

EXECUTIVE SUMMARY

The Sixth Amendment to the Constitution guarantees criminal defendants the right to legal counsel. The Supreme Court of the United States has interpreted this to require that federal, State and local governments provide legal counsel for those criminal defendants unable to afford legal counsel themselves. In California, this function at the appellate court level is divided between the Office of the State Public Defender and a private court-appointed counsel system.

The Office of the State Public Defender (OSPD) is a separate and fully functional agency of the executive branch of State government. The private court-appointed counsel system is a part of the judicial branch of government and consists of three major parts:

- o The private bar, whose members accept court appointments in appellate cases and perform the actual casework.
- o The "appellate projects," which are either non-profit corporations or in one instance a government entity. The appellate projects, under contract to the State Judicial Council and the Administrative Office of the Courts, recruit and evaluate qualified appellate counsel for court appointment, oversee quality and timeliness of casework, and review and make recommendations on compensation claims to the courts, and also take direct case appointments in a very small percentage of cases.
- o The Administrative Office of the Courts, which provides administrative, budget and statistical support to the appellate projects, and also processes payments for appointed counsel.

The two systems duplicate the responsibility for and function of indigent appellate defense.

The cost of defending indigent criminals at the appellate level has been rising steadily in recent years. In the fiscal year 1973-74, prior to the establishment of the State Public Defender, the total cost to the State of private appellate counsel was \$859,920 in real dollars. In fiscal year 1981-82, the State spent \$9.7 million for this purpose, while in fiscal year 1988-89, the total amount budgeted for indigent criminal defense at the appellate level is \$32.0 million--a 230 percent increase in just seven years. Of this total amount, OSPD is currently budgeted \$7.2 million, or 22.5 percent of the total expenditure for this function. The balance of this amount, or approximately \$24.8 million goes to fund the appointment and supervision of private court-appointed counsel.

Due to the increasing criminal appellate workload in California's courts, and the increasing cost of indigent appellate defense, this Commission decided to undertake a study of the OSPD. Since OSPD provides only a portion of indigent appellate defense in the State, its performance could not be judged in a vacuum. Thus, the Commission also collected information on the known costs and performance of the parallel operations of the court-appointed private counsel system. In this way, the

Commission could better evaluate the efficiency and effectiveness of the OSPD.

The Commission found that the division of responsibility for indigent appellate defense between two systems in separate branches of State government creates inefficiencies and duplication in program administration, and results in greater cost and less efficient case handling.

Due to the inadequate information available to the Commission, the Commission could not make accurate cost comparisons between the cost of the work performed by the OSPD and private court-appointed counsel. However, the quality of the professional work of the OSPD is acknowledged by the State judiciary and other interested parties to be equal to or superior to that of the private bar in general.

Since 1983, OSPD has attempted to concentrate its efforts on handling complex non-capital and death penalty cases. More than half of OSPD's caseload now consists of cases with sentences of 15 years to life, life without parole, or death. OSPD has been unable to achieve its own workload standards and goals in recent years, however. This places an increased burden on both the courts and the private counsel system to redirect and absorb unassigned cases.

The Commission further found that OSPD's effectiveness has been badly hampered because it does not have adequately developed workload standards to measure professional staff performance. Without such standards, individual performance cannot be adequately assessed, and valid estimates of overall workload and goal achievement by OSPD management and outside control agencies cannot be made.

The Commission determined that the lack of a consistent case selection and assignment process has hampered the OSPD's workload management efforts. The methods used for case selection vary widely among each of the OSPD's three regional offices. The lack of a consistent case selection and assignment process has hampered workload goal achievement because the OSPD cannot be certain of the timing of the assignment, or the availability of cases for assignment, in the majority of its regional offices and in the State's appellate court districts.

OSPD's case-tracking and timekeeping systems have not been implemented adequately and do not readily provide information needed by OSPD management and State control agencies to monitor and control the work performed by the staff of the OSPD. Although the OSPD has attempted to implement an integrated management information system, it has encountered both technical and procedural problems which have delayed implementation.

Finally, the Commission determined that the number of trial court death sentences, as well as the amount and complexity of legal work required on appeals from a penalty of death has increased in recent years and is projected to continue to increase in the future. For the period from 1978 to 1987, five death penalty cases were affirmed on automatic appeal by the California Supreme Court. From January 1987 through August 1988, 37 of the 49 death penalty appeals decided by the State Supreme Court have been

affirmed. Both prosecutors and defense counsel assume that a significant proportion of current and future death penalty cases will also be affirmed by the State Supreme Court. A large number of these affirmed cases will be reviewed by the federal courts and will require research and consideration of issues not necessarily confronted before, or confronted in a different form. Methods of process and procedure in federal criminal appeals cases will also be different and will require additional work.

The Administrative Office of the United States Courts currently estimates that an appellant's attorney could spend in excess of 1,000 hours of time pursuing a simple appeal of a death penalty in the federal venue, at an estimated total cost in excess of \$80,000. This may potentially result in OSPD needing to spend a significant amount of additional time and resources pursuing federal appeals in many of the 43 capital cases it currently handles as well as future capital case assignments.

The Commission's report presents eight major recommendations for improving the operations of the Office of the State Public Defender, and insuring the continued provision of the highest quality of criminal indigent appellate defense in California. These recommendations include:

1. The Office of the State Public Defender, as a distinct executive branch agency, should be abolished, and the functions of the current SPD, the Appellate Projects and private court-appointed counsel should be merged into a single autonomous agency within the judicial branch of government. The Legislature, with the concurrence of the Governor, should enact appropriate legislation to carry this out. This new agency may be designated the Appellate Defense Agency (ADA). To allow for a smooth transition, the effective date of the organization should be determined by the Judicial Council, but in no case should exceed four years from the date of enactment. This will result in cost savings due to consolidation of administrative functions and greater efficiency in case handling.
2. The Director of the Appellate Defense Agency (ADA) shall be a member of the State Bar of California and be appointed by the Judicial Council. The Agency should be staffed by attorneys appointed by the Director, and will have as its workload all criminal appeals. The Agency should contract with the Administrative Office of the Courts for administrative support services. The Agency should further have the authority to contract with non-profit corporations, government agencies, and private members of the bar to accept appointment or supervise criminal appeals as necessary.
3. Pending the effective date of the above and with the advice and consent of the Judicial Council, the Office of the State Public Defender should continue its efforts to develop, implement and enforce workload production standards for its professional staff.
4. The current Office of the State Public Defender and the Appellate Defense Agency should increase its current law clerk program in order to expose more law students to criminal appellate work and to identify potential staff candidates.

5. The current Office of the State Public Defender and new Appellate Defense Agency should assign a high priority to implementing a comprehensive timekeeping and docketing system. In addition, the staff in each regional office should be fully trained to use and maintain the data bases for this system.
6. The Judicial Council should periodically retain an independent consultant to perform a detailed cost efficiency study of the Appellate Defense Agency and its functions.
7. The Appellate Defense Agency should collect, maintain, and annually report to the Judicial Council cost information relating to the cost of the indigent criminal appellate work including, but not limited to: name of appellant; conviction being appealed by statute section; time spent on case by category of activity for professional, clerical and administrative staff; identity of attorney(s) assigned to each case, and; any additional ancillary costs and services incurred, by category.
8. The Appellate Defense Agency should limit itself solely and directly to legal representation of indigent individuals convicted of felonies. It should in no way engage in legislative advocacy or educational efforts of incarcerated individuals or any activity other than pure individual court representation. Provided, however, the Director of the Appellate Defense Agency, with the consent of the Judicial Council, may respond to questions, if any, initiated and posed to the Director by legislators in connection with pending legislation.