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CONTRACTING FOR INDIGENT DEFENSE SERVICES A SPECIAL REPORT

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Monograph

INDIGENT DEFENSE SERIES

#3

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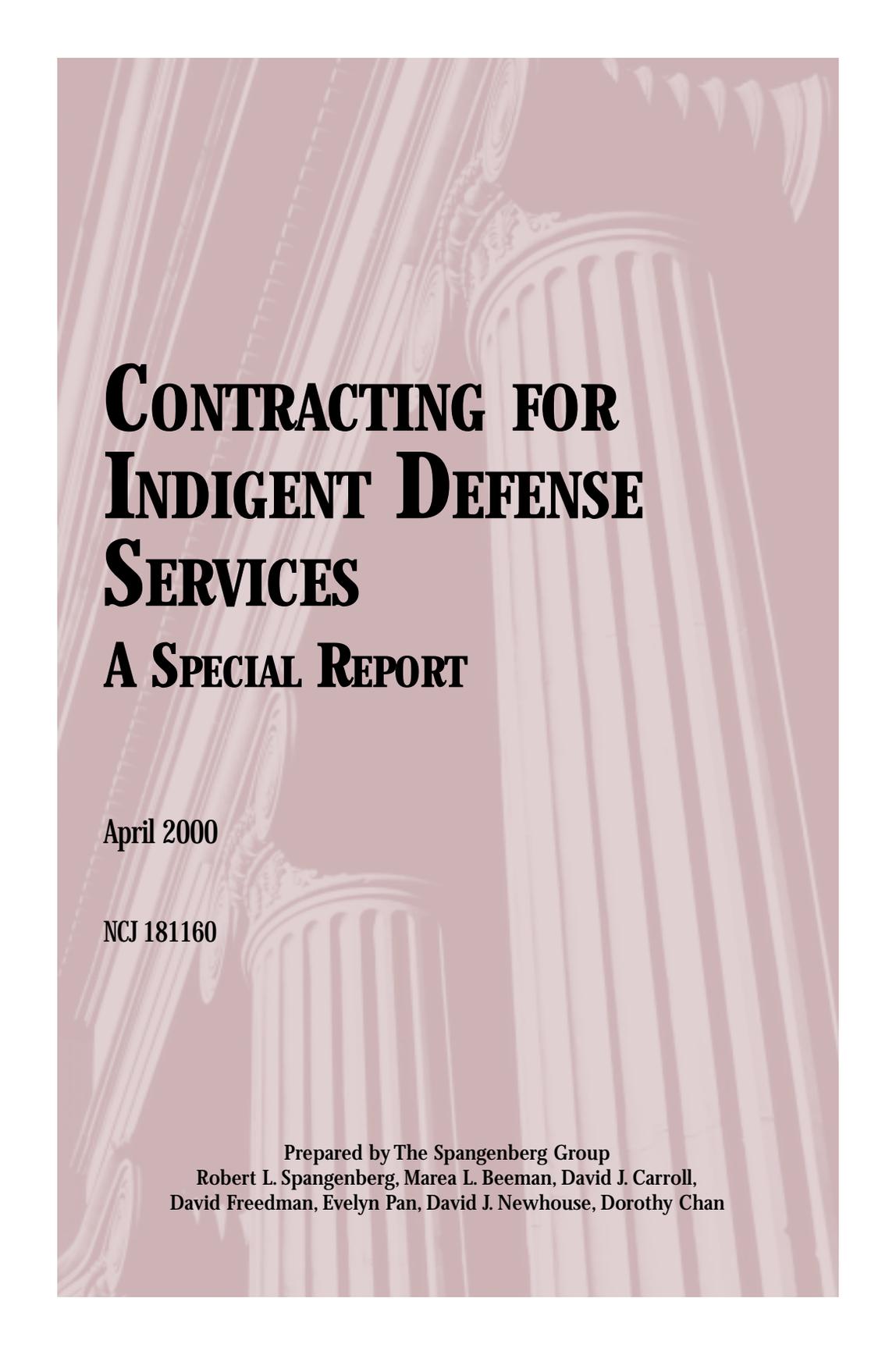
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CONTRACTING FOR INDIGENT DEFENSE SERVICES

A SPECIAL REPORT

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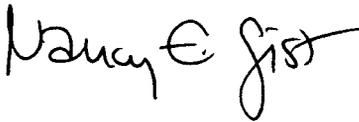
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From the Director

Too often, citizens and public officials do not acknowledge that adequately supporting indigent defenders is critical to preserving the constitutional rights of individuals accused of crimes. To function properly, the criminal justice system needs all of its components—prosecution, adjudication, corrections, and defense—operating effectively.

One important way we can bolster indigent defense in this country is by educating criminal justice practitioners, elected officials, and the public about the challenges facing the indigent defense community. This BJA report series addresses key issues that attorneys and managers in indigent defense systems struggle with every day. It is our hope that the information and recommendations provided here serve as a valuable resource for all of us working to improve the justice system.



Nancy E. Gist

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I. Introduction

In 1997 and 1998, a rural county in California agreed to pay a low-bid contractor slightly more than \$400,000 a year to represent half of the county's indigent defendants. The contractor was a private practitioner who employed two associates and two secretaries, but no paralegal or investigator. The contract required the contractor to handle more than 5,000 cases each year. All of the contractor's expenses came out of the contract. To make a profit, the contractor had to spend as little time as possible on each case. In 1998, the contractor took fewer than 20 cases—less than 0.5 percent of the combined felony and misdemeanor caseload—to trial.

One of the contractor's associates was assigned only cases involving misdemeanors. She carried a caseload of between 250 and 300 cases per month. The associate had never tried a case before a jury. She was expected to plead cases at the defendant's first appearance in court so she could

move on to the next case. One afternoon, however, the associate was given a felony case scheduled for trial the following week. The case involved multiple felony and misdemeanor charges. When she looked at the case file, the associate discovered that no pretrial motions had been filed, no witness list had been compiled, no expert witnesses had been endorsed, and no one had been subpoenaed. In short, there had been no investigation of any kind into the case, and she had no one to help her with the basics of her first jury trial.

The only material in the case file was five pages of police reports. In these reports she found evidence of a warrantless search, which indicated strong grounds for suppression. She told the judge she was not ready to proceed and that a continuance was necessary to preserve the defendant's sixth amendment right to counsel. The continuance was denied. The associate refused to move forward with the case. The contractor's

About the Authors of This Special Report

This special report was researched and written by the staff of The Spangenberg Group, a nationally recognized criminal justice research and consulting firm working to improve the delivery of indigent defense services. Located in West Newton, Massachusetts, The Spangenberg Group has provided research and technical assistance for justice organizations in every state in the nation.

other associate took over the case and pled the client guilty to all charges. The associate who had asked for a continuance was fired.

In this California county, critics' worst fears about indigent defense contract systems came true. When contract systems are created for the sole purpose of containing costs, they pose significant risks to the quality of representation and the integrity of the criminal justice system. We have also learned, however, that contract systems

work when appropriate safeguards are developed and implemented.

This special report was written for individuals in the justice system who are using, considering, or implementing an indigent defense contract system. The report presents the major judicial and legislative attempts to deal with those systems, examines the best and worst features of contract systems, and discusses the national standards that govern contract systems.

*Throughout this special report, the term *contract* refers to legal agreements between a provider and funder. This excludes staff-based programs with annual budgets (traditional public defender agencies) but includes nonprofit corporations under contract with a funder (usually in response to a bidding process), part-time contractors, and contractors who may be referred to as the jurisdiction's public defender. The term *contractors* refers to the attorney, law firm, associated attorneys or firms, or organization (nonprofit or for-profit) that provides representation to indigent persons under contract.

II. History of Indigent Defense Contracting in the United States

Two landmark decisions of the U.S. Supreme Court, *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Argersinger v. Hamlin*, 407 U.S. 25 (1972), paved the way for the appointment of counsel to represent indigent defendants in state court. These decisions left to the states the responsibility to determine how to establish and fund systems to provide representation to indigent defendants. Some states, in turn, shifted the responsibility to individual counties.

Initially, the vast majority of jurisdictions provided indigent defense through either assigned counsel or a public defender office. But in the past 15 years, the number of jurisdictions providing some portion of their indigent defense through a contract system has increased dramatically. More recently, some jurisdictions have replaced assigned counsel programs with contracting. Very few jurisdictions have replaced public defender offices with contracting.

There are a number of reasons contract systems are becoming more prevalent. First, the percentage of defendants in criminal cases receiving court-appointed counsel is growing.¹ Second, in some jurisdictions with a primary defender organization, conflict caseloads² and case overload increasingly are being handled by contractors rather than by assigned counsel. Third, funding authorities are seeking ways to reduce costs through privatizing public sector services, including indigent defense services. And fourth, efforts are under way, as in New York City, to reduce the budget and the number of cases handled by large institutional public defender offices by putting portions of their primary work out for bid.

Critics of contract programs traditionally have raised two concerns.³ The first is that contract programs will inevitably lead to a lower standard of representation through the bidding system, which emphasizes cost over quality. The

¹ It is widely estimated that 60 to 90 percent of all criminal cases involve indigent defendants.

² The term *conflict caseloads* refers to cases in which the primary public defender organization has a conflict of interest (for example, cases involving codefendants or cases in which a witness against the defendant was previously represented by the public defender).

³ See, for example, Nelson, Meredith Anne, 1988, "Quality Control for Indigent Defense Contracts," *California Law Review* 76: 1174; Spangenberg, Robert L., Marea L. Beeman, and Catherine L. Schaefer, 1996, "Questions and Answers Concerning Fixed Price Contracts for

Types of Contracts

Across the nation, jurisdictions are using a variety of contracts to provide indigent defense services. The following is a brief description of each type.

Fixed-Fee, All Cases—specifies the total amount of compensation the lawyer will receive for work on all cases he or she is assigned during a specified contract period. The number of cases assigned to the attorney is not capped; he or she is expected to accept all appointments that arise in the jurisdiction except those in which there is a conflict of interest.

Fixed-Fee, Specific Type of Case—establishes the total amount of compensation the lawyer will receive, but it specifies a particular type of case as well (e.g., all misdemeanors). There is no limit to the number of cases an attorney will be assigned during the contract period.

Flat Fee, Specific Number of Cases—pays a flat fee for all work completed based on a specific number of cases the attorney agrees to accept during the contract period.

Flat Fee Per Case—establishes a fee by case type (e.g., \$150 per misdemeanor), and the attorney agrees to take all cases of that type that arise in the jurisdiction during the contract period.

Hourly Fee With Caps—pays the attorney an hourly fee established in the contract but includes a cap on the total amount of compensation he or she can receive. Once the ceiling is reached, the attorney may be required to perform additional work without compensation.

Hourly Fee Without Caps—pays the attorney an hourly fee established in the contract, but also covers the actual expenses of each case.

In jurisdictions using fixed-fee and flat fee, specific number of cases contracts, the funder knows in advance the total costs associated with representation, regardless of fluctuations or peculiarities in charging practices, caseloads, or case type during the course of the contract. As a result, these types of contracts appeal to funders. The regularity of payment appeals to some attorneys, too. These systems have been criticized by many observers, however, because of the pressure they create to resolve cases as early as possible.

Under flat fee per case and hourly fee contracts, total costs to funders can vary over of the course of the contract, depending on variables outside the control of the contracting attorney and the funder. As a result, some funders have concluded that these types of contracts do not adequately guarantee the contract's maximum cost.

Representation of Indigent Defendants," *Report for the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, Bar Information Program*, Washington, DC: American Bar Association; National Association of Criminal Defense Lawyers, 1997, *Low-Bid Criminal Defense Contracting: Justice in Retreat*, Washington, DC.

second concern is that the private bar no longer will play a role in indigent defense. Contract programs that replace appointed counsel systems generally require far fewer private attorneys. With fewer private bar participants, critics caution, one of the sixth amendment's most important allies will possibly vanish.

Judicial Responses to Contract Systems

Legal challenges to contract systems have provided important insights into how they developed. In *State v. Smith*, the Arizona Supreme Court, in 1984, struck down Mohave County's contract defense system, which for several years solicited sealed bids from private bar members. The court's opinion established a widely cited standard for assessing the constitutionality of a low-bid contract system.

The decision cites the National Legal Aid & Defender Association's (NLADA's) *Guidelines for Negotiating and Awarding Indigent Defense Contracts* and the American Bar Association's (ABA's) *Standards for Criminal Justice* and concludes that Mohave County's system did not conform to those standards in four areas. The system did not take into account the time the attorney was expected to spend representing his or her share of indigent defendants; it did not provide support for costs such as investigators, paralegals, and law clerks; it failed to take into account

the complexity of each case; and it failed to take into account the competency of the attorney.

In another important case, *People v. Barboza*, the California Supreme Court, in 1981, found that a contract for provision of defense services between the county of Madera and an attorney was invalid because it created financial disincentives for the attorney to state a conflict of interest. The case arose from an assault with a deadly weapon conviction with multiple defendants in which the contract attorney represented both defendants. Under the contract, the Madera County public defender was paid \$104,000 per year. From this total, \$15,000 was deducted and held in a reserve account to be drawn against by conflict counsel. Any deficiency in the reserve account was paid by deducting from the monthly payment to the public defender. Any amount left in the account at the end of the year was paid to the public defender. The California Supreme Court held that this type of contract created an "inherent and irreconcilable" financial disincentive for the public defender to declare a conflict.

Some funding authorities have switched to contracting systems in response to legal challenges to inadequate compensation to court-appointed counsel. In recent years, extensive litigation in state courts has challenged the compensation rates for private court-appointed

counsel in criminal cases. In 1992, compensation rates as low as \$10 an hour for out-of-court work and \$15 an hour for in-court work were overturned by the South Carolina Supreme Court in *Bailey v. State of South Carolina*.

Lawsuits challenging the low rates paid to assigned counsel who represent indigent defendants led to an expansion of low-cost contracts in at least two states. In Mississippi and Oklahoma, successful challenges to the system for paying assigned counsel led defense attorneys to believe they would be better compensated for their work. Instead, contracts replaced many case-by-case assignment systems, nullifying the impact of the court decisions.

In 1990, the Mississippi Supreme Court held in *Wilson v. State* that the section of the Mississippi Code that set \$1,000 as the maximum payment for attorneys representing indigent defendants in circuit court was being administered unconstitutionally. Without declaring the statute itself unconstitutional, the court offered a new construction that allowed an attorney \$1,000 in profit plus expenses and interpreted hourly overhead as an actual expense. The court assigned \$25 as a rebuttable hourly overhead rate. As a result, court-appointed counsel in Mississippi are reimbursed for the “actual expense” of overhead for every

hour worked, but they still do not receive additional compensation beyond the \$1,000 “profit.”

In the wake of *Wilson*, contract programs mushroomed throughout Mississippi, where counties are responsible for funding indigent defense representation. Fearing unforeseen increases in their indigent defense expenses, many counties replaced assigned counsel programs with “part-time” public defender programs that in reality were fixed-price contracts. The majority of counties in Mississippi now contract competitively with one or more attorneys to do all of the county’s indigent defense work for a fixed annual amount.

The situation in Oklahoma is similar. In 1990, the Oklahoma Supreme Court found in *State v. Lynch* that the compensation then in effect for court-appointed counsel at the trial level constituted an illegal taking of property of private court-appointed attorneys under the Oklahoma Constitution. The state legislature’s response was a sweeping overhaul of indigent defense in Oklahoma, including the creation of a new statewide agency for providing indigent defense services, the Oklahoma Indigent Defense System (OIDS). The legislature gave OIDS and its board of directors responsibility for providing representation at trial to indigent defendants in noncapital cases in 75 of the state’s 77 counties. (The

state's two largest counties were permitted to retain control of their local public defender programs.)

Prior to *Lynch*, the state was ranked one of the worst in level of funding for indigent defense. Immediately after *Lynch*, it seemed that substantially improved trial representation for indigent defendants could become a reality in Oklahoma. But in May 1992, largely due to budget restraints, the OIDS board adopted a contract system as the primary method for providing noncapital trial counsel in the 75 counties. Each year, attorneys submit bids to the board of directors, which, until 1995, was directed by statute to accept the "lowest and best bid or bids." In 1995, the word "lowest" was removed from the statute after lawsuits were filed by disgruntled bidders whose bids were rejected even though they were the lowest ones.

Oklahoma's contract system presents an annual administrative nightmare for the board during the negotiation process. For fiscal year 2000, the average cost per case for noncapital, trial contract cases is \$183, with some counties having an average cost per case as low as \$99.

Legislatures and Contract Systems

Despite these court decisions, state legislatures, to contain government spending, increasingly seek to require contracting and bidding as one component of providing indigent defense services. One trend emerging from state legislative sessions has been to require state public defender agencies to administer contract programs that handle cases in which the public defender declares a conflict of interest.

For example, in 1995, to reduce spending, the Wisconsin legislature required the State Public Defender (SPD) to use fixed-fee contracts to handle conflict of interest cases rather than rely solely on private court-appointed attorneys. SPD agreed to use contracts for up to one-third of its conflict case misdemeanors annually and established six categories for determining awards: (1) applicant's qualifications and experience, (2) applicant's ethical track record and reputation, (3) proposed cost per case, (4) applicant's ability to handle cases, (5) applicant's financial stability, and (6) adequacy of the applicant's facilities.⁴

⁴For a description of the SPD contract system, see Hardy, Kelly A., 1997. "Contracting for Indigent Defense: Providing Another Forum for Skeptics to Question Attorney's Ethics," *Marquette Law Review* 80: 1053.

The New York City Experience

In 1965, the city of New York established the New York Legal Aid Society (LAS) as the primary defender of indigent people brought to court in New York City. By 1995, LAS's Criminal Defense Division and Criminal Appeals Bureau were handling nearly 250,000 cases a year. That year, to secure an "alternative to the primary defender," the city issued a request for proposals (RFP) from nonprofit and for-profit entities to provide representation to indigent criminal defendants in trial and appellate cases that otherwise would have been assigned to LAS. The bidding process did not affect representation by assigned counsel in conflict of interest cases or representation in homicide cases.

The city's RFP sought to shift 20 percent of LAS's adult criminal defense work to new contract defender organizations by bidding out more than 50,000 trial cases: 10,000 cases in Brooklyn, the Bronx, and Queens; 12,500 cases in Manhattan; all of the LAS's cases in Staten Island; and 400 appeals citywide. LAS, excluded from bidding, continued to operate under a fixed budget with no case-load limits. Each trial contractor was expected to carry between 10,000 and 12,500 nonconflict, nonhomicide cases per year under a 2-year contract.

The RFP set out standards for the provision of services, carefully tracking the ABA *Standards* and NLADA *Guidelines* (see appendix). The RFP did not establish a low bid as the main selection factor, but instead used a weighting scheme that took into account the following factors:

- Experience in handling criminal cases.
- Ability to adhere to caseload standards.
- Financial and management capability and qualifications.
- Range of services.
- Adequacy, appropriateness, and cost-effectiveness of providing staffing, staff supervision and training, and library facilities.
- Understanding of what is required to provide indigent defense.
- Capacity to deal with bilingual clients.
- Proximity of office location.
- Case management and tracking system.

In fall 1995, the Appellate Division of the Supreme Court, First Department, at the request of the New York County Lawyers' Association, the Association of the Bar of the City of New York, and

the Bronx Bar Association, enacted, with the agreement of the city, rules by which the Indigent Defense Organization Oversight Committee was established.⁵ The Oversight Committee was expected to conduct an annual evaluation of LAS and of each indigent defense contractor. Although it had no staff of its own, the committee was considered by the city to be an important component in the evaluation of organizations that bid to provide indigent defense services.

In 1999, the Oversight Committee issued its third evaluation of the system.⁶ The committee found that in many important respects, the contracting system had not diminished the quality of representation. The committee found that the city's requirement that indigent defense contractors hire only experienced staff resulted in a high quality of services, as did the contractors' ability to limit their own caseloads. For instance, when The Bronx Defenders projected that it would reach its maximum contract number of cases (10,000) for the year too quickly, it reached an

agreement with the city to stop covering one of the arraignment shifts.

In the report for 1998, the committee noted that in its report for 1997 it found that "the unfortunate result of creating [the contract organizations] has been to further overburden LAS and seriously undercut the efforts by LAS staff to provide quality representation to its clients." Finding no change in that situation, the committee repeated a recommendation from its 1997 report: "It is imperative that the contractual arrangements with the city provide LAS with the same kinds of limits on its caseload that [the contract organizations] enjoy or a formula for additional funding at a level consistent with the other defense organizations if caseload levels are exceeded."⁷

According to Robin Steinberg, Executive Director of The Bronx Defenders, the real value of a mixed system comes from having small offices that are able to innovate and test new models of indigent defense. "Small defender

⁵ Members of the Oversight Committee are nominated by the presidents of the New York County Lawyers' Association, the Association of the Bar of the City of New York, the Bronx Bar Association, and justices of the Appellate Division of the Supreme Court, First Department. Each member serves a 3-year term, renewable upon renomination by the justices of the Appellate Division. The chair and vice chair of the committee are designated by the presiding justice from among the nominees.

⁶ First Department Indigent Defense Organization Oversight Committee, 1999, *First Department Indigent Defense Organization Oversight Committee Report for 1998*, New York, NY.

⁷ *Ibid.*

organizations,” she said, “can develop methods and strategies and the institutional culture to support such innovations.”

Empirical Studies of Contracting Systems

Very few empirical studies have examined the quality of representation and cost-effectiveness of systems that contract for indigent defense services. The first such study, an assessment of Clark County, Washington, released in 1982, found that costs rose when the county moved from a public defender office to a contract system. In part, the increase resulted from an unforeseen rise in the number of felony cases. The study also noted, however, a decline in the quality of representation, including a decline in the number of cases taken to jury trial, an increase in guilty pleas at first appearance hearings, a decline in the filing of motions to suppress, a decline in requests for expert assistance, and an increase in complaints received by the court from defendants.⁸

A second study, conducted by Houlden and Balkin in 1985, compared the contract counsel system

used in one county with an ordered assigned counsel system used in a second county with similar geographics. The researchers did not identify the counties studied. In the contract system they examined, one firm had held the contract for 8 years. A second firm that submitted a bid to do the work for less money was awarded the contract. There was no solicitation or bidding process for either contract; both were awarded after the law firms approached the county with a proposal. The study found that the contract system cost less than the assigned counsel system for nontrial cases because the contract attorneys spent less time on each case and made fewer appearances. The researchers questioned the quality of representation provided under the contracting system and concluded that over time the costs for contracting would exceed the costs for assigned counsel systems.⁹

In 1993, Worden compared costs associated with different indigent defense systems in Michigan, but did not compare quality. In describing why her study could not fully address issues of quality, Worden noted: “Lawyers’

⁸Lefstein, Norman, 1982, *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing*, New York, NY: American Bar Association.

⁹Houlden, Pauline, and Steven Balkin, 1985, “Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel,” *Journal of Criminal Law and Criminology* 76: 176.

performance is not evaluated easily, in part because standards for effective counsel are vague and in part because thorough and systematic evaluation of performance in individual cases would conflict with professional ethics regarding client confidentiality.” Worden found that contracting with competitive bidding saved money, whereas contracting without competitive bidding significantly

increased costs. (On average, Worden found that competitive-bid contracts cost \$244 per case compared with \$689 per case for no-bid contracts.) Worden also compared public defender costs to assigned counsel costs using the combined average of no-bid and competitive-bid contracts and found that contracts were slightly more expensive.¹⁰

¹⁰ Worden, Alissa Pollitz, 1993, “Counsel for the Poor: An Evaluation of Contracting for Indigent Criminal Defense,” *Justice Quarterly* 10(4): 613.

III. Characteristics of Deficient and Effective Contract Systems

Scholars and practitioners who have studied indigent defense contract systems agree that fairly specific features differentiate effective contract systems that are constitutionally and ethically sound from those that fail to deliver acceptable standards of representation.

Characteristics of Deficient Contract Systems

The most seriously criticized contract systems:

- Place cost containment before quality.
- Create incentives to plead cases out early rather than go to trial.
- Result in lawyers with fewer qualifications and less training doing a greater percentage of the work.
- Offer limited training, supervision, or continuing education to new attorneys or managers.
- Reward low bids rather than realistic bids.
- Provide unrealistic caseload limits or no limits at all.
- Do not provide support staff or investigative or expert services.
- Result in case dumping that shifts cost burdens back to the institutional defender.
- Do not provide for independent monitoring or evaluation of performance outside of costs per case.
- Do not include a case-tracking or case management system and do not incorporate a strategy for case weighting.

In Jones County, Mississippi, the contract system was so poorly constructed that the contractors themselves filed suit, contending that they should be found to be ineffective in all cases as a result of the conditions under which the contract required them to provide services. In 1992, Jones County provided \$32,000 for indigent representation in criminal cases. Two attorneys were hired at \$13,000 each, leaving the attorneys \$6,000 for expenses. When they agreed to the contract, neither attorney was aware of a backlog of 400 pending felony cases that the previous contractor had been paid to represent.

The two contractors brought suit to compel the county to limit their caseload and increase funding. While the case was pending in the

appellate courts, the Jones County Board of Supervisors reached an agreement with the contractors by increasing the amount of the contract to \$118,000.

North Dakota solved a similar problem in a different way. The state provides indigent defense services through contracts in each of North Dakota's seven judicial districts. The contracts are for flat fees without caseload caps. Rather than award contracts to the lowest bidders, judges establish the amount of the contract and issue notice that it is available. Attorneys may then apply, and the presiding judge selects from the applicants.

This practice calls attention to the issue of independence in awarding contracts. Both the *ABA Standards* and *NLADA Guidelines* recommend that the professional independence of indigent defense systems, including contractors, be protected by creating an independent organization such as a board of trustees or policy board to administer and award contracts.

In the North Dakota system, if an attorney receives a particularly difficult case toward the end of the contract period, he or she is expected to carry the case to completion. In some cases, that has meant continuing to work without compensation after the contract ends. Recent changes to the system now allow attorneys to approach the presiding judge to

negotiate either continued payment or transfer of the case, but such actions are discretionary.

Low-bid contracts often require participating attorneys to accept an unlimited number of cases during a contract period with no mechanism for relief. In Yuma County, Arizona, for instance, in fall 1995, a contract attorney who believed that her caseload exceeded her ability to provide competent representation to all her clients asked the superior court to withhold further appointments under her contract until she was able to decrease her workload. She cited the presumptive caseload caps created under Arizona Supreme Court case law. The superior court rejected her claim and continued to assign cases to her. The case was then heard by the Arizona Supreme Court, which sent it back to the superior court for fact-finding. Before a hearing could be held, however, the Yuma County Board of Supervisors decided to establish a public defender office.

As with any forecast or projection, there is uncertainty in predicting the number and type of cases that will be filed in a jurisdiction in any given year. If the number of cases filed is higher than projected, it may result in poor representation and jeopardize the constitutional rights of indigent defendants. Further, the situation poses an ethical dilemma for the contracting attorney, who must determine

whether it is possible to fully and ethically advocate for each of his or her clients.

Contractors may also find themselves earning exceptionally low fees as a result of fixed-fee contracts. Recently, a contractor working in Montana accumulated an excessive caseload of 100 felonies and 250 misdemeanors. The tacit understanding when he agreed to accept the contract was that he would represent up to 60 felony cases and up to 100 misdemeanor cases per year. One felony case ended in a 5-week trial, leaving him little time to attend to the other cases during that period. By the end of the year, based on the contract amount, he was earning approximately \$18 an hour, with no compensation for overhead.

With these experiences in mind, the Board of Supervisors in Ventura County, California, recently decided to continue its contract with Conflict Defense Associates (CDA), a group of attorneys that has provided indigent defense services in the county for the past 18 years for cases in which the primary public defender office has a conflict. In 1999, in response to 4 consecutive years of cost overruns, the board opened bidding on the contract for the first time since CDA began contracting with the

county. A firm with contracts with five other counties in California bid \$1.1 million for the contract, roughly \$700,000 less than CDA's final bid. Based on the bid price alone, a three-judge subcommittee recommended the firm to the other superior court judges.

The full review of the bid, however, also considered quality issues. In reviewing the provision of services in other counties, it was learned that the out-of-county firm saved money by using unlicensed investigators, limiting support staff, and using very inexperienced attorneys. A judge in another county had complained that this firm used inexperienced lawyers who were often unavailable in court, did not maintain full-time offices, and seemed more interested in obtaining other contracts than in providing services.

In the end, the Ventura County Superior Court judges and the Ventura County Board of Supervisors determined that quality of services had to be considered along with cost. This meant evaluating more than the per-case costs of the proposed bids. Both the judges and the supervisors determined that experience and quality of services supported continuing the CDA contract, which they did in July 1999.¹¹

¹¹ In 1992, Ventura County's auditor-controller issued a report that found the county could save up to \$435,000 a year by establishing a second public defender's office rather than continuing to contract for conflict services. That option was not considered during the most recent attempt to cut costs.

Characteristics of Effective Contract Systems

Contract systems viewed by critics as the most effective share features that allow administrators to monitor and evaluate costs while providing quality representation. These features include:

- Minimum attorney qualifications.
- Provisions for support costs such as paralegals, investigators, and social workers.
- Independent oversight and monitoring.
- Workload caps.
- Limitations on the practice of law outside the contract.
- Provisions for completing cases if the contract is completed but breached or not renewed.
- Caseload caps.
- Case management and tracking requirements.
- Guidelines on client contact and notification of appointment.
- A mechanism for oversight and evaluation.

One such model operates statewide in Oregon. It is administered by the Indigent Defense Services Division of the State Court Administrator's Office (SCA).

In Oregon, 92 percent of the trial-level state court indigent defense caseload is covered by contracts awarded by SCA in response to an RFP. In 1999, there were 85 contracts for services (including 5 contracts with non-attorneys) in 34 of Oregon's 36 counties. Four basic types of contracts were used: contracts with nonprofit public defender organizations with salaried staff; contracts with law firm consortia in which groups of attorneys or law firms joined together to provide defense services; partnerships in which individual law firms agreed to have their attorneys provide indigent defense services while continuing to serve private clients; and contracts with individual attorneys.

Ann Christian, Executive Director of the Indigent Defense Services Division (IDSD), believes that a strength of Oregon's system is that it operates statewide. "Because we have been able to create a statewide system that fixes costs within predictable ranges," she said, "other members of the criminal justice system, such as the judges, are able to focus more attention on issues of quality of indigent defense representation. The stability and longevity of our system allows us to accurately assess expected caseloads and costs."

Oregon has developed a detailed RFP to solicit bids from potential contractors. The RFP is based on a model contract that establishes

expectations for caseloads, costs, areas of coverage (including geographic limits and types of cases), level of services, staffing plans, and the applicants' experience and qualifications. The review process includes consultation with local courts and judicial staff and an assessment that the proposal is consistent with the needs of the county, region, and state.

Oregon has also established a process by which extraordinary expenses related to cases are paid through a mechanism outside the standard contract. In most death penalty and serious mandatory minimum sentence cases, funds for experts, investigators, and other expenses not specified in the contract are submitted to IDSD for review. In less serious cases, such funding requests are reviewed judicially. In Oregon, unlike most other systems, these expenses do not come from the money set aside for the contractor's basic operations.

In New Mexico, the standard contract specifies that each contract attorney will independently investigate each case, seek the assistance of a social worker for considering a sentencing alternative, and seek the assistance of an expert witness when such assistance is likely to have a significant impact on the outcome of the case.

Typically, good contract systems cost more per case than do public defender or assigned counsel

programs. In part, this results from the costs of administering the contracts, from the costs of overseeing and evaluating multiple providers, and from the costs of additional work necessitated when contractors lack the institutional knowledge that accumulates within a staff-based organization. A study of San Diego County, California, for example, found that a contract system would cost \$8 million more per year than a staff-based defender agency.

The initial savings a jurisdiction can achieve by switching from an assigned counsel system to a contract system can vanish in subsequent years if, as experience has shown, experienced attorneys drop out of the bidding process as the contracts prove to be more time consuming than anticipated. Many contracts do not even cover average hourly overhead. Jurisdictions are then faced with a dilemma: Do they accept the attrition of experienced attorneys and contract with inexperienced attorneys, risking jail, court delays, and ineffectiveness claims, or do they increase the contract payments to maintain system efficiency and stability? Jurisdictions with particularly strong bar associations often find that they must keep increasing contract rates to continue attracting competent attorneys.

King County, Washington, uses a contracting system to provide indigent defense services. Like the examples discussed above, the

contract establishes standards for the quality of representation and caseload limits. A central administrative agency, the Office of Public Defender (OPD), currently contracts with four nonprofit defender organizations to provide primary representation. Each contractor carries a mixed caseload of felony cases, juvenile cases, and other types of cases. When these organizations are unavailable because of conflicts, the county turns to assigned private counsel.

According to Bob Boruchowitz, Director of the Defenders Association, the largest and oldest of the

four contractors, Seattle defenders worked for years to persuade local government that there should be maximum caseloads for defense attorneys. With the help of a bar association task force called to respond to a report alleging “supermarket justice” in the municipal courts, the defense community in King County developed caseload standards that led to the city and the county agreeing that there should be reasonable caseload limits. “Caseload limits,” Boruchowitz said, “have been the key to protecting our ability to provide effective representation and obtaining the resources we need.”

IV. Conclusion: Lessons Learned

The experiences of indigent defense systems discussed in this special report support the conclusion that contract systems can deliver quality indigent defense services when appropriate safeguards are developed and implemented. However, contract systems that do not jeopardize the quality of representation provided to indigent clients often do not produce the cost savings sought by county, regional, and state funders.

In a jurisdiction with a primary defender supported by contractors doing conflict, overload, or a percentage of the primary work, the politics of establishing contracting offices is very important. One lesson jurisdictions have learned is that the primary defender as well as the contractors must be involved in a collaborative process. When parties are pitted against each other, either in low-bid settings or for political reasons, the quality of representation a system can maintain is harmed. Collaboration is needed to establish and maintain training and oversight, to approach funders, to consider

systemic changes, to facilitate innovation, to manage caseloads and track cases, and to develop institutional knowledge across agencies.

Lesson 1: Certain Types of Contract Models Carry More Risk Than Others

As the examples in this report illustrate, certain types of contract models, often established in the hopes of saving money, pose significant threats to the quality of representation. Two systems in particular—those that solicit bids solely on the basis of cost and fixed-fee systems, without caseload caps but with financial disincentives to investigate and litigate cases—are potentially devastating to the quality of representation.

NLADA has developed a model contract that incorporates the NLADA and ABA guidelines for contracting. Created to be a template for jurisdictions using or considering contracting, NLADA's model balances the interests of quality and cost.¹²

¹²The model contract is available from NLADA, 1625 K Street NW., Suite 800, Washington, DC 20006-1604; Phone: 202-872-1031; World Wide Web: www.nlada.org.

Lesson 2: Requests for Proposals Should Establish Guidelines, Qualifications, and Standards

As shown in the New York and Oregon models, one way to bolster the quality of representation in a contract system is to create a request for proposals that establishes a fair application and award process and weighs a variety of factors that measure quality as well as cost. RFPs should establish guidelines, qualifications, and standards for each aspect of the representation of indigents and a mechanism for the evaluation of contractors.

Lesson 3: National, Enforceable Standards Are Needed

The ABA *Standards* and NLADA *Guidelines* are helpful guides for ensuring quality representation under contract systems. However, more is needed at the level of enforcement and discipline. One possible solution is the creation of national standards enforced by a national oversight committee that would monitor and evaluate the performance of indigent defense systems throughout the United States.

A second solution is the adoption by states of caseload caps, such as Arizona's statewide caseload standard. These caps could be enforced by state court rules

that create enforceable guidelines and standards that track those established by ABA and NLADA.

Lesson 4: Monitoring and Evaluation Are Important

The area of contracting systems that has been least successfully implemented is monitoring and evaluation. Although many of the systems that use contracting require some form of evaluation, few systems have managed to implement a coherent and independent review process that examines compliance with standards as well as individual attorney performance.

For instance, although New Mexico has established high standards and expectations for the performance of its contract attorneys, the state's Public Defender Department has no mechanism with which to assess compliance with the standards, especially in the state's rural counties. New Mexico is not alone in this lack of monitoring. In fact, few jurisdictions have incorporated monitoring and evaluation into their contract systems.

New York City's Oversight Committee is the nation's best example of such an evaluation system. It currently operates on a volunteer basis without full-time staff. In a 1998 memorandum, the committee noted that it needs staff and institutional stability to conduct "continuous and consistent

monitoring of the performance of the organizations and the lawyers . . . assigned to represent indigent parties in criminal proceedings. A permanent monitoring structure

would have the advantages of greater accuracy, continuous monitoring, uniformity and stability.”¹³ Every jurisdiction would benefit from such oversight and monitoring.

¹³ First Department Indigent Defense Organization Oversight Committee, Proposal for Staffing of the First Department Indigent Defense Organization Oversight Committee, 1999, *First Department Indigent Defense Organization Oversight Committee Report for 1998*, New York, NY.

V. Appendix: National Standards

Both the American Bar Association and the National Legal Aid & Defenders Association have promulgated standards for contract systems. Anyone considering establishing or interested in evaluating a contract system should review these materials.¹⁴ ABA's *Standards for Criminal Justice: Providing Defense Services*, Standard 5-1.2(b), states "Every [indigent defense] system should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system and may also include contracts for services."

In February 1985, the ABA House of Delegates adopted the following language concerning contracting: "The American Bar Association opposes the awarding of public defense contracts on the basis of cost alone, or through competitive bidding without reference to quality of representation. Be it further resolved that in order to achieve constitutionally effective representation, the awarding of public defense contracts should additionally be based on qualitative criteria such as attorney caseload

maximums, staffing ratios, criminal law practice expertise, and training, supervision and compensation guidelines."

Additionally, in 1998, the ABA House of Delegates adopted a resolution calling upon each state, territory, and local jurisdiction to adopt minimum standards for the creation and operation of its indigent defense delivery system, including contract systems.

The ABA *Standards* and the NLADA *Guidelines* contain the following common standards for contracting:

- Contracts should ensure quality of representation (ABA Standard 5-3.1; NLADA Guideline III-8). One recommended way of ensuring quality of representation is to refuse to award a contract primarily on the basis of cost (ABA Standard 5-3.1; NLADA Guideline IV-3).
- The professional independence of all indigent defense delivery systems, including contractor systems, should be maintained by creating an independent organization such as a board

¹⁴ See the American Bar Association, 1990, *Standards for Criminal Justice: Providing Defense Services*, Chapter 5, Washington, DC; and the National Legal Aid & Defender Association, 1984, *Guidelines for Negotiating and Awarding Indigent Defense Contracts*, Washington, DC.

of trustees or policy board to administer and award contracts (ABA Standard 5-3.2(b); NLADA Guideline III-1).

- Contracts should not contain provisions that create conflicts of interest between the contractor and clients (ABA Standard 5-3.2(c); NLADA Guideline III-13). Among the potential conflicts addressed are forcing contractors to choose either paying for investigation, expert, transcription, and other services or forgoing these services by not including them in the contract; failing to ensure that the contract's mechanism for addressing conflict cases does not act as a financial disincentive for withdrawing; and inducing an attorney to waive a client's rights for reasons not related to the client's best interests (ABA Standard 5-3.3(b) (vii) (x); NLADA Guideline III-13).
- To avoid situations in which lawyers or law firms are awarded contracts and delegate responsibility to inexperienced associates, contracts should include identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval (ABA Standard 5-5.3(iv)).
- Contracts should include allowable workloads for individual attorneys and measures to address excessive workload (ABA Standard 5-3.3(b) (v); NLADA Guidelines III-6 and III-12).
- Contracts should include provisions for supervision, evaluation, training, and professional development (ABA Standard 5-3.3(b) (xi); NLADA Guidelines III-6 and III-7).
- Contracts should include the grounds for termination of a contract (ABA Standard 5-3.3 (b) (xv); NLADA Guidelines III-4 and III-5). Oregon's contract, for example, allows termination if the contractor misuses funds, habitually disregards court procedures for providing services, demonstrates an inability to adequately serve the interests of the clients, or willfully or habitually fails to abide by minimum standards of professional ethics or performance.

VI. For More Information

To receive more information about indigent defense contract systems, contact the following organization:

The Spangenberg Group
1001 Watertown Street
West Newton, MA 02465
Phone: 617-969-3820
Fax: 617-965-3966
E-mail: tsg@spangenberggroup.com

**Bureau of Justice Assistance
Clearinghouse**
P.O. Box 6000
Rockville, MD 20849-6000
1-800-688-4252
World Wide Web: www.ncjrs.org

Clearinghouse staff are available Monday through Friday, 8:30 a.m. to 7 p.m. eastern time. Ask to be placed on the BJA mailing list.

**U.S. Department of Justice
Response Center**
1-800-421-6770 or 202-307-1480

Response Center staff are available Monday through Friday, 9 a.m. to 5 p.m. eastern time.

To learn more about the national standards for indigent defense contracts discussed in this report, contact the following organizations:

**American Bar Association
Criminal Justice Section**
1800 M Street NW.
Washington, DC 20036
Phone: 202-331-2260
World Wide Web: www.abanet.org

**National Legal Aid & Defender
Association**
1625 K Street NW., Suite 800
Washington, DC 20006-1604
Phone: 202-452-0620
World Wide Web: www.nlada.org

Bureau of Justice Assistance Information

General Information

Callers may contact the U.S. Department of Justice Response Center for general information or specific needs, such as assistance in submitting grant applications and information on training. To contact the Response Center, call 1-800-421-6770 or write to 1100 Vermont Avenue NW., Washington, DC 20005.

Indepth Information

For more indepth information about BJA, its programs, and its funding opportunities, requesters can call the BJA Clearinghouse. The BJA Clearinghouse, a component of the National Criminal Justice Reference Service (NCJRS), shares BJA program information with state and local agencies and community groups across the country. Information specialists are available to provide reference and referral services, publication distribution, participation and support for conferences, and other networking and outreach activities. The Clearinghouse can be reached by

- Mail**
P.O. Box 6000
Rockville, MD 20849-6000
- Visit**
2277 Research Boulevard
Rockville, MD 20850
- Telephone**
1-800-688-4252
Monday through Friday
8:30 a.m. to 7 p.m.
eastern time
- Fax**
301-519-5212
- Fax on Demand**
1-800-688-4252
- BJA Home Page**
www.ojp.usdoj.gov/BJA
- NCJRS World Wide Web**
www.ncjrs.org
- E-mail**
askncjrs@ncjrs.org
- JUSTINFO Newsletter**
E-mail to listproc@ncjrs.org
Leave the subject line blank
In the body of the message,
type: subscribe justinfo
[your name]

The logo for the Bureau of Justice Assistance (BJA) features the letters 'BJA' in a large, bold, serif font. The letters are black and have a slightly stylized appearance with some internal shading or texture.