



# County of San Diego, California

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**Auditor and Controller**

*Final  
Report*

## **Multiple Conflicts Office Performance Audit**

Office of **A**udits & **A**dvisory **S**ervices

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**June 2009  
Report No. A08-007**



# COUNTY OF SAN DIEGO

## INTER-DEPARTMENTAL CORRESPONDENCE

June 30, 2009

TO: Raymond A. Fernandez  
Deputy Chief Administrative Officer  
Public Safety Group

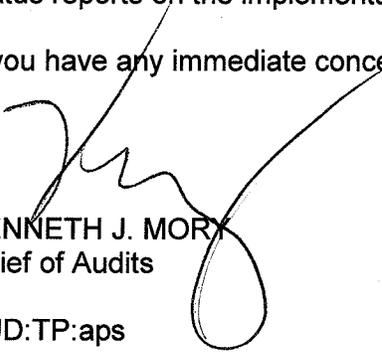
FROM: Kenneth J. Mory  
Chief of Audits

### FINAL REPORT: MULTIPLE CONFLICTS OFFICE PERFORMANCE AUDIT

Enclosed is our report on the Multiple Conflicts Office Performance Audit. The report includes various audit findings and recommendations.

We have reviewed your responses and have attached them to the audit report. The actions taken and planned, in general, are responsive to the findings and recommendations in the report. As required under Board Policy B-44, we respectfully request that you provide quarterly status reports on the implementation progress of the recommendations.

If you have any immediate concerns about the report, please contact me at (858) 495-5662.

  
KENNETH J. MORY  
Chief of Audits

AUD:TP:aps

Enclosure

c: Donald F. Steuer, Chief Financial Officer  
Tracy M. Sandoval, Assistant Chief Financial Officer/Auditor and Controller  
Dorothy Y. Thrush, Group Finance Director, Public Safety Group

## EXECUTIVE SUMMARY

At the request of the Public Safety Group (PSG) Executive Office, the Office of Audits & Advisory Services (OAAS) has completed an audit of the Multiple Conflicts Office (MCO, or the 'Program'). The objective of the audit was to determine if the utilization of the MCO in combination with the San Diego County Bar Association's Private Conflicts Counsel Program (PCC) is cost efficient.

Audit work revealed that while the introduction of the MCO organization has provided a control to prevent contract cost overruns, the cost efficiency of the program under its 2-year profile of case assignments is not favorable to the terms and conditions of the current PCC contract. Audit work revealed the following findings and observations:

***Contract Overruns Eliminated Following MCO Introduction*** – The introduction of the MCO organization was a key factor in eliminating contract cost overruns (true-up payments) resulting from PCC case assignments exceeding their targeted amount. Class V and Class VI cases, which constitute the majority of MCO's case load, represented approximately 64% of the cost overruns in FY 2003-04 and approximately 78% of the overruns in FY 2005-06. True-up payments over a 3-year period (FY 2002-03 through FY 2004-05) totaled approximately \$4.5M.

***PCC Contract Underutilized in FY 2006-07*** – The net PCC contract totals for FY 2005-06 indicated a minimal underutilization of (\$21K); however, in FY 2006-07 the net totals for all case categories were approximately \$689K below the fixed minimum cost. While MCO case assignments contributed to the underutilization, other factors impacted the overall control of contract coverage and underutilization including: contract terms and conditions for fixed minimum price and net payment method, PD/APD resource levels and capacities, variances in crime rate and court cases assignments, and contract monitoring controls.

***MCO Running Cost Per Case Increasing*** – A cost analysis of historical and current MCO activities revealed an increasing overall running cost per case that now exceeds the fixed price of Class VI cases in the current PCC contract. Excluding overhead, the running cost per case exceeds the current PCC fixed price of Class V cases but is less than the fixed price of Class VI cases. The increasing costs are due primarily to a higher concentration of Class VI cases and one Death Penalty case, all of which were still open cases at the time of this review.

***Contract Cost Would Have Been Lower than MCO Direct Cost*** – Our analysis included an evaluation of what the contract cost would have been had the entire MCO case load been assigned to PCC. The net effect of the increased case assignments would have resulted in a true-up payment in FY 2005-06 of approximately \$743K (plus travel expenses) and no payments (\$0.00) in FY 2006-07, while the cumulative (2-year) MCO direct costs were approximately \$1.8M. This does not include the impact of 1 DP case assigned to MCO that would have been outside of the contract terms and bid separately.

***Overall Cost of Secondary Indigent Defense Adequately Controlled*** – From an overall perspective, it was observed that the cost of secondary indigent defense (APD, MCO and PCC) has remained relatively stable and controlled. Since FY 2003-04, secondary indigent defense has remained in a narrow band between \$20.4M and \$21.7M, increasing only 0.5% over that period.

***Special Circumstances Cases May Represent Significant Cost Avoidance*** – In cases where a murder is committed under special circumstances, the District Attorney (DA) must make a decision prior to trial on whether to pursue the death penalty (DP) or life without the possibility of parole (LWOP). DP cases, which fall outside the PCC contract, are usually more complex and more costly than LWOP cases. MCO stated that in 6 special circumstances cases where the defendant was facing the death penalty, only one DP conviction had been pursued by the DA. The average cost per case for DP cases assigned to PCC was approximately \$529K.

## **BACKGROUND**

The Office of Audits & Advisory Services (OAAS) completed an audit of the Multiple Conflicts Office (MCO, or the 'Program') at the request of the Public Safety Group (PSG) Executive Office. MCO was brought into existence, in part, in response to the escalating cost for indigent defense conflict cases assigned under contract with the San Diego County Bar Association (SDCBA). The objective of the audit was to determine if the utilization of the MCO in combination with the San Diego County Bar Association's Private Conflicts Counsel Program (PCC) is cost efficient.

## **AUDIT SCOPE AND LIMITATIONS**

This audit focused on the cost of activities performed by the MCO organization. Actual costs were utilized whenever available. For some current year costs and ongoing case costs, conservative estimates were utilized based on projected cost or attorney evaluation.

External data comparisons and volume assessments were limited to Class V, Class VI and Death Penalty cases for cases assigned to the Public Defender (PD), the Alternate Public Defender (APD), MCO and PCC through the San Diego Superior Court for adult criminal cases only. Death Penalty case cost data was limited to cases assigned to PCC and MCO.

While some data validation was conducted for MCO data maintained in the Justice Case Activity Tracking System (JCATS), no data validation was conducted for JCATS data provided from PD and APD and only limited tests of completeness for PCC case data were performed.

The scope of the audit did not include an assessment of or recommendations for contract renewal terms and conditions, contract monitoring activities, charges for retained indigent defense, or the quality of services.

Projection of future cases for consideration of strategic direction is limited due to the uncertainty of socio-economic environmental conditions and its potential impact on case activity.

This audit was conducted in accordance with auditing standards prescribed by the Institute of Internal Auditors, Inc., as required by California Government Code, Section 1236.

## **METHODOLOGY**

OAAS implemented a multi-faceted methodology to assess the cost effectiveness of the Program. The following bullets briefly highlight the methods used:

- Reviewed and Validated PCC and MCO case and expenditure data;
- Performed a trend analysis of Class 5 + cases assigned to PD, APD, MCO and PCC;
- Performed a Cost per Case analysis and performed a cost comparison between MCO and PCC for Class V, Class VI and Death Penalty cases;
- Performed an analysis and comparison of average case duration by unit, class and disposition;
- Performed interviews and caseload research to assess resource capacity;
- Performed an impact analysis based on past, current and projected MCO eligible cases.

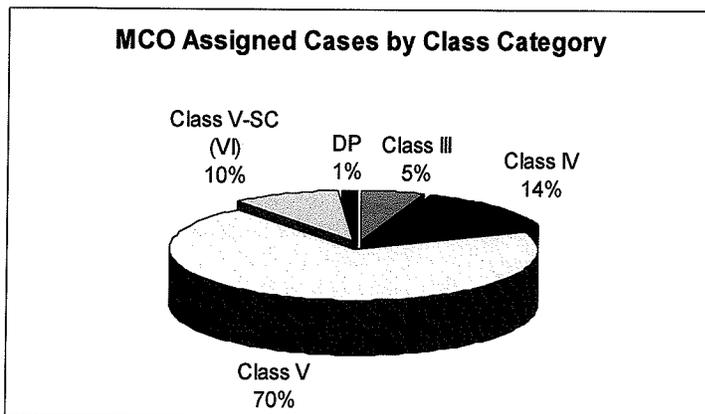
**OVERVIEW**

**The MCO Program**

In 2005, the Multiple Conflicts Office (MCO) was created as an independent public defense unit to provide legal representation for court appointments in major crime and high profile cases. The MCO office accepts appointments in cases which the Public Defender (PD) and the Alternate Public Defender (APD) are unable to accept due to a conflict of interest or other order of the court. While the program was created utilizing existing APD resources and is fiscally budgeted as a part of APD, MCO maintains a 'glass wall' of independence through aggressive protection of case information and strategies from other public defense units, a separate case management system, and education on policies for employees and temporary workers regarding the need to maintain case confidentiality.

The MCO Organization consists of 4 trial attorneys, 1-2 investigators, an administrative secretary, and various student and temporary workers. As of October 30, 2007, MCO had been assigned 74 adult criminal cases.

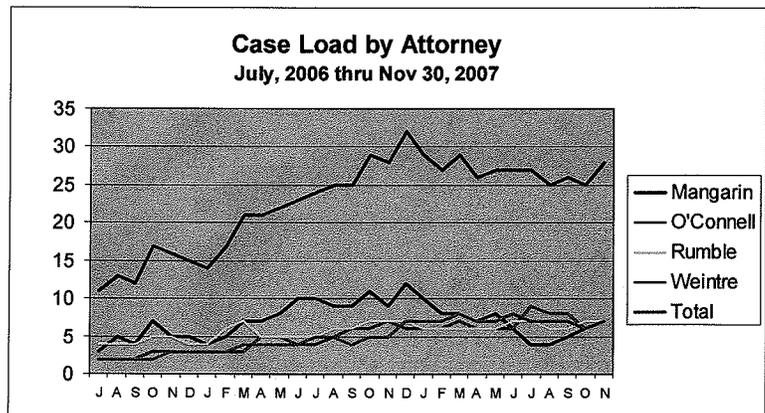
The MCO mission is to focus primarily on the more difficult adult murder and capital cases (Class V, Class VI and Death Penalty), but they also receive assignments for lower level and companion cases. The pie chart



shows the percentage of case assignments by case type, with approximately 80% of the case profile consisting of Class V and Class VI cases.

While there is some variance on how case Class is defined, Class V-SC (special circumstances) is generally comparable to PCC Class VI where life without the possibility of parole is sought.

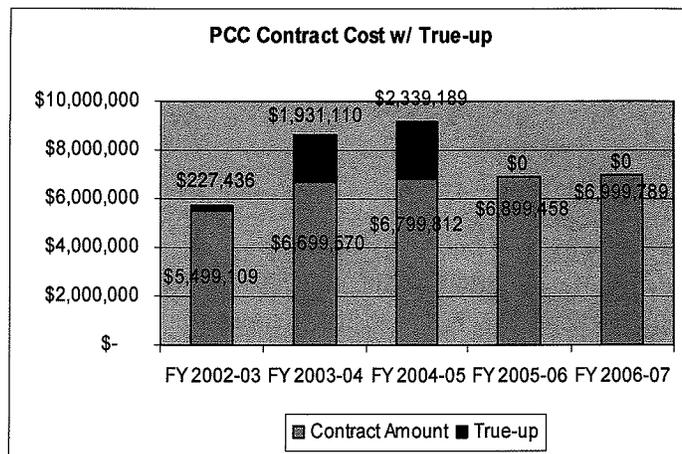
An analysis of the case loads by attorney assignment revealed a case capacity of approximately 7 open cases per attorney. The number of actual cases assigned to the unit will vary based on case type and duration. Excluding cases that were relieved or promptly declared a conflict; the program was assigned 33 cases in FY 2005-06, 28 cases in FY 2006-07, and is currently on pace for approximately 22 cases in FY 2007-08.



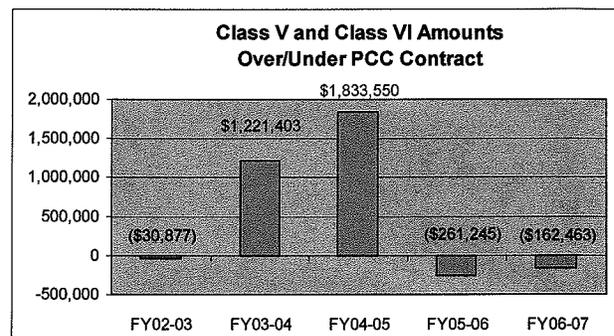
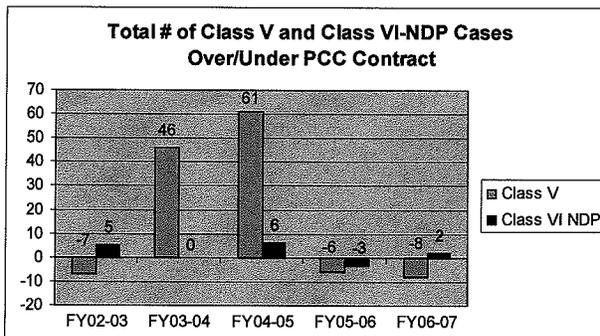
**The PCC Contract**

The current indigent defense contract, initiated on September 1, 2002 and running through August 31, 2008, is administered by the Private Conflict Counsel (PCC) on behalf of the SDCBA, while the PSG Executive Office administers the contract on behalf of the County. The terms of the contract provide for a minimum fixed price (with annual adjustments) based on the unit cost of a specified (target) number of cases in 14 case categories. If the net per-case costs are greater than the fixed price, the County compensates PCC for the difference. An example of the case costs and targets for FY 2007-08 are provided in Attachment 1. For Class V and Class VI cases, the targeted number of cases each year is 50 and 4 respectively. Not included in the scope of the contract are death penalty (DP) cases, cases involving sexually violent predators (SVP), and retained indigent defense<sup>1</sup> cases.

This chart summarized the total cost for cases assigned to PCC within the scope of the current contract. The minimum fixed price is shown in blue with annual increase per contract terms. True-up payments due to net case volumes exceeding contract target amounts are shown in purple. True-up payments over a 3-year period were totaled approximately \$4.5M. There were no contract overruns in FY 2005-06, coinciding with the establishment of the MCO organization.



While the contract results above consider all 14 case categories, the introduction of the MCO organization primarily impacted Class V and Class VI case assignments. The charts below show the over/under for Class V and Class VI cases throughout the contract period.



Between FY 2004-05 and FY 2005-06 the number of Class V's assigned to PCC (targeted at 50) decreased from 111 to 44 cases while Class VI cases (targeted at 4) decreased from 10 to 1. That resulted in an overage of approximately \$1.8M (78% of total true-up payment) being reduced to an underage of approximately \$261K.

<sup>1</sup> Retained indigent defense cases occur when defendants who are not initially eligible for public defense become eligible during proceedings, and the court orders continuation of the current private counsel at public expense.

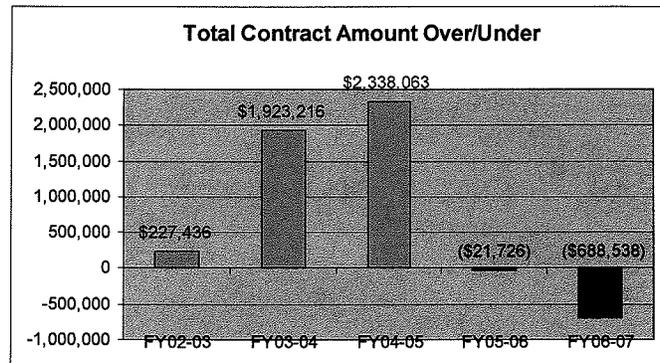
### FINDINGS AND OBSERVATIONS

Audit work revealed that while the introduction of the MCO organization has provided a control to prevent contract cost overruns, the cost efficiency of the program under its 2-year profile of case assignments is not favorable to the terms and conditions of the current PCC contract. Audit work revealed the following findings and observations.

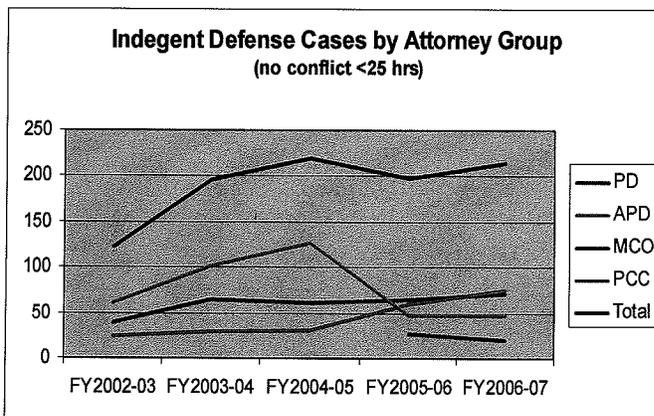
#### Finding I: PCC Contract Underutilized In FY 2006-07

Audit work revealed that while the net PCC contract totals for FY 2005-06 indicated a minimal underutilization of (\$21K), the over/under chart shows that in FY 2006-07 the net totals for all case categories were approximately \$689K under the fixed minimum cost. This, in effect, represents services paid for but not provided. MCO was introduced to help control contract costs; however, there are many other factors affecting the ability to control contract overage and underutilization, including:

- Contract terms and conditions for fixed minimum price and the net payment method;
- PD/APD resource levels and capacities;
- Variances in crime rate and court cases assignments; and
- Contract monitoring controls.



In FY 2005-06, the underutilization in Class V and Class VI reported previously was offset by overages in other case categories due to the net payment method resulting in a net effect very close to the contracted minimum payment amount. Despite a reduction in the underage of Class V and Class VI in FY 2006-07, reductions in case assignments in the other case categories combined to produce the overall underutilization.



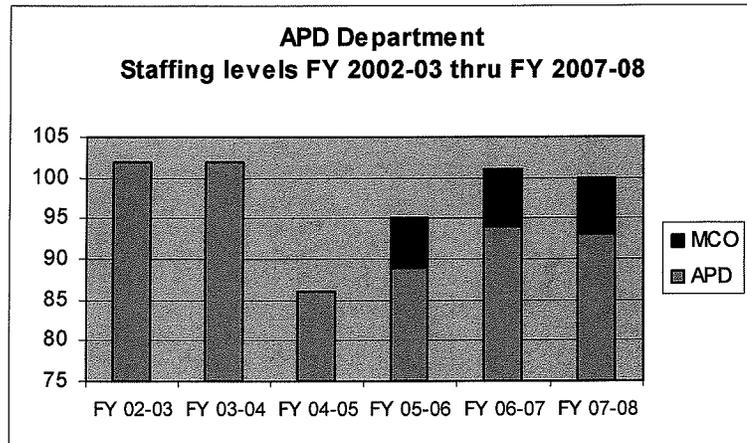
In looking closer at the Class V and Class VI case demand, OAAS performed an analysis of the total case assignments over the period of the current contract (PD, APD, MCO and PCC assignments). The chart indicates case assignment estimates by attorney group. The total number of Class V and Class VI cases assigned for indigent defense increased between FY 2002-03 and FY 2003-04 and remained at or about 200 cases (minus declared conflicts<sup>2</sup>) through FY 2007-08.

<sup>2</sup> Cases excluded from the case trend analysis were based on case outcomes indicating declared conflicts or case relief with less than 25 attorney hours as reported in JCATS data provided by each respective County attorney group.

In addition to the cases assigned to MCO, APD was also assigned an increasing number of cases in FY 2005-06 and FY 2006-07.

As the total indigent cases continued to increase from FY 2003-04 to FY 2004-05, staffing reductions occurred in FY 2004-05, which correlates to the highest true-up payment period. The introduction of MCO as well as staffing increases in APD has resulted in a combined staffing and capacity nearing levels prior to the FY 2004-05 reductions.

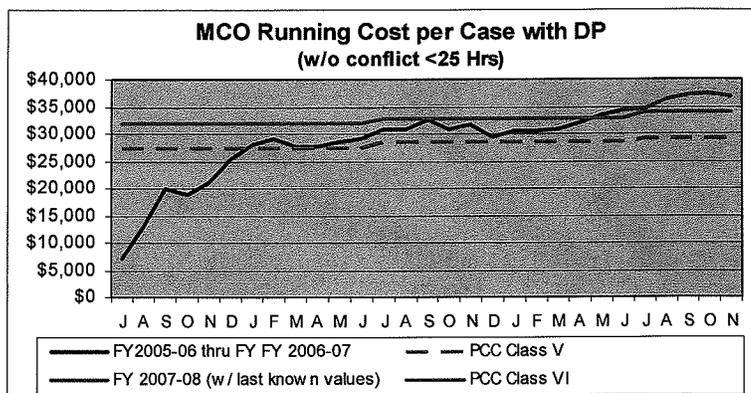
The charts also show that while APD staffing levels have remained below FY 2003-04 levels, Class V and Class VI case assignments taken by APD remained relatively constant in FY 2004-05 and increased in FY 2005-06 and FY 2006-07.



**Finding II: MCO Running Cost Per Case Increasing**

A cost analysis of historical and current MCO activities revealed an increasing overall cost per case, exceeding the fixed price of Class VI cases in the current PCC contract. A running cost per case was utilized versus an actual cost per case due to the limited case volume and the high percentage of open cases at the time of the audit. The chart below shows the cumulative fully loaded cost of the MCO office divided by the number of cases assigned over time.

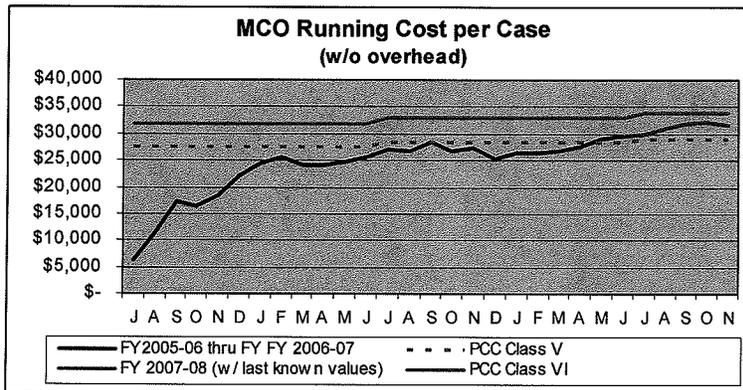
This increasing cost is primarily due to a growing concentration of cases involving special circumstances, all of which were still open at the time of the analysis. However, the running cost per case shown is believed to be conservative as it utilizes the last available cost estimates for labor and overhead and does not reflect the increasing costs of the more expensive ongoing cases.



When overhead costs are excluded<sup>3</sup>, the running cost per case is reduced as shown below. The resulting running cost per case is higher than the current fixed price of Class V cases, but lower than the fixed price for Class VI cases. The County uses the "avoidable cost" method for cost comparisons, where a vendor bid or external cost estimate is compared to the internal costs the County would not incur if the service was contracted.<sup>4</sup>

<sup>3</sup> Overhead cost components include the MCO portions of office lease, administrative support, and A-87 cost, all of which are substantially unavoidable and would be incurred by APD if MCO did not exist.

<sup>4</sup> County of San Diego cost comparison guide, September 15, 1998.

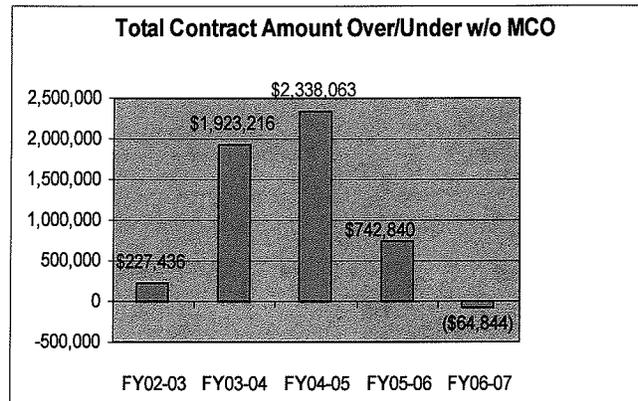


As of November 30, 2007, MCO had been assigned to 7 Class VI (or V-SC) and 1 DP case, all of which were still in an open status. A projection of expected time and duration of all open cases was performed and is included in Addendum 1. Due to the complexity and longevity of these cases, it should be expected that the cost per case will continue to increase as the MCO portfolio

becomes more concentrated with Class VI and DP cases. Case volume should be expected to remain relatively constant at current or lower levels if the number of attorneys remains fixed.

**Finding III: Contract Cost Would Have Been Lower Than MCO Direct Cost**

In assessing the overall cost effectiveness of the MCO organization as a cost control structure, we also analyzed the contract expenditure that would have resulted had the MCO organization not been implemented. All assigned cases, except MCO declared conflicts, were added to the assignment totals reported in FY 2005-06 and FY 2006-07. The chart shows that in FY 2005-06 a true-up payment would have been required of approximately \$743K (plus travel); however, the net effect in FY 2006-07 would have been very close to the targeted fixed payment amount. During that same two-year period, the avoidable direct cost of the MCO organization was approximately \$1.8M. The net effect of this would have been a savings of approximately \$1.1M. This does not take into account the potential impact of the MCO organization on special circumstances cases.



**Observation: MCO Involvement in Special Circumstances Cases May Represent Significant Cost Avoidance**

Despite the apparent higher service costs of the MCO organization, special circumstances cases could represent an area where MCO provides significant cost control. Under California law, a person found guilty of murder in the first degree can be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. However, in cases where a murder is committed under special circumstances, the DA must make a decision prior to trial on whether to pursue the death penalty (DP) or life without the possibility of parole (LWOP).<sup>5</sup>

Research performed indicated that DP cases, which fall outside the PCC contract, are usually more complex and more costly than LWOP cases. Factors for the increased costs include mandatory appeals, more pre-trial research, more motions, higher ancillary costs, and longer

<sup>5</sup> Section 190.2 of California penal code lists 22 different findings of special circumstances.

trial time. Since FY 2001-02, there have been 9 DP cases outsourced for indigent defense, all of which were coordinated by PCC. A review of the charges to the County for 7 cases where data was available revealed an average cost per case of approximately \$529K (excluding one case with ancillary cost only of approximately \$30K). Of the total amount, approximately 52% of the cost was base attorney fees and approximately 48% was ancillary costs.

The MCO Chief Trial Deputy stated that one specialized skill it provides is its ability to avoid pursuit of the death penalty. It was also stated that in 6 special circumstances cases where the defendant was facing the death penalty, only one death penalty conviction had been pursued.

During the time the audit was being conducted, a new agreed upon protocol for court case assignment was introduced. The protocol provided guidance to the courts that for all murder cases with special circumstance, where PD and APD cannot be assigned, the "third tier" assignment would go first to MCO, while all other murder cases would go first to PCC. MCO stated that this protocol would provide an opportunity to; 1) focus on reducing the number of death penalty cases sought by the DA, and 2) provide a cost-effective solution for cases where the DP is sought due to experience and specialization.

## RECOMMENDATIONS

**Recommendation I:** Board Policy B-63 on optimal service delivery states that the goal in providing a service, regardless of the delivery method, should be quality, efficiency and productivity. Therefore, based on our analysis, OAAS recommends that MCO case assignments as a contract cost containment control be discontinued, contingent upon favorable contract terms and conditions of the PCC contract renewal.

**Recommendation II:** While there was not sufficient information to perform a thorough cost analysis, OAAS believes the new protocol proposed by MCO and PCC for MCO assignment of cases where special circumstances are involved merits a period of testing to assess its effectiveness as a cost control strategy. OAAS recommends that the MCO mission statement be modified and specific program objectives and performance criteria developed by which the effectiveness of the new protocol can be assessed.

## COMMENDATION

The Office of Audits & Advisory Services commends and sincerely appreciates the courteousness and cooperation extended by the MCO, APD, and PSG Executive Office officers and staff throughout this audit.

## AUDIT TEAM

Tom Philipp, Senior Auditor

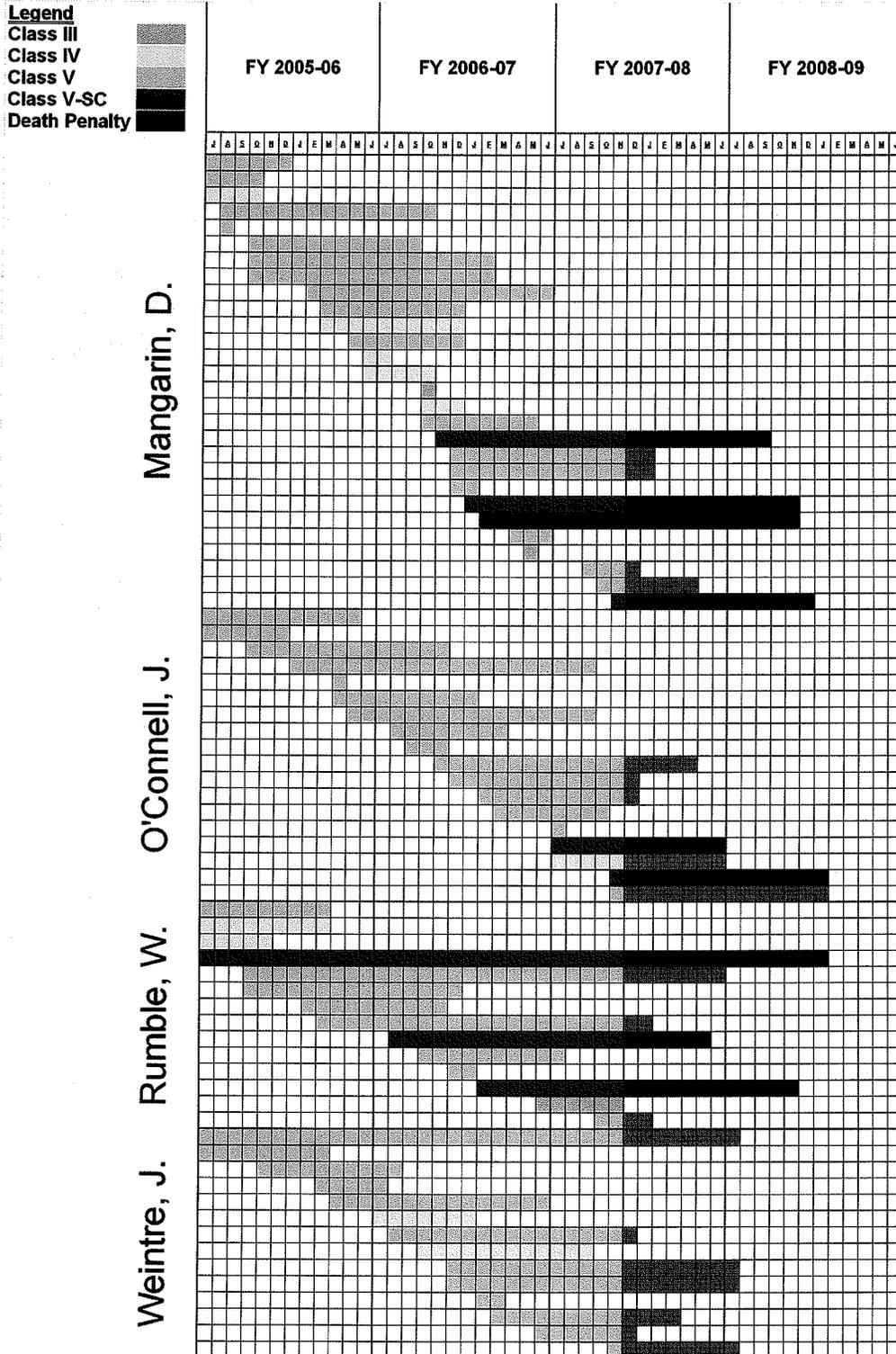
**Attachment 1  
PCC Contract Term FY 2007-08**

**6.6 CONTRACT YEAR 2007-2008 (ending June 30, 2008)**

Item #	Description	Unit	Qty	Unit Price	Extended Price
600	Full cost, including overhead and ancillary costs for Class I and II cases, including "Pro per" and "Pro per" advisor cases.	Per case	1,050	\$429.21	\$450,670.50
601	Full cost, including overhead and ancillary costs for Class III cases and 707 cases.	Per case	1,040	\$930.52	\$967,740.80
602	Full cost, including overhead and ancillary costs for Class IV cases and 707 cases including "Pro per" and "Pro per" advisor cases.	Per case	550	\$4,595.77	\$2,527,673.50
603	Full cost, including overhead and ancillary costs for Class V cases and 707 cases, including "Pro per" and "Pro per" advisor cases.	Per case	50	\$29,052.23	\$1,452,611.50
604	Full cost, including overhead and ancillary costs for Class VI cases (non-death penalty).	Per case	4	\$33,977.36	\$135,909.44
605	Full cost, including overhead and ancillary costs for Class I and II appeals.	Per case	60	\$3,025.38	\$181,522.80
606	Full cost, including overhead and ancillary costs for Misc. Civil cases (e.g., contempt, freedom from custody, mental health).	Per case	80	\$775.38	\$62,030.40
607	Full cost, including overhead and ancillary costs for Delinquency cases to include: 707, 601, 602 and all review hearings.	Per case	1,700	\$507.93	\$863,481.00
608	Full cost, including overhead and ancillary costs for Class I and II Probation Revocation.	Per case	380	\$305.29	\$116,010.20
309	Full cost, including overhead costs and ancillary costs for Class III through V Probation Revocation cases.	Per case	530	\$391.34	\$207,410.20
610	Full cost, including overhead and ancillary costs for witness counseling and Class III Motions to Withdraw Plea.	Per case	200	\$251.29	\$50,258.00
611	Full cost, including overhead and ancillary costs for SARB hearings, motions for new trial, "Romeros", and Class IV and V motions to withdraw plea.	Per case	50	\$1,020.56	\$51,028.00
612	Full cost, including overhead and ancillary for Class I and II motions to withdraw plea.	Per case	50	\$280.30	\$14,015.00
613	Full cost, including overhead and ancillary for "Pro per" and "Pro per" advisor cases for Class III cases.	Per case	25	\$767.52	\$19,188.00
<b>Total Cases</b>			<b>5,769</b>	<b>SUBTOTAL:</b>	<b>\$7,099,549.34</b>
<b>GRAND TOTAL CASES: 33,622</b>				<b>2002-2008 GRAND TOTAL:</b>	<b>\$39,997,286.91</b>

Invoices shall be paid in accordance with ¶23.2.1, Original Invoices, below specifying the dates and manner by which CONTRACTOR invoices shall be paid.

**Addendum 1**  
**Projected Open Case Duration**



**DEPARTMENT RESPONSE**



## County of San Diego

PUBLIC SAFETY GROUP

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DEPUTY CHIEF ADMINISTRATIVE OFFICER  
(619) 831-4535  
FAX (619) 232-2436

June 26, 2009

TO: Kenneth J. Mory, Chief of Audits  
Office of Audits & Advisory Services

FROM: Raymond A. Fernandez, Deputy Chief Administrative Officer  
Public Safety Group

### Response to Report A08-007, Multiple Conflicts Office Performance Audit

We have reviewed the final draft report Multiple Conflicts Office (MCO) Performance Audit dated March 2008 (Report Number A08-007). This review was originally requested to determine whether the utilization of the MCO in combination with the previous San Diego County Bar Association Private Conflicts Counsel Program (PCC) was cost efficient.

At the time of this response, the contract with the San Diego County Bar Association that was in place at the time of this review has expired and has not been renewed.

With respect to the findings of this report:

**Finding 1. PCC Contract Underutilized in FY 2006-2007.** The Public Safety Group Executive Office agrees with this finding.

**Finding 2. MCO Running Cost Per Case Increasing.** The Public Safety Group Executive Office agrees with this finding. During the time period reviewed by the auditors, the caseload of the MCO included a growing concentration of special circumstances (Class VI) cases.

**Finding 3. Contract Cost Would Have Been Lower than MCO Direct Cost.** The Public Safety Group Executive Office agrees with this finding, although additional information should be noted. The analyses conducted by the auditors compares the total cost of the MCO with the cost of assigning those cases to the PCC using the previous fixed price per case classification schedule that is no longer in effect. Those contract prices may not have reflected actual contractor costs. One of the issues that the contractor brought to the County's attention during contract negotiations was that they desired to change the structure of the contract to cease using the fixed price per case classification model due to the contractor's increasing costs. The MCO staff also notes that the total cost of the MCO included resources expended on one or more death penalty cases. Those cases did not have a fixed price per

case under the contract with PCC. If those cases were not assigned to the MCO, the County would have incurred additional costs for payments to panel attorneys and for ancillary costs. The audit report notes that the average cost of a death penalty case was estimated to be \$529,000. The auditors noted that one death penalty case was assigned to MCO during the review period.

**Observation. MCO Involvement in Special Circumstances Cases May Represent Significant Cost Avoidance.** The Public Safety Group Executive Office agrees with this finding.

With respect to the recommendations of this report:

**Recommendation I.** This recommendation could not be implemented since the previous PCC contract has expired and has not been renewed.

**Recommendation II.** This recommendation will be implemented. As approved by the Board of Supervisors on May 12, 2009 (1) and June 16, 2009 (24), these services will be provided more efficiently and economically, while preserving legally-required "ethical wall" separation, by consolidating the separate operations are consolidated into one Department of Public Defender. These separate functions will now be collecting standard cost and activity information. This information will be used to develop specific performance and cost effectiveness measures during Fiscal Year 2009-2010.

The Public Safety Group Executive Office, the MCO and the Department of the Alternate Public Defender appreciate the efforts and professionalism of the Office of Audits and Advisory Services.

Sincerely,



RAYMOND A. FERNANDEZ, Deputy Chief Administrative Officer  
Public Safety Group