

February 26, 2024

Mayor Mike Coffman
Aurora City Council
15151 E. Alameda Parkway
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By Email

To: Mayor Mike Coffman and Members of the Aurora City Council:

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cc: City Manager Jason Batchelor, jbatchel@auroragov.org,
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Presiding Judge Shawn Day, sday@auroragov.org
Chief Public Defender, Elizabeth Cadiz, ecadiz@auroragov.org

Re: Resolution to Repeal & Halt RFP (Feb. 26, 2023, City Council Agenda Item “11.a.4 Restore the Independence of the Indigent Defense Counsel”)

Dear Mayor Coffman and Members of the Aurora City Council:

On behalf of the National Association of Criminal Defense Lawyers (NACDL) we call upon the City of Aurora to rescind its Request for Proposals, R-2384, soliciting firms for bids to replace the city’s current public defense provider. The decision to replace the current public defense system with a flat fee contract will undercut public safety, undermine community confidence, and represents poor fiscal responsibility.

The unnecessary disruption of an effective public defense system to cut costs from the city's current budget will have long lasting and far-reaching consequences that the citizens of Aurora will pay for in the years to come. Efforts to decrease public defense spending without a corresponding decrease in the number of cases being brought, the number of individuals facing incarceration, or the degree of punishment being sought, are short-sighted. The size and depth of a jurisdiction's public defense needs are a direct response to that jurisdiction's arrest and prosecution practices. This is true, whether public defense is provided by an institutional defender or contract counsel.

As the nation's preeminent organization advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing, NACDL's mission is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal legal system, and redressing systemic racism, and ensuring that its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level. We share our insights informed by our decades of work at the federal, state, and local level promoting practices that create a fair, rational, and humane criminal legal system.

The Importance of a Robust and Independent Public Defense System

The provision of public defense services is one of the fundamental obligations of government and a core tenet of the American criminal legal system. Public defense services act as a critical check against government overreach and abuses of power while inspiring greater confidence in the accuracy of its legal system. When a community's public defense system is weakened, whether by underfunding its resources, overloading its lawyers, undercutting its independence, or compromising its loyalties, the entire community bears the consequences. Effective public defense reduces the risks of wrongful convictions and ensures limited state resources are properly used. Investing in a robust public defense system is the epitome of fiscal responsibility. Replacing a healthy, effective, and vibrant public defense system with a flat fee contract will increase the risks of wrongful convictions and excessive punishments, while also diminishing public confidence in the accuracy and justness of its legal system.

To meet the requirements of the Sixth Amendment, a jurisdiction must do more than provide the presence of an attorney. The Constitution requires that every person who stands accused of a crime and faces the possibility of incarceration receive the effective assistance of counsel. This means the attorney must have the resources, staffing, and independence needed to fulfil their role as a check on government action.

As the American Bar Association has recognized, the first standard of a public defense delivery system is that "Public Defense Providers and their lawyers should be

independent of political influence.”¹ The system must be able to freely stand up against the government, raising challenges to its practices and calling out its harmful policies. That role can be compromised when those entrusted with the responsibility to serve as the defense are handpicked by that very same government. The harm of such a system can be two-fold. One is that the defense attorney tempers their zealotry for their client because they have a competing loyalty to the government. The more pernicious and harmful, however, is the public’s perception. For even if the lawyer commits fully to the cause of the client, the perception of the community cannot help but be influenced by the fact that the city solicited and selected the defense attorney. That can be especially true in situations such as the one created by Aurora’s RFP. While the current system operates independently under the leadership of the Aurora Public Defender Commission, the RFP will remove that barrier, placing control of public defense directly under the City Council, City Manager, and the Presiding Judge, as the parties that oversee the procurement and renewal of the contract.

With community confidence in our legal and other government institutions eroding, a city replacing a robust, effective public defense agency in an effort to save a few dollars is immensely harmful and may only serve to have communities further distance themselves from the legal process. This includes rejecting the legitimacy of the court system, as well as absenting themselves from engagement as jurors and witnesses. This in turn, renders a community less safe and less secure. As the American Legislative Exchange Council (ALEC) has highlighted, “effective and independent defenders can shine a light on government overreach and abuses of power, . . . protect the innocent from wrongful convictions, facilitate treatment, services and other outcomes that reduce recidivism, and help ensure fair trials.”²

In addition to ensuring that a public defense delivery system operates independent of political and other influences, the system must have adequate funding and resources, a controlled and reasonable workload, and adequate training and supervision.³ However, the use of flat fee contracts work in direct contravention to such standards, as they place the interests and needs of the client and the attorney in direct opposition to one another.

The conflict between attorney and client in such processes is so foundational that several states have outlawed the use of flat fee contracting altogether. In Idaho⁴,

¹ American Bar Association [Ten Principles of a Public Defense Delivery System](#), (ABA Ten Principles) Principle 1: Independence. (Nov. 9, 2023).

² ALEC [Resolution in Support of Public Defense](#), Approved Sept. 3, 2019.

³ ABA Ten Principles, Principles 2 (Funding, Structure, and Oversight), 3 (Control of Workloads), and 7 (Experience, Training, and Supervision).

⁴ Idaho Code 19-859 provides the board of county commissioners shall provide representation through a public defender office or contracting with a defense attorney “provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney.”

Michigan, South Dakota,⁵ and Washington, the state expressly forbids the use of flat fee contracts for the provision of public defense.

This fundamental conflict between the constitutional mandates for effective representation and the attorney's financial stake is especially acute in cases like Aurora's RFP, in which associated costs such as for investigators, social workers, experts, interpreters, and other case related expenses, are also included in the contract.⁶ As a result, flat fee contracts encourage lawyers to only accept the government's version of events, and act to negotiate quick pleas.

In 2013, in a class action lawsuit against the cities of Mount Vernon and Burlington, Washington, a federal court found that the cities' decision to use flat fee contractors created a systemic denial of counsel akin to their having provided no counsel at all. Noting the ways in which multiple contracting agencies failed to meet with clients, conduct investigations, file motions, or try cases, the court found the "municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation."⁷

Other Shortcomings of the RFP

In addition to the concerns already noted surrounding the request for a flat fee contract, that includes not only the time, overhead, and operating expenses for the attorneys and their staff, but all ancillary services a case requires, including investigators, social workers, and experts, the current RFP has several other substantial shortcomings. Notably, while the city purports to seek to ensure high quality representation continues, there is nothing in the RFP which defines the standards that will be employed to measure it by.

There is no requirement that contractors explain how they will provide oversight and supervision or what caseload standards they will adhere to. Firms are expected to describe their "approach" to case management and information about the experience and expertise of their lawyers, but are not asked to disclose, for example, what percentage of their time or practice the public defense contract will represent. Relatedly,

⁵ State statute in South Dakota require local government to pay public lawyers a "reasonable and just compensation for his services." South Dakota Unified Judicial System Policy 1-PJ-10, issued by the state supreme court, interpreted this statute to ban all flat fee contracts.

⁶ See e.g. Washington State Rule of Professional Conduct 1.8 which provides "[a] lawyer shall not . . . make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm . . . to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel."

⁷ *Wibur v. City of Mount Vernon*, C11-1000RSL, (WD WA 2013) at p.2.

the RFP fails to request input on anticipated workloads, including what workload standards will be applied or how they will be monitored.

In 2023 the American Bar Association and the RAND Corporation released the National Public Defense Workload Study (NPDWS),⁸ providing guidance as to the time attorneys should expend on various classes of felony and misdemeanor cases. In 2017, Colorado undertook a statewide public defense workload study⁹ which similarly provided recommended times attorneys should expend on various felony and misdemeanor cases. The national and state studies vary to a degree on their time estimates but share a common core--that in order to ensure quality, constitutional public defense representation, attorneys must have workloads that are controlled to enable them to devote the time the cases require.

Offense Type	Colorado Project Time	NPDWS Time
Misdemeanor 1 / High Misdemeanors	16.3 hours/case	22.3 hours/case
Misdemeanor 2 &3 / Low Misdemeanors	11.9 hours/case	13.8 hours/case
Misdemeanor Sex Offenses	33.8 hours/case	Included in High Misdemeanors Category

Importantly, both workload studies only addressed the amount of **attorney time** required for case representation. These estimates do not include the additional time that will be required for attorneys to provide supervision and oversight to those providing the representation, time for case management and data entry, as well as the time and related costs that are associated with travel, investigators, experts, social workers, paralegals, and other ancillary support services.

The RFP also does not indicate what steps the City will take to ensure the quality of representation during the performance of the contract. There is currently no indication that anyone will be providing oversight and no description of state or national standards¹⁰ that will otherwise be used to measure the quality of representation.

Finally, the RFP and information released during the public pre-proposal virtual conference indicate that applications will be reviewed first by an “evaluation” committee who will consider the applicant’s: experience, expertise, proposed approach to case

⁸ Pace, Nicholas M., Malia N. Brink, Cynthia G. Lee, and Stephen F. Hanlon, [National Public Defense Workload Study](#). RAND Corporation, 2023.

⁹ [The Colorado Project: A Study of the Colorado Public Defender System and Attorney Workload Standards](#), Rubin Brown and ABA, Aug. 2017.

¹⁰ See e.g. [ABA Standards for the Criminal Defense Function](#), [NLADA Performance Guidelines for Criminal Defense Representation](#), [Idaho Standards for Defending Attorneys](#), [Michigan Indigent Defense Commission Minimum Standards for Indigent Criminal Defense Services](#), [Ohio Performance Standards for Criminal Defense Representation in Indigent Criminal Cases](#), [Virginia Indigent Defense Commission Standards of Practice](#),

management, references, and pricing. To date, no information in the RFP or elsewhere has indicated whether anyone with public defense expertise or experience will sit on the evaluation committee so as to allow the committee to meaningfully assess the applications and their capacity to provide constitutionally sufficient representation consistent with prevailing professional standards.

Flat Fee Contracts Do Not Save Money

Research shows that flat fee contracts end up costing jurisdictions money rather than saving them. While a flat fee contractor may offer their services at a rate below the cost of the institutional defender or the hourly private assigned counsel attorney, it comes with other costs that the community ends up having to pay. Research has shown that representation provided under the auspices of a flat-fee contract results in defendants being convicted more often and serving longer sentences. A 2017 examination in North Carolina showed that cases handled by flat fee contracts led to an 11% increase in conviction rates as well as a nearly 40% increase in the likelihood that the defendant would be sentenced to incarceration. These outcomes are driven by an increased rate of guilty pleas, and, relatedly, attorneys spending 11% fewer hours on flat fee cases than their hourly rate peers, as well as disposing of their case on the same day as their initial meeting 36% more often.¹¹ The rise in conviction rates and sentence lengths means localities using flat fee contracts will have greater direct cost for incarceration.

Criminal convictions, even in misdemeanor cases, have lifelong impacts for the defendant, their family, and their community. Convictions render people ineligible for various professional licenses and job opportunities, can serve as a bar to advancing education, and can be a barrier to securing stable housing. Over a lifetime, the collateral consequences of a criminal conviction can vastly overshadow the immediate punishment imposed by the court.¹² As a result, the city will pay long-term costs in decreased earnings and disposable income for spending, lower tax bases, and overall lower rates of civic engagement.

The city council certainly has an obligation to be good stewards of the community's finances, but it also has a responsibility to be good stewards of the community's safety and well-being. This includes a commitment to having a legal system that is just and fair. In fact, meaningful investment in the public defense function is one of the best ways to exercise fiscal responsibility. Public defense is a check on government abuse and overreach. It helps minimize the use of excessive sentences and prevents wrongful convictions. Underfunded, overtaxed public defense delivery systems which disincentivize engaging in investigations or employing experts, ultimately cost their

¹¹ Flat Fee Compensation, [Lawyer Incentives, and Case Outcomes in Indigent Criminal Defense](#), Andrew J. Lee, University of Texas (Austin) (Dec. 23, 2021).

¹² [National Inventory of Collateral Consequences of Conviction](#) (website), Council of State Governments, Justice Center. See generally, [Collateral Damage: America's Failure to Forgive or Forget in the War on Crime](#), NACDL (2014) and the [National Institute of Corrections, Resource Library](#) for additional research on the impact of collateral consequences.

communities, increasing money spent on expensive incarceration and also increasing the risk of wrongful convictions (which mean true perpetrators continue to engage in criminal activity). Flat fee contracts incentivize the rapid disposal of cases, with minimal expenditures for investigation, hiring experts, or engaging in crucial motions practices. The results of such meet and plead cultures are increased rates of convictions, rendering larger parts of the community unemployable or underemployed, creating long-term impacts on the region's income.

To the extent the Council wishes to examine the costs of its legal system, it should begin such an examination at the sources. Public defense lawyers, like judges, respond to the cases placed before them. Their obligation is to provide constitutionally effective representation to all eligible individuals. If the Council is truly seeking to be good stewards of the community's resources, it is much more likely to find savings opportunities in larger budgets. Cutting \$1 million from the public defender's budget represents roughly a 40% reduction in funding, while searching for that same \$1 million in efficiencies in the police department's \$142 million budget would be asking that agency to make a budget cut of just .07%.¹³

Conclusion

Ensuring a robust defense that has the time, resources, and incentives to engage meaningful investigation and a vigilant motions practice is especially critical in places like Aurora. Given the police department's history of racially biased stops, use of force, and questionable policing practices that have resulted in the ongoing consent decree monitoring, it is vital that there be a defense that critically scrutinizes police actions, independently investigates claims, and thoroughly challenges their assertions.

Replacing a healthy and effective public defense system with a flat fee contract is not a reliable or just way to save money. Instead, this will increase the risks of wrongful convictions, excessive punishments, and unnecessary pre-trial incarceration; diminish the accuracy and justness of the legal system; erode public confidence; and ultimately cost more money.

Today Aurora is home to a top-tier municipal defender office that fulfills its constitutional duties, providing robust, meaningful representation to their clients, supporting their community's faith in the fairness of its government institutions, and serving as a critical check on government abuse and overreach. While some have looked at the city's municipal public defender office as an "outlier" that should be changed to conform with practices in other parts of the state, instead the office should be celebrated as an innovator and leader that other communities should aspire to replicate.

¹³ Aurora City Budget, 2023.

As a long-time member of the Colorado Bar, I am proud of the fact that our state's public defense delivery system is often cited as an example of what public defense can and should be. On behalf of the National Association of Criminal Defense Lawyers, we urge the City Council to rescind its RFP and invest its time and resources in continuing to nurture its municipal public defense system.

Sincerely,

Lisa M. Wayne, Esq.
Executive Director
National Association of Criminal Defense Lawyers