National Legal Aid & Defender Association

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FOR THE PEOPLE.

August 17, 2011

Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

IN RE: RULE 13, SECTION 7, RULES OF THE TENNESSEE SUPREME COURT
No. M2011-01411-SC-RL2-RL

Dear Mr. Catalano,

Thank you for the opportunity to comment on the Tennessee Supreme Court proposed rule change number M2011-01411-SC-RL2-RL. I applaud the court's attempt to address the growing expense of the Tennessee criminal justice system. Though the National Legal Aid & Defender Association (NLADA)[1] stands ready to assist Tennesseans in achieving accountability for and control over indigent defense costs, I caution that efforts to reduce public defense budgets without taking national standards into account tend to have negative effects on the efficiency of a state's courts and on public safety. I provide the following information to assist you in achieving accountability and control without running afoul of constitutional requirements and community safety.

[1] The National Legal Aid & Defender Association (NLADA) is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over ninety years. NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders.

Over its long history, NLADA has become a leader in the development of national standards for indigent defense functions and systems. See: *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976); *The Ten Principles of a Public Defense Delivery System* (written by NLADA officials, adopted by ABA in February 2002, published in U.S. Department of Justice *Compendium of Standards for Indigent Defense Systems, infra n.12*) (http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989), *Defender Training and Development Standards* (NLADA, 1997); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995*); Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services (NLADA, 1984; ABA, 1985); Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Evaluation Design for Public Defender Offices* (NLADA, 1977); and *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1994). With proper evaluation procedures, standards help to assure professionals' compliance with national norms of quality in areas where the governmental policy-makers themselves may lack expertise.

I. National Standards of Justice & Prohibition of Fixed Fee Contracts

Policymakers have long recognized that minimum quality standards are necessary to assure public safety in building a hospital, a school, or a bridge. The taking of a person's liberty merits no less consideration.

Foundational standards set the limits below which no public defense system should fall. The use of national standards of justice to guarantee constitutionally adequate representation meets the demands of the United States Supreme Court. In *Wiggins v. Smith*, 539 US 510 (2003), the Court recognized that national standards - specifically those promulgated by the ABA - should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney practices in an environment that provides her with the time, resources, independence, supervision, and training to effectively carry out her charge to adequately represent her clients. *Rompilla v. Beard*, 545 US 374 (2005) echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."[2]

The American Bar Association's *Ten Principles of a Public Defense Delivery System (Ten Principles)* present the most widely accepted and used version of national standards for public defense systems. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous national standards to their most basic elements, which officials and policymakers can readily review and apply. In the words of the ABA Standing Committee for Legal Aid & Indigent Defendants (ABA/SCLAID), the *Ten Principles* "constitute 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 an attorney."[3] United States Attorney General Eric Holder called the ABA *Ten Principles* the basic "building blocks" of a functioning public defense system.[4]

The ABA *Ten Principles* reflect interdependent standards. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction's compliance with each of the ten criteria

[2] Citation to national public defense standards in court decisions is not limited to capital cases. See, for example: 1) *United States v. Russell*, 221 F.3d 615 (4th Cir. 2000) (Defendant was convicted of prisoner possession of heroin; claimed ineffective assistance of counsel; the court relied, in part on the ABA Standards to assess the defendant's claim); 2) *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1993) (Defendant convicted of being a felon in possession of a weapon; filed appeal arguing, in part, ineffective assistance of counsel. Court stated: "In addition, under the *Strickland* test, a court deciding whether an attorney's performance fell below reasonable professional standards can look to the ABA standards for guidance. *Strickland*, 466 U.S. at 688." And, "[w]hile *Strickland* explicitly states that ABA standards 'are only guides,' *Strickland*, 466 U.S. at 688, the standards support the conclusion that, accepting Blaylock's allegations as true, defense counsel's conduct fell below reasonable standards. Based on both the ABA standards and the law of the other circuits, we hold that an attorney's failure to communicate the government's plea offer to his client constitutes unreasonable conduct under prevailing professional standards."); 3) *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990) (Defendant pleaded guilty to conspiracy to violate the Arms Control Export Act. The court followed the standard set forth in *Strickland* and looked to the ABA Standards as a guide for evaluating whether defense counsel was ineffective.)

[3] American Bar Association. *Ten Principles of a Public Defense System*, from the introduction, at: http://bit.ly/ggLidF.

[4] United States Attorney General Eric Holder. *Address Before the Department of Justice's National Symposium on Indigent Defense: Looking Back, Looking Forward 2000-2010.* Washington, DC February 18, 2010. http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html

and dividing the sum to get an average "score." For example, just because a jurisdiction has a place set aside in the courthouse for confidential attorney/client discussions (*Principle 4*)[5] does not make the delivery of indigent defense services any better from a constitutional perspective if the appointment of counsel comes so late in the process (*Principle 3*),[6] or if the attorney has too many cases (*Principle 5*),[7] or if the attorney lacks the training (*Principles 6 & 9*),[8] as to render those conversations ineffective at serving a client's individualized needs. In other words, a system must meet the minimal requirements of *each and every* of the *Principles* to be considered adequate.

The eighth of the ABA *Ten Principles* explains that: "[c]ontracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services." In short, fixed-fee contracts create a direct financial conflict of interest between the attorney and each client. Because the lawyer will be paid the same amount, no matter how much or little he works on each case, it is in the lawyer's personal interest to devote as little time as possible to each appointed case, pocketing the fixed fee and using his time to do other more lucrative private work.

II. *Analysis of Proposed Rule Change* No. M2011-01411-SC-RL2-RL

To be clear, the ABA *Ten Principles* do not prohibit the use of contracts as a method of providing counsel to the indigent accused. As previously mentioned, national standards require that contracts: specify performance requirements and the anticipated workload; provide an overflow or funding mechanism for excess, unusual or complex cases; and separately fund expert, investigative and other litigation support services." The proposed Tennessee rule change does not provide the first two of these three critical safeguards.

The proposed Section 7, when read in light of existing Section 2, seems to suggest that a contract might be let at the fixed fee rates of Section 2 and with a safety valve to allow for receiving an amount in excess of the maximum for a complex or extended case as provided by Section 2(e). Unfortunately, this does not meet the demands of national standards, in that it merely increases the amount of the fixed fee, but does not allow for the attorney to be compensated for all time necessarily expended. Under the proposed Rule, where attorneys in their professional judgment believe that a client's case requires more hours than are provided for under the fixed fee (even the excess fixed fee), the attorney is placed in an untenable ethical and personal conflict situation. The

[5] ABA *Principle* 4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

[6] ABA *Principle* 3: Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

[7] ABA *Principle 5*: Defense counsel's workload is controlled to permit the rendering of quality representation.

[8] ABA *Principle* 6: Defense counsel's ability, training, and experience match the complexity of the case. ABA *Principle* 9: Defense counsel is provided with and required to attend continuing legal education.

rules of ethics require that the attorney spend the time necessary to the defense of a client, but under the proposed Rule the attorney would have to work the extra hours without compensation. The attorney is forced to either violate her ethical mandates or expend her own time on behalf of the client, in essence serving *pro bono* where her own financial interests are pitted against her client's constitutional right to counsel.

I applaud the proposed Rule's clear intent to cap caseloads of contract conflict defenders through the provision stating that all contracts must be for a "specified number and type of cases." It is hard to evaluate what that means, however, without seeing what the specified number would be. There is, after all, a significant difference between capping serious felony cases at 50 cases per year versus 300 cases, even though both would fit the proposed language of an as yet undetermined "specified number."

What concerns me most is that portion of the proposed Rule addressing the manner by which proposals for contracts shall be evaluated. The emphasis that contracts "shall not be awarded solely on the basis of cost" is laudable. The proposed Rule seems to suggest, however, the Administrative Director will rely entirely on the attorneys' statements in their proposals that they have "the ability . . . to exercise independent judgment on behalf of each client" and that they will "maintain workload rates that w[ill] allow [them] to devote adequate time to each client." This is inadequate to meet the national standards' requirement that a contract specify performance requirements and the anticipated workload. Self-regulation in the provision of constitutionally-mandated right to counsel services simply does not work.

The inability of lawyers to self-regulate is one of the reasons why the very first of the ABA *Ten Principles* calls for the establishment of an independent right to counsel oversight board[9] (e.g., OPDSC), whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the indigent defense function.[10] Although the primary public defense system in Tennessee assures independence through publicly-elected district public defenders, there is no safeguard assuring independence of attorneys in the conflict system. Rather, the conflict system in Tennessee is a patchwork of attorneys generally overseen by either judges or court personnel with no supervision over quality beyond measuring a judge's satisfaction.[11]

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[9] To help jurisdictions in the establishment of independent public defender boards or commissions, NLADA has promulgated guidelines. NLADA's *Guideline for Legal Defense Services* (Guideline 2.10) states: "A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members."

[10] As stated in the U.S. Department of Justice, Office of Justice Programs report, *Improving Criminal Justice Through Expanded Strategies and Innovative Collaborations: A Report of the National Symposium on Indigent Defense*: "The ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks."NCJ 181344, February 1999, at 10.

[11] Courts should have no greater oversight role over lawyers representing defendants than they do for attorneys representing paying clients. The courts should also have no greater oversight of public defense practitioners than they do over prosecutors. As far back as 1976, the National Study Commission on Defense Services concluded that: "The mediator between two adversaries cannot be permitted to make policy for one of the adversaries."*NSC* Report, at 220, citing National Advisory Commission on criminal Justice Standards and Goals (1973), commentary to Standard 13.9.

While the vast majority of judges strive to do justice in all cases, political pressures, administrative priorities such as the need to move dockets, or publicity generated by particularly notorious crimes can make it difficult for even the most well-meaning judges to maintain their neutrality. Having judges maintain a role in the supervision of the conflict public defense services can easily create the appearance of partiality -- creating the false perception that judges are not neutral. Policymakers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are based solely on the factual merits of the case and ***not*** on a public defender's desire to please the judge in order to maintain his or her job. When the public fears that the court process is unfair, people tend to be less cooperative with law enforcement, less likely to appear as witnesses and for jury duty and, in general, tend to be more cynical about the capacity of government to treat all members of the community in a fair and evenhanded manner.[12]

There are indigent defense systems in the country that operate through contracts and also comply with national standards. For example, the state of Oregon funds 100% of indigent defense services, which are provided through a series of contracts with private attorneys, consortia of private attorneys, or private nonprofit defender agencies, similarly to the contracts in the proposed Tennessee Rule.

The Oregon Public Defender Services Commission (OPDSC) oversees all trial-level indigent defense services provided through these contracts. The OPDSC contracts are the enforcement mechanism to ensure that state standards are met regarding quality, effectiveness, efficiency, and accountability. For instance, every non-profit public defender agency is required to maintain an appropriate and reasonable number of full-time attorneys and support staff to perform its contractual obligations. If a defender agency does not meet this requirement, or to the extent that the agency lawyers are found to be handling a substantial private caseload, the contract will not be renewed.

Oregon enforces strict workload standards in their contracts through a system of case weighting. A typical contract sets a precise total number of cases to be handled by the law firm during the contract term. The cases to be handled are further broken down by the specific types of cases, taking into account the amount of work generally required by each case type. This means that within one office an attorney handling more minor felony cases might carry a higher number of cases than an attorney assigned to defend serious violent felonies that require more time. This allows a contract law firm or non-profit public defense office and the OPDSC to more accurately plan for and ensure compliance with the actual work and staffing needs. Every six months, each public defense contractor has a budget review process with state funding officials. During this review, the contractor can request additional reimbursement by the state for extra work done in cases that turned out to require more than the usual amount of time.

[12] The failure of this policy was pointed out by the U.S. Supreme Court during the Scottsboro Boys' case over 80 years ago: "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." *Powell v. Alabama* 287 U.S. 45 (1932).

Each Oregon contract public defense provider monitors the number of cases it receives and can project the extent to which it will reach its estimated workload maximum on a week-by-week basis. It notifies the court promptly if workloads are being exceeded, and when that occurs then it declines any additional appointments. If, for example, the provider meets its workload level on Wednesday, all new cases for the rest of that week must go to the private bar attorneys contracted to handle the overflow cases. This flexibility allows each provider to consistently provide a uniform quality of service and maintain manageable workloads for attorneys, even during periods of lower-than-normal staffing levels due to turnover, sickness, or other leave. Similar contract provisions ensure appropriate attorney qualifications, training, supervision, continuous representation by the same attorney, etc.

III. *Implementation of Proposed Rule Changes will Result in "Non-Representation" under United States v. Cronic*, 466 U.S. 648 (1984)

On May 6, 2010, New York's highest court ruled that a class action lawsuit brought by the New York Civil Liberties Union (NYCLU) against five counties is an allegation "not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*." The Court declared that *Strickland* "is expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State," in reversing an appellate court decision that would have stemmed the case. The Court found that where "counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients" is at heart "non-representation rather than ineffective representation."

On November 24th of last year, the Iowa Supreme Court reached much the same conclusion in handing down a unanimous decision in finding that a rigid fee cap of $1,500 per appellate case would "substantially undermine the right of indigents to effective assistance of counsel" because " [l]ow compensation pits a lawyer's economic interest … against the interest of the client." In reaching this conclusion, the Iowa Court went to great lengths to carefully analyze *Strickland v. Washington*. The Court determined that "the *Strickland* prejudice test does not apply in cases involving systemic or structural challenges to the provision of indigent defense counsel." The Iowa Supreme Court deserves recognition for firmly acknowledging that "[w]hile criminal defendants are not entitled to perfect counsel, they are entitled to a real, zealous advocate who will fiercely seek to protect their interests within the bounds of the law." That cannot occur without public defense attorneys having the time, tools, training and resources to treat each client's case appropriately. The decision, in essence, bans flat fee contracting for right to counsel services.

What these two cases point out is that there is a presumption in *Strickland* that is rarely discussed or challenged. *Strickland* requires that courts "must be highly deferential …. and indulge a strong presumption that counsel's performance was within the wide range of reasonable professional assistance." In short, the *Strickland* presumption of "reasonable" assistance of counsel is rooted in the mistaken belief that states have developed right to counsel systems that meet the expectations

demanded by *Gideon v. Wainwright* and its progeny. The majority of states, including Tennessee, have not done so.[13]

So did the United States Supreme Court blindly assume that states followed prior right to counsel rulings in setting up *Strickland*? The answer is "no," because on the same day that *Strickland* was argued and on the same day that it was handed down, the United States Supreme Court also heard and ruled on another case. *United States v. Cronic*, 466 U.S. 648 (1984), delineates the criteria under which a client receives "non-representation" as contrasted with "ineffective representation."

The *Cronic* court observed that the most obvious instance of this is the complete denial of counsel altogether. The complete absence of counsel is most glaringly obvious in our country's lower courts where misdemeanor cases are heard and felony cases are often begun.[14] It is a common occurrence for such courts to attempt to save money and expedite the processing of cases by pressuring the accused to forego his right to legal representation without adequately informing him of the

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[13] I may be much more inclined to believe that the proposed rule changes were a good faith attempt to provide fiscal responsibility to the Tennessee citizenry were it not for the well-documented underfunding of right to counsel services in your state. Just this year, the Tennessee Administrative Office of Courts released a report which states:

> Funding for the state's public defender system comes from the legislature, and each office should be staffed by enough defenders to represent eligible indigent clients in all cases except those where such representation would create a conflict of interest with another client represented by the public defender. And although local governments are required to fund public defenders at a rate of three positions for every four district attorneys, the state itself does not fund these offices at that level. TCA § 16-2-518 mandates that any local funding for public defenders be at a rate of 75% of funding for the corresponding district attorney general's office, it generally being agreed that approximately 75% of those being prosecuted by the district attorney will be indigent. However, at the state level, 228 full time assistant public defenders are funded, and 379 assistant district attorneys are funded, a ratio closer to three to five. (Sykes, Elizabeth L. and David Haines, *Tennessee's Indigent Defense Fund: A Report to the 107th Tennessee General Assembly*, Prepared by the Tennessee Administrative Office of Courts. January 15, 2011)

This inadequate funding is not something new. In 1999, the Tennessee comptroller's office funded three case-weighting studies to measure the need for increased judges, prosecutors and public defenders. Overseen by the National Center for State Courts, the defender portion was performed by The Spangenberg Group. Their report found that collectively the Tennessee districts operated with fewer than 82% (250 rather than the recommended 306) of the attorneys needed to adequately represent clients (See: The Spangenberg Group, *Tennessee Public Defender Case-Weighting Study*, April 1999, Appendix D-6). And, it should be noted, that the prosecutors case-weighting study lists 369 full-time equivalent prosecutors, a ratio (68%) that is well below the target ratio of 75%. Indeed, as far back as 1977, NLADA concluded that, "[i]t is readily apparent that the present system bears little relationship to an adequately funded system. (See: National Legal Aid & Defender Association, *Tennessee Report*, 1977).

[14] The ability to say with certainty that similar violations are taking place with regularity in Tennessee's General Sessions Courts is hampered by a stunning lack of data. Simply put, here exists no central repository for the collection, analysis and dissemination of public defense data. Tennessee decision-makers are therefore left to form policy based on anecdotal information, and the formation of public attitudes is consigned to speculation, intuition, presumption, and even bias. See, for example, Sykes, Elizabeth L. and David Haines, *Tennessee's Indigent Defense Fund: A Report to the 107th Tennessee General Assembly*, Prepared by the Tennessee Administrative Office of Courts. January 15, 2011. p. 11: "A large majority of criminal cases originate and are disposed of in Tennessee's General Sessions courts. The sheer volume of these cases places one of the greatest demands on the indigent defense fund. Unfortunately, accurate statistics for activities in general sessions courts are not available. Despite recommendations from the Comptroller's office and requests from the Administrative Office of Courts ("AOC"), the legislature has never provided funding to gather and analyze this data. As a result, the typical general sessions case can be described based only on anecdotal information. However, judges and lawyers from numerous jurisdictions across the state report a similar experience: crowded dockets consisting of numerous defendants, some of whom have made bail, and some who have not."

consequences of doing so (such as potential loss of public housing, deportation, inability to serve in the armed forces, and/or ineligibility for student loans). Other courts impose large fines and costs if a client insists on legal representation or simply refuse to appoint an attorney altogether in direct violation of the Sixth Amendment.

Beyond this, *Cronic also* defines as non-representation those circumstances where, although counsel is nominally available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. The Court suggests that the systemic factors in *Powell v. Alabama*,[15] created such as situation. This is the case of the Scottsboro Boys in which a judge appointed unqualified attorneys who met their clients on the eve of trial and failed to devote sufficient time to zealously advocate for their clients in the face of the state court's emphasis on disposing of the cases as quickly as possible.

As noted above, attorneys working under flat fee contracts have a financial incentive to dispose of cases as quickly as possible. But as the United States Supreme Court pointed out in *Powell*: "The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob." Each client is constitutionally entitled to be represented by a public defense attorney who has sufficient time and resources to fulfill the basic requirements of attorney performance on behalf of that client. This means the attorney is able to, among other things: meet and interview the client; prepare and file necessary motions; receive and review the prosecutions responses to motions; conduct a factual investigation, including locating and interviewing witnesses; engage in plea negotiations with the state; prepare for and enter a plea or conduct the trial; and prepare for and advocate at the sentencing proceeding when there is a guilty plea or conviction following trial. The fixed fee contracts of proposed Rule 13, Section 7, will assuredly give rise to conflicts of interest between attorneys and their clients. When the attorneys, acting in their own self-interest, do not dedicate appropriate time to meeting the requirements of ethical representation, this will result in a *Cronic* violation of "non-representation."

Following similar reasoning, the Washington Supreme Court in January 2009, effectively banned indigent defense providers from entering into flat fee contracts because of the inherent conflict of interest they produce between a client's right to adequate counsel and the attorney's personal financial interest.[16]

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[15] *Powell v. Alabama* 287 U.S. 45 (1932)

[16] RULE 1.8 - CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES … (m) A lawyer shall not: (1) 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: (i) to bear the cost of providing conflict counsel; or (ii) 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; or (2) knowingly accept compensation for the delivery of indigent defense services from a lawyer who has entered into a current agreement in violation of paragraph (m)(1).

IV. Conclusion

I strongly urge against the adoption of Tennessee Supreme Court Rule 13 Section 7 as proposed. Rather, the Court should follow the lead of Iowa and Washington by banning flat fee contracts for criminal cases by judicial fiat. Indeed, the Court should impose through court rule[17] as many of the ABA *Ten Principles* as is practicable.

I recognize that this will have a financial impact on the state and respectfully suggest that the proper response is to reduce the number of cases coming into the formal criminal justice system. Public defense systems do not generate their own work and do not have any control over the number of clients that come into the system. Instead, public defender clients are generated through the convergence of decisions made by other governmental agencies. Legislatures may criminalize additional behaviors or increase funding for additional police positions; law enforcement may crack down on a particular problem in a community by making more arrests; and, prosecutors may decide to go forward with marginal cases rather than dismissing them. All of these decisions are beyond the control of indigent defense attorneys and systems, yet all increase the public defense caseload.

Policymakers ***can*** choose to reduce the number of clients who need public defense representation. Prudent use of taxpayer dollars requires that our criminal justice spending should buy us greater public safety while upholding our core constitutional principles, and that our limited resources should not be squandered on expanding criminal justice bureaucracies that do not increase our safety.[18]

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[17] For example, the Nevada Supreme Court formed an indigent defense task force, later named the Commission on Indigent Defense (Commission). Established April 26, 2007 and led by Nevada Supreme Court Justice Michael Cherry, the Commission was charged to examine and make recommendations regarding the delivery of indigent defense services in Nevada. At its first meeting, Chief Justice Maupin stated that the mission of the Commission was not to decide whether to implement the *ABA Ten Principles*, but rather how best to do so. Three sub-committees were formed, on independence, caseloads, and rural issues. The Commission conducted a statewide survey of indigent defense services and held meetings throughout 2007. Just six months after being established, on November 20, 2007, the Commission issued its "*Final Report and Recommendations of the Supreme Court Indigent Defense Commission*." The Nevada Supreme Court is given authority to regulate all legal practice in the state. *See* NV Constitution Article 6, Section 19, and Supreme Court Rule 39. Based on this authority and the recommendations of the Commission, on January 4, 2008, the Court issued an Order in ADKT No. 411: establishing a single standard to be used for determining indigency; requiring that trial judges be excluded from the process for: appointing counsel; approving fees for attorneys, experts, and investigators; and determining indigency of defendants; implementing performance standards (this was subsequently put off until April 1, 2009); requiring that weighted caseload studies be done for the Clark and Washoe County Public Defender offices, and for the State Public Defender office, and requiring that public defenders in Clark and Washoe counties notify their county commissioners when they are unavailable to accept additional appointments based on ethical considerations; requiring the AO to develop a method of collecting uniform statistics on indigent defendants; and establishing a permanent statewide commission for the oversight of indigent defense. For order, please see: http://www.nlada.net/sites/default/files/nv_adkt411sctorder01-04-2008_0.pdf

[18] For example, many states are significantly reducing the cost of providing public defense by looking carefully at all of their criminal statutes and making reasoned decisions about the types of behaviors that should be punished through jail or prison and those that can be better addressed in some other way. For example, significant defense and prosecutorial resources are expended throughout the country because lawmakers have made it a criminal offense for a person to fail to comply with various administrative regulations – like driving a vehicle that lacks a current inspection sticker or failing to register ownership of a dog. Speaking broadly, what generally happens in these cases is that a person gets a ticket. If that person is indigent, she likely cannot afford to pay the ticket. When she does not pay the ticket, a warrant is issued for her arrest. Eventually she may be arrested and taken to jail. Yet none of this has gotten us any closer to achieving the purpose of the regulation, i.e., this has not caused the vehicle to be inspected or the dog to be registered.

Please feel free to contact me with any questions or concerns. Thank you.

Sincerely,

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At this point, we are criminalizing the indigent person's failure to pay a fine. And because the person is in jail and potentially faces more jail time, we have brought on to taxpayers all the costs of the formal criminal justice system including the cost of public defenders. I understand the need to hold people accountable, but the current economy forces us to question whether it is fiscally wise to jail a person pre-trial at perhaps $115/per day -- perhaps for a significant period because a publicly-paid lawyer does not have the time to get to their case – and then bring in the costs of the entire criminal justice system.

Some of the strongest proponents of reclassification are coming from traditionally conservative or libertarian think tanks. For example, during a 2009 hearing on the right to counsel before a United State House Judiciary Sub-Committee, Cato Institute Adjunct Scholar, Erik Luna remind policy-makers that: "the states have brought any crisis upon themselves through … overcriminalization – abusing the law's supreme force by enacting dubious criminal provisions and excessive punishments, and overloading the system with arrests and prosecutions of questionable value. State penal codes have become bloated by a continuous stream of legislative additions and amendments, particularly in response to interest-group lobbying and high-profile cases, producing a one-way ratchet toward broader liability and harsher punishment. Lawmakers have a strong incentive to add new offenses and enhanced penalties, as conventional wisdom suggests that appearing tough on crime fills campaign coffers and helps win elections, irrespective of the underlying justification."