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Safeguarding Liberty, Justice & the Rule of Law

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*Affiliations listed for
identification purposes only*

August 9, 2011

VIA FACSIMILE

The Honorable John Breternitz
Chairman
Washoe County Board of Commissioners
1001 E. 9th Street, Building A
Reno, NV 89512

Re: Proposed Contract with Washoe Legal Services

Dear Chairman Breternitz and Board of Commissioners:

As President of The Constitution Project, I write to urge the Board of Commissioners not to approve the Agreement for Provision of Legal Services to Indigents Defendants (Agreement), into which the Board is currently considering entering with Washoe Legal Services (WLS).

The Constitution Project is a nonprofit organization in Washington, D.C. that promotes and defends constitutional safeguards through constructive dialogue across ideological and partisan lines. Its National Right to Counsel Committee (a list of members of which is attached as Appendix A) is a bipartisan, blue-ribbon Committee that comprises individuals with expertise in every relevant part of the criminal justice system, including prosecutors, judges, victim advocates, defenders, and scholars.

In its 2009 report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, the Committee unanimously concluded that properly trained and funded indigent defense counsel help ensure criminal proceedings are properly conducted and defendants' constitutional rights are protected. Quality indigent defense counsel reduce the chances of costly appeals and lessen the likelihood that innocent people will be wrongly incarcerated while the true perpetrators remain free, continuing to victimize society.

The Agreement before the Board represents a clear threat to constitutionally adequate representation for indigent clients. The Agreement also fails to address the standards outlined in the Nevada Supreme Court's January 4, 2008 Order ADKT No. 411 (the Order). As Washoe County Public Defender Jeremy Bosler understood, indigent defense providers could not participate in Washoe County's Early Case Resolution (ECR) program, as designed, while at the same time meeting the performance standards outlined in the Court's Order. Unfortunately, nothing in the current Agreement addresses changes necessary to meet the performance standards, and, in fact, raises serious additional concerns.

As an initial matter, the arrangement with WLS violates the independence of the defense function by allowing the district attorney to choose opposing counsel for the ECR program. In *Justice Denied*, our Committee found that it “is exceedingly difficult for defense counsel always to be vigorous advocates on behalf of their indigent clients when their **appointment**, compensation, resources, and **continued employment** depend primarily upon satisfying judges or other elected officials (emphasis added).” WLS was chosen primarily because, according to the Agreement, “the ECR program was suspended by the Washoe County Public Defender... and District Attorney now seek[s] to reintroduce the program.” In other words, the Public Defender remains unwilling to participate in the ECR because of continued concerns, so the District Attorney has handpicked a willing participant. Additionally, the term of the Agreement expires in six months unless Washoe County chooses to extend the Agreement. Both of these factors raise serious concerns about WLS’s independence.

Furthermore, the fixed-fee provided for in the Agreement creates a conflict of interest between WLS and its ECR clients by incentivizing the investment of minimal time in cases in order to maximize the value of the fee. Fixed-fee arrangements for the provision of indigent defense services reduce the quality of representation by creating a financial disincentive for an attorney to work as many hours as needed to represent his or her client—especially in complex and time-consuming cases. The more hours that WLS works on a case, the closer it comes to operating at a loss because of hourly overhead. For this reason, the fixed-fee arrangement could result in a conflict of interest for attorneys, who are ethically obligated to act in the interest of their clients but who also have a strong disincentive to put adequate time into the cases of their indigent clients, or to engage in the time-consuming research, investigation, and preparation necessary for complex cases, because they will not get paid for the additional time and effort. Failure to be able to devote the time necessary for zealous representation is clearly in tension with the performance standard adopted in the Court’s Order that “Counsel has an obligation to make available sufficient time [and] resources... to afford competent representation.”

The Agreement also specifies that WLS will only provide legal representation for the ECR program. This is in direct violation of the performance standard promulgated in the Order requiring, “defense counsel to provide zealous and quality representation to their clients **at all stages of the criminal proceeding** (emphasis added).” This also violates the American Bar Association (ABA) Ten Principles of a Public Defense Delivery System, which acknowledges the benefit of having the same attorney represent a client from initial assignment through the trial and sentencing. The requirement that WLS abandon representation after the ECR process is completed prevents clients from obtaining the full benefit of continuous representation.

Finally, while WLS is no doubt an able and zealous advocate for its current clients, there is no indication that its attorneys are “familiar with the substantive criminal law and laws of criminal procedure and its application in the courts of Nevada,” as the Court’s Order requires. In fact, WLS’s website states that the organization “provides free quality legal services and representation to qualified residents to enable them to receive justice in **civil legal matters** (emphasis added).” WLS lists among its services representation in immigration, housing discrimination, landlord tenant issues, consumer protection issues, bankruptcy, family law/domestic violence, and child advocacy. It makes no mention of expertise or even experience in criminal law.

The Constitution Project urges the Commissioners to carefully consider the serious constitutional concerns that the use of the ECR program raises. Given the threat the program poses to the fundamental constitutional rights of so many indigent clients, the Board should not

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approve the Agreement, but should instead look for ways to work with both the District Attorney and the Public Defender to, as the Agreement contends, find ways “to minimize the overall indigent caseload.” The Constitution Project would be glad to answer any additional questions or provide any assistance as you undertake to determine how to best provide indigent defenses in Washoe County.

Sincerely,

A handwritten signature in cursive script, appearing to read "Virginia E. Sloan".

Virginia E. Sloan
President

cc: David Humke, Washoe County Commissioner
Kitty Jung, Washoe County Commissioner
Robert Larkin, Washoe County Commissioner
Bonnie Weber, Washoe County Commissioner
Katy Simon, Washoe County Manager
John Berkich, Washoe Assistant County Manager