

Contracting for Indigent Defense Services

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What Is a Contract System?

When a funder, such as a county, reaches a legal agreement with a provider for the purpose of indigent defense. Providers do not include staff-based programs with annual budgets, but do include individual attorneys or firms, associations of lawyers or firms, and non-profit organizations. Providers may be full time or part time and paid a flat rate of some kind or hourly.

“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.”

“Contracting for Indigent Defense Services: A Special Report.” By The Spangenburg Group for the Bureau of Justice Assistance, U.S. Dept. of Justice. April 2000.

Risks vs. Rewards

Risks of Bad Systems

- Lack of quality representation
- Destruction of private bar
- Cost overruns

Rewards of Good Systems

- Consistent Quality of Representation
- Cooperation with and Support of Local Bar
- Cost Containment and Predictability

Characteristics of Bad 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 personnel
- Reward low bids rather than realistic bids.
- Provide unrealistic caseload limits or no limits at all.

Characteristics of Bad Systems

- Do not provide support staff or investigative or expert services.
- 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.

Characteristics of Good Systems

- Minimum attorney qualifications.
- Provisions for support costs such as paralegals, investigators, and social workers.
- Independent oversight and monitoring.
- Workload and caseload caps.
- Limitations on the practice of law outside the contract.
- Provisions for completing cases if the contract is completed but breached or not renewed.

Characteristics of Good Systems

- Case management and tracking requirements.
- Guidelines on client contact and notification of appointment.
- A mechanism for oversight and evaluation.
- Adequate and accessible facilities.

Recommendations

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

“Contracting for Indigent Defense Services: A Special Report.”
By The Spangenburg Group for the Bureau of Justice Assistance, U.S. Dept. of Justice. April 2000.

Recommendations

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).

Recommendations

The professional independence of all indigent defense delivery systems, including contractor systems, should be maintained by creating an independent organization to administer and award contracts.

(ABA Standard 5-3.2(b); NLADA Guideline III-1).

The Commissioners Court could establish a permanent group, such as a board of trustees, composed of members of SACDLA, local judiciary, community members, and other stakeholders with staggered terms.

Recommendations

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).

Avoid forcing contractors to choose either paying for investigation, expert, 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).

Recommendations

Lawyers and law firms should be prevented from delegating too much responsibility to inexperienced associates.

(ABA Standard 5-5.3(iv)).

Lawyers should be identified in the contract and substitution of counsel should be prohibited without prior approval; minimum qualifications for lawyers should be established in the contract

Recommendations

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 may include caseload limits, must clearly define the scope of lawyers' responsibility in terms of type of cases, courts, geographical area, etc., and escape provisions should be included in case of unexpected volume

Recommendations

Contracts should include provisions for supervision, training, evaluation, training, and professional development.

(ABA Standard 5-3.3(b)(xi); NLADA Guidelines III-6 and III-7).

These provisions could specify CLE requirements, years of experience in criminal practice, trial experience, and require contractors to establish mentoring programs for newly retained lawyers. They should also establish metrics by which contractors will be judged, both in regards to costs and quality of representation.

Recommendations

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.

Conclusion

A Well-Designed Contract System Will:

- Ensure consistency and quality of representation better than the status quo
- Cooperate with and strengthen the local bar
- Contain costs and make them more predictable
- Foster innovation by encouraging sharing of resources, direct competition, and measurable results