



National Legal Aid & Defender Association

EQUAL JUSTICE.  
OF THE PEOPLE.  
FOR THE PEOPLE.

August 16, 2011

Patrick Call, Chairman  
Ann English, Vice-Chairman  
Richard Searle, Supervisor  
Cochise County Board of Supervisors  
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Dear Supervisors Call, English and Searle,

The National Legal Aid & Defender Association (NLADA)<sup>1</sup> applauds your efforts to provide an indigent defense system that enables its attorneys to provide effective representation to their clients in the most cost-effective method possible. I recognize and respect the duty of Arizona's state- and county-level officials to make policy decisions in the best interests of the citizenry and stand ready to assist you in achieving your goals. Toward that end, I offer the following comments on Cochise County's proposed "Indigent Defense Contract Counsel Agreement: Fiscal Year 2011-2012 through Fiscal Year 2012-2013" (Indigent Defense Contract).

Efforts to control public defense expenditures that do not take into account prevailing national standards tend to have negative effects on both the efficiency of a state's courts and public safety. Policymakers have long recognized that minimum quality standards are necessary to assure public safety in the building of a hospital, school or a bridge. The taking of a person's liberty merits no less consideration.

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<sup>1</sup> The National Legal Aid & Defender Association (NLADA) is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over ninety years. NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders.

Over its long history, NLADA has become a leader in the development of national standards for indigent defense functions and systems. See: *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976); *The Ten Principles of a Public Defense Delivery System* (written by NLADA officials, adopted by ABA in February 2002, published in U.S. Department of Justice *Compendium of Standards for Indigent Defense Systems, infra n.12*) (<http://bit.ly/ggLidF>); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989), *Defender Training and Development Standards* (NLADA, 1997); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995); *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985); *Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Evaluation Design for Public Defender Offices* (NLADA, 1977); and *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1994). With proper evaluation procedures, standards help to assure professionals' compliance with national norms of quality in areas where the governmental policy-makers themselves may lack expertise.

Foundational standards set the limits below which no public defense system should fall. The American Bar Association's *Ten Principles of a Public Defense Delivery System (Ten Principles)* present the most widely accepted and used version of national standards for indigent defense systems. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous national standards for public defense systems to their most basic elements, which officials and policymakers can readily review and apply. In the words of the ABA Standing Committee on Legal Aid & Indigent Defendants, the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."<sup>2</sup>

The use of national standards of justice to gauge whether representation is constitutionally adequate meets the demands of the United States Supreme Court. In *Wiggins v. Smith*, 539 US 510 (2003), the Court recognized that national standards – specifically those promulgated by the ABA – should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney is provided the time, resources, independence, supervision, and training to adequately represent her clients. *Rompilla v. Beard*, 545 US 374 (2005), echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."<sup>3</sup>

The proposed Indigent Defense Contract represents a significant attempt to provide fiscal predictability to Cochise County's taxpaying public, while ensuring the rights to counsel and due process of each indigent defendant, in a way consistent with Arizona case law including *State v. Joe U. Smith*<sup>4</sup> and *Zarabia v. Bradshaw*.<sup>5</sup> The proposed contract goes far toward meeting many of the ABA *Ten Principles*. Most notably:

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<sup>2</sup> American Bar Association. *Ten Principles of a Public Defense System*, from the introduction, at: <http://bit.ly/ggLidF>. United States Attorney General Eric Holder called the ABA *Ten Principles* the basic "building blocks" of a functioning public defense system (United States Attorney General Eric Holder. *Address before the Department of Justice's National Symposium on Indigent Defense: Looking Back, Looking Forward 2000-2010*. Washington, DC February 18, 2010. <http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html>).

<sup>3</sup> Citation to national public defense standards in court decisions is not limited to capital cases. See, for example: 1) *United States v. Russell*, 221 F.3d 615 (4th Cir. 2000) (Defendant was convicted of prisoner possession of heroin; claimed ineffective assistance of counsel; the court relied, in part on the ABA Standards to assess the defendant's claim); 2) *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1993) (Defendant convicted of being a felon in possession of a weapon; filed appeal arguing, in part, ineffective assistance of counsel. Court stated: "In addition, under the *Strickland* test, a court deciding whether an attorney's performance fell below reasonable professional standards can look to the ABA standards for guidance. *Strickland*, 466 U.S. at 688." And, "[w]hile *Strickland* explicitly states that ABA standards 'are only guides,' *Strickland*, 466 U.S. at 688, the standards support the conclusion that, accepting Blaylock's allegations as true, defense counsel's conduct fell below reasonable standards. Based on both the ABA standards and the law of the other circuits, we hold that an attorney's failure to communicate the government's plea offer to his client constitutes unreasonable conduct under prevailing professional standards."); 3) *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990) (Defendant pleaded guilty to conspiracy to violate the Arms Control Export Act. The court followed the standard set forth in *Strickland* and looked to the ABA Standards as a guide for evaluating whether defense counsel was ineffective.)

<sup>4</sup> 140 Ariz. 355, 681 P.2d 1374 (Ariz. Apr. 4, 1984).

<sup>5</sup> 185 Ariz. 1, 912 P.2d 5 (Ariz. Feb. 13, 1996).

1. *Principle 2* requires that indigent defense delivery systems consist of both staffed public defender offices and private attorneys in jurisdictions where caseloads are sufficiently high.<sup>6</sup> The Cochise County system includes a primary public defender agency, an alternate defense office, and appoints private attorneys to represent indigent clients in tertiary conflicts and overload cases, thus meeting the requirements of *Principle 2*. The Indigent Defense Contract would continue compliance with the *Principle* by maintaining the active participation of the private bar.
2. *Principle 6* requires that the ability, training, and experience of defense counsel match the complexity of the case to which they are appointed. Just as you would not go to a dermatologist for a heart operation even though heart and skin specialists are both doctors, it is wrong to expect that everyone with a bar card has the ability to provide adequate criminal defense representation. Representing a juvenile in a delinquency proceeding or defending a person charged with capital murder are very different than preparing a will or real estate conveyance instrument or defending an insurance malpractice claim, for example. The Indigent Defense Contract includes, as Exhibit B, a set of “Minimum Qualifications” by type of case that each attorney must meet in order to receive contract appointments, which essentially mirror experience requirements established through state bar rules, state court orders, and Arizona statute.
3. *Principle 8* states: “[c]ontracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services.” The Arizona Supreme Court echoed this *Principle*, ruling in *Zarabia v. Bradshaw* that “[i]t is impermissible ... to transfer the public’s constitutional obligation to pay the financial cost of indigent defense to the county’s private lawyers.” Cochise County goes far toward meeting this standard under the current proposal. The Indigent Defense Contract will pay each private attorney a flat rate per case, by case type (\$900 per felony case; \$150 per misdemeanor; \$1,500 per appeal; \$400 per probation violation; and so forth), while also allowing the attorney to seek additional fees “if, in the judgment of the Attorney, an assigned case requires more than the base level of service anticipated by this Agreement.” While attorneys are responsible for their own basic overhead costs, they can apply for funds to cover case-related out-of-pocket expenses for expert witnesses, investigators, out-of-county travel, transcripts, and other “extraordinary fees.” It is clear that Cochise County intends the proposed contract to adequately compensate attorneys for their time and to reimburse them for necessary expenses, in order to provide sufficient incentive for attorneys to dedicate the time and resources necessary for an effective defense.

While the Indigent Defense Contract goes far toward meeting many national standards, I must point out what I consider to be major deficiencies in the proposal. These deficiencies are likely to prevent policymakers from implementing a constitutionally adequate system with clear accountability to the citizenry.

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<sup>6</sup> Footnotes to the ABA *Ten Principles* note that “sufficiently high” can generally be understood to mean that there are enough assigned cases to support a full-time public defender office (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

ABA *Principle 10* requires accountability from and by defense systems, so that taxpayers and policymakers and victims and clients alike can all know whether a system's attorneys are fulfilling the obligations to each client that are imposed by the federal and state constitutions.<sup>7</sup> In addition, national standards, including ABA *Principle 1*, require ongoing oversight of the public defense function by an independent, non-partisan board or commission that is vested with full authority to select the system's chief attorney or executive administrator, promulgate guidelines for attorney and staff performance, and continually ensure that performance expectations are met. Ongoing oversight by an independent public defense commission assures that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined, for example, are based solely on the factual merits of the case and *not* on political factors that are arbitrary to the constitutional demands of zealous advocacy. There are aspects of the proposed Contract that fail to meet these requirements of independence and accountability, but which are capable of being cured.

The contract proposal passes onto the attorneys themselves the entire responsibility for ensuring that they – the attorneys – have the necessary qualifications, training, and experience to be appointed to the particular types of cases and that they fulfill their ethical performance obligations to their clients.<sup>8</sup> This is insufficient in light of the Arizona Supreme Court's requirements under *State v. Joe U. Smith*.

In establishing any form of system, the *Smith* Court explained, the *county* – not the attorneys – must account for:

- the time an attorney is expected to spend representing his indigent clients;
- the costs of support such as investigators, paralegals, and law clerks;
- the competency of the attorney; and
- the complexity of the cases;

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<sup>7</sup> The ABA *Ten Principles* are a set of standards that are interdependent. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction's compliance on each of the ten criteria and dividing the sum to get an average "score." For example, a jurisdiction may have a place set aside in the courthouse for confidential attorney-client discussions (*Principle 4*), yet this does not make the delivery of indigent defense services any more adequate if the appointment of counsel comes so late in the process (*Principle 3*), or if the attorney has too many cases (*Principle 5*), or if the attorney lacks the necessary training (*Principle 8*), as to render those conversations ineffective for serving the client's representation needs.

*Principle 10* states: "Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency."

<sup>8</sup> For example, Section 1.H.2 of the proposed contract, which states: "The Attorney shall comply with the Arizona Supreme Court Rules of Professional Conduct, the Arizona Supreme Court rulings on the standards for effective assistance of counsel as set forth in *State v. Smith*, 140 Ariz. 355 (1984) and *Zarabia v. Bradshaw*, 185 Ariz. 1 (1996), state and local court rules, all applicable local, state and federal laws, statutes, ordinances, rules and regulations and the written administrative policies and procedures established by the Court or the IDC."

Each client is constitutionally entitled to be represented by a public defense attorney who has sufficient time and resources to fulfill the basic parameters of attorney performance on behalf of that client. In over-simplified terms, this means the attorney is able to, among other things: meet and interview the client; prepare and file necessary motions; receive and review the prosecutions responses to motions; conduct a factual investigation, including locating and interviewing witnesses; engage in plea negotiations with the state; prepare for and enter a plea or conduct the trial; and prepare for and advocate at the sentencing proceeding when there is a guilty plea or conviction following trial. These obligations, owed by each criminal defense attorney to each individual client, are explained in detail in the rules, standards, procedures and cases cited within the proposed Indigent Defense Contract, and in the national attorney performance standards.

The contract provides no suggestion as to the day to day supervision of the contract attorneys to ensure ongoing compliance with the performance requirements listed therein.

in determining the number and type of cases that an attorney can effectively handle without violating a defendant client's due process rights. When a *county* "fails to take into account" these basic criteria in letting contracts for public defense services, "there will be an inference that the adequacy of representation is adversely affected."

Cochise County maintains an Office of the Indigent Defense Coordinator (IDC), which employs two full-time staff members to administer the public defense system and whose work will include administering the contract defender system currently being considered. The primary purpose of Cochise County's Office of the Indigent Defense Coordinator is to manage the "business" interests of the public defense function.<sup>9</sup> The office itself is part of the county administration<sup>10</sup> whose fiscal interests are regularly, and understandably, at odds with the defendants' case-specific concerns. Yet under the proposed contract, where attorneys in their professional judgment believe that a client's case requires more hours than are provided for under the presumptive "flat fee," it is to this county administrative office that they must apply for approval to be compensated for these additional necessary hours. Similarly, it is to this county office that the attorney must apply before incurring necessary expenses such as hiring experts or an investigator. This places the attorney in an untenable ethical and personal conflict situation. The rules of ethics require that the attorney spend the time and resources necessary to the defense of a client, but the proposed contract prohibits the attorney from doing so, or at least from being compensated and reimbursed, unless it is first approved by a county office whose allegiance is to the political branch rather than to the defense of the client. If the political business judgment of the county office differs from the professional judgment of the attorney and the request for additional hours or resources is not approved, then the attorney is forced to either violate her ethical mandates or expend her own personal funds on behalf of the client.

Instead, oversight of the contract attorneys should be provided by an independent, non-partisan board or commission called for by ABA *Principle 1*. This commission would oversee all contracting attorneys, ensuring that they have the qualifications, experience, and training needed for the cases to which they are appointed and that they are providing representation consistent with national attorney performance standards. The commission would also oversee payment of fees and approval of expenses in indigent cases, ensuring that ethics requirements are met, quality representation is provided to clients, and each tax dollar spent is accounted for.

Where public defense systems do not provide for both independence and accountability, political pressures like cronyism and re-election concerns often prevent public defense service providers (including contract defenders and private assigned counsel) from providing the zealous advocacy of clients that is required by their ethical duties under the Constitution.<sup>11</sup> Such programs inevitably compromise the integrity of the attorney-client relationship and work to the detriment of public defense

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<sup>9</sup> "IDC does not represent clients or give legal advice. IDC functions as a business office making attorney assignments, paying appointed attorneys' fees and case related expenses, maintaining databases, and assisting with quality control throughout the court system." [http://www.cochise.az.gov/uploadedFiles/Indigent\\_Defense\\_Coordinator/08-09AnnualReportIDC.pdf](http://www.cochise.az.gov/uploadedFiles/Indigent_Defense_Coordinator/08-09AnnualReportIDC.pdf)

<sup>10</sup> According to the Cochise County organization chart, the defense function is placed within the purview of the Deputy County Administrator. [http://www.co.cochise.az.us/BOS/11\\_07\\_CountyOrgChart.pdf](http://www.co.cochise.az.us/BOS/11_07_CountyOrgChart.pdf).

<sup>11</sup> As the United States Supreme Court observed more than thirty years ago, in *Branti v. Finkel*, the employment of a "public defender cannot properly be conditioned upon his allegiance to the political party in control .... His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation."

clients by providing them with counsel whose professional judgment may be influenced by concerns that are, at best, irrelevant to clients' adequate representation. A properly designed system, with both independence and accountability, ensures that all clients receive constitutionally effective assistance of counsel and that taxpayers are receiving a fiscally responsible public defense system.<sup>12</sup>

In conclusion, I again applaud Cochise County's elected officials and staff for their desire to implement a public defense delivery system that meets the state's performance requirements and that does so in the most cost-effective manner possible. I also applaud the transparency with which you have undertaken this effort, by allowing time for public reaction to the proposal. The proposed contract goes far toward meeting these important goals, and with minor improvements it can provide both independence of the defense function and accountability that, together, ensure quality services are rendered in return for the dollars spent.

I respectfully recommend that the most prudent way to reduce indigent defense expenditures is to reduce the need for public defense attorneys by removing non-violent misdemeanors and low-level felonies from the formal justice system through diversion and/or reclassification of crimes to non-jailable infractions, where it is safe, reasonable, and sensible to do so. This will not only reduce the county's indigent defense budget, but also the attendant costs of the formal criminal justice system. Such an endeavor, of course, falls within the purview of the Arizona Legislature and, as is indeed the case throughout the nation, the extremely high volume of criminal cases coursing through the county courts is largely a problem of the state's making. The responsibility to make efficient use of limited taxpayer dollars falls equally on state-level officials as the counties' officials. Arizona's county officials should therefore consider requesting a review of the state's sentencing codes.

Please feel free to contact me with any questions or concerns.

Sincerely,



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<sup>12</sup> To help jurisdictions in the establishment of independent public defender boards or commissions, NLADA has promulgated guidelines. NLADA's *Guideline for Legal Defense Services* (Guideline 2.10) states: "A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members." Cochise County's Office of the Public Defender and Office of the Legal Defender both suffer from the same independence concerns. Because the Office of the Indigent Defense Coordinator currently makes case assignments to all three delivery systems, by establishing an independent board over the IDC the county would effectively provide insulation for all service providers at once, as is required under national standards.