

**TESTIMONY OF THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
BEFORE
CALIFORNIA COMMISSION ON
THE FAIR ADMINISTRATION OF JUSTICE**

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**Professional Responsibility Issues:
Focus Question 1(4)
Ethical Rules for Public Defenders Caseloads**

**John Wesley Hall
First Vice President
National Association of
Criminal Defense Lawyers
1150 18th Street, Suite 950
Washington, DC 20036**

Introduction

My name is John Wesley Hall and I am the First Vice President and President-Elect designate of the National Association of Criminal Defense Lawyers. I am also the author of *PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE* (3d ed. 2005) and served as Chair of the NACDL Ethics Advisory Committee for 15 years. On behalf of NACDL, I would first like to thank you for allowing NACDL to comment on some of the proposals under consideration by the commission.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL is the only national bar association¹ working in the interest of public and private criminal defense attorneys and their clients.

NACDL has long worked to improve this country's public defense systems. Through public education, advocacy, and litigation, we have sought to ensure that those without financial means are afforded the zealous, competent counsel necessary to guarantee a fair trial in our adversarial system. NACDL has a full-time staff member who monitors indigent defense issues nationwide.

Our testimony focuses on two of the most prevalent and pernicious problems within the arena of public defense today: Increased use of low-bid, flat-fee contracts as a means of providing public defense services, and the overwhelming caseloads facing public defenders and assigned counsel. These problems have the same effect – they hamstring the defense, thus unbalancing of the scales of justice. When the defense cannot do its job fully – exploring to the fullest alternative factual and legal scenarios for persons accused of crime – the entire justice system, and, indeed, ultimately the public suffer. Money is wasted on more appeals and post-conviction proceedings with merit and unwarranted prison sentences. Alternatives to incarceration are not fully explored.

¹ The National Association of Criminal Defense Lawyers is a professional bar association founded in 1958. Its 12,000-plus direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

And, in the worst cases, the wrong people go to jail, while actual guilty parties remain free.

All this leads to a lack of public confidence in the criminal justice system, something it cannot afford to endure.

This Commission has the power, by recommending the adoption of particular ethical rules and standards, to eliminate (or at least significantly ameliorate) these problems and avoid their harmful effects on the California criminal justice system. We strongly urge you to do so.

I. Dealing With Overwhelming Caseloads for Public Defense Lawyers

No matter how brilliant and dedicated the attorney, if she is given too large a workload, she will not be able to provide clients with appropriate assistance. Defense counsel will not be capable of providing the “guiding hand of counsel” as required by the Sixth Amendment to the U.S. Constitution.² With this in mind, the National Advisory Commission on Criminal Justice Standards and Goals set the following caseload limits for full-time public defenders: 150 felonies, or 400 misdemeanors, or 200 juvenile, or 200 mental health, or 25 appeals. In no event should caseloads surpass the maximum listed in the NAC standards.³ Established more than 20 years ago, these standards have withstood the test of time as a barometer against which full-time public defender caseloads should be judged.

Tragically, almost no jurisdiction in the country abides by these caseload standards, and full

² *Powell v. Alabama*, 287 U.S. 45, 49 (1932) (quoted in *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1964)); *Argersinger v. Hamlin*, 407 U.S. 25, (1972) (quoted in *Alabama v. Shelton*, 535 U.S. 654, 665 (2002)).

³ There are a variety of reasons, however, that caseloads should actually be lower than the standards propose. For example, the standards assume that the defender is full-time and works exclusively on cases. Accordingly, any administrative responsibilities allocated to the defender should reduce the expected maximum caseload. The caseload standards also assume appropriate support staffing in the office. If the number of assistants or investigators are insufficient, requiring the attorney to take on this work as well, the attorney’s caseload should be reduced accordingly. Including death penalty cases in the numbers supplant for a huge percentage of the felony caseload, depending on the role of the lawyer involved in the case.

workload assessments⁴ that determine the number of cases that is reasonable in the particular jurisdiction are even less common.

When caseloads become overwhelming, public defense attorneys are forced to cut corners. They cannot take the time to investigate cases, consult experts or investigators, request and review discovery or file pre-trial motions, and they cannot prepare adequately for trial. Additionally, staggering caseloads often prevent the attorney from taking time to explore diversion or treatment alternatives for clients, which often results in reduced recidivism and therefore significant cost savings when appropriately utilized. So what are public defense attorneys to do if their caseload becomes such that they are incapable of providing a full and vigorous defense for their clients?

Arguably, the current ethical rules provide a full answer. However, it is a common view that this rule has limited applicability to those who are viewed as having no control over their caseload, *i.e.* public defenders and prosecutors. For this reason, the American Bar Association's Standing Committee on Ethics and Professional Responsibility a year ago issued an ethics opinion that specifically requires public defenders to keep their caseloads under control or seek relief in court. That opinion, ABA Ethics Opinion No. 06-441,⁵ states, "If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation."⁶ If their caseloads become too high, individual

⁴ Precise workload targets are best established through an individualized study that allows a locality to take into account its unique geographic issues, the administrative and other responsibilities of the attorney, as well as the format of its judicial system and the make-up of its criminal docket, the baseline national caseload standards allow us to evaluate systems where an individualized workload study has not been done.

Colorado is an example of a system that used a case-weighting study to establish appropriate workloads for its public defenders. The study was completed in 1996 and the legislature has accepted the formula from that study for purposes of both budgeting and analyzing the fiscal impact of proposed legislation. A number of other states also have established caseload standards. For a slightly outdated overview, see Bureau of Justice Assistance, Keeping Defender Workloads Manageable, available at <http://www.ncjrs.org/pdffiles1/bja/185632.pdf>.

⁵ The full opinion appears at http://www.abanet.org/cpr/06_441.pdf.

⁶ The American Council of Chief Defenders has similarly published an ethical opinion stating that defenders are "ethically required to refuse to accept additional casework" if that case-

public defenders are ethically compelled to seek a reduction. The real question is: by what means?

The ethics opinion first requires a line defender to go to his or her supervisor for that caseload reduction, and then up the chain of command to the head of the office. If, however, the office does not address the problem, the opinion requires the defender to go above their heads and seek relief in court. “[T]he lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.” Case law supports this proposition. *See* cases cited in note 8, *infra*.

This portion of the ethical opinion has been viewed as controversial by some who do not believe that judges should interfere in the operations of public defender offices. The independence of public defender offices must be vigorously protected to ensure that interests other than those of the best interest of the defendant are never a consideration in case decision making. We are also aware of the reality that, even without judicial intervention, politics, administrative and budgetary pressures, and factors other than the interest of the clients frequently do influence the operation of public defender offices. As a result, it is critical that the decisions of the chief public defender not be absolute and can be subject to higher administrative review or even judicial review if the line defender believes that the interests of the client are potentially or actually being harmed.

A line defender who has a reasonable belief that her caseload is so excessive as to harm her clients who has sought relief but to whom relief is denied by her superiors must have an outlet for relief, outside of her public defender’s office, to challenge that decision. That said, it is not clear to NACDL that this outlet must be through the judiciary, but it has to be when the situation becomes critical or administratively intractable. *See* note 8, *infra*. It could, and perhaps should, instead first be an independent agency or commission, such as a state or regional public defender commission⁷

work would cause them to exceed the capacity of the agency’s attorneys. *See* ACCD Ethics Opinion 03-01 (April 2003), available at http://www.nlada.org/Defender/Defender_ACCD/Defender_ACCD_Home.

⁷ The protection of the client must be the goal and focus of any such procedures. Accordingly, in addition to being independent, this commission or a sub-group thereof, must be capable of acting quickly to address the allegation of per se ineffectiveness. The client of the public defender at issue should not be required to choose between proceeding with an attorney who contends they are

or, even in extreme circumstances the State Bar, were such an entity in a position to and sufficient to independently evaluate the evidence and rule on the issue. If the public defender commission agrees, it can seek redress, too.

NACDL recognizes that each lawyer in a public defense agency is an independent being for purposes of the ethics rules, and she should act accordingly. If the chain of command must be followed, it first should be. But, if the response from the chain of command in the office does not correct the potential problems in the case such as a personal conflict of interest from funding deficiencies or a looming ineffective assistance claim, the lawyer has a duty to the client to seek relief from the court with jurisdiction over the case⁸ or an administrative agency charged with that responsibility.

We urge the California Commission on the Fair Administration of Justice to recommend the adoption of amendments to the California Rules of Professional Conduct directly address the problem of overwhelming caseloads in public defender offices. Specifically, NACDL recommends that, consistent with ABA Ethics Opinion No. 06-441, the Commission endorse amendments that compel public defenders to decline representation if commitments to other clients or lack of adequate expertise or resources preclude competent representation as required by right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution. This could include an amendment to California Rule of Professional Conduct 3-110 or to its discussion.

II. Low-bid Contracts for Public Defense Work Are Inherently Unethical Because They Put Funding Before Quality Representation

In a “Low-bid” or “Fixed Rate” or “Flat Fee” contract public defense system, lawyers

too overburdened to adequately prepare or delaying his or her case again and again while waiting for the caseload issue to be adjudicated.

⁸ See, e.g., *State v. Peart*, 621 So. 2d 780, 791 (La. 1993); *State v. Citizen*, 898 So. 2d 325 (La. 2005); *Levallee v. Justice in the Hamden Superior Court*, 442 Mass. 228, 812 N.E.2d 895 (2005); *Arabia v. Bradshaw*, 185 Ariz. 1, 912 P.2d 5, 8 (1996).

See Edward C. Monahan & James Clark, *Coping with Excessive Workload*, in Rodney J. Uphoff, Ed., *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER* 318 (1995).

compete for criminal court appointments by submitting a proposal to represent all or a portion of a jurisdiction's indigent defense caseload for a fixed price. In most cases, there is no numeric limit on the number of cases the attorney will receive and no mechanism for the price of the contract to change if the cases are unduly complex, numerous, or require experts or investigators. Generally, the jurisdiction accepts whichever bid is the lowest. Few contract systems consider the qualifications and experience of bidding attorneys.

Virtually unknown prior to the 1980's, the use of low-bid contracts for public defense services has proliferated in the past two decades. In the past year alone, NACDL is aware of a number of counties in California that have switched to low-bid, flat-fee contracts as their means of providing public defense services in criminal cases. NACDL is firmly opposed to such contracts for providing public defense services.

The primary goal of fixed-price contracting is not quality representation but cost limitation. Fixed-price contracts inevitably result in case overload and inadequate representation, as the incentive for the attorney is to process cases quickly. The system thus discourages investigation, consultation of experts, motions practice, and trials. Instead, it encourages quick plea bargaining, regardless of whether it is appropriate or right for the client. Accordingly, these systems inevitably and naturally create a personal financial conflict of interest between attorney and client, in violation of well-settled ethical proscriptions. We submit that it then would violate California Rule of Professional Conduct 3-310(B)(3).⁹

Low-bid, fixed price contracting for public defense services can also lead to violations of the American Bar Association's Ten Principles for delivery of defense services, which are "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

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(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

...

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by the resolution of the matter;

an attorney.”¹⁰ The eighth principle directs, “Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should . . . provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services.”¹¹

In 1984, the National Legal Aid and Defender Association adopted Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services which explicitly forbid the use of low-bid, flat-fee contracts. Indeed, NACDL submits that low-bid, flat-fee contracts violate the California State Bar Guidelines on Indigent Defense Services Delivery Systems.¹² Instead, these standards require compensation to be determined by work, strictly enforced workload limits for contract attorneys, and separate pools of funds to pay third-party service providers, such as investigators and experts, whenever their assistance is required.

Despite this widespread condemnation of the practice, contracting in this manner for public defense services persists. Thus, it is time to take steps to compel counties to consider quality above cost-savings in their criminal justice systems.¹³

Counties are generally forbidden from awarding a construction contract to a bidder – lowest or otherwise – without requiring them to abide by certain standards. A public defense contract should be no different, because failing to require quality, in both instances, puts the citizens of the county in jeopardy and leaves the county open to potential civil liability.

¹⁰ The ABA Ten Principles are available online at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

¹¹ The NLADA Contracting Guidelines are available online at http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts#threeonezero.

¹² The California State Bar Guidelines are available online at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/4dae4947ae3537e4852566d6000dae23/\\$FILE/Calif.htm](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/4dae4947ae3537e4852566d6000dae23/$FILE/Calif.htm).

¹³ Cost savings on the front end are only that. There are hidden costs in all the failures of an adequate defense in the first instance as described above: unnecessary appeals, meritorious appeals and post-conviction proceedings, extended incarceration of those who should not or no longer be, etc.

Accordingly, NACDL urges the California Commission on the Fair Administration of Justice to recommend the adoption of regulations, consistent with those adopted by the California State Bar, that require contracts for public defense services to include terms mandating that contractors comply with standards of practice and caseload limitations.

III. Conclusion

For all of these reasons, NACDL urges this Commission to endorse changes to the California Rules of Professional Conduct that would help protect Californians from the two of the most harmful problems in the public defense arena – low-bid contracts and overwhelming caseloads for public defenders and assigned counsel.

Thank you for the opportunity to speak to you today. We hope the information NACDL has provided is helpful to you.