

# Alternate Defender Program Worries Conflicts Attorneys

**By Robert Selna**

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Alameda County criminal conflicts panel attorneys are in a bind.

They have seen their relatively low pay stagnate for years. But they don't want to push for more, fearing that might put them out of business.

During previous economic downturns, counties have created second public defenders' offices, or "alternate" offices, as a cost-effective way to deal with conflicts.

But such offices take work away from private criminal defense attorneys who in many instances depend on conflicts cases to pay the bills.

In January, Alameda County Public Defender Diane Bellas took a step in the direction of a second defender's office. On a pilot basis, she created a separate division

where five experienced deputy public defenders handle conflicts.

While there is no plan to establish a larger, more permanent alternate defender's office, attorneys in Alameda County say the threat is always looming, forcing conflicts lawyers to take less pay to avoid losing work.

"Compared to other counties we are underpaid — grossly underpaid," said Jim Giller, an Oakland private criminal defense attorney who is chairman of the county's conflicts panel committee. "But we have to walk a fine line because the argument is always out there that the alternate defender's office is cheaper."

Comparing the conflicts pay in Alameda to other large urban counties is difficult because pay scales differ. One significant drawback to Alameda's fee schedule, say

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lawyers, is that except for death penalty cases, the county pays conflicts attorneys based on services performed as opposed to an hourly rate.

For instance, a noncapital homicide in Alameda County pays a \$1,400 base rate, \$200 for a preliminary hearing and \$250 for trial sessions.

San Francisco, on the other hand, pays \$92 an hour for similar cases regardless of the particular service the attorney performs. Sacramento also pays by the hour. A serious felony in Sacramento pays \$72.55 for in court sessions and \$55.20 for "out of court preparation."

In 2002, Alameda County's capital case pay rose from \$65 to \$100 an hour, putting it on par with neighboring counties. But, in other felony cases, Alameda's fee-for-service model continues to translate to lower pay when compared with counties that pay by the hour.

"You make much less money when you get paid a base amount, because attorneys are always having to wait around in court and having to drive back to the office from the jail or other things that take time, and you're not getting paid for it," said Michael Roman, a Berkeley-based defense attorney who also serves on the panel committee.

The conflicts panel's approximately \$4 million annual budget expires in 2005. Due to tough times, the panel committee voluntarily gave up a built-in 7 percent budget increase in 2003-2004, and it will pass on an increase again in the coming fiscal year, Giller said.

But Giller and Roman insist that the poor pay has not translated to sub par representation for the panels' indigent clients.

"Nobody has ever complained about the level of competency of our lawyers; there has never been any criticism of the panel as a group," Giller said. "I don't know if our county is unique, but we've always had lawyers who want to do this kind of work."

Some attorneys believe otherwise. Kim Kupferer, a Berkeley criminal defense solo-practitioner and former long-time deputy public defender, said she believes the fee schedule in Alameda County "breeds incompetence."

Though she did not identify any cases that had been handled incompetently, Kupferer said that when attorneys are paid the same amount regardless of how much time they spend preparing for a hearing, motion or trial, incentive for putting in long hours declines.

"The motivation is to plead a case out because they're only going to get a few hundred dollars for a felony case ... and then you get another fee for sentencing," Kupferer said. "Either you do that and make enough to survive or you operate as competent counsel and you don't make enough to survive."

She said the best way for a defense attorney to handle felony cases is to prepare in anticipation of going to trial while working to negotiate a decent plea bargain. The preparation takes time and energy that Alameda's fee schedule does not reward, she said.

Los Angeles Public Defender Michael Judge chairs a State Bar committee that is reviewing standards for indigent defense. He said he believes counties "get what they pay for" when it comes to conflicts lawyers.

"A lot of lawyers won't do these cases if it's not worth their time financially," Judge said. "Low pay will cause lawyers with a lot of years of experience to stay out of the conflicts pool."

There is no state or national standard governing conflicts panel pay, said David Carroll, director of research and evaluation for the National Legal Aid and Defender Association.

The closest thing to a national guideline is the federal conflicts panel pay schedule — \$90 an hour for felony cases and \$125 for capital cases, Carroll said.

Elena Condes, a Berkeley private criminal defense lawyer who serves on the Alameda County conflicts panel committee, said that while she agrees that flat fees provide "an implicit incentive to resolve cases more quickly rather than negotiating and working a case up," many attorneys in Alameda County are dedicated to doing a good job for indigent defendants.

"Like any profession, there are people who do good work and that's who they are, regardless of pay and what they are being asked to do," Condes said. "And then there are going to be people who take advantage of the system and don't do good work."

She said a significant problem is that some attorneys attempt to derive all of their work from the panel, something it was not intended to provide.

Alameda County District Attorney Tom Orloff said he believes conflicts panel attorneys are providing competent counsel, but he expressed some concern about seeing fewer young attorneys on the panel.

"Ten to 15 years from now, it does not look like a lot of people will be doing it [taking cases from the panel]," Orloff said. "From what I understand it's a pretty tough grind to make money at it."

Bellas said she created the small alternate defender office in an effort to save the county money as it struggles with a tight budget. She said it will stay open as long as funding permits and that the decision to create a permanent alternate defender's office rests with the county.

Bellas declined to comment on the county conflicts panel fee schedule.

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