

CLALLAM PUBLIC DEFENDER
516 EAST FRONT STREET
PORT ANGELES, WA 98362
(360) 452-3307
FAX (360) 452-3329

HARRY D. GASNICK
Director

JOHN F. HAYDEN
SUZANNE M. B. HAYDEN
LOREN D. OAKLEY
ALEX R. STALKER
DOUGLAS J. KRESL
CHARLIE COMMERE
ROBERT E. COOPER
HEATHER A. WEIR
BRUCE HANIFY
Staff Attorneys

October 16, 2017

Mr. Jim Jones, Administrator
Board of Clallam Co. Commissioners
Clallam Co. Commissioner's Office
223 East 4th Street, Suite 4
Port Angeles, WA 98362

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OCT 16 2017

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Dear Mr. Jones and Board of Commissioners

We have had an opportunity to review the draft job description posted on 10/12/17, for District Court public defense coordinator and have the following comments. They are arranged somewhat in the order of the proposal's text.

1. The Proposal creates a conflict of interest in the duties of the Coordinator (IDC).

The proposed contract includes the following in the duties of the Coordinator:

"...If applicable conditions exist for a PD appointment, the IDC shall represent them at their first appearance, and shall determine who their appointed Public Defender shall be if their case continues past that point. Nothing in this base agreement prevents the IDC from designating him/herself from additionally serving as the on-going PD, for additional compensation, as detailed in that contract.

This provision creates a conflict of interest for the coordinator as a result of his/her self interest in representing a defendant in certain cases which may be personally beneficial to him/her. It also creates a conflict with respect to the goal to appoint the most qualified or appropriate attorney to represent a defendant in a particular type of case, or based upon prior experience or prior contacts with or knowledge of the defendant. It also creates the potential for friction between the coordinator and other defense attorneys agreeing to accept appointments under this new proposal should the Coordinator assign himself or herself to more desirable and/or less time consuming cases. The Clallam County Public Defender organization is aware of no County in the State of Washington that has a similar provision in its public defense system.

2. The role of the Coordinator in conducting the initial interviews creates an attorney-client relationship influencing his/her assistance to the Court in making an appointment of defense counsel.

The nature of the proposed interviews/consultations between the Coordinator and the defendant creates the risk that an attorney/client relationship will be created between the coordinator and the accused. Because the communications are privileged, they implicate ethical, confidentiality, and attorney liability issues. This is especially true for those persons deemed ineligible by the coordinator but who still wish appointment of a public defender. Similar issues apply to the conveying of the information required by the court. Per CrRLJ 3.1 and RCW 10.101 et. seq., the determination of eligibility is exclusively a judicial function. In those counties where a public defense coordinator makes the determination, the coordinator does not provide legal advice and does not provide subsequent representative defense services. As such they are considered as serving a "quasi-judicial" role that cannot be attributed in this working model. Moreover, if the coordinator is also permitted to be privately retained by the persons he/she interviews in this process, this also raises significant ethical/propriety issues.

3. The proposal fails to ensure the availability of sufficient qualified defense counsel to comply with applicable defense standards and requirements.

Given the applicable case load standards, it will require the hiring of at least four (4) full time defense attorneys in addition to the Coordinator position. Based upon the standards used in District Court, current case load requirements limit an attorney's case load to 400 cases per year. Based upon its RFP, Clallam County has estimated approximately 1,600 indigent defense appointments in District Court per year. Simple math indicates it will require 4 attorneys (not counting the Coordinator) to handle the estimated 1,600 cases in District Court each year. There has been no indication that there is willing, available and qualified four (4) criminal defense attorneys in Clallam County willing to take on a full time court appointed criminal defense case load nor sufficient part time qualified criminal defense attorneys to meet this case load limitation. The Clallam County Committee on Public Defense's final report of November 28, 2016, specifically noted at section 3(b), "there is not a critical mass of local lawyers to fill the need (for an ombudsman supervised attorney list system)". Recent evidence tending to confirm this is the fact that the Clallam Public Defender was the only proponent responding to the County's 2017 RFP for public defense services.

4. Permitting the coordinator to handpick what cases he or she chooses to keep for him or herself "for additional compensation" creates significant practical and ethical concerns.

The proposed rule indicates the Coordinator shall determine who the appointed Public Defender shall be if their case continues past that point. Nothing in this base agreement prevents the IDC from designating him/herself from additionally serving as the on-going PD. To the contrary, it appears to specifically allow this. Because the Coordinator has an attorney/client relationship with all charged persons, and especially those who are awarded indigent defense, there are conflict problems/issues that apply to all cases, but especially in matters that involve multiple defendants. This applies even to the cases assigned to other public defenders.

The proposal provides that the IDC shall oversee and ensure that all appointed PD attorneys under contract with Clallam County conform to all applicable Rules of Professional Conduct, Clallam County Indigent Defense Standards, Supreme Court guidelines, and District Court conditions. Moreover, the proposal states that the performance of the obligations of the Coordinator include the fielding of any client complaints. This is also very problematic in that

the Coordinator would potentially be required to field and determine complaints in matters for which he or she has a conflict of interest.

6. Judicial review of the Coordinator's performance violates the requirement of the required independent nature of such a position.

The proposal states: "[t]he IDC shall meet with the Presiding Judge(s) of the District Court(s) at least twice a year to review the attorney's compliance with all applicable standards, and his/her performance as IDC.

This requirement is contrary to Principle 1 of the ABA's "ten principles of a public defense delivery system", "the public defense function, including the selection, funding, and payment of defense counsel, is independent . The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff." (emphasis added). The breach of this principle is what has given rise to the ACLU lawsuit that is currently pending regarding Grays Harbor's public defense system.

7. The proposal does not address District Court 2 in Forks.

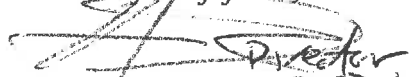
As you will note, the proposed contract initially places the responsibility on the Coordinator to meet daily in the Jail with persons charged with crimes in District Court. It also requires that the Coordinator meet in in the Courthouse with those charged but not in jail. It does not address how this is to occur in District Court II in Forks.

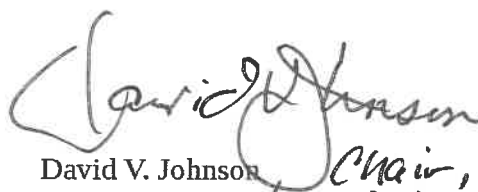
8. Conclusion.

As noted in our previous letter, CPD believes that any bifurcation of delivery of indigent criminal defense services between the Superior and District Courts, is ill conceived, especially as pertains to quality of service and the economies that inure by the same entity providing representation in both Courts. The inherent deficiencies and ethical shortcomings of the proposed implementation of such this new system elevate these concerns.

Simply from a risk management perspective, we strongly urge the County to consider consulting with independent attorneys, including an ethicist and person conversant with the special requirements of public defense in Washington, about the issues identified above. Alternatively, although the prosecuting attorney's office may not select public defense providers (RCW 10.101.040) they may be consulted as to the efficacy of different models of public defense delivery systems.

Very truly yours,


Harry Gasnick CPD


David V. Johnson, Chair, Board of Directors

