

**TESTIMONY OF THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
BEFORE
CALIFORNIA COMMISSION ON
THE FAIR ADMINISTRATION OF JUSTICE
ON ETHICAL RULES FOR PUBLIC DEFENDERS**

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

I. Introduction

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

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

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

Our testimony will focus on two of the most prevalent and pernicious problems within the arena of public defense today are the increased use of low-bid, flat-fee contracts as a means of providing public defense services and the overwhelming caseloads public defenders and assigned counsel face. These problems have the same effect – they hamstring the defense, thus unbalancing of the scales of justice. When the defense cannot do its job fully – exploring to the fullest alternative factual scenarios – the entire justice system, and indeed the public suffer. Money is wasted on more appeals with merit and unwarranted prison sentences. Alternatives to incarceration are not explored. And, in the worst cases, the wrong people go to jail, while actual guilty parties remain free.

This commission has the power, by recommending the adoption of particular ethical rules and standards, to curtail these problems and avoid their harmful effects on the California criminal justice system. We strongly urge you to do so.

I. Addressing Overwhelming Caseloads for Public Defense Lawyers

No matter how brilliant and dedicated the attorney, if she is given too large a workload, she will not be able to provide clients with appropriate assistance. Defense counsel will not be providing the “guiding hand of counsel” as required by the Sixth

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

Amendment to the U.S. Constitution.² With this in mind, the National Advisory Commission on Criminal Justice Standards and Goals set the following caseload limits for full-time public defenders: 150 felonies, or 400 misdemeanors, or 200 juvenile, or 200 mental health, or 25 appeals. In no event should caseloads surpass the maximum listed in the NAC standards.³ Established more than 20 years ago, these standards have withstood the test of time as a barometer against which full-time public defender caseloads should be judged. Tragically, almost no jurisdiction in the country abides by these caseload standards, and full workload assessments⁴ that determine the number of cases that is reasonable in the particular jurisdiction are even less common.

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

Arguably, the current ethical rules provide a full answer. However, it is a common view that this rule has limited applicability to those who are viewed as having no-control over their caseload, *i.e.* public defenders and prosecutors. For this reason, last year, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued an ethics opinion that specifically requires public defenders to keep their caseloads under control or seek relief in court. That opinion, ABA Ethical Opinion No. 06-441,⁵ states, "If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she

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

³ There are a variety of reasons, however, that caseloads should, in reality, be lower than the standards propose. For example, the standards assume that the defender is full-time and works exclusively on cases. Accordingly, any administrative responsibilities allocated to the defender should reduce the expected maximum caseload. The caseload standards also assume appropriate support staffing in the office. If the number of assistants or investigators are insufficient, requiring the attorney to take on this work as well, the attorney's caseload should be reduced accordingly.

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

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

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

must not continue the representation of that client or, if representation has not yet begun, she must decline the representation.”⁶ In other words, if the caseloads become too high, individual public defenders are ethically compelled to seek a reduction.

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

This portion of the ethical opinion has been viewed as controversial by some who do not believe that judges should interfere in the operations of public defender offices. While we agree that the independence of public defender offices must be vigorously protected to ensure that interests other than those of the defendant, such as politics, are never a consideration in case decision-making, we also aware of the reality that, even without judicial intervention, politics, administrative and budgetary pressures, and factors other than the interest of the clients frequently do influence the operation of public defender offices. As a result, it is critical that the decisions of the chief public defender not be absolute. A line defender who has a reasonable belief that their caseload is so excessive as to harm their clients who has sought relief but to whom relief is denied by her superiors must have an outlet, outside of her public defender office to challenge that decision. That said, it is not clear to NACDL that the outlet must be judicial. It could, and perhaps should, instead be an agency or commission, first the public defender commission and then, eventually, the state’s ethical commission, were such an entity appropriately positioned and sufficiently independent to hear the evidence and rule on the claim in a timely manner.⁷

We urge the California Commission on the Fair Administration of Justice to recommend the adoption of amendments to the California Rules of Professional Conduct directly address the problem of overwhelming caseloads in public defender offices. Specifically, NACDL recommends that, consistent with the ABA Ethical Opinion, the commission endorse amendments that compel public defenders to decline representation if commitments to other clients or lack of adequate expertise or resources preclude competent representation.

⁶ The American Council of Chief Defenders has similarly published an ethical opinion stating that defenders are “ethically required to refuse to accept additional casework” if that casework would cause them to exceed the capacity of the agency’s attorneys. See ACCD Ethics Opinion 03-01 (April 2003), available at http://www.nlada.org/Defender/Defender_ACCD/Defender_ACCD_Home.

⁷ The protection of the client must be the goal and focus of any such procedures. Accordingly, in addition to being independent, this commission or a sub-group thereof, must be capable of acting quickly to address the allegation of *per se* ineffectiveness. The client of the public defender at issue should not be required to choose between proceeding with an attorney who contends they are too overburdened to adequately prepare or delaying his or her case again and again while waiting for the caseload issue to be adjudicated.

II. Low-bid Contracts for Public Defense Work

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

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

The primary goal of fixed-price contracting is not quality representation but cost limitation. Fixed-price contracts inevitably result in case overload and inadequate representation, as the incentive for the attorney is to process cases quickly. The system thus discourages investigation, consultation of experts, motions practice and trials. Instead, it encourages quick plead bargaining, regardless of whether it is appropriate or right for the client. Accordingly, these systems create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions.

Low-bid, fixed price contracting for public defense services also violates the American Bar Association’s Ten Principles, which are “the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict free representation to accused persons who cannot afford to hire an attorney.”⁸ The eighth principle directs, “Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should . . . provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services.”

In 1984, the National Legal Aid and Defender Association adopted Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services⁹ which explicitly forbid the use of low-bid, flat-fee contracts. Indeed, low-bid, flat-fee contracts violate the California State Bar Guidelines on Indigent Defense Services Delivery Systems.¹⁰ Instead, these standards require compensation to be determined by work, strictly enforced workload limits for contract attorneys, and separate pools of money to pay third-party service providers, such as investigators and experts, whenever their assistance is required. Despite this widespread condemnation of the practice,

⁸ The ABA Ten Principles are available online at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

⁹ The NLADA Contracting Guidelines are available online at http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts#threeonezero.

¹⁰ The California State Bar Guidelines are available online at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/4dae4947ae3537e4852566d6000dae23/\\$FILE/Calif.htm](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/4dae4947ae3537e4852566d6000dae23/$FILE/Calif.htm).

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

Counties are generally forbidden from awarding a construction contract to a bidder – lowest or otherwise – without requiring them to abide by certain standards. A public defense contract should be no different, because failing to require quality, in both instances, puts the citizens of the county in jeopardy and leaves the county open to potentially enormous liability. Accordingly, NACDL urges the California Commission on the Fair Administration of Justice to recommend the adoption of regulations, consistent with those adopted by the California State Bar, that require contracts for public defense services to include terms mandating that contractors comply with standards of practice and caseload limitations.

III. Closing

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

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