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Don Dawson, Executive Director  
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Dear Don,

Thank you for the opportunity to comment on the appointment of a district attorney to your board of oversight. Tennessee Code § 40-30-202: “Legislative intent” specifically states that it is the intent of the legislature that “the operation of the post-conviction defender commission and office of post-conviction defender shall be consistent with professional standards and shall not compromise independent professional judgment or create a professional or institutional conflict of interest, appearance of impropriety, breach of attorney-client confidence or secret or other violation of the Tennessee Rules of Professional Conduct or the Tennessee Code of Judicial Conduct (emphasis added).” The presence of a district attorney on the oversight board is clearly inconsistent with professional standards as defined by the American Bar Association, as detailed below:

### **National Standards**

The concept of using standards to address quality concerns is not unique to the field of indigent defense. In fact, the strong pressures of favoritism, partisanship, and/or profits on public officials underscore the need for standards to assure fundamental quality in all facets of government. For instance, realizing that standards are necessary to both compare bids equitably and to assure quality products, policy-makers long ago ceased taking the lowest bid to build a hospital, school, or a bridge and required winning contractors to meet minimum quality standards of safety. So must there be minimum standards in the provision of counsel to the poor.<sup>1</sup>

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<sup>1</sup> The use of national standards of justice in this way reflects the demands of the United States Supreme Court in *Wiggins v. Smith*, 539 US 510 (2003) and *Rompilla v. Beard*, 545 US 374 (2005). In *Wiggins*, the Court recognized that national standards, including those promulgated by the American Bar Association (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 practices in an environment that provides her with the time, resources, independence, supervision, and training to effectively carry out her charge to adequately represent her clients. *Rompilla* echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel “in terms no one could misunderstand.”

Citation to national public defense standards in court decisions is not limited to these two capital cases. See, for example: 1) *United States v. Russell*, 221 F.3d 615 (4<sup>th</sup> 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 (9<sup>th</sup> Cir. 1993) (Defendant convicted of being a felon in possession of a weapon; filed appeal arguing,

The American Bar Association's *Ten Principles of a Public Defense Delivery System* presents the most widely accepted and universally used version of national standards for public defense. 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." The *very* first of the ABA's *Ten Principles* addresses the importance of independence and calls for the establishment of an independent oversight board whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the indigent defense function.<sup>2</sup>

ABA *Principles #1* references three sets of national standards in the creation of independent public defense oversight boards that specifically prohibit prosecutors from serving on the board:

**1. American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992), Standard 5-1.3: Professional independence<sup>3</sup>:**

(a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. **Boards of trustees should not include prosecutors or judges.** The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service

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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>2</sup> American Bar Association. *Ten Principles of a Public Defense System*, from the introduction. at: [http://72.14.207.104/search?q=cache:li1\\_aP9C2sJ:www.abanet.org/legal-services/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf+ABA+Ten+Principles&hl=en&gl=us&ct=clnk&cd=1](http://72.14.207.104/search?q=cache:li1_aP9C2sJ:www.abanet.org/legal-services/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf+ABA+Ten+Principles&hl=en&gl=us&ct=clnk&cd=1).

<sup>3</sup> [http://www.abanet.org/crimjust/standards/defsvcs\\_blk.html#1.3](http://www.abanet.org/crimjust/standards/defsvcs_blk.html#1.3)

programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction

**2. National Legal Aid & Defender Association, *Guidelines for Legal Defense Systems in the United States*, Guideline 2.10<sup>4</sup>:**

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, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria:

The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.

- (a) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- (b) No single branch of government should have a majority of votes on the Commission.
- (c) Organizations concerned with the problems of the client community should be represented on the Commission.
- (d) A majority of the Commission should consist of practicing attorneys.
- (e) **The Commission should not include judges, prosecutors, or law enforcement officials.**

Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval.

**3. National Legal Aid & Defender Association, *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984), Guidelines II-2: Members<sup>5</sup>:**

The Policy Board should consist of from three to thirteen members, depending upon the size of the community the number of identifiable factions or components of the client population, and judgments as to which groups should be represented.

Policy Board members should be appointed using the following criteria:

- (a) Appointees should be persons who will ensure the independence of Contractor.

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<sup>4</sup> [http://www.nlada.org/Defender/Defender\\_Standards/Guidelines\\_For\\_Legal\\_Defense\\_Systems#twoten](http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems#twoten)

<sup>5</sup> [http://www.nlada.org/Defender/Defender\\_Standards/Negotiating\\_And\\_Awarding\\_ID\\_Contracts#twotwo](http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts#twotwo)

- (b) Policy Board members should represent a diversity of factions in order to insure insulation from partisan politics.
- (c) No single branch of government should have a majority of votes on the Policy Board.
- (d) Private organizations directly serving the poor should be a source for Board members.
- (e) Organizations concerned with the problems of the client community should be represented on the Policy Board.
- (f) A majority of persons on the Board should be practicing attorneys.
- (g) The Policy Board should not include judges, prosecutors, or law enforcement officials.
- (h) Members of the Policy Board should serve staggered terms in order to ensure continuity and to avoid upheaval.

Thank you again and please let me know how I can be of further assistance to you.

Sincerely,

A handwritten signature in black ink, appearing to read "David J. Carroll". The signature is written in a cursive, flowing style.

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