



## Associated Counsel for the Accused

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June 10, 2011

To: Seattle City Councilmembers: Tim Burgess, Chair  
Sally Bagshaw, Vice Chair  
Sally J. Clark, Member  
Nick Licata, Member

Fr: Associated Counsel for the Accused (ACA)

Re: Discussion SMC Public Defense Contract

In the Public Safety and Education Committee meeting on June 1, there was briefing and discussion on the City of Seattle public defense contracts. We submit this memo to give a written response to the questions asked by Councilmembers.

### Non-profit vs. profit law firms

The goal of our non-profit public defense agency is to provide quality and effective representation to individuals accused of a crime. It is not to make money.

When an individual is accused of a misdemeanor crime in the City of Seattle, the individual has the right to be represented by a lawyer. If the person has means, a private practitioner will be retained. The private practitioner will base the fee charged upon the complexity of the case, the anticipated resources required to competently defend the matter, and the amount of money the lawyer desires to make on the case. Different lawyers will charge different amounts depending on their approach to the case and the amount of compensation they believe they deserve.

If a person is indigent, the City of Seattle is obligated to provide the individual with an attorney. To ensure quality defense, the City pays for and requires support services such as investigators, social workers, paralegals, and supervision. The City also funds overhead and rent to the public defense agencies. If expert services are needed, application is made through the Court for funding at public expense. Caseload limits and periodic auditing and monitoring by the City ensure that the individual charged will be fully represented, regardless of ability to pay. The public defender's duty to the client is to identify the objectives of the representation – whether the case is set for trial, a plea negotiation, or placement in a specialty court and what resources are necessary to

accomplish that objective. In deciding the approach to a case the public defender does not factor in those financial costs of how much time the case will take, how much the support services will cost, and the complexity of the case. Financial costs do not matter because the public defender, investigator, social worker, paralegal and supervisor are salaried. The goal is to do that which is necessary to accomplish the objective – regardless of the time or resources necessary to defend the case.

A for-profit firm would not be able to approach a case as is currently done in the City of Seattle with our non-profit public defense agencies. Complexity of the case, anticipated time needed, and resources required would always be weighed as cost factors. As the indigent client is not paying, and does not have the ability to pay, the danger to quality representation is that the client's objectives may be marginalized and take a second seat to the financial needs of the firm. Costs would have to be weighed in all cases and there would be foreseeable tendencies to resolve cases without fully developing and exploring all available options.

Additionally, if the for-profit law firm also represents paying clients, there is danger that the paying client will receive more in terms of full representation and the indigent client's case may be pushed to the back burner and not get the attention necessary for effective representation.

### The City's Oversight Role

The City's commitment to high quality public defense is shown by their ongoing commitment to providing sufficient financial support while closely monitoring the services providers. This approach has proven to be effective. In 2010 the National Center for State Courts did a study on Improving Case Processing in Seattle Municipal Court. This study was prepared under a State Justice Institute grant. In its final report dated October 15, 2010, the study noted: "Public defense services provided through the City of Seattle are some of the best NCSC consultants have seen in large urban courts nationwide".

The City does this in several ways: In the contract between the City and the agencies, there are performance requirements. The expected practice standards are clearly outlined. These practice standards are in accord with the American Bar Association 10 Principles of a Public Defense Delivery system and the Washington State Bar Association's Standards for Indigent Defense Services. Caseload limits and support staff ratios are mandated.

Compliance is monitored by the City Budget Office with annual Public Defense Legal Services Contract Compliance Reviews. This extensive review not only monitors adherence to the required practice standards but also audits the financial health of the firm. Additionally there are monthly closed case reports including attorney assignments and quarterly salary and staff positions reports; quarterly reports showing attorney caseloads and supervisor to attorney ratio; annual year-end attorney caseload assignment

report; annual financial statements, IRS Form 990 and the annual outside audit by a Certified Public Accountant which includes the required management letters.

In addition to the above, the City Budget Office Analyst Linda Taylor Manning chairs the SMC Case Assignment Work Group. Participating in this work group are representatives of the City Attorney, Public Defense Agencies, and the Court. This group meets monthly to deal with and solve issues relating to the delivery of public defense services.

Also independent of the City Budget Office, the Seattle City Auditor conducted extensive audits in 2007 and again in 2010. The complete audit was previously provided to the City Council and Mayor. A summary of the 2010 audit is attached.

### Duration of Public Defense Contracts

First: By ordinance, the duration of the contracts with the public defense agencies are three years. The City began contracting with the public defense agencies in January, 2005. ACA was awarded the primary defense contract in 2005, and then again in 2008 and again during the latest RFP process.

From ACA's perspective, the three year duration is too short. As the Primary Defender, we have 33.6 ftes dependent on this contract. Additionally we have overhead and rent agreements dependent on the SMC contract.

Quality public defense is generally better served by employing and keeping experienced and reliable attorneys and support staff. The problem with the current three year duration is that there is never a guarantee of work beyond three years. 33 employees face being laid off every three years. This doesn't allow for ongoing efficiency and stability of economic resources and exerts extreme pressure and uncertainty on the work force. This impacts morale and impairs focus on doing what should be done – providing the best defense services possible. The built in instability of a three year contract affects the ability to retain and hire an experienced staff. Because of the uncertainty of being employed, if the opportunity for employment becomes available elsewhere, they will take that opportunity. Consequently, the inability to provide a long term commitment to the public defense agencies adversely impacts relationships with clients, employees and the court because of the unpredictability of not knowing who will be providing defense services.

There is also a financial cost to us by the current duration of the contracts. ACA's current five year lease expires at the end of 2012. To negotiate favorable terms, it is generally necessary to commit to at least a five year lease. Our problem is that ACA does not know if we will be the Primary Defender beyond June 30, 2014. If I only commit to a two year lease at the end of 2014, I will be disadvantaged by the terms. If I commit to a five year lease, and ACA is not awarded the next scheduled RFP in 2014, I am still obligated for the terms of the lease and have jeopardized the financial viability of the law firm, which could conceivably cause drastic effects - both to our law firm and to the

remaining work force. Business wise, the current three year duration with no extension is very problematic.

Additionally, the cost factor is ever present. With the current RFP process, the City of Seattle weighs seven different criteria for a maximum of 100 points for the Primary Defender. Proposed services and cost counts for 15 points. In the Secondary and Third Defender criteria, cost is worth 20 points. Because of this, there is built in pressure to submit the lowest bid possible. As there are currently four public defense agencies in King County, it is never a given on who will be awarded the City contract. To maintain an experienced staffing level, the agencies who are awarded the contracts will need to provide merit raises and cost of living raises when appropriate. The public defense agencies who do not have the current Seattle contract can submit bids significantly lower, as they will be able to start off with new staff and pay lower salaries. The end result is that the City, because of economic pressures, may not continue to contract with an experienced and capable agency. This type of situation directly impacts delivery of public defense services.

It is common knowledge that experienced and capable lawyers affects the efficient and expeditious handling of criminal matters and saves money in the long run. Also, there is institutional knowledge that will be lost by changing providers. For the Primary Defender, this would be not only in the traditional adversarial court, but also in the specialty courts that are so important. For instance, Mental Health Court requires long term commitment to the client base that is served. Community Court is proven to be successful and there is currently work being done to implement services for veterans and developing a Transitional Court that will address the needs of young prostitutes.

Another unintended consequence of costs being a consideration in the award of the defense contracts is that instead of healthy competition and cooperation between agencies there are inherent misgivings of one another. This does not assist in promoting quality defense.

The City has protections if issues develop with a public defense provider. Our contracts with the City allow the City to terminate the contract before the three year period if the Agency substantially breaches any duty, obligation, or service required pursuant to the Contract or engages in misappropriation of funds or fraudulent disbursement of funds. Short of termination, corrective action is also allowed to rectify any deficiency with contract performance. If the corrective action does not remedy the problem, the City can withhold payment to the Agency and proceed to termination of the contract.

Second: ACA proposes that neither our agency nor any other defense agency be joined together regarding the length of the contract. We are separate law firms. If at the end of the current period, the City wants to extend the contract of one agency, but not the other, there is no reason why that shouldn't be an option. The City should separately reserve the right to extend the duration of the contract with the different law firms.

Number of Agencies

In the first public defense contract in 2005, the primary agency received most of the cases. The secondary agency was used mainly for conflicts and had one or two caseloads. In the 2007 City Auditor's review, the City Auditor recommended that the City increase the size of the secondary agency and decrease the size of the primary agency. The secondary would be increased to seven caseloads. The reason for this was that it would enable more efficient staffing of trial courts by the secondary agency. As the primary agency, ACA concurred that this proposal made sense. In the 2008 RFP, the number of agencies was increased to three. The primary agency was awarded the bulk of the work, the secondary agency was enlarged to 7 caseloads, and a third agency was added at a 1.0 fte for conflict cases between the first and secondary agencies and to administer the conflict panel of private attorneys should all three agencies have conflicts.

If there are any questions concerning any of the above, or if any Councilmembers would like to further discuss any of these issues, we will make ourselves available at your convenience. Thank you for considering the above.

This memo can be shared with the other Councilmembers.

Sincerely,



Donald Madsen  
Managing Director

City of Seattle Office of City Auditor

# Indigent Defense Services Follow-up and 2010 Audit

November XX, 2010

David G. Jones, City Auditor  
Virginia B. Garcia, Auditor-in-Charge

## I. INTRODUCTION

In August 2007, the Office of City Auditor issued an audit report on the City of Seattle (City) Indigent Defense Services Program<sup>1</sup> which contained 36 recommendations. This audit was followed by the passage of a City Council ordinance (122602) requesting that our office audit the indigent defense services program in 2010 against certain national and Washington State standards.

It is our standard practice to follow up on the implementation of our audit recommendations to report on their status. Therefore, this report provides the results of our follow-up work on the 36 recommendations from our 2007 audit, as well as the ordinance-required review of the program against the American Bar Association (ABA) 10 Principles of a Public Defense Delivery System and the Washington State Bar Association's (WSBA) Standards for Indigent Defense Services.

## II. SUMMARY

Overall, the City and the public defense agencies it contracts with to provide public defense services have made significant progress in implementing our 2007 audit recommendations and have demonstrated a high level of adherence to ABA and WSBA standards. Appendix 1 shows the implementation status of the 2007 recommendations. Appendices 2 and 3 provide comparisons of public defense program stakeholder compliance in 2007 and 2010 with ABA and WSBA standards.

Of the 36 Office of City Auditor 2007 audit recommendations, 34 have been implemented or addressed, one is pending, and one is not being implemented.

Of the 28 standards we evaluated (10 from the ABA and 18 from the WSBA) in 2010, we found the program to be in compliance or have demonstrated improved compliance with 27, and in partial compliance with one. These results indicate a significant increase in compliance from 2007, when we found full compliance with 10, and partial compliance with 13 standards.

A defendant survey conducted earlier this year also showed an improvement in defendants' satisfaction with the public defense services that they received. An analysis of the survey results can be found on page 11 of our report.

The implementation of several recommendations was the result of the cooperation and collaboration among the Seattle Municipal Court, the City Budget Office and the three public defense agencies, the Associated Counsel for the Accused, The Defender Association, and the Northwest Defenders Association. Staff from these agencies comprised the Case Assignment Workgroup, which has met monthly since the start of the current contracts in June 2008 to implement audit recommendations and work on other improvements to the City's indigent defense services program.

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<sup>1</sup> Seattle Indigent Defense Services, August 6, 2007

However, one issue we raised in our 2007 audit needs to be addressed further. We found some public defense attorneys still believe that simply sending a letter to their client can satisfy the City contract requirement that attorneys shall have contact with their out-of-custody clients within five days of assignment to a case; however, this does not meet the contract requirement for initial contact with out-of-custody clients. Therefore, we propose changes in the City's contracts with the public defense agencies to ensure more consistent compliance with this contract provision.

We also found the City could do more to recover costs from defendants who are able to afford paying a portion of their public defense costs. To address these and other issues we raise in this audit, we offer 12 new recommendations, which are discussed in section VI of this report and summarized in Appendix 4.