

DEPARTMENT: Administration

BY: Rick Benson  
PHONE: 966-3222

**RECOMMENDED ACTION AND JUSTIFICATION:**

Approve termination of the Legal Services Agreement with David Smothers effective April 9, 2010, and authorize staff to seek a replacement. David Smothers is one of three attorneys that the County contracts with to perform Public Defender services. Beginning in December 2009, Mr. Smothers has been unable to perform the required services, which has been verified by staff at the Mariposa County Superior Court. The original agreement states that the County may terminate this agreement with any contractor upon 30 days written notice in the event of a breach by a contractor (paragraph 24 of Legal Services Agreement).

Due to the nature of the County's public defender cases it is necessary to have three attorneys available. Without a third attorney it may become necessary for the Superior Court Judges to order additional attorneys at the County's expense beyond the cost of the existing agreement.

Staff will request proposals for a replacement and then bring an amended agreement for Board approval. County Counsel was consulted on this issue and agrees that this is the appropriate action.

**BACKGROUND AND HISTORY OF BOARD ACTIONS:**

The Board adopted Resolution 01-273 approving an agreement with David Smothers and Gary Collings for public defender services. The Board adopted Resolution 06-199 approving an amendment to the Legal Services Agreement amending the amount, extending the agreement for another 5 years, and adding a third conflict level - Deborah Bennett. On July 14, 2009, the Board adopted Resolution 09-336 approving a second amendment to the Legal Services Agreement replacing the third level of conflict with Thomas Cooke.

**ALTERNATIVES AND CONSEQUENCES OF NEGATIVE ACTION:**

Do not remove David Smothers from the Public Defender agreement. Mr. Smothers will continue to receive payments for services he may not be able to provide.

Financial Impact? ( ) Yes (X) No	Current FY Cost: \$	Annual Recurring Cost: \$
Budgeted In Current FY? ( ) Yes ( ) No ( ) Partially Funded		
Amount in Budget: \$		List Attachments, number pages consecutively
Additional Funding Needed: \$		Original Legal Services Agreement
Source:		
Internal Transfer		
Unanticipated Revenue	_____ 4/5's vote	
Transfer Between Funds	_____ 4/5's vote	
Contingency	_____ 4/5's vote	
( ) General ( ) Other		

**CLERK'S USE ONLY:**

Res. No.: 10-109 Ord. No. \_\_\_\_\_  
 Vote - Ayes: 5 Noes: \_\_\_\_\_  
 Absent: \_\_\_\_\_  
 Approved  
 ( ) Minute Order Attached ( ) No Action Necessary

**COUNTY ADMINISTRATIVE OFFICER:**

Requested Action Recommended  
 No Opinion  
 Comments:  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

The foregoing instrument is a correct copy of the original on file in this office.

Date: \_\_\_\_\_  
 Attest: MARGIE WILLIAMS, Clerk of the Board  
 County of Mariposa, State of California

By: \_\_\_\_\_  
 Deputy

CAO: RJB

DEPARTMENT: Admin/Co. Counsel

BY: Gregory G. Iturria &  
Jeffrey G. Green

PHONE: 966-3222

RECOMMENDED ACTION AND JUSTIFICATION: (Policy Item: Yes\_\_\_ No\_\_\_)

Resolution approving Agreement and authorizing Chairman to sign long-term Legal Services Agreement with current providers of the indigent legal services in Mariposa County.

Counsel has verified the increase in caseload with the Superior Court and based on that increased caseload, staff recommends the requested increase of \$2,250 per month. The proposal also contains a 3% COLA annually which will not only cover costs of living increases, but also reasonable increases in caseload which are expected. The County Administrative Officer joins in this recommendation.

There is currently sufficient funding for this proposed increase.

BACKGROUND AND HISTORY OF BOARD ACTIONS:

The current Agreement expired on August 16, 2001. The current Agreement does not contain any provisions for additional extensions.

LIST ALTERNATIVES AND CONSEQUENCES OF NEGATIVE ACTION:

1. Approve recommendation with current providers to continue services.
2. Direct staff to further negotiate with current providers.

COSTS: ( ) Not Applicable

A. Budgeted current FY \$ \_\_\_\_\_

B. Total anticipated costs \$ \_\_\_\_\_

C. Required additional funding \$ \_\_\_\_\_

D. Internal transfers \$ \_\_\_\_\_

SOURCE: ( ) 4/5ths Vote Required

A. Unanticipated revenues \$ \_\_\_\_\_

B. Reserve for contingencies \$ \_\_\_\_\_

C. Source description: \_\_\_\_\_

Balance in Reserve for Contingencies, if approved: \$ \_\_\_\_\_

SPECIAL INSTRUCTIONS:  
List the attachments and number the pages consecutively:

1. Legal Services Agreement
2. Letter from David Smothers, Esq.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

CLERK'S USE ONLY:

Res. No.: 01-273 Ord. No. \_\_\_\_\_

Vote - Ayes: \_\_\_\_\_ Noes: \_\_\_\_\_

Approved: Stewart Absent: \_\_\_\_\_

( ) Minute Order Attached ( ) No Action Necessary

ADMINISTRATIVE OFFICER'S RECOMMENDATION:  
This item on agenda as:

Recommended

Not Recommended

For Policy Determination

Submitted with Comment

Returned for Further Action

Comment: \_\_\_\_\_

A.O. Initials: [Signature]

The foregoing instrument is a correct copy of the original on file in this office.

Date: \_\_\_\_\_

ATTEST: MARGIE WILLIAMS, Clerk of the Board  
County of Mariposa, State of California

By: \_\_\_\_\_  
Deputy

LEGAL SERVICES AGREEMENT

THIS AGREEMENT shall become effective on the 17<sup>th</sup> day of August 2001 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 David A. Smothers and Gary L. Collings, hereinafter referred to as "CONTRACTORS". Smothers and Collings represent and warrant that they are now, and will during the term of this Agreement and any extensions, each conducting business as an independent law office and they are in no way affiliated as partners, employees or agents of the 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 an independent contractor for the special legal services hereinafter set forth; and

WHEREAS, CONTRACTORS are Attorneys at Law, licensed to practice law before all 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 Two Hundred Six Thousand Eight Hundred Eighty Dollars (\$206,880.00) per year, payable monthly in TWELVE (12) payments of Seventeen Thousand Two Hundred Forty Dollars (\$17,240.00) 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. Commencing on July 1, 2002 the total sum to be paid to CONTRACTORS shall

1 be increased by three percent (3 %) for the following year, and each July 1,  
2 thereafter the total sum shall be increased by an additional three percent (3 %)  
3 during the term of this Agreement. Each CONTRACTOR shall be paid according  
4 to the formula agreed upon between the CONTRACTORS and the County  
5 Administrative Officer, however, in no event shall the total paid to all  
6 CONTRACTORS exceed the sum of Seventeen Thousand Two Hundred Forty  
7 Dollars (\$17,240.00) in any month during the term of this AGREEMENT unless  
8 an increase is granted pursuant to paragraph 3 below, or otherwise as approved  
9 by County based upon the terms and conditions of this Agreement. The parties  
10 agree and represent that the amount of compensation has been established after  
11 consideration of the facts set forth in California Penal Code § 987.3 and further  
12 recognize that circumstances such as those referred to in Paragraphs 4 and 5  
13 may require changes in the total amount of compensation. COUNTY and  
14 CONTRACTORS agree to re-negotiate the total sum to be paid to  
15 CONTRACTORS hereunder if in the event CONTRACTORS are required to make  
16 Court appearances for new programs which no regular Court appearances are  
17 required at the time of the execution of this Agreement. By way of example  
18 only, if a new program is added to the judicial system, which requires  
19 CONTRACTOR to appear in Court on Monday, in addition to the then current  
20 appearances on Wednesday and Thursday, this clause will be invoked.  
21 However, should the Court simply move Thursday court to Monday, with no  
22 additional days requiring court appearances, this clause shall not be invoked.

23 County will make available to the Superior Court the sum of Five  
24 Thousand Dollars (\$5,000) for each fiscal year during the term of this Agreement  
25 to be used for investigative purposes as determined by the Court. No funds will  
26 be accessed by Contractor for investigative expenses without the prior written  
27 approval of the Court. In the event investigative expenses which are approved  
28 by the Court exceed the sum of Five Thousand Dollars (\$5,000) during any fiscal

1 year of this Agreement, Contractor shall be solely responsible for those sums  
2 over and above Five Thousand Dollars (\$5,000) for that fiscal year only.

3 3. This Agreement shall be for a term of four (4) years, ten (10) months,  
4 and fourteen (14) days, commencing on August 17, 2001, and terminating on  
5 June 30, 2006, unless earlier extended by mutual agreement of the parties.  
6 COUNTY shall have the option to extend the term of this AGREEMENT for one  
7 (1) three (3) year term. Should COUNTY elect to extend this AGREEMENT  
8 CONTRACTORS shall be notified in writing sixty (60) days prior to the expiration  
9 of the initial term, or any extended term. In the event of any extensions  
10 hereunder the parties shall mutually agree upon the following annual contract  
11 price.

12 4. COUNTY shall receive all funds collected pursuant to Penal Code §§  
13 987.4, 987.6, and 987.8, Government Code § 27712, and any similar statute  
14 providing for reimbursement for the cost of legal services rendered under this  
15 Agreement, and no portion of the funds shall inure to CONTRACTORS' benefit or  
16 otherwise affect the amount specified in Paragraph 2 above.

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

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

24 7. Each CONTRACTOR shall maintain a full-time office within the  
25 County of Mariposa and shall insure that all attorneys performing legal services  
26 under this Agreement are members of the California State Bar in good standing  
27 and have the qualifications required in the Request for Proposals which preceded  
28 this AGREEMENT or its predecessor. Each CONTRACTOR shall maintain a

1 telephone answering service or device for the taking of telephone messages  
2 during non-business hours. In-custody clients shall be interviewed within thirty-  
3 six (36) hours of CONTRACTOR'S appointment. Out-of-custody clients shall be  
4 interviewed within seventy-two (72) hours of CONTRACTOR'S appointment.

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

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

20 10. The parties recognize that ethics considerations, such as those  
21 referred to in the Rules of Professional Conduct, may prohibit CONTRACTORS  
22 from accepting some appointments that would otherwise be included within this  
23 Agreement's caseload.

24 Upon discovery of a conflict of interest or other ethical  
25 consideration which precludes further representation, CONTRACTOR shall  
26 immediately notify the affected client(s) and move the court to be relieved as  
27 counsel.

28

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

10           12. A) CONTRACTORS hereby individually indemnify and hold COUNTY,  
11 its officers and its employees absolutely harmless from any and all liability, cost,  
12 or expense whatsoever arising out of, or pertaining to, this Agreement and shall  
13 defend at no cost to COUNTY or COUNTY'S officers or employees, any such  
14 action brought against COUNTY, its officers or its employees.

15           B) During the term of this Agreement, each CONTRACTOR shall  
16 carry professional malpractice insurance in a minimum amount of \$750,000,  
17 insuring CONTRACTOR against all claims arising out of CONTRACTORS'  
18 services performed hereunder. CONTRACTORS shall provide COUNTY with  
19 proof of insurance required herein upon execution of this Agreement by  
20 CONTRACTORS.

21           C) Each CONTRACTOR shall notify COUNTY, in writing, within ten  
22 (10) working days of receipt by CONTRACTOR of a claim or allegation of  
23 ineffective representation by CONTRACTOR arising out of services provided  
24 hereunder by CONTRACTOR.

25           13. Upon the termination of this Agreement, CONTRACTORS shall  
26 cooperate fully with COUNTY and with such persons as may be designated by  
27 COUNTY to succeed CONTRACTORS in order to effect the orderly transition of  
28 legal services from CONTRACTORS to his/her successor. The cooperation

1 specified in this Paragraph includes, but is not limited to, the releasing of such  
2 files, papers and records as may be required to carry out the provisions of this  
3 Agreement and any subsequent agreement with a successor contractor and to  
4 ensure the continued adequate legal representation of persons eligible for the  
5 services herein set forth.

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

15 15. CONTRACTORS shall provide for the maintenance of quality  
16 representation of indigent defendants consistent with constitutional and  
17 professional standards. Federal and state constitutions require provision of  
18 competent counsel in criminal cases. In California, the benchmark adopted test  
19 for determining competency of counsel in criminal cases is that of a reasonably  
20 competent attorney acting as a diligent, conscientious advocate. (People v.  
21 Pope, 23 Cal.3d 412 [1979]).

22 CONTRACTORS agree to provide competent legal services in  
23 conformity with the above standard, or with standards as modified by more  
24 recent legislation or case law. Specifically, the following duties and  
25 responsibilities of counsel as set forth in prior court decisions and professional  
26 standards will be observed. These include:

27 A. Duty of careful factual and legal investigation. (See People v.  
28 Ibarra, 60 Cal.2d 460 [1963]) (duty to research the law and raise settled



1 objections); In re Saunders, 2 Cal.2d 1033 [1970] (duty to investigate medical  
2 reports and conduct psychiatric examinations to support a diminished capacity  
3 defense); ABA Standards on the Defense Function (hereinafter referred to as  
4 "ABA Standards", Section 4.1).

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

10 C. Duty to keep the client informed. (ABA Standards, Section  
11 3.8).

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

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

17 F. Duty to advise concerning appeals. (ABA Standards, Section  
18 8.2(a)).

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

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

24 I. Duty to maintain client confidences and secrets.

25 16. The fees of attorneys appointed to represent persons who  
26 CONTRACTORS' cannot represent because of a conflict of interest shall not  
27 constitute a charge against any sums to which CONTRACTORS are otherwise  
28 entitled pursuant to this Agreement. CONTRACTORS shall not decline to

1 represent any eligible person except for a conflict of interest for disqualification  
2 recognized by the Court.

3 17. All matters to which CONTRACTORS have been appointed prior to  
4 the termination of this Agreement shall be completed by CONTRACTORS  
5 notwithstanding the termination of this Agreement. CONTRACTORS  
6 acknowledge that services rendered by CONTRACTORS to complete matters  
7 pending at the termination of this Agreement shall not entitle CONTRACTORS to  
8 any fees beyond the annual payment due CONTRACTORS pursuant to Paragraph  
9 2 above.

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

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

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

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

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

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

9           COUNTY:           COUNTY OF MARIPOSA  
10                               c/o County Administrative Officer  
11                               P.O. Box 784  
12                               Mariposa, CA 95338

13           CONTRACTOR:   DAVID A. SMOTHERS, ATTORNEY AT LAW  
14                               4983 8<sup>th</sup> Street; Suite "A" - P.O. Box 1580  
15                               Mariposa, CA 95338

16           CONTRACTOR:   GARY L. COLLINGS, ATTORNEY AT LAW  
17                               4983 8<sup>th</sup> Street; Suite "B"   P.O. Box 1793  
18                               Mariposa, CA 95338       Oakhurst 93644

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

20           24. The COUNTY may terminate this Agreement as to any  
21 CONTRACTOR performing services hereunder upon a thirty (30) day written  
22 notice in the event of a breach by a CONTRACTOR of any of the terms and  
23 conditions contained in this Agreement.

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

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

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

3  
4 COUNTY OF MARIPOSA:

5 Doug Balmain  
6 DOUG BALMAIN, Chair  
7 Board of Supervisors

DATE: 10-18-01

8  
9 ATTEST:

APPROVED AS TO FORM  
AND LEGAL SUFFICIENCY:

10 Margie Williams  
11 MARGIE WILLIAMS  
12 Clerk of the Board

Jeffrey G. Green  
JEFFREY G. GREEN  
County Counsel

13  
14 CONTRACTORS:

15  
16  
17 David A. Smothers DATE: 10-24-01  
18 DAVID A. SMOTHERS  
19 Attorney at Law

20  
21 Gary L. Collings Date: 10/25-01  
22 GARY L. COLLINGS  
23 Attorney at Law

EXHIBIT "A"

1  
2 1. Represent all persons whom the court has deemed indigent and who  
3 are charged with the commission of any felony or misdemeanor when appointed  
4 by a judge of the Mariposa County Court. Represent juveniles in all 300 and  
5 600 Welfare and Institutions Code Petitions.

6 2. Represent any and all level 2 conflict defendants whom the court has  
7 deemed indigent and who are charged with the commission of any felony or  
8 misdemeanor when appointed by a judge of the Mariposa County Court.

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

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

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