RESOLUTION - ACTION REQUESTED 2014-592

MEETING: November 25, 2014

TO: The Board of Supervisors

FROM: Steve Dahlem, County Counsel/Interim HR Director-Risk Manager

RE: First Amendment to Legal Services Agreement

RECOMMENDATION AND JUSTIFICATION:
Approve First Amendment to the Legal Services Agreement for Indigent Defense Legal Services with Eugene Action, and Authorize the Board of Supervisors Chair to Sign the Amendment.

Michael A. Fagalde has submitted his resignation effective November 30, 2014, as a result of recent elections selecting him as a Superior Court Judge. Eugene Action is willing to provide legal services pursuant to the Legal Services Agreement.

BACKGROUND AND HISTORY OF BOARD ACTIONS:
On May 21, 2013, the Board of Supervisors adopted Resolution 13-198 approving a Legal Services Agreement with Gary Collings, Michael Fagalde, and Neal Douglass for Indigent Services.

ALTERNATIVES AND CONSEQUENCES OF NEGATIVE ACTION:
Do not approve the Amendment. The County would only be retaining two levels of indigent legal services which may necessitate the need for additional legal services outside of the contract.

FINANCIAL IMPACT:
There is sufficient funding budgeted in the Indigent Defense Budget for this contract.

ATTACHMENTS:
1st Amendment to Legal Srvces Agrmnt2014 (DOC)
Exhibit A to 1st Amendment of LSA (PDF)

CAO RECOMMENDATION
Requested Action Recommended
RESULT: ADOPTED BY CONSENT VOTE [UNANIMOUS]
MOVER: Janet Bibby, District III Supervisor
SECONDER: John Carrier, District V Supervisor
AYES: Stetson, Jones, Bibby, Cann, Carrier
FIRST AMENDMENT TO LEGAL SERVICES AGREEMENT

THIS FIRST AMENDMENT TO LEGAL SERVICES AGREEMENT shall become effective on the 1st day of December, 2014 regardless of date of execution by the parties, and is executed in Mariposa, California, by and between the COUNTY OF MARIPOSA, a political subdivision of the State of California, hereinafter referred to as “COUNTY,” and Eugene Action.

WHEREAS, COUNTY and Gary Collings, Michael A. Fagalde and Neal Douglass entered into an Agreement on July 1, 2013, attached hereto as Exhibit “A”; and

WHEREAS, Michael A. Fagalde has submitted his resignation, effective November 30, 2014, as a result of recent elections selecting him as a Superior Court Judge; and

WHEREAS, Eugene Action is willing to provide legal services pursuant to the Legal Services Agreement, effective December 1, 2014; and

WHEREAS, the parties desire to amend the Legal Services Agreement to reflect this change.

NOW, THEREFORE, in consideration of the mutual covenants and conditions hereinafter contained the parties agree as follows:

1. Effective December 1, 2014, Eugene Action shall be substituted as a party to the Legal Services Agreement in place of Michael A. Fagalde.

2. All of the terms and conditions contained in the Agreement, attached hereto as Exhibit “A”, shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have executed this Amendment in duplicate on the day and year below written.

COUNTY OF MARIPOSA:

KEVIN CANN, Chairman
Board of Supervisors

DATE: 11/25/14

CONTRACTOR:

EUGENE ACTION

DATE: 11/11/14

ATTEST:

RENE LAROCHE
Clerk of the Board

APPROVED AS TO FORM:

STEVEN W. DAHLEM
County Counsel
LEGAL SERVICES AGREEMENT

THIS AGREEMENT shall become effective on the 1st day of July 2013, regardless of the date of execution by the parties, and is executed in Mariposa, California, by and between the COUNTY OF MARIPOSA, a political subdivision of the State of California, hereinafter referred to as “COUNTY,” and Gary L. Collings, Michael A. Fagalde, and Neal D. Douglass, hereinafter referred to as “CONTRACTORS.” CONTRACTORS represent and warrant that they are now, and will during the term of this Agreement and any extensions, each conduct business as an independent law office and that they are in no way affiliated as partners, employees or agents of each other.

WHEREAS, the Board of Supervisors of the COUNTY OF MARIPOSA has determined that it is in the best interest of the COUNTY OF MARIPOSA to contract with independent contractors for the special legal services hereinafter set forth; and

WHEREAS, CONTRACTORS are Attorneys at Law, licensed to practice law before all of the courts of the State of California and are otherwise qualified to perform the services hereinafter set forth.

NOW, THEREFORE, IT IS HEREBY AGREED as follows:

1. CONTRACTORS shall perform all duties normally provided by a public defender as required by law including but not limited to those duties outlined on Exhibit “A” attached hereto.

2. COUNTY shall pay to CONTRACTORS the sum of Three-Hundred Thirty-Seven Thousand Nine-Hundred Thirty-Three Dollars ($337,933.00) per year, payable monthly in TWELVE (12) payments of Twenty-Eight Thousand One-Hundred Sixty-One Dollars and Eight Cents ($28,161.08) on or before the tenth (10th) day of each month. Each monthly payment shall be in arrears for the services performed during the prior month. Each CONTRACTOR shall be paid according to the formula agreed upon between the CONTRACTORS and the County Administrative Officer, however, in no event shall the total paid to all CONTRACTORS exceed the sum of Twenty-Eight Thousand One-Hundred Sixty-One Dollars and Eight Cents ($28,161.08) in any month during the term of this Agreement unless an increase is granted pursuant to paragraph 3 below, or otherwise as approved by the COUNTY based upon the terms and conditions of this Agreement. The parties agree and represent that the amount of compensation has been established after consideration of the facts set forth in California Penal Code §987.3 and further recognize that circumstances such as those referred to in Paragraphs 4 and 5 may require changes in the total compensation. COUNTY and CONTRACTORS agree to re-negotiate the total sum to be paid to CONTRACTORS hereunder if in the event CONTRACTORS are required to make Court appearances for new programs for which no regular Court appearances are required at the time of the execution of this Agreement. By way of example only, if a new program is added to the judicial system, which requires CONTRACTOR to appear in Court on Monday, in addition to the then current appearances on Wednesday and Thursday, this clause will be invoked.
However, should the Court simply move Thursday court to Monday, with no additional days requiring court appearances, this clause shall not be invoked.

COUNTY will make available to CONTRACTORS the sum of Ten-Thousand Dollars ($10,000.00) for each fiscal year during the term of this Agreement to be used for investigative purposes as determined by the Superior Court. No funds will be accessed by CONTRACTOR for investigative expenses without the prior written approval of the Superior Court. In the event investigative expenses which are approved by the Superior Court exceed the sum of Ten-Thousand Dollars ($10,000.00) during any fiscal year of this Agreement, CONTRACTOR shall be solely responsible for those sums over and above Ten-Thousand Dollars ($10,000.00) for that fiscal year only.

3. This Agreement shall be for a term of two (2) years commencing July 1, 2013, terminating on June 30, 2015, unless earlier extended by mutual agreement of the parties. COUNTY shall have the option to extend the term of this Agreement for one (1) year term. Should COUNTY elect to extend this Agreement, CONTRACTORS shall be notified in writing sixty (60) days prior to the expiration of the initial term, or any extended term. In the event of any extensions hereunder the parties shall mutually agree upon the following annual contract price.

4. COUNTY shall receive all funds collected pursuant to Penal Code §§ 987.4, 987.6, and 987.8, Government Code §27712, and any similar statute providing for the reimbursement for the cost of legal services rendered under this Agreement, and no portion of the funds shall inure to CONTRACTORS’ benefit or otherwise affect the amount specified in Paragraph 2.

5. This Agreement shall not apply to cases governed by California Penal Code §987.9, “Capital Cases,” nor shall it apply to costs for investigators in Homicide cases where the Superior Court has approved extraordinary expenses.

6. In addition to the sum specified in Paragraph 2 above, CONTRACTOR shall be reimbursed for reasonable out-of-pocket expenses incurred in representing criminal defendants in matters where venue has been changed outside the County of Mariposa.

7. Each CONTRACTOR shall maintain a full-time office within the County of Mariposa and shall insure that all attorneys performing legal services under this Agreement are members of the California State Bar in good standing. Each CONTRACTOR shall maintain a telephone answering service or device for the taking of telephone messages during non-business hours. In-custody clients shall be interviewed within thirty-six (36) hours of CONTRACTOR’S appointment. Out-of-custody clients shall be interviewed within seventy-two (72) hours of CONTRACTOR’S appointment.

8. CONTRACTORS shall develop eligibility guidelines for the purpose of determining individual person’s financial eligibility for indigent representation. CONTRACTORS shall obtain from each and every person he/she is appointed to represent, a completed questionnaire verifying the person’s eligibility for
indigent representation services. Failure to perform this requirement shall constitute a material breach of this Agreement.

9. In performing the duties herein specified, each CONTRACTOR is and shall be an independent contractor and not an employee of the COUNTY. CONTRACTORS will be responsible to COUNTY for only the good faith performance of this Agreement in conformity with the Rules of Professional Conduct of the State Bar of California and not for the specific manner in which his/her duties are performed or his/her professional judgment exercised. Because each CONTRACTOR is an independent contractor, it shall be his/her sole and absolute responsibility to comply with all Federal, State, and local statutes, regulations and ordinances respecting this Agreement.

10. The parties recognize that ethics considerations, such as those referred to in the Rules of Professional Conduct, may prohibit CONTRACTORS from accepting some appointments that would otherwise be included within this Agreement’s caseload. Upon discovery of a conflict of interest or other ethical consideration which precludes further representation, CONTRACTOR shall immediately notify the affected client(s) and move the Superior Court to be relieved as counsel.

11. CONTRACTORS, as independent contractors, shall be solely responsible for providing all office furniture, equipment, supplies, secretaries, clerks, attorneys, in-house investigators, and other persons necessary to performing this Agreement, including any professional education and expenses, except experts, expert witness fees, court reporter fees, filing fees, transcript fees, and witness fees paid out the Superior Court’s budget. In the event of a conflict in the performance by CONTRACTORS’ investigator, CONTRACTORS shall request additional sums from the Superior Court with which to retain investigative services.

12. (A) CONTRACTORS hereby agree to individually indemnify and hold COUNTY, its officers and its employees absolutely harmless from any and all liability, cost, or expense whatsoever arising out of, or pertaining to, this Agreement and shall defend at no cost to COUNTY or COUNTY’S officers or employees, any such action brought against COUNTY, its officers or its employees.
(B) During the term of this Agreement, each CONTRACTOR shall carry professional malpractice insurance in a minimum amount of $1,000,000, insuring CONTRACTOR against all claims arising out of CONTRACTORS’ services performed hereunder. CONTRACTORS shall provide COUNTY with proof of insurance required herein upon execution of this Agreement by CONTRACTORS and annually thereafter.
(C) Each CONTRACTOR shall notify COUNTY, in writing, within ten (10) working days of receipt by CONTRACTOR of a claim or allegation of ineffective representation by CONTRACTOR arising out of services provided hereunder by CONTRACTOR.

13. Upon the termination of this Agreement, CONTRACTORS shall cooperate fully with COUNTY and with such persons as may be designated by COUNTY to succeed CONTRACTORS in order to effect the orderly transition of legal services from CONTRACTORS to his/her successor. The cooperation specified in this
Paragraph includes, but is not limited to, the releasing of such files, papers and records as may be required to carry out the provisions of this Agreement and any subsequent agreement with a successor contractor and to ensure the continued adequate legal representation of persons eligible for the services herein set forth.

14. Each CONTRACTOR shall maintain all files and records for each case for which services are provided under this Agreement for at least ten (10) years following the last date CONTRACTOR rendered services pursuant to this Agreement, unless such files are assigned to successor counsel. CONTRACTORS shall have access to his/her files as necessary. Neither the COUNTY nor any other person or entity shall be permitted access to any such files without the written consent of CONTRACTOR or court order. Prior to closing each case, CONTRACTOR shall notify the client of the requirements of this clause.

15. CONTRACTORS shall provide for the maintenance of quality representation of indigent defendants consistent with constitutional and professional standards. Federal and State constitutions require provision of competent counsel in criminal cases. In California, the benchmark adopted test for determining competency of counsel in criminal cases is that of a reasonably competent attorney acting as a diligent, conscientious advocate. (People v. Pope, 23 Cal.3d 412 [1979]). CONTRACTORS agree to provide competent legal services in conformity with the above standard, or with standards as modified by more recent legislation or case law. Specifically, the following duties and responsibilities of counsel as set forth in prior court decisions and professional standards will be observed. These include:

A. Duty of careful factual and legal investigation. (See People v. Ibarra, 60 Cal.2d 460 [1963] regarding duty to research the law and raise settled objections; In re Saunders, 2 Cal.2d 1033 [1930] regarding duty to investigate medical reports and conduct psychiatric examinations to support a diminished capacity defense; and ABA Standards on the Defense Function [hereinafter referred to as “ABA Standards”] Section 4.1).

B. Duty to take prompt action to protect a client’s legal rights. (See ABA Standards, Section 3.6a [including procedural steps such as moving for pretrial release, obtaining psychiatric examination, moving for change of venue or continuance, suppression of illegally obtained evidence, severance from jointly charged defendants, or dismissal]).

C. Duty to keep the client informed. (See ABA Standards, Section 3.8).

D. Duty to prepare for jury selection, examination of witnesses, submission of instructions and presentation of argument at trial. (See ABA Standards, Section 7.2(a) and 7.2(b)).

E. Duty to know and explore sentencing alternatives. (See ABA Standards, Section 8.1(b)).

F. Duty to advise concerning appeals. (See ABA Standards, Section 8.2(a)).

G. Duty not to accept more cases than can be competently handled. (See Martin v. State Bar, 20 Cal.3d 717 [1978]).

H. Duty not to handle a legal matter which the lawyer knows or should know that he/she is not competent to handle. (See ABA Code of Professional Responsibility, Canon 6, Disciplinary Rule No. 6-101 (a)).

I. Duty to maintain client confidences and secrets.
16. The fees of attorneys appointed to represent persons who CONTRACTORS’
cannot represent because of conflict of interest shall not constitute a charge
against sums to which CONTRACTORS are otherwise entitled pursuant to this
Agreement. CONTRACTORS shall not decline to represent any eligible person
except for a conflict of interest for disqualification recognized by the Superior
Court.

17. All matters to which CONTRACTORS have been appointed prior to the
termination of this Agreement shall be completed by CONTRACTORS
notwithstanding the termination of this Agreement. CONTRACTORS
acknowledge that services rendered by CONTRACTORS to complete matters
pending at the termination of this Agreement shall not entitle CONTRACTORS to
any fees beyond the annual payment due CONTRACTORS pursuant to
Paragraph 2 above.

18. Should any clause, paragraph or language in this Agreement be held to be void,
unenforceable, or unconstitutional, such clause, paragraph or language shall
be stricken from this Agreement and the remainder of this Agreement shall
continue in full force and effect the same as if such clause, paragraph or
language had never been contained herein.

19. Neither this Agreement nor any of the rights, obligations or duties specified
herein shall be assigned, transferred or delegated to any person without prior
written consent of COUNTY. CONTRACTOR shall neither assign nor transfer any
interest in or to the proceeds of this Agreement. Any assignment, transfer or
delegation in violation of this Paragraph shall be void.

20. This Agreement may not be modified or amended except by a written agreement
signed by all parties hereto.

21. Any controversy or claim arising out of or relating to this Agreement which
cannot be amicably settled without court action shall be litigated either in a
State Court in Mariposa County, California, or in the United States District
Court for the Eastern District of California. The rights and obligations of the
parties and all interpretations and performance of this Agreement shall be
governed in all respects by the laws of the State of California.

22. This Agreement constitutes the entire agreement between CONTRACTORS and
COUNTY with respect to the subject matter thereof and supersedes all previous
negotiations, proposals, commitments, writings, advertisements, publications
and understanding of any nature whatsoever unless expressly included in this
Agreement.

23. Any notices herein provided to be given by either party to the other shall be
deemed to have been fully given when made in writing and deposited in the
United States mail, postage prepaid and address as follows:

COUNTY:
COUNTY of Mariposa
County Administrative Officer
P.O. Box 784
Mariposa, CA 95338

CONTRACTOR: Gary L. Collings, Attorney at Law
P.O. Box 2730
Oakhurst, CA 93644

CONTRACTOR: Michael A. Fagalde, Attorney at Law
P.O. Box 1907
Mariposa, CA 95338

CONTRACTOR: Neal D. Douglass, Attorney at Law
1233 W. Shaw Ave., Ste. 100
Fresno, CA 93711

Nothing herein shall preclude the giving of any notice by personal service.

24. **The COUNTY may terminate this Agreement as to any CONTRACTOR** performing services hereunder upon a thirty (30) day written notice in the event of a breach by a CONTRACTOR of any of the terms and conditions contained in this Agreement. COUNTY may further terminate this Agreement without cause if the Board of Supervisors determines in any budgetary cycle that it is unable to fund this Agreement in its budget period. This provision is intended to comply with Article XVI, Section 18 of the Constitution of the State of California.

25. While some of the duties of CONTRACTORS hereunder would be the duties of a Public Defender in a county served by a Public Defender, all parties hereto understand and agree that CONTRACTORS are not a Public Defender as described in California Government Code §27700, et seq.

26. In the event any CONTRACTOR ceases to perform services hereunder or is removed by COUNTY, COUNTY shall replace CONTRACTOR with a qualified attorney.

**IN WITNESS WHEREOF**, the parties have executed this Agreement in duplicate on the day and year below written.
COUNTY OF MARIPOSA:

LEE STETSON, Chairman
Board of Supervisors

DATE: 5/22/13

APPROVED AS FORM:

STEVEN W. DAHLEM
County Counsel

DATE: 5/14/13

CONTRACTORS:

GARY L. COLLINGS
Attorney at Law

DATE: 5/14/13

MICHAEL A. FAGALDE
Attorney at Law

DATE: 5/14/13

NEIL D. DOUGLASS
Attorney at Law

DATE: 5/14/13

ATTEST:

RENE LAROCHE
Clerk of the Board
EXHIBIT 'A'

1. Represent all persons whom the Superior Court has deemed indigent and who are charged with the commission of any felony (except capital) or misdemeanor when appointed by a Judge of the Mariposa County Superior Court. Represent juveniles in all petitions filed under Welfare and Institutions Code Sections 300 and 600.

2. Represent any and all level 2 and level 3 conflict defendants whom the Superior Court has deemed indigent and who are charged with the commission of any felony or misdemeanor when appointed by a Judge of the Mariposa County Superior Court.

3. Represent all persons requesting counsel and for whom counsel is appointed under Division 4 (Section 1400 et seq.) of the Probate Code (Guardianships and Conservatorships).

4. Represent all persons in pretrial extraordinary writs and appeals to the Superior Court, related to accusations referred to in Paragraphs 1 and 2 above, provided that CONTRACTOR may decline appellate appointments when he/she has represented the client in related trial court proceedings. CONTRACTOR will in all cases assist client in perfecting client’s right to appeal.

5. Represent all indigent persons before the Superior Court for violations of Probation, Post Release Community Supervision, Mandatory Supervision, and Parole Violations.

The CONTRACTOR shall be required to represent individuals under Government Code §27706(f), except for capital cases, as required by the trial court with respect to conditions of detention, of restriction prior to adjudication, or of treatment or punishment in criminal or juvenile proceedings only when appointed by the Superior Court. The CONTRACTOR shall not be required to represent persons in proceedings for modification of conditions of probation without the Superior Court’s consent.