

INDIGENT DEFENSE CONTRACT COUNSEL AGREEMENT

Contract No. 13-06-IDC-01

THIS AGREEMENT (the "Agreement") is made this 1st day of July, 2013 between Nancy Bourke, ESQ., PO Box 725, Naco, AZ and Cochise County, a political subdivision of the State of Arizona, through the Indigent Defense Coordinator, 1415 Melody Lane, Bisbee, AZ 85603 (hereinafter the "County").

Recitals:

- A.** The County provides counsel for indigent juveniles and adults in delinquency, incorrigibility, criminal, dependency and mental health commitment cases;
- B.** The Cochise County Public and Legal Defender Offices sometimes have conflicts of interest or for other reasons are unable to represent indigent clients in these kinds of cases;
- C.** The County desires to engage private counsel for indigent persons ("Clients") when the County Public and Legal Defender Offices have a conflict or for other reasons are unable to represent them;
- D.** The County desires the services of the Attorney as counsel for Clients in the classes of cases specified in this Agreement;
- E.** The County is authorized to procure the professional services of the Attorney as an independent contractor under A.R.S. §§ 11-201, 11-251 and 11-254.01 for these matters.

NOW THEREFORE, in consideration of their mutual promises set out herein, the Attorney and the County agree as follows:

1. Scope of Work and Compensation

- A.** The Attorney shall provide legal services for Clients in the following classes of cases as assigned by the Indigent Defense Coordinator (hereinafter the "IDC"):

Class 6 through Class 2 felony cases other than those listed in A.R.S. § 13-706 as "serious offenses" or "violent or aggravated felonies"

Misdemeanor Cases

Delinquency and Dependency Appeals

- B.** The compensation for each class of cases, including the timing of payment, is set forth on Exhibit A hereto. Each felony, probation revocation and misdemeanor case assigned to the Attorney shall be compensated as a separate case. This includes cases that are referred to and disposed of in Early Resolution Court. A case that is resolved through a deferred prosecution agreement shall be deemed concluded for purposes of this Agreement, so that if prosecution is resumed for failure to comply, the resumed prosecution shall be deemed a separate case. For dependency cases, the date the original petition was filed will determine whether the case is a "1st Year" case or a "2+ Year" case. Supplemental dependency petitions are not considered separate matters with respect to pre-existing parties and will not be paid as a new assignment. If the Attorney is assigned a dependency case, which subsequently develops into a severance case, the severance case will be treated and compensated separately. However, the following shall not count as cases:

- 1. Felony cases dismissed due to no complaint being filed nor an indictment returned. Attorney shall be paid at the rate of \$50 per hour, not to exceed \$200, for such cases. Attorney must submit an itemized billing statement to IDC for these cases within 60 days of the dismissal.

2. Any case in which Attorney withdraws due to a conflict or other reason. Attorney shall be paid at the rate of \$50 per hour, not to exceed the base amount paid for that case type. Attorney must submit an itemized billing statement to IDC within 60 days of the withdrawal. If an Attorney has been paid for a dependency case and, subsequently must withdraw prior to the end of the case, the Attorney will only be entitled to \$50.00 per hour for work performed on that case and must reimburse the County for any amount over that. The County may offset any amount needed to be reimbursed from any future payment owed to Attorney.
 3. Juvenile delinquency cases in which the Attorney is assigned as Guardian Ad Litem or assigned to represent parents in Order to Show Cause proceedings. Attorney shall be paid at the rate of \$50 per hour for such cases. In the event that a Guardian Ad Litem assigned in a delinquency matter determines that it is appropriate to file a petition to initiate dependency proceedings, Attorney will be paid according to the Dependency fee schedule for work performed after the dependency petition is filed.
- C. In the event that a client fails to appear for a court proceeding and the court issues a bench warrant for the arrest of the client, the Attorney shall move to withdraw from the case within 60 days of the issuance of the bench warrant. Upon withdrawal, Attorney will be paid at the rate of \$50 per hour, not to exceed the base amount paid for that case type. If the client is later arrested on a bench warrant, the case will not be counted as an additional case. If reappointed, the Attorney will receive the base amount for that case type minus any prior payment. Attorney must submit a final itemized billing statement to IDC within 30 days of the disposition of the case.
- D. Assignments of cases to the Attorney and other independent contract attorneys shall be made at the sole discretion of the IDC.
- E. **Protracted and Complex Cases.** Attorney may apply to the IDC for additional fees if, in the judgment of the Attorney, an assigned case requires more than the base level of service anticipated by this Agreement because of the complex or protracted nature of the case. Such additional fees may be a fixed amount or an hourly rate.

For felony cases listed in A.R.S. § 13-706 as “serious offenses” or “violent or aggravated felonies”, Attorney may apply to the IDC for an hourly rate of no more than \$75.00 per hour.

All requests for additional compensation shall be submitted to the IDC for approval. If the IDC is unable to approve a request, the IDC will submit the request to the Superior Court Presiding Judge, the Presiding Judge’s designee or the appropriate court for approval. The determination whether a case warrants additional fees and, if so, the amount or rate, shall be determined by the IDC, subject to review as set forth in Paragraph 22 of this Agreement. All requests shall include the following:

1. The total amount of additional fees and/or hourly rate requested.
2. A specific explanation of the circumstances affecting the length and/or complexity of the case.
3. An itemized listing of the services provided up to the date of the request showing the amount of time spent on each item.

- F.** If approved for an hourly rate, Attorney must submit monthly itemized billing statements that contain the date of service, a brief description of the service and the actual time spent, billed in one-tenth (1/10) of an hour increments. Monthly billing statements shall be submitted no later than the 15th day of the month following the provision of the service.
- G.** In all cases, Attorney shall not be compensated for any work performed by attorney of a non-legal nature that would ordinarily be performed by support personnel, including secretarial and clerical support work involved in opening and closing files, administrative communications with IDC, preparing and transmitting documents, copying, organizing, filing or similar functions.
- H.** The Attorney shall represent Clients from the date of assignment, through trial and sentencing, or other resolution of the case, including, but not limited to, a plea agreement and sentencing pursuant to such agreement, restitution hearing post-sentencing, dismissal, deferred prosecution or through fulfillment of terms of a cooperation/witness agreement with the State. If a criminal case proceeds to trial and results in a conviction, the Attorney is responsible for preparation of and filing a Notice of Appeal. If a case is resolved pursuant to a deferred prosecution agreement, the Attorney may withdraw from the case at that time. If a Client reaches an agreement with the State to resolve a matter and it requires the Client to testify against another party, work as an informant or otherwise cooperate with the State, the Attorney shall remain attorney of record until the Client fulfills these obligations. In appropriate circumstances, the Attorney may also file a Notice of Post-Conviction Relief or provide Clients with the forms to file it. In a mental health commitment case, the Attorney shall represent the Client from the date of assignment through time period covered by an order of treatment. In a delinquency case, the Attorney shall represent the Client from the date of assignment through disposition. In a dependency case, the Attorney shall represent the Client until a final order is entered. Generally, assignment of Justice Court and Superior Court cases does not include responsibility for post-trial appeals, post-adjudication appeals, or Rule 32 petitions, which will be assigned and compensated separately.
- I.** If the Attorney is a member of a law firm, the Attorney may assign a case to any attorney in the firm who has been approved by the County to handle such cases.
- J.** Attorney shall provide competent, effective, and timely legal assistance and representation and shall perform the work in accordance with the terms of the Agreement to the best of Attorney's ability. The Attorney represents that he/she is qualified to act as counsel in the cases he/she has agreed to accept pursuant to this Agreement, and meets the minimum qualifications for such cases as set forth on Exhibit B.
 - 1. The Attorney shall maintain contact with Clients and keep them informed until the case is terminated. The Attorney shall also use reasonable diligence in notifying Clients of necessary court appearances, as well as court action resulting from their clients' non-appearance.
 - 2. The Attorney shall comply with the Arizona Supreme Court Rules of Professional Conduct, the Arizona Supreme Court rulings on the standards for effective assistance of counsel as set forth in *State v. Smith*, 140 Ariz. 355 (1984) and *Zarabia v. Bradshaw*, 185 Ariz. 1 (1996), state and local court rules, all applicable local, state and federal laws, statutes, ordinances, rules and regulations and the written administrative policies and procedures established by the Court or the IDC.

3. If the Attorney uses any employees to perform these services, said employees shall be suitably trained and skilled and the Attorneys shall supervise their work in accordance with the standards of the profession and the Rules of the Court.
- K. The Attorney shall not accept a fee or other compensation for services rendered other than as stated in this Agreement. However, the County understands and agrees that the Attorney may represent private clients not covered by this Agreement.
- L. The Attorney should be mindful of Rule 6.4 of the Arizona Rules of Criminal Procedure regarding indigency and make appropriate requests to the Court for re-determination of indigence for Clients.
- M. Once Attorney is assigned a case, the Attorney's duty to represent Clients shall survive expiration of this Agreement. Should the Attorney be unable or unwilling to continue representation due to a conflict or otherwise, the Attorney shall file a motion to withdraw with an order referring the case back to the IDC for reassignment of counsel.
- N. The Attorney, on occasion, may have another attorney appear as substitute counsel due to being reasonably unavailable.
- O. The Attorney is not entitled to reimbursement for work performed after completion of representation, as set forth in the Agreement, unless the IDC expressly authorizes it in writing.
- P. Attorney acknowledges and agrees that pursuant to A.R.S. § 11-622(C) the County shall not pay any claim unless a demand is made within six months after the last item of account accrues. This applies to claims for compensation and extraordinary expense (see below) pursuant to this Agreement.
- Q. Attorney acknowledges that Cochise County operates on a fiscal year that begins each July 1st and ends each June 30th of the following year. All claims for work performed through June 30th of each fiscal year must be submitted to IDC no later than August 15 following the end of the fiscal year on June 30th. Claims submitted after this date shall not be paid.

2. Expenses

- A. **Routine Expenses.** The Attorney agrees that routine or ordinary expenses involved in the representation of Clients are not reimbursable, but instead are included in the compensation pursuant to this Agreement. These expenses include, but are not limited to in-office copying, postage, telephone, facsimiles, computer, computerized legal research (i.e. Westlaw, Lexis and Loislaw), office supplies, secretarial and paralegal services, and travel within the County.
- B. **Extraordinary Expenses.** The County shall pay the Attorney, in addition to the fees provided in this Agreement, Extraordinary Expenses. These include, but are not limited to, the costs of expert witnesses, investigators, extraordinary travel, transcripts for trial court purposes, including interview and deposition transcripts, clothing for defendant at trial, subpoena fees (if a Civil Division of a Sheriff's Department or Constable is unavailable to serve the subpoenas) and any other costs associated with representation in cases that are the subject of this Agreement pursuant to A.R.S. § 13-4013 and within County guidelines and rates. The Attorney shall obtain prior written approval of the IDC before incurring any such Extraordinary Expenses, subject to review as set forth in Paragraph 22 of this Agreement. All subcontractors for these expenses shall submit their bills to the Attorney, who shall review the bills, certify that they are reasonable and were incurred in the course of representation for an assigned case, then forward them to the

IDC for payment. Subcontractor bills shall be reimbursed "at cost". Jury lists and transcripts for appeals and Rule 32 cases shall be obtained in the manner prescribed by the Arizona Rules of Criminal Procedure. Payments for authorized expenses incurred by a subcontractor will be made directly to the subcontractor, with notice to the Attorney that the expenses have been paid.

- C. Travel Expenses.** The County shall pay Attorney for mileage at the then current IRS rate only for out-of-County travel reasonably necessary in order to provide representation in an assigned case. The Attorney must obtain prior approval from IDC before incurring out-of-County travel expenses, subject to review as set forth in Paragraph 22 of this Agreement. Out-of-County travel does not include travel to Cochise County by an Attorney who resides in another county.

The County shall pay Attorney for mileage at the then current IRS rate for in-County travel reasonably necessary to provide representation in assigned **felony cases only**.

- D. Interpretation.** The Court Administrator is responsible for providing qualified interpreters for non-English speaking clients. The Attorney shall request their services for all in court proceedings, out-of-court interviews and transcriptions. In extraordinary circumstances, the County may pay for outside interpreters, contingent upon approval from the IDC prior to contracting for them.

3. Term of Agreement

The initial term of this Agreement shall be from the date of execution through June 30, 2014 with the option to extend on a year to year basis at the County's discretion for a maximum of four (4) additional one (1) year periods. The County shall mail out its proposal to extend the contract for an additional year to Attorney no later than March 30. County must receive Attorney's acceptance to extend the contract no later than April 30.

4. Termination

Either party may terminate this Agreement at any time with or without cause; provided, however, that if the Attorney terminates the Agreement the Attorney will be responsible for the cost of reassigning the cases previously assigned to the Attorney, but if the County terminates the Agreement without cause the County will be responsible for such costs and must compensate the Attorney for time reasonably spent on assigned cases.

5. Attorney's Status

- A.** The Attorney is an independent contractor. The Attorney is not an officer, agent, servant, or employee of the County. The Attorney shall be solely responsible for the acts and omissions of his/her officers, agents, servants, and employees. The Attorney is responsible for providing all workers' compensation insurance required by law.
- B.** The professional duty of the Attorney is the representation of Clients assigned under this Agreement. Neither the County nor the IDC may exercise any control over the professional judgment of the Attorney with regard to assigned cases.

6. Amendment and Entirety of Contract

This document constitutes the entire Agreement between the parties with respect to the subject matter hereto and shall supersede all previous proposals, both oral and written, negotiations, representations, commitments, writings, agreements and other communications between the parties. It may not be changed or modified except by an instrument in writing signed by a duly authorized representative of each party.

7. Records

- A. The Attorney shall submit all reports and invoices specified in this Agreement.
- B. The Attorney shall preserve and make available all records for a period of five (5) years from the date of final payment under this Agreement and for such period as is required by any other paragraph of this Agreement including the following:
 - 1. If this Agreement is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for such a period of five (5) years from the date of any such termination;
 - 2. Records which relate to disputes, litigations or the settlement of claims arising out of the performance of this Agreement or to costs and expenses of this Agreement to which exception has been taken by the County shall be retained by the Attorney until such appeals, litigations, claims or exceptions have been fully resolved.
 - 3. If any litigation, claim or audit is started before the expiration of the five-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved.
 - 4. Records shall also be kept and made available in accordance with the Arizona Supreme Court Rules of Professional Conduct.

8. Approval by the County

Before this Agreement shall become effective and binding upon the County, it must be approved by the County Board of Supervisors. In the event that the Board of Supervisors does not approve this Agreement, it shall be null and void and of no effect whatsoever.

9. Waiver

The failure of either party at any time to require performance by the other party of any provisions hereof shall in no way affect the party's subsequent rights and obligations under that provision. Waiver by either party of the breach of any provision hereof shall not be taken or held to be a waiver of any succeeding breach of such provision or as waiver of such provision itself.

10. No Assignment or Sub-Contracting

This Agreement is non-assignable and the contract services with the Attorney cannot be sub-contracted to a third party. Any attempt to assign or subcontract any of the rights, duties or obligations of this Agreement shall be void.

11. Cancellation of Agreement

Pursuant to A.R.S. §38-511, the provisions of which are incorporated herein by reference, all parties are hereby put on notice that this Agreement is subject to cancellation by the County or its departments or agencies if any person significantly involved in initiating, negotiating, securing, drafting or creating the Agreement on behalf of the County or its departments or agencies is, at any time while the Agreement or any extension of the Agreement is in effect, an employee or agent of any other party to the Agreement in any capacity or a consultant to any other party of the Agreement with respect to the subject matter of the Agreement.

12. Non-discrimination

The Attorney shall comply with Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1975 and Federal Executive Order No. 11246, State Executive Order No. 75-5 and A.R.S. §41-1461 et. seq., which mandates that all persons, regardless of race, color, religion, sex, age, national origin or political affiliation, shall have access to employment opportunities. The Attorney shall comply with Section 503 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination in the employment or advancement in employment of qualified persons because of physical or mental handicap. The Attorney shall comply with Title 6 of the Civil Rights Act of 1964, as amended, which prohibits the denial of benefits or participation in contract services on the basis of race, color, or national origin. The Attorney shall comply with the requirements of Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in delivering contract services.

13. Indemnification

The Attorney shall at all times indemnify, defend and hold harmless the County and/or any of its agents, officials and employees from any and all claims, demands, suits, actions, proceedings, laws, costs and/or damages of every kind and description including any attorney's fees and/or litigation expenses which may be brought or made against or incurred by the County on account of loss of or damage to any property or for injuries to or death of any person, caused by, arising out of, or contributed to, in whole or in part, by reason of any alleged act, omission, professional error, fault, mistake, or negligence of the Attorney, its employees, agents, representatives, or subcontractors, their employees, agents, or representatives in connection with or incidental to the performance of this Agreement or arising out of Workers' Compensation claims, Unemployment Compensation claims, or Unemployment Disability Compensation claims of employees of the Attorney and/or its subcontractors or claims under similar such laws or obligations. The Attorney's obligations under this paragraph shall not extend to any liability caused by the sole negligence of the County or its employees.

14. Notice to Attorney Regarding Tax Duties and Liabilities

The Attorney is responsible for paying, according to law, Attorney's income and self-employment taxes. The County will not withhold any such taxes.

15. No Authority to Bind County

The Attorney has no authority to enter into contracts or agreements on behalf of the County. This Agreement does not create a partnership between the parties.

16. Declaration by Attorney

The Attorney declares that he/she has complied with all federal, state and local laws regarding business permits, certificates and licenses that may be required to carry out the work to be performed under this Agreement.

17. Notice

Any notice given in connection with this Agreement shall be given in writing and shall be delivered either by hand to the party or by certified mail-return receipt requested to the party's place of business.

18. Choice of Law

Any dispute under this Agreement or related to this Agreement shall be decided in accordance with the laws of the State of Arizona.

19. Severability

If any part of this Agreement shall be held unenforceable, the rest of the Agreement will nevertheless remain in full force and effect.

20. Insurance

- A. Attorney agrees as a material condition of this Agreement that each shall provide and maintain professional liability insurance in the minimum amount of \$100,000.00 per claim, \$300,000.00 in the aggregate.
- B. The Attorney shall provide the IDC with a copy of current certificates of insurance.
- C. Failure on the part of the Attorney to procure and maintain current liability insurance and provide proof thereof to the County shall constitute a material breach of the Agreement upon which the County may immediately terminate the Agreement.

21. Licensing and Education

- A. The Attorneys, and each of them, warrants that each is licensed to practice law in the State of Arizona, in good standing with the Arizona State Bar and is competent to handle all matters contemplated by this Agreement in a prompt and professional manner on behalf of their clients.
- B. Suspension or disbarment of Attorneys from the practice of law during the term of this Agreement shall constitute a material breach of contract, entitling County to terminate this Agreement immediately with or without notice.

22. Review of Determinations by IDC

Any determination made by IDC pursuant to this Agreement, if disputed by Attorney, will be subject to review by the Presiding Judge of Superior Court or a person designated by the Presiding Judge. The IDC, with approval by the Presiding Judge, will establish the procedure for review, including any forms for requesting review.

IN WITNESS WHEREOF the parties hereto have executed this Agreement on the dates indicated.

ATTORNEY

COCHISE COUNTY

Nancy Bourke

By: _____
Ann English, Chairman
Cochise County Board of Supervisors

ATTEST:

APPROVED AS TO FORM:

Clerk of the Board

David Seward, Director
Cochise County Procurement Department

Date: _____

**EXHIBIT A
COMPENSATION SCHEDULE***

FELONY

Felony (Death Penalty)	\$125/hour (lead counsel) \$90/hour (co-counsel)
Felony (Class 1)	\$75/hour
Felony (Class 2 - 6)	\$900/case for up to 25 hours of work; \$60/hour for over 25 hours of work
ERC Felony (Class 2 – 6)	\$200/case for up to 3 hours of work With prior IDC approval, \$60/hour for over 3 hours' work, not to exceed \$900

PROBATION VIOLATION **\$400 per case**

MISDEMEANOR **\$200 per case**

APPEAL **\$50/hour**

RULE 32 POST CONVICTION RELIEF **\$50/hour**

MENTAL HEALTH **\$300 per case**

JUVENILE DELINQUENCY **\$350 per case**

JUVENILE DEPENDENCY **1st year: \$1200/case
2+ years: \$500/year
Severance: \$500/case**

PSYCHIATRIC REVIEW BOARD **\$50 per hour**

*Unless pursuant to Paragraph 1.E of the Agreement attorney applies to IDC and IDC approves additional fees

Payment for cases approved for an hourly rate will be made monthly. Attorney shall submit monthly itemized billing in the manner prescribed by IDC no later than the 15th day of each following month.

Payment for felony, probation violation, misdemeanor, mental health and juvenile delinquency cases will be made upon completion of the case. Attorney shall submit a payment request to IDC no later than sixty (60) days after the case is completed.

Payment for juvenile dependency cases will be made at the time of assignment for the first year of the case. Payment for subsequent years of representation will be made on the anniversary of the initial assignment. Attorney shall submit a payment request to IDC no later than sixty (60) days from the date of assignment or anniversary date.

All payment requests shall be submitted in accordance with IDC procedures.

EXHIBIT B
MINIMUM QUALIFICATIONS

Attorney shall be an active member in good standing of the State Bar Association of Arizona. Attorney shall meet the following qualifications for each case type assigned:

Death Penalty Cases – lead counsel and co-counsel must meet the requirements of Rule 6.8, Arizona Rules of Criminal Procedure

Serious Offenses or Violent or Aggravated Felonies as Listed in A.R.S. § 13-706 – experienced and active in criminal law with not less than five years criminal litigation experience; at least 5 jury trials of serious complex cases tried to completion

Felony Cases – experienced and active in criminal law with not less than 3 years criminal litigation experience; and lead or co-counsel in at least 3 jury trials to verdict of any class of felony

Appeals and Rule 32 Cases – experienced in criminal law with not less than 3 years criminal litigation or criminal appellate/post-conviction experience

Misdemeanor Cases – experienced and active in criminal law with not less than 1 year criminal experience

Title 36 Mental Health Cases – at least 3 years courtroom experience, to include a combination of some experience with guardianships and conservatorships, and ability to identify programs and resources to meet client's needs, or general civil litigation

Delinquency Cases – not less than 3 years experience in criminal law and/or juvenile law, familiar with dispositional alternatives, services available through the Court, CPS and community agencies

Dependency and Severance Cases – some experience with child welfare system, family law, mental health and/or guardianships, familiar with services available in the areas of mental health, substance abuse, domestic violence, education, job/vocation training; attorneys representing children must meet the requirements set out in Supreme Court Administrative Order No. 2011-17