

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

BOARD OF DIRECTORS

Stephen F. Hanlon - Chair
Holland & Knight LLP

Mariano-Florentino Cuéllar
Stanford Law School

Mickey Edwards
The Aspen Institute

Armando Gomez
Skadden, Arps, Slate, Meagher & Flom LLP

Phoebe Haddon
University of Maryland, School of Law

Morton H. Halperin
Open Society Foundations

Kristine Huskey
University of Texas, School of Law

Asa Hutchinson
Asa Hutchinson Law Group PLC

David Keene
The American Conservative Union
Former Chair

Timothy K. Lewis
Schnader Harrison Segal & Lewis LLP

Paul C. Saunders
Cravath, Swaine & Moore LLP

William S. Sessions
Holland & Knight LLP

Virginia E. Sloan
The Constitution Project President

*Affiliations listed for
identification purposes only*

August 17, 2011

Mr. Michael J. Ortega
Cochise County Administrator
1415 Melody Lane, Building G.
Bisbee, Arizona 85603

Re: Proposed Contract Counsel Agreement

Dear Mr. Ortega:

As President of The Constitution Project (TCP), I write to urge the Cochise County Board of Supervisors not to adopt the proposed Indigent Defense Contract Counsel Agreement for FY 2011-2012 through FY 2012-2013 (the "Proposed Agreement"). I appreciate that Cochise County must decide how to control expenses during a time when budget shortages are pervasive. However, the Proposed Agreement would undermine the constitutional right to counsel for indigent defendants. Governments cannot abdicate their duty to ensure that constitutional rights remain intact, even in the worst of financial times.

TCP is a constitutional watchdog that promotes and defends constitutional safeguards through constructive dialogue across ideological and partisan lines. In 2004, TCP established the National Right to Counsel Committee—comprising former judges, prosecutors, defense lawyers, law enforcement officials, and scholars—to examine the ability of the American justice system to provide adequate counsel to individuals in criminal and juvenile delinquency cases who cannot afford lawyers.¹ In 2009, the Committee issued *Justice Denied: The Continuing Neglect of the Constitutional Right to Counsel*, the most comprehensive examination of our country's system of indigent defense in 30 years.² In *Justice Denied*, the Committee unanimously recommended, among other things, that indigent defense systems be adequately funded and administered by politically independent commissions. The Committee further recommended that the commission establish workload limits, provide fair compensation and ensure that indigent defense counsel have access to sufficient support services and resources like experts, investigators and paralegals.

While the Board of Cochise County has made some very positive decisions about the structure of its indigent defense system, such as the establishment of a full-time public defender office, the Proposed

¹ A list of National Right to Counsel Committee members is attached as Appendix A.

² Available at <http://www.constitutionproject.org/pdf/139.pdf>. *Justice Denied* has been praised by Attorney General Eric Holder in speeches to the American Council of Chief Defenders and the Brennan Center for Justice; the *Washington Post* has called it an "excellent report"; and it has been cited and relied upon by numerous state supreme courts, policymakers and news outlets around the country.

Agreement would take a step backwards, threatening constitutionally adequate representation for indigent defendants in Cochise County. The primary problem with the Proposed Agreement is its fixed-fee compensation scheme. Fixed-fee arrangements for the provision of indigent defense services generally 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 a contract attorney works on a fixed-fee case, the closer he or she comes to operating at a loss.

The Proposed Agreement does provide that attorneys may apply for additional fees when “in the judgment of the Attorney, an assigned case requires more than the base level of service anticipated by the Agreement.” ¶1(E). The attorney may also incur “Extraordinary Expenses” such as expert witnesses and investigators. ¶2(B). However, the Office of the Indigent Defense Coordinator (IDC)—not the attorney—makes the determination as to whether additional fees are warranted and if so, the amount of additional fees to authorize. ¶1(E). And the “prior written approval of the IDA” is required before incurring these types of expenses. ¶2(B). If the IDC determines that no further funds or additional expenses are warranted, attorneys could face a conflict of interest: they would be ethically obligated to act in the interest of their clients but would also have a strong disincentive to invest adequate time in the case, to engage in time-consuming but necessary research, investigation, and preparation, or to hire the needed experts or investigators, because they will not get paid for the additional time and effort or be compensated for the expenses.

This conflict of interest, inherent to any flat-fee compensation scheme for indigent defense, is exacerbated by the fact that contract attorneys will not be compensated for felony or misdemeanor cases dismissed due to no complaint being filed nor indictment returned, or probation revocation cases dismissed before arraignment, without approval from the IDC. ¶1(B)(1)-(2). A contract attorney bears the burden of convincing the IDC the dismissal “results from material work of the Attorney,” offering the attorney no guarantee of compensation for any effort to have the charges against his or her client dismissed.

Further, the IDC, which is responsible for making decisions about compensation, is not a politically independent entity. Rather, it is a county “business office” with duties and loyalties to the Deputy County Administrator. As such, the IDC may prioritize the minimization of expenses, rather than providing as many dollars as constitutionally adequate representation requires. Decisions about attorney compensation ought to be made by a politically independent office instead.

The Proposed Agreement would also endanger the constitutional right to effective assistance of counsel due to lack of enforcement of attorney qualification standards. In finding a flat-fee contract system unconstitutional in *State v. Smith*, 681 P.2d 1374, the Court held that one reason the system fell short was that it “fail[ed] to take into account the competency of the attorney.” *Id.* at 1381. Commendably, the Proposed Agreement does set out minimum qualifications for attorneys. However, per the Proposed Agreement, the attorney rather than the County is responsible for monitoring their qualifications and experience. Exhibit B. The County should actively monitor attorney qualifications, including experience and training, as “[a]ssigning an attorney incapable, for whatever reason, of providing effective assistance . . . violates a defendant’s constitutional rights.” *Zarabia v. Bradshaw*, 912 P.2d 5, 6 (Ariz. 1984).

August 17, 2011
Page 3 of 6

TCP respectfully urges the Board of Supervisors to carefully consider the serious constitutional concerns that the Proposed Agreement raises. The Board must ensure full and fair compensation for indigent defense counsel, even as it understandably struggles to control costs. TCP would be glad to answer any additional questions or provide any assistance as you undertake to determine how to best provide indigent defenses in Cochise County.

Sincerely,

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

Virginia E. Sloan
President

cc: Patrick Call, District 1, Chairman
Ann English, District 2, Vice-Chairman
Richard Searle, District 3, Supervisor
James E. Vlahovich, Deputy County Administrator
Amy Hunley, Indigent Defense Coordinator
Judge Wallace R. Hoggatt, Presiding Superior Court Judge

APPENDIX A

National Right to Counsel Committee

Honorary Co-Chairs

Walter F. Mondale

Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977–1981; United States Senator (D-MN), 1964–1977; former Minnesota Attorney General who organized the amicus brief of 23 states in support of Clarence Earl Gideon in *Gideon v. Wainwright*

William S. Sessions

Partner, Holland & Knight LLP; Director, Federal Bureau of Investigation, 1987–1993; Judge, United States District Court for the Western District of Texas, 1974–1987, Chief Judge, 1980–1987; United States Attorney, Western District of Texas, 1971–1974

Co-Chairs

Rhoda Billings

Professor Emeritus, Wake Forest University School of Law; Justice, North Carolina Supreme Court, 1985–1986, Chief Justice, 1986; Judge, State District Court, 1968–1972

Robert M. A. Johnson

District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association; former Chair, American Bar Association Section of Criminal Justice

Timothy K. Lewis

Co-Chair, Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992–1999; Judge, United States District Court for the Western District of Pennsylvania, 1991–1992; former Assistant United States Attorney, Western District of Pennsylvania; former Assistant District Attorney, Allegheny County, Pennsylvania

Members

Shawn Armbrust

Executive Director, Mid-Atlantic Innocence Project; as a member of the Northwestern University Medill School of Journalism was instrumental in achieving the 1999 death row exoneration of Illinois inmate Anthony Porter

Jay W. Burnett

Former Judge, 351st Criminal District Court, Harris County Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986–1998; Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas, 1999–2000

Alan J. Crotzer

Probation and Community Intervention Officer, Florida Department of Juvenile Justice; wrongfully convicted and sentenced to 130 years in prison; served 24.5 years in prison; exonerated based on DNA evidence in 2006

Tony Fabelo

Director of Research, Justice Center of the Council of State Governments; former Senior Associate, The JFA Institute; former Executive Director, Texas Criminal Justice Policy Council, 1991–2003

Norman S. Fletcher

Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis LLP; Justice, Supreme Court of Georgia, 1989–2005, Chief Justice, 2001–2005

Monroe H. Freedman

Professor of Law and former Dean, Hofstra University School of Law; nationally-acclaimed scholar of lawyers' ethics

Susan Herman

Associate Professor of Criminal Justice, Pace University; former Executive Director, National Center for Victims of Crime

Bruce R. Jacob

Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida, represented Florida in *Gideon v. Wainwright*

Abe Krash

Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, Georgetown University Law Center; represented Clarence Earl Gideon in *Gideon v. Wainwright*

Norman Lefstein

Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis (served as one of the Committee's Reporters)

Charles J. Ogletree, Jr.

Jesse Climenko Professor of Law; Executive Director, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School

Bryan A. Stevenson

Director, Equal Justice Initiative of Alabama; Professor of Clinical Law, New York University School of Law

Larry D. Thompson

Senior Vice President, Government Affairs, General Counsel and Secretary, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001–2003; former United States Attorney, Northern District of Georgia

Hubert Williams

President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission

Reporters

Norman Lefstein

Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis; LL.B., 1961, University of Illinois College of Law; LL.M., 1964, Georgetown University Law Center.

Professor Lefstein's prior positions include service as director of the Public Defender Service for the District of Columbia, as an Assistant United States Attorney, and as a staff member in the Office of the Deputy Attorney General of the U.S. Department of Justice. His professional activities include serving as Chair, American Bar Association (ABA) Section of Criminal Justice in 1986–1987; and as Reporter for the Second Edition of ABA Criminal Justice Standards Relating to *The Prosecution Function*, *The Defense Function*, *Providing Defense Services*, and *Pleas of Guilty*. During 1997–1998, Professor Lefstein served as Chief Consultant to a Subcommittee on Federal Death Penalty Cases of the Judicial Conference of the United States, directing preparation of a report on the cost and quality of defense representation in federal death penalty prosecutions. His publications include *Criminal Defense Services for the Poor*, published by the ABA in 1982, and co-authorship of *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, published by the ABA in 2004. He also has served as a member of the ABA's Standing Committee on Legal Aid and Indigent Defendants and for nine years chaired its Indigent Defense Advisory Group. In 2007, Professor Lefstein concluded seventeen years as Chairman of the Indiana Public Defender Commission.

Robert L. Spangenberg

Research Professor and Founder, The Spangenberg Project, Center for Justice, Law, and Society, George Mason University; B.S., 1955, Boston University; J.D., 1961, Boston University School of Law.

Professor Spangenberg specialized in civil legal services early in his career, developing the Boston Legal Assistance Project, a neighborhood civil legal services program, which he headed for nine years. After a two-year foundation study of civil legal services in Boston and a statewide study of indigent defense in Massachusetts, Professor Spangenberg joined Abt Associates in Cambridge, Massachusetts, where for nine years he conducted national and local studies of indigent defense systems across the country. In 1985, he founded The Spangenberg Group to continue the study of indigent defense nationwide. During his 23 years as President of the organization, he visited all 50 states, testified before legislative bodies about the justice system, and served as an expert witness in court proceedings. The Spangenberg Group published hundreds of reports and studies pertaining to the country's system of justice in criminal and juvenile proceedings, and for more than 20 years, Professor Spangenberg has served as a consultant to the ABA Standing Committee on Legal Aid and Indigent Defendants. In February 2009, Professor Spangenberg joined George Mason University, where he will continue his work on indigent defense matters.