorney appointments.**
4. **The PD and APD should review the electronic report noted above to determine if and/or when the order of appointment is not followed (i.e., panel attorneys are unnecessarily appointed to cases). Incidents where the PD and APD are bypassed should be referred to the Supervising Judge for corrective action.**

In summary, total panel attorney workload increased through FY 2007-08. The total cases in which the PD declared itself unavailable increased between FY 2005-06 and 2007-08. The PD also declared conflict in 11% more cases, from 17,896 in FY 2005-06 to 19,899 in FY 2008-09. The PD generally declares conflict in multiple defendant cases, since they can only represent one defendant, and if a currently represented client is a witness against a defendant. The PD and APD gave no specific reasons for the increase. Although the APD handled a portion of these unavailable and conflict cases, the overflow was assigned to panel attorneys, thereby increasing indigent defense expenditures.

It should be noted that the PD did not declare itself unavailable in any cases in FY 2009-10. Additional PD staff and a lower workload helped eliminate the declarations of unavailability. As a result, panel attorney workload decreased in FY 2009-10. However, the projected expenditures only decreased slightly for the year. This is primarily due to on-going billings for panel attorney cases assigned from the prior years. As noted above, panel attorney workload significantly increased in fiscal year 2007-08. Based on our review, case proceedings (e.g., criminal felony, etc.) and the related expenditures can carryover into multiple fiscal years. The recent decrease in panel attorney workload should impact subsequent years' expenditures.

**Criminal Cases**

Legal representation for indigent defendants charged with criminal activities (i.e., felony or misdemeanor) account for the largest category of indigent defense expenditures. Since FY 2005-06, at least 50% of the total indigent defense costs were spent on criminal attorneys (see Attachment II). The County currently contracts with LACBA to provide a panel of qualified attorneys proficient in the defense of indigent criminal defendants. The contract provides panel attorneys with set hourly rate compensation based upon case type (i.e., misdemeanor or felony) and a flat fee amount for capital cases.

**Capital Cases**

Based on preliminary Court reports and interviews with Court staff, the largest component of criminal defense costs is related to capital cases (i.e., special circumstance or death penalty cases). Capital case expenditures by panel attorneys

represented 20% or approximately \$6.6<sup>3</sup> million of the total criminal attorney expenditures in FY 2008-09. On average, panel attorneys were appointed to approximately 60 new capital cases annually between 2005 and 2009. However, panel attorneys were appointed to 102 capital cases in 2007.

A Memorandum of Understanding (MOU)<sup>4</sup> between the County and ICDA specifies the compensation rate for different categories of capital cases (see Table 3). For example, Category 1 represents cases with one defendant and one victim, whereas Category 4 normally involves numerous victims and/or defendants, are the most complex and considered high profile cases. Due to the complexity of category 4 cases, the MOU allows the judge to review and approve an increase in compensation beyond the MOU fixed fee rates.

<b>Capital Cases - Fixed Fee Rates (Table 3)</b>		
	<b>Attorney</b>	<b>Trust Fund (1)</b>
Category 1	\$ 60,000	\$ 5,000
Category 2	\$ 90,000	\$ 7,500
Category 3	\$ 125,000	\$ 10,000
Category 4	\$ 200,000	\$ 25,000
<i>(1) Covers costs for expert witnesses, travel, etc.)</i>		

**Fixed Fee Compensation**

As indicated above, attorneys appointed to capital cases receive a fixed fee compensation under the existing MOU with the County. Generally, a fixed fee model is intended to 1) provide an incentive for increased efficiency in the delivery of attorney services and 2) reduce costs.

We reviewed eight capital case files to ensure total expenditures were in compliance with the MOU fixed fee rates. Based on our review, case-to-date expenditures for Category 4 cases exceeded the established fixed fee rate. Specifically, we noted that:

- In three of eight cases reviewed, panel attorney compensation exceeded the fixed fee rates by \$1.4 million (42%) as of March 2010. All three were Category 4 cases: two of the cases involve multiple defendants, each with his/her own attorney, and one is a retrial, which is only 50% complete. Although the MOU allows panel attorneys assigned to Category 4 cases to petition the Court for a higher compensation, if they believe it is warranted, by definition, all the necessary costs to defend a case are already covered under a fixed fee model.

<sup>3</sup> This total excludes expenditures on expert witnesses or other ancillary services used in criminal cases.

<sup>4</sup> The MOU was last revised in May 1993.

Both the Court and ICDA reasoned that the existing fixed fee rates are based on costs developed almost 20 years ago and should be revised. Accordingly, the CEO, in conjunction with the Court and ICDA, should review and revise the current MOU to ensure that attorney compensation is reasonable and appropriate.

**Recommendation**

- 5. The CEO, in conjunction with the Court and ICDA, review and revise the current MOU to ensure attorney compensation is reasonable and appropriate.**

***Trust Funds***

Each attorney is allocated a trust fund amount to cover related case expenditures (e.g., expert witnesses, investigators, travel, etc.). (See Table 3 above for allocable trust fund amounts.) Within 30 days of a defendant's sentencing hearing, the attorney shall submit a full accounting of trust fund expenditures to the Court for review. The Assistant Supervising Judge and Court staff review the final accounting (e.g., accounting ledgers, receipts, etc.) and determine if actual expenditures were appropriate.

In cases where questioned costs are identified, the cost is disallowed and a reimbursement from the attorney is requested. However, based on our review, the evaluation process is tedious and very time consuming. By the end of a case, the final accounting may represent multiple years of expenditures and reviewers may not easily identify inappropriate expenditures. To ensure that trust fund expenditures are reviewed more timely and effectively, the County should request that the Court require attorneys to submit periodic (e.g., quarterly, etc.) expenditure reports and review actual expenditures prior to the end of the case.

**Recommendation**

- 6. The County request the Court require attorneys to submit periodic (e.g., quarterly, etc.) expenditure reports and review actual expenditures prior to the end of the case to ensure that trust fund expenditures are reviewed more timely and effectively.**

***Second Counsel Appointments***

According to the MOU the judicial officer has the authority to appoint second counsel to a case if the District Attorney formally indicates in writing their intent to seek the death penalty against a defendant. The primary counsel submits an affidavit to the Supervising Judge stating why a second counsel should be appointed. The MOU sets the second counsel's compensation at 15% of the primary counsel's fixed fee rate, unless the Supervising Judge approves a higher amount.

We reviewed eight capital cases involving a total of eighteen defendants, with each defendant represented by a primary attorney. Based on our review, six of the eighteen (33%) defendants were assigned a second counsel. Each of the six second counsels were paid up to 50% of the fixed fee rate, or 35% higher than what is allowed under the MOU. Cumulatively, the MOU approved rate was exceeded by approximately \$300,000. As indicated above, the Court and ICDA reason that the MOU rates are outdated and should be revised.

**Recommendation**

- 7. The CEO, in conjunction with the Court and ICDA, review compensation rates for second counsel and revise the MOU accordingly to ensure rates are reasonable and appropriate.**

**Financial Screening**

The PD determines, through financial screening, whether a criminal defendant is eligible for indigent defense. If a defendant does not have or cannot afford counsel, the defendant is referred to the PD for assistance. The PD makes an immediate determination based on the defendant's completed financial screening application and/or interview with the applicant. Questionable information is referred to the PD's Investigations Unit for further review. In addition to the on-the-spot financial screening, the PD's Investigations Unit conducts a subsequent random audit of financial screening applications. The Unit has access to a person's credit information (e.g., Experian, bank account, etc.), background check, Department of Motor Vehicle records, and other resources to substantiate a client's ability to pay.

On average, 300-400 applications are audited annually. This represents only 0.001% of the PD's total annual workload. It may be feasible to conduct additional audits. However, the PD indicated that further analysis is necessary to ensure the Investigation Unit's primary function (i.e., case investigation) is not severely affected if additional audits are performed. The PD also cited staffing shortages (e.g., due to unfilled vacancies, etc.) as a reason for not conducting more random audits. The use of Investigations Unit staff in random audits may be mitigated by training and using non-investigators, if deemed cost effective, to assist in the random audit process.

**Recommendations**

- 8. The PD evaluate increasing the number of random audits performed monthly, if further analysis deems it feasible and it does not significantly affect the primary function of the Investigations Unit.**
- 9. The PD consider training staff (i.e., non-investigators), if deemed cost-effective, to assist in the random audit process.**

### Expert Witnesses

Attorneys may use expert witnesses with expertise in various fields (e.g., neurology, firearms, fingerprints, gangs, etc.) in preparing the defense of their clients. Expert witness appointments increased from 3,751 to 5,823 (55%) between FY 2005-06 and 2008-09 (see Table 4). The related expenditures increased from \$3.7 million in FY 2005-06 to \$5.4 million (45%) in FY 2008-09, and is projected to reach \$5.8 million by the end of the current fiscal year (see Attachment II).

Expert Witness Appointment (Table 4)					
	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10 (1)
<b>Total Appointments</b>	<b>3,751</b>	<b>4,486</b>	<b>6,165</b>	<b>5,823</b>	<b>5,335</b>
<i>(1) Annual Projection is based on PACE July-November 2009 actual appointments.</i>					

### Mitigation Experts

The Court, ICDA, PD, and APD also cited the prevailing use of mitigation experts as a reason for the increase in overall costs. The American Bar Association (ABA) Guidelines require the attorney to assemble a capital defense team including a mitigation expert. Mitigation experts have the clinical skills to analyze a defendant's development and behavior and provide guidance in formulating a defense strategy. It is for the penalty phase of the trial that the mitigation expert is most important.

There are two phases (i.e., guilt and penalty) in a death penalty trial. If a defendant is found guilty of the charges, the penalty phase commences almost immediately after the guilt phase. Therefore, from the beginning, the attorneys must be prepared to go forward with both phases of the trial.

Generally, mitigation experts are not utilized once the District Attorney (DA) drops the death penalty. On average, the DA makes the determination from six to twelve months following the preliminary hearing, but can take up to 18-24 months, in complex cases.<sup>5</sup> Until then, the defense attorney proceeds as if the DA will seek death and prepares for a potential penalty phase of the trial (i.e., mitigation experts are retained and expert costs are incurred).<sup>6</sup> Since the use of mitigation experts is dependent upon whether the DA seeks the death penalty, it is important that a determination is made as quickly as possible.

The current process and timeline may be appropriate and reasonable. However, we did not evaluate the determination process because it is outside the scope of this review. While the Court has a statutory responsibility to provide quality legal representation for

<sup>5</sup> Per the DA, defense continuances of the preliminary hearings delay the case from being heard by the DA's special circumstance committee. However, the PD and APD indicated that, in some cases, the determination can be made before the preliminary hearing.

<sup>6</sup> After review and analysis (before the preliminary hearing), if it does not appear that the DA will seek death in a case, the PD and APD indicated that they do not request the appointment of a mitigation expert.

indigent defendants, including access to ancillary services such as mitigation experts, the Court also has a responsibility to monitor costs. Therefore, the County should request that the Court continue to closely evaluate requests for resources and ensure only essential services are approved and provided.

**Recommendation**

- 10. The County request the Court continue to closely evaluate requests for resources (e.g., mitigation experts) and ensure only essential services are approved and provided.**

**Family Law**

The use of Court-appointed attorneys in Family Law cases increased from 1,392 to 2,444 (76%) cases between FY 2006-07 and 2008-09. As a result, Family Law expenditures have more than doubled from \$2.9 million to \$6.2 million in the same fiscal years. (See – Table 5).

<b>Family Law Expenditures (1)</b>					
<b>(Table 5)</b>					
	<b>FY 2005-06</b>	<b>FY 2006-07</b>	<b>FY 2007-08</b>	<b>FY 2008-09</b>	<b>FY 2009-10 (2)</b>
Total Expenditure	\$2,585,763	\$2,922,211	\$4,499,557	\$6,197,746	\$6,280,612
Total Case	(3)	1,392	1,923	2,444	3,206
<i>(1) Data includes expenditures for minor's counsel (e.g., paternity, divorce, etc), adoptions and abandonment cases.</i>					
<i>(2) Annual projection is based on July 2009 through April 2010 actual expenditures.</i>					
<i>(3) Detailed case data is not available due to conversion from CAPS to eCAPS.</i>					

**Minor's Counsel**

Expenditures for minor's counsel (i.e., attorneys representing the interest of children in family/custody cases) accounts for approximately 85% of the total Family Law expenditures. The Family Law Supervising Judge identified the adoption of California Rules of Court 5.240 as a significant change in law which directly contributed to the increase in minor's counsel expenditures. The Rule (effective January 1, 2008) increased the awareness of the bench and the bar to the availability of minor's counsel as a tool in family law cases. As a result, more attorneys were appointed to cases.

Court staff also cited additional reasons for the expanded use of minor's counsel, including 1) custody cases have become more complex and more likely to be litigated (i.e., fathers are more involved and asserting their parental rights), 2) greater attention on domestic violence issues that affect children, 3) added focus on the developmental needs of children, etc. The increase in expenditures is directly correlated to the greater use of minor's counsel (i.e., higher workload).



## **Court Order**

In April 2009, the Family Law Court was alerted to the rising cost of minor's counsel.<sup>7</sup> Until April 2009, the Court did not have a formal review process in place to effectively monitor Family Law expenditures. After an assessment of the costs, the Family Law Supervising Judge issued 1) a formal court order limiting hourly and annual compensation and 2) guidelines for appointment and payment levels for minor's counsel.

The court order, issued on October 20, 2009, 1) sets the attorney compensation hourly rate at \$125 per hour and \$100,000 per fiscal year, 2) requests each trial court to consider reasonable limitations on the number of compensated hours to be expended, and 3) requires the attorneys to submit claims for payment within 90 days of the date the services were rendered. Payment requests for services more than 90 days can be reduced or denied at the discretion of the appointing judge. Claims for reimbursement exceeding the court order limits require approval by the Family Law Supervising Judge.

We reviewed monthly compensation reports<sup>8</sup> used by the Court and nineteen claims paid after the court order was issued. Although we noted the following exceptions, the explanations appear reasonable. The Court will strictly enforce the court order beginning July 2010.

- Nine of 159 (6%) court-appointed attorneys exceeded the \$100,000 salary cap as of March 31, 2010, with two of the nine attorneys exceeding \$200,000 in compensation. Since the court order was issued four months into the fiscal year, attorneys were allowed to continue working on on-going cases (i.e., assigned prior to the court order) to avoid unnecessary delays in the case proceedings. As a mitigating control, the Court prohibits attorneys who are nearing or have exceeded the salary cap from being appointed to new cases.
- Thirteen of nineteen (68%) claims billed for services provided more than 90 days from receipt of the claim. For example, a claim received in November 2009, included services rendered in March 2007. The Court indicated that the 90-day rule applied only to services provided prospectively and not to services rendered prior to October 2009. However, legal services provided should be billed more timely.

## **Recommendation**

- 11. The County request the Court continue to monitor attorney expenditures and strictly enforce compliance with the requirements of the October 2009 court order.**

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<sup>7</sup> The CEO contacted the Family Law Court for an explanation on the rising Family Law expenditures.

<sup>8</sup> Since October 2009, the Supervising Judge began monitoring total compensation by attorney every month. The Supervising Judge also notifies the bench on which attorneys have exceeded and/or approaching the annual limit with instructions not to appoint those attorneys to new cases.

## Payment Guidelines

In July 2009, the Family Law Supervising Judge distributed guidelines for appointment and payment to all judges. The guidelines indicate the maximum compensation for minor's counsel depending on the complexity of the case. For example, Level 1 includes interviewing the child, parents and counsel makes one appearance for a report to the Court, whereas Level 4 represent the most complex cases (e.g., allegations of abuse, domestic violence, etc.). (See Table 6.)

Family Law Guidelines for Appointment and Payment (Table 6)		
Case Level	Maximum Payment (1)	Description
1	\$ 1,500	One Court Appearance
2	\$ 3,000	Multiple Court Appearances
3	\$ 5,000	Special Needs (More Complex)
4	(2)	Complex Cases (e.g., allegations of abuse)
(1) The payment is renewable at the Court's discretion.		
(2) Due to the complexity of Level 4 cases, the payment amount is determined by the Court at the initial appointment.		

The guidelines serve to control expenditures by establishing consistent parameters for minor's counsel payment. To ensure that all judges are in compliance with the guidelines, the County should request that the Family Law Supervising Judge periodically (e.g., monthly, etc.) review a random sample of judicial appointment orders. Questionable compensations should be immediately addressed.

### Recommendation

- The County request the Family Law Supervising Judge periodically (e.g., monthly, etc.) review a random sample of judicial appointment orders to ensure that all judges are in compliance with the guidelines. Questionable compensations should be immediately addressed.**

## Financial Screening

Per California Rules of Court §5.241, the Court (i.e., appointing judge) is responsible for determining the financial ability of the parties (i.e., parents, legal guardians, etc.) to pay all or a portion of counsel's compensation. The appointing judge determines financial ability based on the parties' financial information at the time of appointment or shortly thereafter. Unlike the Public Defender, Family Law does not regularly perform subsequent evaluations (i.e., random audits) of the parties' ability to pay. However, since a parent or guardian's financial circumstance may change by the end of the case proceedings, it may be beneficial to establish a random audit process to confirm the

parties' ability.<sup>9</sup> The Court agreed that subsequent random audits could result in potential revenue to mitigate the cost of legal representation.

**Recommendation**

- 13. The County request the Court perform subsequent evaluations of a parties' ability to pay for all or a portion of court-appointed counsel's compensation.**

**PACE System**

As part of our review, we interviewed Professional Appointee Court Expenditures (PACE) staff and management, observed PACE claim processing/payment activities and reviewed PACE claims and reports. The Court uses the PACE system to process claims for payment. Court-appointed attorneys and expert witnesses complete PACE claim forms to request reimbursement for their services. Services provided or time spent on a case (e.g., preparation, research, wait time in court, jury trial, etc.) are itemized on a Detail of Services and Expenses form. PACE staff keypunch claim information into PACE, and after verification and validation, the claim is approved and paid.

Based on our review, we identified limitations in the PACE system (e.g., availability of reports, intensive manual processing, old software, etc.). In addition, the Court has only one employee that is capable of maintaining the PACE system and the County Internal Services Department no longer provides PACE back-up programmers. These same limitations were noted in the Auditor-Controller's October 2007 report on PACE.

To address these matters, the Auditor-Controller recommended in its October 2007 report that the Court should consider replacing the PACE system. During the current fiscal year, the Court has taken initial steps to replacing the system. The Court requested funding, through its proposed FY 2010-11 budget request to the Board, for the County's Chief Information Office to evaluate the existing PACE system.

**Recommendation**

- 14. The CEO work with the Court to continue their efforts to replace the PACE system.**

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<sup>9</sup> Generally, a case can take up to six months or longer depending on the complexity of the case. Minor's counsel may be necessary until the child reaches the age of majority.

Attachment II

Top Indigent Defense Expenditures (By eCAPS Category)										
Expenditure Category	FY 2005-06		FY 2006-07		FY 2007-08		FY 2008-09		FY 2009-10 <sup>(1)</sup>	
	Category Total	% to Total	Category Total	% to Total	Category Total	% to Total	Category Total	% to Total	Category Total	% to Total
Attorney - Criminal	\$18,731,644	50%	\$24,449,846	52%	\$30,924,207	53%	\$32,839,828	54%	\$30,166,444	51%
Attorney - Family Law	\$2,585,763	7%	\$2,922,211	6%	\$4,499,557	8%	\$6,197,746	10%	\$6,280,612	11%
Expert Witness - Criminal	\$3,707,593	10%	\$4,283,918	9%	\$5,665,467	10%	\$5,389,593	9%	\$5,809,348	10%
<b>Subtotal</b>	<b>\$25,025,000</b>	<b>67%</b>	<b>\$31,655,975</b>	<b>67%</b>	<b>\$41,089,231</b>	<b>71%</b>	<b>\$44,427,167</b>	<b>73%</b>	<b>\$42,256,404</b>	<b>72%</b>
<b>Total Indigent Defense Costs</b> <i>(From Table 1 above)</i>	<b>\$37,829,957</b>		<b>\$47,204,568</b>		<b>\$58,121,559</b>		<b>\$61,712,399</b>		<b>\$58,739,496</b>	
<i>(1) The annual projection is based on actual expenditures from July 2009 through April 2010.</i>										