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UNCONSCIONABLE CONTRACTING FOR INDIGENT DEFENSE: USING CONTRACT THEORY TO INVALIDATE CONFLICT OF INTEREST CLAUSES IN FIXED-FEE CONTRACTS

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Indigent defense remains in crisis and yet constitutional challenges to promote systemic change have met with mixed success. This Article explores the new strategy of applying contract theory and principles to challenge indigent defense contracts that violate the canons of professional responsibility. This Article begins by discussing the author's experience working on cases of indigent defendants whose convictions were overturned through the efforts of the Innocence Project Northwest. The erroneous convictions were facilitated by the indigent defense contract in place at the time of the convictions. Pursuant to this contract, the indigent defense contractor agreed to provide representation in all criminal cases in the county for a fixed price, and to hire and pay for conflict counsel out of the lump-sum fee. This Article discusses why such a contract creates multi-faceted conflicts of interest between the contracting attorney, conflict counsel, and their clients. Since these conflicts are too grave to waive through the process of informed consent, the provisions of the contract are unconscionable, and violate the public policy encompassed in the canons of professional responsibility. This Article suggests that bar associations are uniquely situated to use the principles of contract law to challenge indigent defense contracts that violate the rules of ethics by their very terms.

INTRODUCTION

The jurisprudence of the Sixth Amendment right to counsel has not fulfilled its promise of guaranteeing indigent defendants their right to receive capable representation.[1] Nor has the Sixth

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1. *See* ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEF., GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE—A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS 38 (2004) [hereinafter ABA REPORT] ("[I]ndigent defense . . . remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.").

Amendment ensured that attorneys comply with their ethical duties to zealously advocate for clients and to refuse representation that involves a conflict of interest. Instead, under our Sixth Amendment jurisprudence, courts have found the constitutional guarantee to counsel satisfied even in cases where the defendant's lawyer engaged in egregious instances of ethical misconduct.[2] The rules of professional responsibility do impose a higher standard of conduct than the Constitution. For example, no one would suggest that attorneys who are asleep or drunk at trial are in compliance with the rules of professional responsibility. And yet, courts have found a defendant's constitutional right to counsel met when represented by a lawyer who was intoxicated or asleep during trial.[3]

This Article proposes turning towards a different jurisprudence, founded in contract law, to challenge provisions in indigent defense contracts that violate ethical canons, as a means of improving the quality of indigent defense. The need for reform is poignantly illustrated by recent events demonstrating that when the indigent defense system fails, innocent people are convicted of crimes.[4] In

2. *See, e.g.*, Mickens v. Greene, 74 F. Supp. 2d 586, 612, 615 (E.D. Va. 1999), *aff'd sub nom.* Mickens v. Taylor, 535 U.S. 162 (2002) (finding that a defense attorney who successively represented defendant and victim in a capital trial had a "myopic view of the potential conflicts and utter insensitivity to the ethical issues raised by the facts" and had conducted himself "unwisely, and in derogation of his ethical duties", but holding that the representation did not violate defendant's constitutional rights).

3. *See, e.g.*, People v. Garrison, 765 P.2d 419, 440 (Cal. 1989) (finding no showing of ineffective assistance of counsel when attorney was arrested driving to court with a .27 blood alcohol content and declarations indicated that attorney "drank in the morning, during court recesses, and throughout the evening"); McFarland v. State, 928 S.W.2d 482, 505–06 (Tex. Crim. App. 1996) (finding that defendant was not denied effective assistance of counsel by fact that his lead counsel slept through parts of trial).

4. Incompetent lawyering contributed to the conviction of Jimmy Ray Bromgard, who, at age eighteen, was sentenced to forty years in prison for the rape of an eight-year-old girl. Bromgard served fifteen years before being exonerated through post-conviction DNA tests. At trial, he was represented by an attorney known as "Jailhouse John Adams" who "met with him once before trial, hired no investigators or scientific experts, filed no motions to suppress evidence, made no opening statement, failed to prepare Mr. Bromgard for his testimony and, after indicating he would appeal, did not." Adam Liptak, *DNA Will Let a Montana Man Put Prison Behind Him, but Questions Linger*, N.Y. TIMES, Oct. 1, 2002, at A22. Dennis Williams was sentenced to death in a case that became known as the "Ford Heights Four." Williams was represented at trial by an attorney defending three co-defendants. His attorney failed to investigate exculpatory evidence and failed to challenge flawed forensic evidence. William's claim of ineffective assistance of counsel was initially rejected by the state supreme court. In subsequent disbarment proceedings against Williams' attorney, evidence surfaced that the lawyer was suffering a personal collapse during Williams' trial. The state supreme court then reversed Williams' conviction and ordered a new trial. It took many more years before DNA tests exonerated Williams and his codefendants. During that time, the licenses of three other defense lawyers for the Ford Heights Four were suspended or revoked. BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 183–86 (2000) [hereinafter SCHECK ET AL., ACTUAL INNOCENCE].

the past two decades over 300 exonerations have occurred in the United States.[5] The advent of deoxyribonucleic acid (DNA) testing has irrefutably established that people are convicted and sentenced, sometimes to death, for crimes they did not commit.[6] Studies of exonerations conclude that poor lawyering plays a substantial role in the conviction of the innocent.[7]

In its successful effort to free innocent people convicted during a sex-ring investigation, the Innocence Project Northwest (IPNW)[8] reached the same conclusion regarding the impact of poor lawyering in wrongful convictions. For three years, the organization devoted itself to overturning convictions of individuals wrongly imprisoned for child sex-abuse in Wenatchee, Washington in the mid-1990s. The IPNW investigations uncovered evidence of overzealous and abusive actions by police and social service caseworkers, prosecutorial misconduct, unreliable forensic evidence, conflicts of interest, and ineffective representation by criminal defense attorneys.[9]

The terms of an existing indigent defense contract divided counsels' loyalties, and resulted in ineffective advocacy. The fixed-fee contract contained a clause that required the contracting attorney[10] to identify conflicts of interest and employ substitute counsel when a conflict of interest arose. The clause specified that no additional funds would be provided to the contracting attorney for payment of substitute counsel. These contract clauses led to

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5. *See* Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523–24 (2005) (identifying 340 exonerations between 1989 and 2003, 144 of which were exonerations based on postconviction DNA testing, and 196 cases where individuals were freed through other types of evidence).

6. *See, e.g.*, The Innocence Project, http://www.innocenceproject.org (last visited Aug. 25, 2006) (on file with the University of Michigan Journal of Law Reform) (showing a current list of DNA exonerations); Death Penalty Information Center, *Innocence: List of Those Freed From Death Row*, http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (on file with the University of Michigan Journal of Law Reform) (showing a current list of death penalty exonerees and noting the role of DNA evidence).

7. SCHECK ET AL., ACTUAL INNOCENCE, *supra* note 4, at 263 (stating that ineffective or incompetent defense counsel played a role in the conviction of thirty percent of the first sixty-two DNA exonerations in the United States).

8. IPNW was founded at the University of Washington School of Law in 1997. It began as a volunteer organization of professors, lawyers, and law students dedicated to providing legal representation to underprivileged individuals imprisoned for crimes they did not commit. In 2002, IPNW became part of the Clinical Law Program at the University of Washington School of Law. *See* University of Washington School of Law Clinical Law Program, http://www.law.washington.edu/Clinics/IPNW.html (last visited Aug. 25, 2006) (on file with the University of Michigan Journal of Law Reform).

9. *See infra* Part I.B.

10. For purposes of this Article, "contracting attorney" and "indigent defense contractor" refer to the lawyer or organization entering into a contract with a government entity for the delivery of indigent defense services.

tragic results in Washington when a morass of conflicts arose as multiple indigent defendants were charged with thousands of counts of child sex abuse involving the same victims. The indigent defense contract created a situation of divided loyalties where counsels' personal and financial interests took precedent over the interests of their clients, in contravention of counsels' duties of professional responsibility.

The conflict of interest provision in the indigent defense contract violated the canons of ethics in several ways. First, it created a financial disincentive to identify and declare conflicts of interest by penalizing the contracting lawyer for withdrawing from a case. Second, it mandated third party payment of conflict counsel without requiring the client's informed consent, and allowed no alternative method of obtaining independent defense counsel should the client refuse to waive the conflict. Finally, it placed the contracting attorney in the untenable position of hiring substitute counsel to defend clients whose interests were adverse to those of the contracting attorney's clients.

This Article proposes that fixed-fee indigent defense contracts that contain clauses requiring the contracting attorney to pay for conflict counsel out of a fixed-fee are subject to challenge under the contract theory of unconscionability, or on the ground that the contract violates public policy. Part I of the Article begins with a review of the Wenatchee cases, which illustrate the need for indigent defense reform. Part II provides an overview of indigent defense in the United States, with a focus on the increase in the use of low bid contracts and the conflict of interest scenarios that arise when contracting for indigent defense. Part III discusses the inherent and irreconcilable conflicts of interest that occur when an indigent defense contractor is obligated to pay for conflict counsel from the funds provided in a fixed-fee contract. Part IV explains why a constitutional challenge to these types of contracts would be unsuccessful. Part V discusses the intersection between contract law and criminal law, and the application of contract theory to the indigent defense contracts in question. Part VI contends that bar associations are the proper organizations to challenge these types of indigent defense contracts because the contracts are injurious to the organizations' missions. The Article concludes by suggesting that challenges to indigent defense contracts under the principles of contract law are a means of supplementing, not supplanting, challenges brought under the Constitution.

I. THE WENATCHEE CASES—A STUDY IN THE NEED FOR REFORM

In 1994 and 1995, forty-three adults were arrested on 29,726 charges of child sex abuse involving over sixty children in the Wenatchee Valley of Eastern Washington.[11] Wenatchee and East Wenatchee are part of Chelan County, a beautiful area east of the Cascade Mountains in the state of Washington, where many of the 62,000 residents are supported by the orchard farming economy. It is the last place one would expect to find a "collection of incestuous pedophiles lurk[ing] among the orchards and brown ridgetops . . . sexually assaulting as many as 48 children."[12]

A. The Investigation

The investigation began when two married couples pled guilty to child rape and molestation of family members. However, after prosecutors conducted multiple interviews of the children, additional charges were filed in what the prosecutors contended was a "multifamily sex-ring in which parents, their children, and adult friends participated in group sex."[13] The media latched on to the lurid details in the cases to report that the accusations were "mind boggling."[14]

As time went on, the allegations became increasingly bizarre, evolving from disclosures of young children touching each other's private parts into scenarios where parents swapped children with other adults, and adults (including a Child Protective Services worker) stood in line to have sex with children.[15] Early in the investigations the primary officer, Detective Perez, became the foster parent of a girl who had made the initial disclosures of abuse.[16] The investigation widened in March of 1995, when Detective Perez put his foster child in the front seat of his police car and drove her

11. *See* Andrew Schneider & Mike Barber, *Children Sacrificed for the Case; Allegations Set up a Puzzle of Doubtful Ethics, Dubious Facts*, SEATTLE POST-INTELLIGENCER, Feb. 23, 1998, at A6 [hereinafter Schneider & Barber, *Children Sacrificed*].

12. Scott Sunde, *Wenatchee Sex-Abuse Probe Widens; Minister, Wife Join List of Those Charged*, SEATTLE POST-INTELLIGENCER, Apr. 5, 1995, at A1.

13. Gordy Holt, *Parent-Child Group Sex-ring is Uncovered; Probe of Wenatchee Incest Cases Turns "Mind Boggling,"* SEATTLE POST-INTELLIGENCER, Oct. 8, 1994, at B1.

14. *Id.*

15. *See* KATHRYN LYON, WITCH HUNT: A TRUE STORY OF SOCIAL HYSTERIA AND ABUSED JUSTICE xxxii–xxxiii (1998).

16. *See* Schneider & Barber, *Children Sacrificed*, *supra* note 11, at A6.

through Wenatchee and East Wenatchee. The foster child identified locations where she said she and other children were repeatedly raped and molested over a seven-year period. During the drive, she pointed out a total of twenty-two homes and buildings and named adults who had participated in the abuse. When a deliveryman and a taxi driver were spotted, they were added to the list of abusers.[17] The following day Detective Perez questioned his foster child at home for six hours, eliciting details of the orgies in homes she identified during the drive. Other children, after repeated questioning by Detective Perez, told tales of orgies that took place at several homes and at the Pentecostal church, where children were said to sometimes fall into trances.[18] Accusations of molestation by unidentified men in black clothes and sunglasses followed.[19]

The official response was not to test the veracity of these "mind-boggling" disclosures, nor to question the impartiality of Detective Perez. Instead, charges were brought against the people named by the children and arrested by the Detective. One suspect, Harold Everett, was charged with 6,422 counts of child sex abuse.[20] When asked how he arrived at the numbers, Detective Perez responded: "It's just simple math . . . I ask these people, 'How many times . . . did you have sexual intercourse with this child?' I'm sitting there literally with a calculator and a pad, writing down what (criminal) charge it fits. You add them up, and that's what goes on the arrest form."[21]

In the end, over forty-three people were charged with sexual abuse and twenty-eight of those individuals were convicted.[22] The convicted were among society's most vulnerable; the majority of the individuals were poor and many suffered from developmental disabilities or mental illness.[23]

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17. *See id.*

18. *See* LYON, *supra* note 15, at xxxii–xxxiii.

19. *See id.* at xxxv.

20. *See* Schneider & Barber, *Children Sacrificed*, *supra* note 11, at A7.

21. *Id.*

22. *See* Mike Barber & Andrew Schneider, *The Accused: Over Two Years, 43 People Were Charged with 27,726 Counts of Child Sex Abuse. 17 Were Convicted and Remain in Prison. 4 Were Acquitted*, SEATTLE POST-INTELLIGENCER, Feb. 25, 1998, at A6 [hereinafter Barber & Schneider, *The Accused*].

23. *See* Timothy Egan, *Charges of Child Abuse Split a Town*, N.Y. TIMES, Apr. 15, 1995, at A12.

B. The Miscarriages of Justice

In 1998, the *Seattle Post-Intelligencer* published a series of articles exposing the flaws in the investigation.[24] At the time of publication, seventeen people convicted in the Wenatchee investigations remained in prison, and thirteen of those individuals did not have counsel.[25] The series captured the attention of the newly formed Innocence Project Northwest (IPNW), a volunteer organization based at the University of Washington School of Law. IPNW took on the task of coordinating the representation of the unrepresented individuals and began to solicit lawyers and law students to work on the cases. The first organizational meeting took place on July 10, 1998, with a volunteer group of over fifty-five lawyers, law students, and law professors in attendance.[26] At the meeting, each of the thirteen individuals was assigned a legal defense team of lawyers and law students who took on the task of that person's representation.[27]

The IPNW lawyers and law students held monthly meetings to discuss legal issues of common interest in the cases. Experts in the fields of recovered memories, false confessions, child suggestibility, forensic linguistics, and forensic science agreed to volunteer their time and assist in the defense.[28] The legal teams reinvestigated the cases and uncovered a chronology of events that exposed overzealous and abusive actions by police and social service caseworkers, prosecutorial misconduct, unreliable forensic evidence, and ineffective representation by criminal defense attorneys.[29]

Investigation and research by the IPNW attorneys and law students revealed substantial new information that was previously unavailable to the defendants. The investigation revealed patterns in several areas, including:

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24. *See* Andrew Schneider & Mike Barber, *The Power To Harm*, SEATTLE POST-INTELLIGENCER, Feb. 23–28, 1998.

25. Jacqueline McMurtrie, *Justice—a cautionary tale—the Wenatchee cases*, 4 BUTTERWORTHS FAM. L.J. 15, 16 (2002).

26. *Id.*

27. Elizabeth Amon, *Many Injustices Call for Many Lawyers*, NAT'L L.J., Dec. 25, 2000, at A15.

28. Dr. Joyce Adams, Dr. Phillip Esplin, Dr. Elizabeth Loftus, Dr. Richard Leo, Dr. Roger Shuy, and Dr. Gail Stygall were among those who volunteered their expertise in the cases.

29. *See* McMurtrie, *supra* note 25, at 16–18.

- *Threatening and suggestive interviewing of alleged victims.*[30] Children were questioned repeatedly—some more than a dozen times ("It is clear from police reports that children were subjected to as many as 13 investigative interviews");[31] children were called liars when they denied abuse or said they didn't know anything ("[An interviewer stated:] 'It's well known that children are telling the truth when they say they've been abused. . . . But [they] are usually lying when they deny it.");[32] interviewers used a threatening tone during the interviews[33] and asked leading and suggestive questions;[34]
- *Separating children from supportive counselors.* Investigators instructed Child Protective Services to take immediate action to remove the children from any counselors who entertained a belief that molestation had not occurred because they would not be good witnesses;[35]

30. *See, e.g.*, Andrew Schneider & Mike Barber, *Children Hurt By The System, Society's Protectors Bent, Broke and Ignored Rules*, SEATTLE POST-INTELLIGENCER, Feb. 24, 1998, at A1, A6 ("Numerous children say they were hurt horribly—not by rapists but by state Department of Social and Health Services caseworkers and counselors and therapists hired by DSHS or its Office of Child Protective Services. . . . A former associate dean at Spokane's Gonzaga University, [Juana Vasquez] returned to her hometown in 1988 to work as a DSHS supervisor. Her career in state government was short. She says she and two other Wenatchee staff members were fired after complaining about 'blatantly inappropriate' actions of DSHS caseworkers, therapists and Perez. 'Counseling sessions became interrogations, placements (in foster homes) were used as threats. Warnings that they'd never see their parents again were held over the children's heads if they failed to say they had been abused,' Vasquez says.").

31. VICKI WALLEN ET AL., STATE OF WASH. OFFICE OF THE FAMILY & CHILDREN'S OMBUDSMAN, 1998 REVIEW OF THE WENATCHEE CHILD SEXUAL ABUSE INVESTIGATIONS 26–27 (1998) ("At one point, a prosecutor requested that the court dismiss criminal charges against the defendant. One reason for the prosecutor's request was that one of the child witnesses had 'suffered emotional distress due to the strain of the numerous interviews' and was no longer available as a witness.").

32. Schneider & Barber, *Children Sacrificed*, *supra* note 11, at A8. *See also* State v. Everett, No. 94-1-00454-0 & No. 94-1-00455-8, slip op. at 15 (Chelan Co. Ct. Mar. 31, 1998) (Court's Memorandum Decision on Reference Hearing) (on file with the University of Michigan Journal of Law Reform) [hereinafter Court's Memorandum Decision on Reference Hearing] (noting that teenager who denied that he was sexually abused was confronted by detective with, "You're lying, and I know it") ; WALLEN, *supra* note 31, at 26–27 (1998) (referencing numerous instances of children being called liars when they denied being abused).

33. WALLEN, *supra* note 31, at 26–27 (referencing numerous instances of coercive questioning on the part of the authorities).

34. *Id.* at 24–25.

35. *See* Court's Memorandum Decision on Reference Hearing, *supra* note 32, at 35 ("Detective Perez told CPS to take immediate action to remove the children from any coun-

- *Removing children who denied abuse from their homes.* Investigators removed alleged victims from their homes and placed those children with foster parents or in an out-of-state psychiatric hospital (After denying that her parents abused her, a sixteen-year girl was strapped to a gurney even though she had never been violent, and taken to Pinecrest. At Pinecrest, she was repeatedly pressed to reveal abuse and was told that she had a memory block and should have hypnotherapy.);[36]
- *Cross-contamination of accusations.* Investigators told one child what another child, a sibling, or a parent had allegedly said and routinely brought in siblings or other family members so that one child heard the allegation of others;[37]
- *Coercive and manipulative interrogations.* Mentally retarded and/or otherwise vulnerable adults were threatened with life imprisonment and termination of parental rights during the interrogations;[38]
- *Undisclosed conflicts of interest.* Judges, prosecutors, Child Protective Services employees, and defense attorneys were laboring under conflicts of interest which were not revealed to the defendants;[39]

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selors who entertained a belief that *molestation had not occurred* because they *would not be good witnesses*.").

36. *Id.* at 39–41.

37. WALLEN, *supra* note 31, at 31 ("[Police and CPS workers] actively participated in giving witnesses information about what other witnesses were saying. . . . [C]hildren's therapists routinely brought in siblings or other family members so that one child heard the allegations of others.").

38. Everett v. Abbey, 31 P.3d 721, 724 (Wash. Ct. App. 2001) ("[T]he evidence of Detective Perez's tactics is sufficient *on its face* to support a finding of impropriety. . . . The record supports the reference hearing court's finding the interview tactics used in this case were improper." (internal citation omitted)).

39. *See, e.g.*, McMurtrie, *supra* note 25, at 15 ("At a pretrial hearing, [the defendant] Doris Green found herself in [c]ourt with her lawyer, the prosecutor and the Judge. On the witness stand was Detective Perez, the main witness against Ms[.] Green. The stated agenda for the hearing was to determine whether or not . . . [Doris Green's] confession would be admitted as evidence. In order to make that ruling, the Judge would need to determine whether Detective Perez's version of the interrogation was more credible than the account of Doris Green. However, the hearing also contained a hidden agenda. Unbeknownst to Doris Green: the Judge's wife served as the guardian ad litem for her children, her defense lawyer had represented Detective Perez in his second divorce action, the Judge had actual notice of the defense attorney's conflict because he signed the decree of dissolution, and the Judge had represented Detective Perez in his first divorce action. The confession was admitted as evidence, and Doris Green was convicted at trial and sentenced to 280 months (23.3 years) in prison.").

- *Ineffective assistance of counsel.*[40] Defense lawyers urged their clients to plead guilty without conducting any investigation into the charges;[41] many lacked experience handling complex cases;[42] and others were denied adequate resources to defend their clients.[43]

In the Wenatchee cases, the lack of advocacy by defense counsel played a substantial role in contributing to the wrongful convictions of indigent defendants. And in many cases, attorneys were burdened by conflicts of interest that affected the representation of their clients. At the time of the sex-ring investigations, one law firm received a lump sum of money to provide legal representation for indigent defendants in *all* of the criminal matters in Chelan County, where Wenatchee is located.[44] In addition, the law firm providing indigent defense for the county was responsible under the contract for identifying conflict of interest cases and employing outside counsel to represent defendants in those cases.[45] The contract provided that there would be "no further payment for such

40. Mike Barber, *Prosecutor Now Wants Freedom for Defendant*, SEATTLE POST-INTELLIGENCER, Feb. 26, 1999, at A1 (noting that prosecutor agreed with defense counsel's claim that the latter's client received inadequate representation of counsel and did not challenge his appeal).

41. Mike Barber & Andrew Schneider, *With Every Step, Rights were Trampled*, SEATTLE POST-INTELLIGENCER, Feb. 25, 1998, at A1 [hereinafter Barber & Schneider, *With Every Step*] (relaying conversation with Chief Public Defender Jeff Barker: " 'Did everyone have a minimally qualified defense? I believe they did. Did they have a great defense?' He answers his own question with a shrug."); Andrew Schneider & Mike Barber, *"Lies, Lies And More Lies," Says Jailed Man*, SEATTLE POST-INTELLIGENCER, Feb. 25, 1998, at A6 (reporting that Manuel Hidalgo Rodriguez, a defendant in the cases, stated: "My lawyer only talked to me 20 minutes. He was telling me 'Plead guilty, guilty, guilty.' "). *See also* Personal Restraint Petition at 26–31, 33–43, *In re* Henry Cunningham, No. 180093 (Wash. Ct. App. Nov. 5, 1998) (on file with the University of Michigan Journal of Law Reform) (noting that defense attorney failed to interview defendant's psychiatrist, who had information casting doubt on the veracity of the confession and upon defendant's physical inability to commit abuse. The attorney also failed to interview witnesses at defendant's place of employment who would have testified that it was unlikely that the defendant abused his daughters at work, as was alleged. Instead defense counsel visited defendant on the eve of trial, urging him to plead guilty to the charges, without having negotiated a sentencing recommendation from the state.).

42. Barber & Schneider, *With Every Step*, *supra* note 41, at A1 (Defendant was represented by an attorney who advised her to plead no contest and accept a fifty-six month sentence. At the time, the attorney had practiced law for a little over a year. And, the attorney failed to introduce a report from a forensic psychologist, which concluded that the defendant was not competent to stand trial.).

43. *Id.* (relating that the defense attorney quit the law after he was denied adequate resources to defend two clients he believed were innocent).

44. Contract for Legal Services for Indigent Criminal Defendants in Chelan County, at 1 (Dec. 21, 1993) (contract between Chelan County and Barker & Howard, P.S.) (on file with the University of Michigan Journal of Law Reform) [hereinafter Barker & Howard Contract].

45. *Id.* at 3.

outside counsel."[46] As further illustrated by the case of Doris Green (*infra* Section III.B), the indigent defense contract, and notably the conflict of interest provision, created insurmountable problems and guaranteed that indigent defendants would receive inadequate counsel, who labored under divided loyalties.

II. INDIGENT DEFENSE

The majority of people who are charged with crimes in the United States cannot afford to hire their own attorneys.[47] More than forty years ago the Supreme Court, in the landmark case of *Gideon v. Wainwright*,[48] announced a constitutional right to counsel at public expense for those who could not afford counsel.[49] In doing so, the Court resoundingly embraced the principle that defense lawyers for the poor were necessary to protect the accused's fundamental right to a fair trial.[50]

Although the government's obligation to provide counsel to indigent defendants is clear, the *Gideon* Court did not specify how governments should comply with the constitutional mandate. Thus, the quality of indigent defense services and the method by which it is provided varies from jurisdiction to jurisdiction. Studies have shown that with the proper support, including adequate funding, training, and experience, attorneys providing indigent defense achieve as great a success on behalf of their clients as private counsel in acquittals, charge reductions, and short sentences.[51] Due to

46. *Id.*

47. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000) (noting that in 1998, approximately 66% of federal felony defendants and 82% percent of felony defendants in the seventy-five largest state counties were represented by public defenders or assigned counsel). In Washington State, approximately 85% to 90% of all trial level criminal defendants in superior court are indigent. WASH. STATE OFFICE OF PUBLIC DEFENSE, CRITERIA AND STANDARDS FOR DETERMINING AND VERIFYING INDIGENCY 12 (2001) (on file with the University of Michigan Journal of Law Reform), *available at* www.opd.wa.gov/report%202.htm (follow hyperlink "Criteria and Standards for Determining and Verifying Indigency" under "Other Reports").

48. Gideon v. Wainwright, 372 U.S. 335 (1965).

49. *Id.* at 344. Gideon was charged with a felony, but the right to counsel for all crimes that involve potential imprisonment was affirmed in *Argersinger v. Hamlin*, 407 U.S. 25 (1972). More recently, the Court held that a suspended sentence that may end up in actual deprivation of personal liberty may not be imposed unless the defendant was accorded counsel in the prosecution for the crime charged. Alabama v. Shelton, 535 U.S. 654, 658 (2002).

50. *Gideon*, 372 U.S. at 344.

51. *See, e.g.*, ROGER A. HANSON ET AL., NAT'L CTR. FOR STATE COURTS, INDIGENT DEFENDERS: GET THE JOB DONE AND DONE WELL 3 (1992) (concluding after study of nine state trial court indigent defense systems, that indigent defenders are "as successful as privately

the lack of adequate funding for indigent defense, however, it is well documented that there is a severe shortage of indigent defenders who provide quality representation.[52] Moreover, studies concluding that indigent defenders get the same results for their clients as retained counsel have primarily been conducted in large urban areas.[53] Fewer studies have been conducted in municipalities and rural counties, meaning that the quality of indigent representation in non-urban settings has received less scrutiny.[54] The deficiencies in indigent defense services in smaller counties have

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retained counsel in gaining favorable outcomes for their clients (e.g. acquittals, charge reductions, and short sentences to prison)" and attributing the success in part to the presence of experienced counsel); HARLOW, *supra* note 47, at 1 (reporting that conviction rates in both federal and large state courts were the same for defendants represented by indigent defenders and private lawyers, but that higher percentages of defendants with indigent defenders were sentenced to incarceration); Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 366 (1991) (reviewing numerous studies from the 1970s and early 1980s, which collectively suggest that defendants with retained and appointed counsel receive similar outcomes in the adjudication of their cases). *Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 35 (1997) (explaining that "though early studies showed that defendants with retained and appointed counsel had similar outcomes, some more recent studies suggest that defendants with retained counsel do significantly better" (citations omitted)).

52. HANSON ET AL., *supra* note 50. *See, e.g.*, ABA REPORT, *supra* note 1, at 38 ("[I]ndigent defense . . . remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction." (emphasis omitted)); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 846 (2004) (containing reference by author, a lifetime advocate of improved indigent defense services and a prolific scholar, to "numerous law review articles in which the deplorable state of indigent defense has been exposed, emphasizing the connection between lack of adequate funding and the quality of representation").

53. *See, e.g.*, HANSON ET AL., *supra* note 51, at 29 (noting that only three out of the nine communities studied had populations under 50,000); HARLOW, *supra* note 47, at 1 (containing a study conducted in federal courts and state courts of the seventy-five largest counties in the United States).

54. The Spangenberg Group, a preeminent research and consulting firm on indigent defense issues, has done studies of over a dozen county indigent defense systems, all located in counties with large populations. *See* The Spangenberg Group, Indigent Defense Studies, http://www.spangenberggroup.com/work_indig.html (on file with the University of Michigan Journal of Law Reform). The smallest counties included in the list of studies are the County of Lancaster, Nebraska, with a population of around 260,000 in 2005, and Cameron County, Texas, with a 2005 population of around 378,000. Other regional and county studies ranged from Albuquerque, New Mexico (around 484,000) to Los Angeles County (around 9,000,000 in 2005). *Id.* For population estimates, see www.census.gov.

come out anecdotally through news articles[55] and reports issued by commissions[56] and committees.[57]

The lack of national uniformity in the provision of indigent defense services, coupled with a lack of oversight of the diverse methods of funding indigent defense, makes *Gideon*'s guarantee of a fair trial a hollow promise. Some jurisdictions have undertaken a market-driven approach to indigent defense services, without regard to the ethical obligations placed upon attorneys by the rules of professional responsibility. The following section provides an overview of the different models of indigent defense used throughout the country, a discussion of the increase in competitive, or low-bid, contracting for indigent defense contracts, and the ethical dilemmas that are implicated when contracting for indigent defense.

A. Indigent Defense Models

After *Gideon* was decided, state and local governments began the effort of developing new systems or expanding existing systems in order to comply with the Court's mandate.[58] Currently, three different models are used to provide indigent defense services: (1) public defender, (2) assigned counsel, and (3) contract attorneys. The public defender model involves a public or private nonprofit organization whose office is staffed with attorneys working exclusively as public defenders. In a jurisdiction using the assigned counsel model, private attorneys are assigned indigent criminal cases—generally by a judge—and the lawyers are paid on a case-by-case basis. The contract model employs a contract between a jurisdiction and an individual attorney or an organization to provide indigent defense for the jurisdiction.[59] The types of contracts under

55. *See, e.g.*, Ken Armstrong, Florangela Davila & Justin Mayo, *The Empty Promise of Equal Defense*, SEATTLE TIMES, Apr. 4–6, 2004, at A1 (reporting on the inadequate state of indigent defense in Grant County, Washington, whose population was approximately 81,000 in 2005). For population estimates, see www.census.gov.

56. *See, e.g.*, WASH. STATE BAR ASS'N, REPORT OF THE WSBA BLUE RIBBON PANEL ON CRIMINAL DEFENSE App. 5 (2004), http://www.wsba.org/blueribbonreport.pdf (on file with the University of Michigan Journal of Law Reform).

57. *See e.g.*, ABA REPORT, *supra* note 1, at 2, 5.

58. *See* 1 LEE SILVERMAN, AM. BAR FOUND., DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 253–67 (1965) (giving an index of criminal counsel schemes in 1965).

59. Robert L. Spangenberg & Marea L. Beeman, *Toward a More Effective Right to Assistance of Counsel, Indigent Defense Systems in the United States*, LAW & COMTEMP. PROBS., Winter 1995, at 31–32.

a contract system can range from a "fixed-fee, all cases" contract, where the contract price covers *all* cases in the jurisdiction, regardless of the number of cases or the level of complexity of the cases, to a "hourly fee, without caps" contract, where attorneys are paid the hourly fee specified in the contract without placing a cap on the total amount of compensation an attorney can receive for each case.[60]

B. Low-bid Contracting for Indigent Defense

The use of the contract system to provide indigent defense services has grown significantly in the past two decades.[61] The movement towards the contract model is driven in part by an increase in the number of indigent defendants and the use of contract counsel to handle conflict and overload cases in jurisdictions with a public defender office. However, the increase in the use of the contract system is primarily based upon an attempt by funding authorities to reduce costs in the face of increased prosecutions.[62]

The question of whether quality representation can be provided under a contract model is the subject of academic and professional debate.[63] The American Bar Association (ABA) and the National Legal Aid and Defender Association (NLADA) have conducted extensive studies and evaluations of indigent defense systems and promulgated standards and guidelines to assist with the provision

60. Other types of contracts include the "Fixed-Fee, Specified Type of Case[s]" (a flat fee contract for a specific category of cases, e.g., all misdemeanors); "Flat Fee, Specific Number of Cases" (a flat fee for a specific number of cases undertaken by the attorney during the contract period); "Flat Fee Per Case" (sets a fee by case type, e.g., $150 per misdemeanor); and "Hourly Fee With Caps" (a set hourly fee with a cap on the total amount of compensation the attorney can receive). THE SPANGENBERG GROUP, U.S. DEP'T. OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 4 (2000) [hereinafter USDOJ REPORT].

61. *See, e.g.*, USDOJ REPORT, *id.* at 3; ACLU OF WASH., THE UNFULFILLED PROMISE OF GIDEON: WASHINGTON'S FLAWED SYSTEM OF DEFENSE FOR THE POOR 17 (2004) (noting that twenty-four of Washington State's thirty-nine counties rely on private contractors to provide indigent defense services).

62. *See* USDOJ REPORT, *supra* note 60, at 3.

63. *See, e.g.*, Margaret H. Lemos, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV 1808, 1842 (2000) (advocating for litigation through § 1983 civil actions to challenge indigent defense contracts); Spangenberg & Beeman, *supra* note 59, at 35 (concluding that many jurisdictions have adopted fixed-price contracts solely as a means of trimming costs at the expense of quality representation); *Low-Bid Criminal Defense Contracting: Justice in Retreat*, CHAMPION, Nov. 1997, at 22 [hereinafter *Low-Bid Criminal Defense Contracting*] (documenting the failure of low-bid contracts in providing quality representation).

of indigent defense services.[64] Both organizations endorse the use of the public defense system.[65] In order for a contract system to provide quality representation, the contract must include safeguards such as minimum attorney qualifications; work-load and case-load standards; limits on a lawyer's ability to practice law outside the contract; funding for support staff, paralegals, investigators, and social workers; and a method for overseeing and evaluating the provision of services under the contract.[66] Unfortunately, the trend has been to award contracts on the basis of cost alone, leading to an erosion of the constitutional principle of the right to counsel and the diminishing of lawyers' professional responsibilities.[67]

C. Conflict of Interest Scenarios

When contracting for the provision of indigent defense services, the parties need to take into consideration the lawyer's ethical obligation not to undertake representation that involves a conflict of interest.[68] The conflict of interest problems that arise from indigent

64. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.2 (3d ed. 1992) [hereinafter ABA DEFENSE SERVICES STANDARDS]; NAT'L LEGAL AID AND DEFENDER ASS'N, NLADA MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES (2000), http://www.nlada.org/DMS/Documents/1025702469.09/Full%20volume.doc/ (on file with the University of Michigan Journal of Law Reform) [hereinafter NLADA MODEL CONTRACT]; NAT'L LEGAL AID AND DEFENDER ASS'N, NLADA GUIDELINES FOR NEGOTIATING AND AWARDING INDIGENT LEGAL DEFENSE CONTRACTS (1984), http://www.nlada.org/DMS/Documents/998926360.668/black%20letter.doc (on file with the University of Michigan Journal of Law Reform) [hereinafter NLADA GUIDELINES]. *See also* USDOJ REPORT, *supra* note 60, at 4 (identifying the specific features of deficient versus effective contract systems and making recommendations for jurisdictions to ensure that quality is not sacrificed in the name of cost).

65. ABA DEFENSE SERVICES STANDARDS, *supra* note 64, Standard 5-1.2 (recommending that each jurisdiction should provide for the services of a full-time defender organization and active and substantial participation of the private bar); *id.* at 8 (citing NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR DEFENSE SERVICES, I.2.a (1976) ("[a] full-time defender organization should be available for all communities, rural or metropolitan, as the preferred method of supplying legal services.")); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, STANDARDS FOR THE DEFENSE ch. 13.5 (1973), *available at* http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense (recommending that each jurisdiction have a full-time public defender program and an assigned counsel program with substantial participation of the private bar).

66. USDOJ REPORT, *supra* note 60, at 16.

67. Lemos, *supra* note 63, at 1810 n.16 (reporting that the "use of low-bid contracts to provide indigent defense services has been criticized roundly by bar association, government and academic studies").

68. Every state bar has an ethical rule prohibiting lawyers from undertaking representation that involves a conflict of interest. *See* 2 NATIONAL REPORTER OF LEGAL ETHICS AND

defense contracts most often implicate an attorney's duty of loyalty to the client.[69] This loyalty can come into question when a lawyer's loyalty is divided between a current and a former client ("loyalty to others"), or when a lawyer puts his or her own financial or personal interests above that of the client ("loyalty to self").[70]

The Model Rules of Professional Conduct prohibit representation—except under limited circumstances—for situations that involve a "concurrent" conflict of interest.[71] A concurrent conflict is defined as representation that is "directly adverse" to another client, or poses a "significant risk" that the representation will limit the lawyer's responsibility to "another client, a former client or a third person, or . . . a personal interest of the lawyer."[72] A lawyer cannot undertake representation that involves a concurrent conflict of interest if the representation is prohibited by law (e.g., some states have laws prohibiting lawyers from representing co-defendants in a capital case),[73] or if the representation involves an assertion of one client against another client in the same proceeding.[74] In other instances of concurrent conflicts, the lawyer can only proceed with the representation if the lawyer reasonably believes that he or she can offer competent and diligent representation, *and* each affected client gives informed consent.[75] Consent is "informed" only if the lawyer communicates to the client enough information for the client to understand the material risks of, and the reasonably available alternatives to, the lawyer's representation.[76]

1. Loyalty to Others—Joint and Successive Representation—The concurrent representation of multiple defendants, or "joint representation" in criminal cases, is "strongly discouraged by ethics rules and case law."[77] Under the Model Rules, joint representation can only proceed if each affected client gives informed consent,

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PROFESSIONAL RESPONSIBILITY (2001) (reprinting the codes of professional responsibility for all fifty states).

69. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 10-1, at 10-3 (3d ed. Supp. 2004) ("Loyalty to clients is one of the core values of the legal profession, perhaps equal in importance with maintaining confidentiality and diligently or zealously working to advance a client's interests.")

70. Conflicts of interest can arise when members of the contracting authority and agency and/or the agency directors, officers and employees have a personal financial interests in the contract or agency. *See* NLADA MODEL CONTRACT, *supra* note 64, at 19.

71. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

72. *Id.* at R. 1.7(b).

73. *Id.* at R. 1.7(b)(2) cmt. 16.

74. *Id.* at R. 1.7(b)(3).

75. *Id.* at R. 1.7(b)(2)(1), (4).

76. *Id.* at R. 1.0(e).

77. *Id.* at R. 1.7 cmt. 23.

confirmed in writing.[78] The ABA Standards for Criminal Justice prohibit representing co-defendants, except in unusual situations where counsel has determined, after careful investigation, that there is "no conflict."[79] Additionally, the ABA Standards for Criminal Justice mandate that a waiver of joint representation conflicts be subject to judicial inquiry.[80] Conflicts arising in the case of joint representation are non-waivable, if the representation of co-defendants jeopardizes the defense of one, by favoring one client over the other.[81] The problems are such that many commentators urge a complete ban on joint representation of co-defendants in criminal cases.[82]

Once a lawyer's representation of a client ends, the conflict of interest rules involved with "successive representation" recognize that the lawyer's obligation to the client diminishes, and the rules become more permissive. Under Model Rule 1.9(a), the lawyer must obtain the former client's written informed consent before representing a new client in "the same or a substantially related" matter in which that person's interests are "materially adverse" to the interests of the former client.[83]

Drafting an indigent defense contract that accounts for the ethical questions raised by joint and successive representation is problematic. Whether in small municipalities or large, urban areas, contractors may find themselves in a position of representing co-defendants, or clients charged as co-defendants of former clients. Defense attorneys may also find themselves representing criminal defendants in cases where the government's witnesses are former clients. The NLADA Model Contract contains a clause requiring the agency to agree to screen cases for conflicts brought about by co-defendants and adverse witnesses upon assignment and throughout the discovery process, and to refer to the state rules of professional conduct and the ABA Standards for Criminal Justice

78. *Id.* at R. 1.7(b).

79. ABA DEFENSE SERVICES STANDARDS, *supra* note 64, § 4-3.5(c).

80. *Id. See also* Holloway v. Arkansas, 435 U.S. 475, 478–80 (1978) (prejudice was presumed when trial court denied defense counsel's motion of separate counsel in case where counsel asserted he could not adequately represent the divergent interests of three co-defendants).

81. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2002).

82. *See, e.g.*, Debra L. Basset, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387 (2001); John S. Geer, *Representation of Multiple Criminal Defendants*, 62 MINN. L. REV. 119 (1978); Gary L. Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939 (1978); Peter W. Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075 (1979).

83. MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2002).

for guidance in determining the existence of conflicts and in resolving the conflicts.[84]

2. Loyalty to Self—Personal/Financial Conflicts of Interest—A "concurrent" conflict of interest can also arise when the contracting attorney's personal interest conflicts with the provision of legal services.[85] This "personal" conflict of interest is at the heart of many challenges to royalty agreements, where lawyers sign book deals in high profile cases,[86] and contingency fee arrangements in criminal defense cases.[87] It has also been used as a basis to challenge indigent defense contracts.[88] In an attempt to prevent financial conflicts of interest, the NLADA Guidelines specifically warn against the practice of holding the contracting attorney responsible for the expenses of investigations, expert witnesses, transcripts, and other necessary defense costs.[89] Attorneys burdened with these financial responsibilities may be tempted to waive a client's right to trial to limit their out-of-pocket costs, rather than making the decision solely on the basis of the client's best interest.

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84. NLADA MODEL CONTRACT, *supra* note 64, at 6 ("Conflicts of interest may arise in numerous situations in the representation of indigent defendants. The Agency agrees to screen all cases for conflict upon assignment and throughout the discovery process, and to notify promptly the Contracting Authority when a conflict is discovered. The Agency will refer to the [state] Rules of Professional Conduct, as interpreted by [the state or other relevant Bar Association and/or] opinions of the state judiciary, and to the American Bar Association Standards for Criminal Justice in order to determine the existence and appropriate resolution of conflicts.").

85. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

86. *Compare* People v. Corona, 145 Cal. Rptr. 894, 915–16 (Ct. App. 1978) (reversing a conviction in a case where the court found that a literary and dramatic rights agreement created a situation where counsel was forced to choose between his own pocketbook and his client's interests), *with* Hammond v. State, 452 S.E.2d 745, 881 (Ga. 1995), *cert. denied*, 516 U.S. 829 (1995) (holding that defendant in capital case failed to establish that media rights agreement between the defendant and his attorney created a conflict of interest).

87. MODEL RULES OF PROF'L CONDUCT R. 1.5(d)(2) prohibits a lawyer from entering into an arrangement for, charging for, or collecting a contingent fee for representing a defendant in a criminal case. However, courts have found that a contingency fee arrangement is not a per se ground for reversal of the defendant's conviction. MODEL RULES OF PROF'L CONDUCT R. 1.5(d)(2) (2002). *See, e.g.*, Winkler v. Keane, 7 F.3d 304, 309–10 (2d Cir. 1993), *cert. denied*, 511 U.S. 1022 (1994) (finding that the contingency fee created an actual conflict of interest for trial counsel because Winkler's interests in effective representation were pitted against trial counsel's monetary interest, but that the defendant did not show counsel's representation was adversely affected by the conflict of interest). For a critique of the per se prohibition against contingent fees in criminal cases see Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595 (1993).

88. *See* People v. Barboza, 627 P.2d 188, 189–91 (Cal. 1981) (invalidating a public defense contract that created a financial disincentive for the public defender to investigate and declare conflicts of interest); People v. Knight, 194 Cal. App.3d 337, 346–48 (Ct. App. 1987) (holding that there was an insufficient factual basis to hold that indigent defense contract, which provided a flat fee regardless of whether a case went to trial and allowed attorneys to engage in private practice, created a financial disincentive for attorneys to go to trial).

89. *See* NLADA GUIDELINES, *supra* note 64, at Guideline III-13.

Financial conflicts of interest can also arise when an indigent defense attorney is financially penalized for withdrawing from a case because of a conflict of interest. Most germane to this Article, the ABA Standards call for a provision of funds independent of the funds provided in the indigent defense contract to compensate conflict counsel.[90] The NLADA Guidelines warn against financially penalizing the indigent defense contractor or individual attorneys for withdrawing from a case that poses a conflict of interest to the attorney.[91]

III. PAYING FOR CONFLICT CASES FROM A FIXED-FEE INDIGENT DEFENSE CONTRACT—THE CREATION OF AN UNWAIVABLE CONFLICT OF INTEREST

The Chelan County contract illustrates the personal and financial conflicts of interest that arise when a contracting attorney agrees to pay for conflict counsel as part of the attorney's contractual obligation. Unlike the nineteen states which employ a state-wide public defender system,[92] each of Washington's thirty-nine counties and its numerous municipalities determine how to provide indigent defense services. The result is a "patchwork" of varying practices across the state.[93] Chelan County, which is the seventeenth most populous county in the state,[94] changed its method of providing representation in 1975 from an assigned counsel to a contract system.[95] In maintaining a contract system, it ignored the recommendations of the county bar association that the County

90. ABA DEFENSE SERVICES STANDARDS, *supra* note 64, at Standard 5-3.3(b), (vii) ("Contracts for services should include . . . a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses.").

91. *See* NLADA GUIDELINES, *supra* note 64, at Guideline III-13.

92. CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, STATE-FUNDED INDIGENT DEFENSE SERVICES 1–2 (1999) (reporting that in twenty-one states, virtually all of the funding for indigent defense comes from the state, and that nineteen of those states use the public defender system). Since the report was written, at least two more states—Georgia and Montana—have enacted state-wide public defender programs. *See* Mike Dennison, *Public Defender System Cited as National Model*, GREAT FALLS TRIB., June 8, 2005, at 1A; Bill Rankin, *Legislature 2004: Indigent Defense Bill Ok'd House-Passed Measure Puts Funding Mechanism In Place*, ATLANTA J. & CONST., Mar. 16, 2004, at D4.

93. WASH. STATE BAR ASS'N, REPORT OF THE WSBA BLUE RIBBON PANEL ON CRIMINAL DEFENSE 4 (2004) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.wsba.org/blueribbonreport.pdf.

94. *See* PAUL A. BASTINE ET AL., WASH. STATE BAR ASS'N, CURRENT STATUS OF DEFENSE SERVICES IN WASHINGTON 28 (1976).

95. *Id.* at 29.

would be better served by adopting a public defender system.[96] At the time of the Wenatchee sex-ring investigations, the County was employing a "fixed-fee, all cases" contract that required the contracting attorney to pay conflict counsel from the lump sum of money received under the contract. The division of loyalties created by this financial arrangement, combined with third-party payment of conflict counsel, resulted in an indigent defense contract with inherent, and irreconcilable conflicts of interest.

A. The Problem's Genesis—The Conflict of Interest Clause in a Fixed-Fee Contract

In 1991, Chelan County entered into a two-year contract with the Central Legal Defenders to provide legal representation to indigent defendants in all criminal matters, juvenile matters, mental illness matters, and any other matters for which the court made an appointment of attorney.[97] The parties agreed that the Central Legal Defenders were responsible for employing substitute counsel should a conflict of interest arise.[98] The contract price was $500,000.[99]

After two years, Chelan County lowered its costs of indigent defense by awarding the contract to the law firm of Barker and Howard, P.S. at a contract price of $475,000.[100] The law firm agreed to provide legal representation in *all* matters for which court-appointed counsel was afforded on the basis of indigence.[101] This contract's conflict of interest clause was even more specific in its mandate that the law firm was responsible for hiring outside counsel in cases of conflict of interest:

> ATTORNEYS agree to employ such outside counsel and/or firms as is necessary within the aforementioned payments to represent persons appointed to ATTORNEYS with which

96. *Id.* (reporting that the Chelan County Commissioners did not concur with the Chelan County Bar Association's recommendation that a public defender system would provide the best representation for the county).

97. *See* Contract for Legal Services for Indigent Criminal Defendants in Chelan County (Dec. 20, 1991) (contract between Chelan County and Central Washington Legal Defenders) (on file with the University of Michigan Journal of Law Reform).

98. *Id.* at 3.

99. *Id.* at 6.

100. *See* Barker & Howard Contract, *supra* note 44, at 1 (noting, for a four-year contract, a contract price of $475,000 for 1994, $495,000 for 1995, $520,000 for 1996, and $545,000 for 1997).

101. *Id.*

> there may be a conflict of interest based upon ATTORNEYS representation of a co-defendant or witness. There shall be no further payment for such outside counsel.[102]

Implicit in the contract was the understanding that the law firm was to self-regulate its conflicts of interest without oversight.

As discussed in the following section, this type of contract creates an impermissible division of loyalties between contracting lawyers, conflict counsel, and their clients. Additionally, the Chelan County contract did not contain any of the features that have been identified as ways to monitor and evaluate costs, while still providing quality representation.[103] Furthermore, the contract was in violation of a law enacted by the Washington state legislature in 1989, because the contract did not contain any standards regarding compensation and caseload limits, limitations on private practice, or a means of monitoring and evaluating attorneys.[104] The contract was a "fixed-fee, all cases" contract, meaning that the contract price covered *all* cases that arose in the jurisdiction regardless of the number cases involved, or the level of complexity of the cases.[105]

The strain that tens of thousands of complex child-abuse charges placed upon the Chelan County Prosecuting Attorney's Office was acknowledged when the office was awarded an additional $141,000 to defray the costs of prosecution.[106] However, the law firm that held the indigent defense contract did not receive any additional funding for defending the cases, even though the majority of the accused were indigent.[107] Since the indigent defense contract did not allow for additional funds for this increase in defendants, the law firm found itself in the position of choosing which clients to represent, and hiring substitute counsel to represent defendants whose interests were adverse to its clients' interests.

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102. *Id.* at 3.

103. USDOJ REPORT, *supra* note 60, at 16. *See supra* Part II.B.

104. *See* WASH. REV. CODE § 10.101.030 (1989). The Chelan County Contract could be challenged on public policy grounds because it violated the legislative mandate of § 10.101.030. However, such a challenge is beyond the scope of this Article.

105. See *supra* note 61, for a discussion of other types of contracts.

106. Barber & Schneider, *With Every Step*, *supra* note 41, at A7.

107. Schneider & Barber, *Children Sacrificed*, *supra* note 11, at A7.

B. The Problem Illustrated—The Case of Doris Green

When she was arrested in 1994, Doris Green was a 34-year-old mother of four children, who worked in the fruit orchards of the Wenatchee Valley.[108] She became part of the sex-ring investigations when she was accused of horrific acts of sexual abuse and rape against three children she babysat.[109] The ordeal began when Detective Perez called Doris Green to the police station for an interview and told her she was being interviewed in relation to other sex abuse cases.[110] However, the interview soon turned confrontational. According to Ms. Green, Detective Perez became verbally and physically abusive and threatened to take away her children if she did not confess to the crimes.[111] After almost four hours of interrogation, a four page typewritten statement was produced and was placed in front of Doris Green for her signature.[112] Ms. Green, who is marginally literate, asked Detective Perez to read the statement to her and he refused to read her the entire statement.[113] Doris Green signed the statement, in which she admitted to vile acts of sexual abuse, and was booked into jail.[114]

Immediately after her arrest, Doris Green began writing to her lawyer, vigorously asserting that Detective Perez fabricated her alleged confession.[115] Five days after her arrest, she was charged with three counts of rape of a child in the first degree, and one count of child molestation in the first degree. Jeffrey Barker, a partner in the law firm that held the indigent defense contract, appeared as counsel for Doris Green on September 23, 1994. On October 19, 1994, the law firm withdrew because of a conflict of interest and David M. Bohr substituted as counsel.[116] In accordance with the provisions of the indigent defense contract, David Bohr was paid by the law firm holding the indigent defense contract.

On February 3, 1995, Bohr sent the following letter to Jeffrey Barker:

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108. Barber & Schneider, *The Accused*, *supra* note 22, at A6.

109. Personal Restraint Petition at 1–2, 6–7, *In re* the Personal Restraint of Doris Green, No. 179206 (Wash. Ct. App. Oct. 16, 1998) (on file with the University of Michigan Journal of Law Reform).

110. *Id.* at 4–5.

111. *Id.* at 21–23.

112. *Id.* at 7–8, 22–24.

113. *Id.* at 25.

114. Personal Restraint Petition, *In re* the Personal Restraint of Doris Green at 20–25.

115. *Id.* at 34.

116. *Id.* at 30, app. 11 (noting that the law firm of Barker and Howard represented the parents of P.H., who had accused both her parents and Doris Green of sexual abuse).

Dear Jeff:

In an attempt to save you money, I did, per your authorization or that of Keith Howard, have Nick Yedinak review the file and talk to Doris Green begging her again to plead to the charges. Naturally, she refused and Yedinak sent me a bill for $189.00. I would ask that you pay Nick direct.

Sincerely,

David M. Bohr[117]

The letter illustrates the multi-faceted divisions of loyalty that were engendered by the contract. Doris Green's attorney is writing to his employer, Jeffrey Barker, who has withdrawn as Ms. Green's counsel because he represents a client whose interests are adverse to Ms. Green. And yet, Jeffrey Barker is making decisions about Doris Green's representation by "authorizing" the hiring of a third lawyer, whose mission is defined as "begging" Doris Green to plead guilty. According to the letter, Doris Green's attorney's loyalties lie not with his client, but with his employer. His declared interest is to spare his employer the costs of a trial. And he is revealing client confidences (a refusal to plead guilty) to a lawyer representing clients whose interests are adverse to his client.[118] The person who was kept unaware of the conflict was Doris Green. She was not given a copy of the letter. At trial, Doris Green was found guilty and sentenced to 280 months (23.3 years) in prison.[119]

117. *Id.* app. 26 (Letter from David M. Bohr, Attorney to Jeffrey C. Barker, Attorney (Feb. 3, 1995)) (on file with the University of Michigan Journal of Law Reform).

118. By revealing client confidences, an attorney also breaches his or her professional duty to maintain client confidences. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

119. Personal Restraint Petition, *In re* the Personal Restraint of Doris Green at 2. See *supra* note 40 for a description of other conflict of interest issues in Doris Green's case.

C. The Problem Defined—The Contract's Inherent and Irreconcilable Conflicts of Interest

Indigent defense contracts that require the contracting attorney to pay conflict counsel are not uncommon.[120] A recent study reported that three of the thirty-nine counties in Washington State require the indigent defense contractor to pay conflict counsel; nine counties have contracts that are so vague it is not possible to determine who is responsible for paying conflict counsel; and one county contract is silent as to who is responsible for paying the costs.[121]

As discussed in Section III.C.1, this type of contract creates a financial disincentive for the contracting attorney to acknowledge a conflict of interest and seek withdrawal. Since conflict lawyers are paid out of the lump sum of money received by the contracting attorney, the contract penalizes the contracting attorney for withdrawing from a case. Funds that could be used to finance the contracting attorney's law firm operations are instead diverted to outside conflict counsel, whose client's interests are in conflict with the contracting attorney's client's interests. As discussed in Section III.C.2, the contract also implicates ethical rules on third-party payment, because the contracting attorney pays for the services of conflict counsel. The conflicts that arise when a lawyer receives payment from someone other than the client can only be waived if the client is made aware of reasonably available alternatives to the payment "triangle" and gives informed consent. Under the very terms of the contract, no alternatives are available.

1. Financial Conflicts of Interest—The financial conflict of interest created by a contract that penalizes indigent defenders for acknowledging conflicts of interest was at the center of the California case *People v. Barboza*.[122] The defendants in *Barboza* were represented jointly by attorneys from the office of the Public Defender. After trial and conviction, they brought an ineffective assistance of counsel claim asserting that the public defense contract impermissibly created disincentives for the Public Defender to find and

120. *See Low-Bid Criminal Defense Contracting*, *supra* note 63, at 24 ("Many contracts require the contracting attorney to pay substitute counsel when a conflict of interest arises, creating a disincentive for the contractor to acknowledge a conflict and seek to withdraw.").

121. ACLU OF WASH., THE UNFULFILLED PROMISE OF GIDEON: WASHINGTON'S FLAWED SYSTEM OF DEFENSE FOR THE POOR 21 (2004) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.aclu-wa.org/library_files/Unfulfilled%20Promise%20of%20Gideon.pdf.

122. People v. Barboza, 627 P.2d 188 (Cal. 1981).

declare conflicts, and that their attorneys were laboring under an actual conflict of interest as a result of the defendants' joint representation. The public defense contract required the Public Defender to set aside a sum of money in a reserve account each year to pay conflict counsel. If there was a surplus in the reserve account at the end of the fiscal year, the funds reverted to the office of the Public Defender. On the other hand, if there was a deficit in the account, the office of the Public Defender was liable for the deficiency.[123]

The *Barboza* court found that the "set aside fund" created an irreconcilable conflict of interest, which arose at the moment the Public Defender was appointed to represent two defendants whose interests were adverse to each other.[124] The Court recognized that the arrangement created a financial disincentive for the Public Defender either to investigate or declare the existence of actual or potential conflicts of interest and placed him in a situation where his professional and personal financial interests were adverse to the interests of certain of his clients.[125]

The *Barboza* court held, as a "judicially declared rule of criminal procedure",[126] that the "contract contain[ed] inherent and irreconcilable conflicts of interest," and overturned the defendants' convictions on that basis.[127] In doing so, the Court avoided the question of whether the defendants were deprived of the effective assistance of counsel.[128] Moreover, the Court held that its ruling was prospective, rather than retroactive, because of the probable reliance upon the validity of the Public Defender contract prior to the filing of the opinion.[129]

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123. *Id.* at 189.

124. *Id.* at 189–90.

125. *Id.* at 189.

126. *Id.* at 191 (quoting People v. Rhodes, 524 P.2d 363, 367 (Cal. 1974) and People v. Cahan, 282 P.2d 905, 910 (Cal. 1955)).

127. *Id.* at 191. For other instances in which the California court has decided cases as a matter of common law rules of criminal procedure see *Rhodes*, 524 P.2d at 367–68 (holding that a city attorney with prosecutorial responsibilities may not defend or assist in the defense of persons accused of crimes); People v. Vickers, 503 P.2d 1313, 1321 (Cal. 1972) (finding that a probationer is entitled to the representation of retained or appointed counsel at formal proceedings for the revocation of probation); *Cahan*, 282 P.2d at 910–11 (adopting an exclusionary rule as a judicially declared rule of evidence prior to the Supreme Court ruling in *Mapp v. Ohio*, 367 U.S. 643 (1961), that the exclusionary rule applied to state courts by way of the Fourteenth Amendment).

128. *Barboza*, 627 P.2d at 191.

129. *Id.* Disciplinary proceedings were later brought against the Public Defender. The Court found he had violated disciplinary rules by failing to obtain written consent of defendants to joint representation, opposing the appointment of outside counsel in a case where his office had a conflict because of joint representation, and adopting an office policy of not declaring conflicts except when one defendant was to testify against another. The Court

As in *Barboza*, contracts such as the Chelan County contract create situations where the personal and financial interests of the contracting attorney are in conflict with the client's interests.[130] By agreeing to provide representation in *all* criminal cases for a lump-sum of money, the contracting attorney is financially penalized for acknowledging conflicts and withdrawing from cases. Funds that could go to support the law firm or to provide legal representation to clients are diverted to outside sources. Furthermore, contracts like the Chelan County contract make the indigent defense contractor responsible for the direct employment of conflict counsel, which creates an additional layer of divided loyalties.

2. Third-Party Payment for Legal Services—A contract that requires an indigent defense contractor to pay substitute counsel when a conflict of interest arises invokes the rules of ethics governing third-party compensation. Rule 1.8(f) of the Model Rules of Professional Responsibility provides:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.[131]

The risk involved in third-party compensation is "that the lawyer will serve the interests of the paymaster, rather than those of the client."[132] The conflict of interest is multi-faceted; the client's inter-

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issued a public reprimand, instead of imposing the State Bar's recommended sanctions of a thirty-day suspension from practice, stayed on the condition that the attorney be placed on supervisory probation for one year. *See* Gendron v. State Bar of Cal., 673 P.2d 260 (Cal. 1983).

130. The California courts have extended the reasoning in *Barbozo* to disqualify a prosecutor's office in a case where a corporate victim paid approximately $13,000 towards prosecution expenses, finding that the payment created a grave conflict of interest, People v. Eubanks, 927 P.2d 310, 321–23 (Cal. 1995), and to overturn a trial court's order that denied a capital defendant's application for funding to pay for interpreters, experts, transcribers and investigation, and required his attorney to pay the expenses from a $300,000 fund the family pooled together for his attorney's fees, Tran v. Superior Court, 112 Cal. Rptr. 2d 506, 510–12 (Ct. App. 2001).

131. MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2002).

132. HAZARD & HODES, *supra* note 69, § 12.13, at 12–33.

ests may be adverse to the third-party payer, and the lawyer receiving third-party payment may betray the client in order to gain favor with the person controlling the purse strings. Thus, a lawyer may only accept payment from a third party if the client gives informed consent and agrees to the arrangement. In order to ensure that the client's consent is truly informed, the attorney must communicate reasonably adequate information regarding the material risks of third-party payment, and communicate reasonably available alternatives to the proposed course of conduct.[133]

Third-party payment issues arise in civil cases in the context of prepaid legal services, where salaried government lawyers and corporate counsel also represent individual members of the organization, and in family arrangements in which parents hire counsel for their children.[134] They also exist in almost all liability insurance policies, through the inclusion of a clause by which the insurer agrees to provide and pay for counsel to represent policyholders who are sued or threatened with a suit.[135] This type of agreement, found in contracts ranging from car insurance to professional malpractice insurance, is often referred to as "the 'eternal triangle.' "[136]

Third-party payment "triangles" also arise in cases handled by private criminal defense counsel. They can arise when corporations hire counsel to represent employees, or when municipalities hire

133. MODEL RULES OF PROF'L CONDUCT R. 1.8, 1.0(e) (2002).

134. HAZARD & HODES, *supra* note 69, §§ 12–13.

135. *Id.* §§ 12–14.

136. The characterization of the relationship between insurer, insured, and the insurance defense counsel as an "eternal triangle" is not universal.

> The relationship is variously referred to as the 'tripartite relationship,' Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 Neb. L. Rev. 265, 266 (1994); Eric M. Holmes, *A Conflicts-of-Interest Roadmap for Insurance Defense Counsel: Walking an Ethical Tightrope Without a Net*, 26 WILLAMETTE L. REV. 1, 2 (1989); the 'triadic' relationship, Karen O. Bowdre, *Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel*, 17 AM. J. TRIAL ADVOC. 101, 101 (1993); the 'insurance triangle,' STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 273–74 (4th ed. 1995); the 'lovers triangle,' Francis M. Hanna, *When Medical Malpractice Becomes Legal Malpractice: Some of the Dangers Inherent in Representing Professional Malpractice Defendants*, 12 MISS. C.L. REV. 73, 76 (1991); and the 'eternal triangle,' Paul M. Vance & Cindy T. Matherne, *Legal Ethics—Defense Counsel's Responsibilities to Insured and Insurer*, 6 U.S.F. MAR. L.J. 157, 157 (1993); Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511 (1991).").
>
> Douglas Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 476 n.1 (1996).

counsel to represent police officers.[137] The issue most commonly surfaces in criminal cases involving organized crime, where someone other than the defendant pays a lawyer's fees.[138] In these cases, government attorneys have sought to disclose the identity of the third party payer[139] or petitioned the court to disqualify defense attorneys.[140] Even in situations where the employer is involved in a legitimate business activity, a court must conduct an inquiry to determine whether the employer's interests are divergent from the employee's interests when the employer pays a defense attorney to represent an employee.[141] These problems are so great that one commentator has suggested "ethical norms require criminal defense lawyers to decline the payment and instead refer the potential client to a public defender."[142]

The "triangle" dilemma created by the Chelan County contract raises even more grave ethical concerns. First, the contracting attorney employer owes a duty of loyalty to his clients. The provisions of the contract, however, call this "loyalty to others" into question at the moment the employer hires employees to represent clients whose interests are adverse to the employer's clients. The contracting attorney faces two dilemmas: (1) Should he hire an inept conflict counsel employee in order to protect his own client's interests? (2) Should he place limits on the amount of money his employee can spend in conflict cases to preserve funds for his own clients?[143]

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137. *See* Roman M. Roxzkewycz, *Third Party Payment of Criminal Defense Fees: What Lawyers Should Tell Potential Clients and Their Benefactors Pursuant to (an Amended)* Model Rule *1.8(f)*, 7 GEO. J. LEGAL ETHICS 573, 574 (1993).

138. *See, e.g.*, U.S. v. Gotti, 771 F. Supp. 552, 560–63 (E.D.N.Y. 1991) (disqualifying counsel upon evidence that defendant had paid counsel to defend others after determining that evidence of these "benefactor payments" were relevant to whether the benefactor was the head of the criminal enterprise as defined by RICO).

139. U.S. v. Hodge and Zweig, 548 F.2d 1347, 1349–50 (9th Cir. 1977).

140. *Gotti*, 771 F. Supp. at 553 (allowing removal of defense counsel where the government alleged that they were "'house counsel' to the 'enterprise' charged in the indictment—the Gambino Organized Crime Family").

141. Wood v. Georgia, 450 U.S. 261, 273–74 (1981) (remanding the case to determine whether counsel was actively representing the conflicting interests of the employer, rather than the employees). *See also In re* Abrams, 266 A.2d 275, 278 (N.J. 1970) (stating that "it is . . . inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony" and determining that a reprimand was the appropriate discipline for an attorney who accepted payment for an employee charged with a lottery offense from the employer (a gambler)).

142. David Orentlicher, *Fee Payments to Criminal Defense Lawyers from Third Parties: Revisiting* United States v. Hodge and Zweig, 69 FORDHAM L. REV. 1083, 1084 (2000).

143. Barber & Schneider, *With Every Step*, *supra* note 41, at A1 (noting that local firms rejected requests from the indigent defense contractor to represent defendants in the sex-abuse trials because they were too complex and costly for $90 an hour offered by contractor).

Second, the contract, for the reasons set forth in the preceding section, impermissibly creates a situation where the contracting attorney employer's financial interests, or "loyalty to self," are divergent from the conflict counsel employee's interest in advocating for her clients. Moreover, the conflict counsel employee's financial interests, or "loyalty to self," may lead her to betray her client in order to curry favor with her employer and receive more conflict cases.[144]

Finally, a waiver cannot cure the ethical problems created by the contract. A client represented by conflict counsel under these circumstances cannot give informed consent to the third-party payment as is required under the rules of professional responsibility.[145] The client could not be informed about "reasonably available alternatives" to third-party payment, when there were none. Since the contract did not provide any alternative means of securing counsel, if an indigent client refused to waive the payment "triangle" conflict of interest, there would be no method of obtaining counsel. In short, the conflicts of interest created by the Chelan County contract, and other similar contracts, are unwaivable.[146]

IV. WHY A CLAIM THAT THE INDIGENT DEFENSE CONTRACT VIOLATED THE SIXTH AMENDMENT WOULD NOT SUCCEED

Despite the entreaties of scholars and the heroic efforts of litigators, Sixth Amendment challenges to indigent defense contracts have achieved mixed success.[147] The Sixth Amendment has never

144. The employee/employer relationship created by contracts such as the Chelan County contract also implicate the duty of confidentiality. *See supra* note 118 and accompanying text.

145. The Chelan County Contract did not require the contracting attorney to obtain client consent when hiring conflict counsel. *See* Barker & Howard Contract, *supra* note 44, at 1.

146. *See e.g.*, U.S. v. Schwarz, 283 F.3d 76, 96 (2d Cir. 2002) (finding that conflict could not be waived under the circumstances because "no rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation" (quoting U.S. v. Fulton, 5 F.3d 605, 613 (2d Cir. 1993) (holding that conflict could not be waived where it arose when defendant's counsel was accused of participating in criminal activity related to the crimes for which the defendant had been charged)).

147. *See, e.g.*, Quitman County v. State, 910 So. 2d 1032, 1034 (Miss. 2005) (affirming dismissal of challenge in Mississippi); Wayne County Criminal Def. Bar Ass'n v. Chief Judges of Wayne Circuit Court, 663 N.W.2d 471, 472 (Mich. 2003) (unsuccessful challenge in Michigan); N.Y. County Lawyers' Ass'n v. State, 763 N.Y.S.2d 397 (2003) (successful challenge in New York); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2069–70 & n.55–58 (2000) (discussing successful challenges

been used as a mechanism to police the ethical behavior of attorneys.[148] Nor has the Sixth Amendment jurisprudence raised the quality of representation for indigent defendants.[149] In order to understand why a Sixth Amendment challenge to the Chelan County contract would be difficult, it is necessary to briefly review the doctrine on the right to counsel.

A. Analysis of Sixth Amendment Claims

The Sixth Amendment right to counsel is a right that involves "fundamental principles of liberty and justice," and denial of that right constitutes a violation of due process.[150] The *Gideon* court recognized that defense lawyers are not "luxuries," but rather are necessary to the fundamental goal of conducting a fair trial.[151] In *Gideon,* the Court held that an indigent defendant who cannot afford to pay an attorney has an absolute right to have an attorney appointed by the court.[152] The Supreme Court has also recognized that a constitutional right to counsel encompasses the right to effective assistance of counsel.[153] Whether a defendant was afforded the constitutional guarantee of counsel is an inquiry that depends

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to contracts in Arizona, Louisiana, Oklahoma, Pennsylvania and Connecticut and unsuccessful challenges in Minnesota and New Jersey); Ken Armstrong, *Grant County Settles Defense Lawsuit,* SEATTLE TIMES, Nov. 8, 2005, at B1 (successful challenge in Washington); Leonard Post, *Montana Upgrades Indigency Defense System,* NAT'L L.J., June 6, 2005, at 4 (stating that in response to a lawsuit brought by the American Civil Liberties Union, the Montana legislature passed The Montana Public Defender Act, creating a statewide public defender system and an indigent defense commission); *Indigents Who Spent Weeks in Jail Settle,* NAT'L L.J., Apr. 21, 2003, at B2 (reporting that lawsuit brought by indigent defendants in Coweta County, Georgia, was settled when the county agreed to hire more full-time attorneys). At the time of publication of this Article, class action law suits were also pending in Massachusetts and Louisiana. *See* Laura Maggi, *Public Defenders Swamped, Suit Says; Prisoners, Poor Face Long Wait for Lawyers,* TIMES-PICAYNE, Sept. 24, 2004, at 4; Jonathan Saltzman, *Suit Seeks Pay Raises for Public Defenders; Ability of Indigent to Get Aid Seen at Risk,* BOSTON GLOBE, June 29, 2004, at B1.

148. Nix v. Whiteside, 475 U.S. 157, 165 (1986) ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.").

149. *See* ABA REPORT, *supra* note 1, at 38 ("[I]ndigent defense . . . remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.").

150. Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

151. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

152. *Id.* at 344.

153. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to effective representation of counsel." (citing Reece v. Georgia, 350 U.S. 85, 90 (1955))); Glasser v. United States, 315 U.S. 60 (1942); Avery v. Alabama, 308 U.S. 444 (1940); Powell v. Alabama, 287 U.S. 45 (1932).

upon the nature of the claim of deprivation. Courts apply different standards of review depending on the specific Sixth Amendment claim.

1. Presumption of Prejudice: Denial of Counsel and State Interference with Counsel's Assistance—The Supreme Court has identified a narrow group of Sixth Amendment claims in which prejudice to the defendant is presumed. A presumption of prejudice applies if there is an actual or constructive denial of assistance of counsel,[154] or if the violation results from State interference with counsel's assistance,[155] which includes preventing defense counsel from subjecting the prosecution's case to meaningful adversarial testing.[156] Under these circumstances, prejudice is presumed because "[p]rejudice . . . is so likely that case-by-case inquiry into prejudice is not worth the cost."[157]

2. Presumption of Effective Representation—Incompetent Counsel Claims—A claim that defense counsel's performance was deficient is evaluated under the two-prong test enunciated by the Supreme Court in *Strickland v. Washington*.[158] To prevail on an ineffective assistance of counsel claim, a defendant must establish that defense counsel's performance was deficient, and that the defendant was prejudiced by the deficient performance.[159]

Under the performance prong, judicial scrutiny of counsel's performance is highly deferential. The defendant must show that

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154. The total failure to provide counsel will result in an automatic reversal of the conviction. Strickland v. Washington, 466 U.S. 688, 692 (1984). Under some circumstances, the absence of counsel after the initiation of the charge is seen as harmless error. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 10–11 (1970) (finding that counsel's absence during preliminary hearing was subject to harmless error analysis). If counsel is absent during a "critical stage" of the proceeding, the harmless error doctrine will generally not apply and prejudice is presumed. United States v. Cronic, 466 U.S. 648, 659 (1984). Courts do not agree on the question of whether prejudice is presumed when counsel is rendered absent through sleep. *Compare* Burdine v. Johnson, 262 F.3d 336, 341 (5th Cir. 2001), *cert. denied*, 535 U.S. 1120 (2002) (finding that prejudice must be presumed in a case where the defendant's attorney was repeatedly sleeping during "not insubstantial" portions of the trial case), *with* United States v. Cordero, 95 F. Supp. 2d 76, 81–82 (D.P.R. 2000) (noting that sleeping during trial does not constitute prejudice per se, and appearance of sleep may be used by attorneys as a "strategic tool").

155. *See, e.g.*, Geders v. United States, 425 U.S. 80 (1976) (trial court ordered the defendant not to consult with his attorney during overnight recess which separated the direct and cross examination); Herring v. New York, 422 U.S. 853 (1975) (statute allowed trial court to refuse to permit closing argument in a bench trial); Brooks v. Tennessee, 406 U.S. 605 (1972) (statute requiring that defendant testify first, or not at all); Ferguson v. Georgia, 365 U.S. 570 (1961) (statute which allowed defendant to make an unsworn statement, but prohibited direct examination of defendant by counsel).

156. *Cronic*, 466 U.S. at 659.

157. *Strickland*, 466 U.S. at 692 (citing *Cronic*, 466 U.S. at 658).

158. *Id.*

159. *Id.* at 691–92.

counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment."[160] The defendant has the burden of overcoming the "strong presumption" that counsel rendered adequate assistance and made all significant decisions in exercise of reasonable professional judgment.[161] The defendant must show that counsel's conduct was outside the range of competence demanded of criminal defense attorneys, and that the representation fell below an objective standard of reasonableness.[162] The courts often resolve claims of incompetence by finding that an attorney's questionable actions fell within the ambit of trial strategy.[163]

Under the prejudice prong, the defendant must establish that counsel's errors were so serious as to deprive the defendant of a "fair trial, a trial whose result is reliable."[164] Errors by counsel, even if professionally unreasonable, do not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. To show prejudice in the trial, the defendant must establish that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[165] If a court can dispose of an ineffectiveness claim because the defendant failed to establish prejudice, the court may dismiss the claim without ruling on the question of whether counsel's performance was substandard.[166] In many cases of egregious attorney misconduct, the defendant's conviction is affirmed because the court finds that the defense counsel's incompetence did not affect the result of the trial.[167]

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160. *Id.* at 687.

161. *Id.* at 690.

162. *Strickland*, 466 U.S. at 687–88.

163. *See, e.g.*, Bell v. Cone, 535 U.S. 685, 702 (2002) (finding that defense counsel's choice to not present available mitigating evidence in a capital case, and the failure to make any closing argument or plea for his client's life at the conclusion of the penalty phase, was a tactical decision about which competent lawyers might disagree).

164. *Strickland*, 466 U.S. at 687.

165. *Id.* at 694. Where the defendant pleaded guilty, the defendant can only satisfy the prejudice prong by demonstrating that, but for counsel's deficient performance, a reasonable probability exists that the defendant would not have pleaded guilty and would have insisted on a trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). In the context of an appeal, a defendant must show that there is a reasonable probability that, but for counsel's deficient failure to consult with defendant about an appeal, defendant would have timely appealed, or that the result of the appeal would have been different. Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000).

166. *Strickland*, 466 U.S. at 697 (1984) ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.").

167. Martin C. Calhoun, Note & Comment, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 430–32 (1988). In a survey of all federal ineffective assistance claims reviewed by the circuit courts of appeals from the *Strickland* decision until May 1988, counsel's performance was found rea-

3. The Murky Middle: Conflict of Interest Claims—The right to counsel entitles a defendant to the undivided loyalty of his or her counsel.[168] In *Mickens v. Taylor*,[169] the Court agreed that prejudice is presumed, requiring reversal rather than the *Strickland* analysis, in situations where counsel "actively represented conflicting interests."[170] However, counsel's violation of a provision of the Canons of Legal Ethics does not, in and of itself, warrant a finding of ineffective assistance of counsel.[171]

In *Mickens*, the question before the Court was whether prejudice was presumed in cases where a trial court was aware of a defense counsel's conflict of interest, yet failed to conduct an inquiry to determine whether the conflict precluded representation by counsel.[172] Mickens' lawyer, Bryan Saunders, represented a juvenile on criminal charges.[173] When the juvenile was murdered, the trial court dismissed the charges against him due to his death.[174] Four days later, the same trial judge appointed Saunders to represent Mickens on the capital charge of causing the death of Saunders' juvenile client.[175] Saunders did not disclose to Mickens, or to co-counsel, that he had previously represented the victim.[176] The Court acknowledged that the trial court had failed in its duty to inquire into the conflict of interest.[177] However, it held where the trial court fails to inquire into a "potential" conflict of interest about which it was aware, the defendant has to establish prejudice by showing that the conflict of interest adversely affected counsel's performance. The Court affirmed the lower court's finding that

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sonable in only 54.3% of the cases. However, only 4.3% ineffectiveness claims resulted in reversals. Of the remaining claims resolved by a finding that prejudice was not proven, the court indicated that defense counsel's performance was inadequate in 5.3% of the claims, while affirming the conviction. *Id.*

168. Cuyler v. Sullivan, 446 U.S. 335, 356 (1980) (Marshall, J., concurring in part and dissenting in part) ("An actual conflict of interests negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney.").

169. Mickens v. Taylor, 535 U.S. 162 (2002).

170. *Id.* at 166.

171. *Id.* at 176 (Kennedy, J., concurring) ("The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland*, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." (citing Nix v. Whiteside, 475 U.S. 157, 165 (1986) ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."))).

172. *Mickens*, 535 U.S. at 164.

173. *Id.* at 164–65.

174. *Id.*

175. *Id.*

176. *Id.* at 165.

177. *Id.* at 173–74.

Mickens had not made the requisite showing of prejudice.[178] Mickens was executed by the state of Virginia on June 12, 2002.[179]

Many unresolved issues remain when analyzing whether a Sixth Amendment violation occurs as a result of a conflict of interest. Courts have developed different standards for determining whether a conflict is an "actual" conflict (which focuses the inquiry on whether counsel's performance was affected by the conflict), versus a "potential" conflict (which subjects the claim to review under *Strickland* and focuses the inquiry on whether there is a showing of probable impact on the outcome of the trial).[180] At least one circuit has held that an "actual" conflict of interest can only arise in cases of multiple or serial representation.[181] Other circuits reject this narrow approach by extending the category of "actual" conflicts to cases where there is a financial conflict of interest between the client and the attorney.[182] The question of whether an "actual conflict" can be found in cases of successive (versus joint) representation is, according to *Mickens*, "an open question."[183]

Courts have also struggled to define what constitutes an adverse impact upon representation. Some courts have defined an "actual conflict" as one that "adversely affects the defense lawyer's performance," making the analysis a one-step inquiry.[184] Other courts have applied a two-part test, holding that the defendant must first establish an "actual conflict," and then prove that the "actual conflict" had an "adverse impact" on representation.[185] The *Mickens*

178. *Id.*

179. *See* Death Penalty Information Center, Execution Database, http://www.deathpenaltyinfo.org/executions.php (search for "Walter Mickens") (on file with the University of Michigan Journal of Law Reform).

180. *See* Brief of Legal Ethicists and the Stein Center for Law and Ethics as Amici Curiae in Support of Petitioner at 6, Mickens v. Taylor, 535 U.S. 162 (2002) (No. 00-9285) ("[V]arious opinions . . . reveal a bewildering number of competing concepts [to distinguish among conflicts]: conflict of interest; actual conflict; technical conflict; potential conflict; apparent conflict; genuine conflict; actually representing conflicting interests; possible conflict; a conflict that never ripened into an actual conflict; a conflict of interest that actually affected the adequacy of representation; a client actually saddled with a genuine conflict; and, finally, a conflict of interest that actually existed.").

181. Beets v. Collins, 65 F.3d 1258, 1272 (5th Cir. 1995) (en banc) (expressing a concern that all defendants would characterize their ineffectiveness claims as conflicts of interest claims, the court held that *Strickland*'s standard applied to personal conflicts of interest between attorney and client).

182. *See, e.g.*, Amiel v. United States, 209 F.3d 195 (2d Cir. 2000); United States v. Hearst, 638 F.2d 1190 (9th Cir. 1980).

183. *Mickens*, 535 U.S. at 176 (Kennedy, J., concurring).

184. United States v. Hearst, 638 F.2d 1190, 1194 (9th Cir. 1980).

185. United States v. Schwarz, 283 F.3d 76, 92 (2d Cir. 2002) ("The finding of an actual conflict, however, is only the first step in determining whether Schwarz has established his claim of ineffective assistance of counsel. He must also show that the actual conflict adversely

Court appeared to endorse a one-step process by stating that "'an actual conflict of interest' meant precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties."[186]

B. Application of the Sixth Amendment to the Contract

It would be difficult to successfully challenge the Chelan County contract, and other similar contracts, under the Sixth Amendment. First, *Mickens* indicates that a heightened level of scrutiny, examining the effect of the conflict on counsel's performance, can only be applied in situations where the defense counsel engages in joint representation of defendants. Even if a reviewing court adopted the more expansive interpretation of what constitutes an "actual conflict," the defendant would have to show that the conflict adversely affected counsel's representation. For example, in *Cole v. State*, a Florida court found that there was an inherent conflict in an arrangement where private defense counsel's set fee included all discovery and investigative fees, since investigation costs would come out of counsel's pocket.[187] However, it affirmed the defendant's conviction because he had not shown the conflict adversely affected the lawyer's performance.[188] If the reviewing court ruled that the conflict was merely "potential," challengers would have to meet *Strickland's* heightened showing that the outcome of the trial was affected by counsel's performance.[189] Finally, a case-by-case analysis of an individual client's Sixth Amendment claim would do little to remedy a systemic problem in contracting for indigent defense.[190]

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affected [his attorney's] performance by demonstrating that 'a "lapse in representation" resulted from the conflict.'" (citations omitted)).

186. *Mickens*, 535 U.S. at 163.

187. Cole v. State, 700 So. 2d 33, 37 (Fla. Dist. Ct. App. 1997), *rev. denied*, 705 So. 2d 569 (Fla. 1998).

188. *Id.*

189. For a critique of the *Strickland* standard, see Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1445–79 (1999).

190. Even if a defendant is able to establish that counsel was ineffective, that individual will face formidable obstacles in a suit for monetary damages against the lawyer. Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1255 (2003). The majority of states require plaintiffs in a criminal malpractice suit to obtain post-conviction relief, either through an acquittal or by vacating the guilty verdict. Johanna M. Hickman, *Recent Developments In The Area Of Criminal Malpractice*, 18 GEO. J. LEGAL ETHICS 797, 797–98 (2005). Some courts have held that a reversal of a conviction, in and of itself, is insufficient proof of criminal malpractice. *Compare* Ang v. Martin, 114 P.3d 637, 643 (Wash. 2005) (proof of "actual innocence" by a preponderance of evidence is a necessary element of a criminal

V. THE APPLICATION OF CONTRACT LAW TO FIXED-FEE CONTRACTS THAT INCLUDE PAYMENT OF CONFLICT COUNSEL

Indigent defense contracts have not been challenged on the basis that a clause, or the entire contract, is void on the grounds of unconscionability or public policy. Nonetheless, the principles of contract law are not foreign to criminal law. Most criminal cases are solved through the process of negotiation, resulting in a plea bargain in which the government and the defendant enter into a contract.[191] A defendant who pleads guilty gives up certain constitutional rights in exchange for the prosecutor's promise to make a sentencing recommendation. She gives up the right to trial by judge or jury, the right to call and confront witnesses, the right to remain silent, the right to be presumed innocent and have the government prove its case beyond a reasonable doubt, and the right to appeal.[192] If a prosecutor fails to comply with terms of the agreement, the defendant can ask for one of two contractual remedies—to withdraw from the contract or have the terms of the contract specifically enforced.[193]

Defendants have sought contractual remedies in cases alleging that government officials breached their contractual duties to provide indigent defense. As of yet, no court has addressed the merits of such a claim. In Mississippi, Quitman County brought a civil action for declaratory and injunctive relief against the State alleging, among other claims, that the State breached its contractual duties under the Pubic Defender System Act of 1998 to provide a statewide, state-funded, public defender system.[194] The claim was dismissed as moot because the Public Defender System Act was not funded by the legislature, and therefore the Act never went into

malpractice lawsuit), *with* Shaw v. Dep't of Admin., 861 P.2d 566, 572 (Alaska 1993) (issue of plaintiff's "actual guilt" is an affirmative defense that must be proven by a preponderance of evidence by the defendant in a criminal malpractice lawsuit).

191. In 2003, ninety-five percent of all state felony convictions were the result of a guilty plea. *See* U.S. DEP'T. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 450 (2003).

192. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969) (noting that pleading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one's accusers, and the Sixth Amendment right to trial by jury). A defendant may give up additional constitutional rights, such as the right to receive undisclosed exculpatory impeachment evidence, United States v. Ruiz, 536 U.S. 622, 633 (2002), or the right to effective assistance of counsel, United States v. White, 307 F.3d 336, 340–44 (5th Cir. 2002), as part of the plea agreement.

193. Santobello v. New York, 404 U.S. 257, 262–63 (1971).

194. State v. Quitman County, 807 So. 2d 401 (Miss. 2001).

effect.[195] In Georgia, a lawsuit brought by indigent defendants included claims against the County Board of Commissions and the Indigent Defense Committee, alleging that the entities breached their contractually assumed duties to implement and manage the indigent defense program established by Coweta County.[196] The county eventually agreed to settle the suit, and hired three full-time attorneys to cover the work that was previously handled by two part-time attorneys.[197] More recently, the state of Georgia passed the Georgia Indigent Defense Act, which mandates the creation of forty-nine Public Defender offices, a Mental Health Advocacy Division, an office of the Georgia Capital Defender, and the creation of a council to promulgate guidelines and oversee the work of the Public Defender offices and appointed conflict defenders.[198]

The well-established principles of contract law and professional responsibility can be used as a basis to challenge fixed-fee contracts that require payment of conflict counsel from the original contract price. First, the provisions of such contracts violate the canons of ethics. As described Section III.C.1, the contracting attorney is placed in a situation where the attorney's personal and financial interests in declaring conflicts and paying for substitute counsel are divergent from the client's interests, creating an inherently irreconcilable conflict. Second, as discussed Section III.C.2, the provision for third-party payment of conflict counsel from the fixed-fee contract also creates a multi-layered division of loyalties that cannot be cured through a waiver. As described below, these circumstances translate into a contract that is unconscionable, or contrary to public policy.

A. The Principle of Unconscionability

The principle of unconscionability has its historical pinning in early common law. A contract was considered unconscionable if it

195. *Id.* at 404. At trial after remand, the trial court ruled on the lawsuit's remaining constitutional claim. It found that Quitman County had not met its burden of proving that the funding mechanism established by statute had led to systemic ineffective assistance of counsel in Quitman County and throughout the state. The Mississippi Supreme Court affirmed the trial court's ruling. *See* Quitman County v. State, 910 So. 2d 1032 (Miss. 2005).

196. *See* Complaint and Petition for Mandamus, Bowling v. Lee, No. 01-V-802 (Ga. Super. Ct. Aug. 10, 2001) (on file with the University of Michigan Journal of Law Reform), *available at* http://schr.org/news/docs/complaint_final.pdf.

197. *Indigents Who Spent Weeks in Jail Settle*, NAT'L L.J., Apr. 21, 2003, at B2.

198. Marion Chartoff, *Indigent Defense: The Georgia Indigent Defense Act of 2003*, CHAMPION, Aug. 2003, at 61.

was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[199] *The Restatement (Second) of Contracts* provides that a court may refuse to enforce a contract, or a term in a contract, or it may limit the terms of the contract, on the grounds of unconscionability.[200] *The Uniform Commercial Code* contains similar language,[201] and although its provisions only apply to the sale of goods, not services, it has been influential in guiding an analysis of the doctrine of unconscionability.[202]

Determining what constitutes an unconscionable term or contract is a task that reaches towards philosophical and ethical notions of justice,[203] and is the subject of extensive scholarly debate.[204] Arthur Leff was the first to introduce an analytical framework for analyzing unconscionability within the commercial setting, which distinguished between procedural unconscionability and substantive unconscionability.[205] Procedural unconscionability addresses the process of contract formation, and examines what took place between the parties when the contract was made, while substantive unconscionability deals with the resulting content of the contract.[206] In defining unconscionability, courts have used

199. Hume v. United States, 132 U.S. 411 (1889) (quoting Earl of Chesterfield v. Janssen, (1750) 28 Eng. Rep. 82, 199 (Ch.)).

200. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

201. U.C.C. § 2-302 (2005).

202. RESTATEMENT (SECOND) OF CONTRACTS § 208 reporter's note, cmt. a (1981) ("Uniform Commercial Code § 2-302 is literally inapplicable to contracts not involving the sale of goods, but it has proven very influential in non-sales cases. It has many times been used either by analogy or because it was felt to embody a generally accepted social attitude of fairness going beyond its statutory application to sales of goods."). *See also* Honey Dew Assocs. v. M & K Food Corp., 241 F.3d 23, 28 n.2 (1st Cir. 2001) ("Massachusetts courts dealing with claims of unconscionable contract terms have recognized the relevance of the Uniform Commercial Code provisions in analyzing the claims before them even if the contract was not covered by the Code."); Kelly v. Widner, 771 P.2d 142, 145 (Mont. 1989) (noting that the unconscionability standard applied to sales transactions is also used by courts to determine unconscionability of release in a personal injury case resulting from an automobile accident).

203. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 372 (4th ed. 1998) ("'Unconscionable' is word that defies lawyer-like definition. It is a term borrowed from moral philosophy and ethics.").

204. *See* John P. Dawson, Unconscionable Coercion, *The German Version*, 89 HARV. L. REV. 1041, 1042–44 (1976) (discussing comparative analysis of unconscionability doctrine); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981) (reviewing scholarship on the doctrine of unconscionability).

205. *See* Arthur Allen Leff, *Unconscionability and The Code-The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

206. *See, e.g., id. See also* Williams v. Walker-Thomas Furniture, Co., 350 F.2d 445 (D.C. Cir. 1965).

such colorful language as "shock[ing to] the conscience,"[207] "monstrously harsh,"[208] "outrageous,"[209] or "exceedingly calloused."[210]

B. Contracts that Violate Public Policy

Many courts rely upon grounds of public policy, as well as unconscionability, to void contracts or terms of a contract.[211] The *Restatement (Second) of Contracts* § 178 provides that a contract or term is unenforceable on grounds of public policy if legislation provides that it is unenforceable, or if the public policy against enforcement clearly outweighs the interest in enforcement.[212] When conducting an analysis under § 178, courts are less concerned with the relative bargaining strengths, or procedural unconscionability, of the parties to the contract. A contract provision, even if it is negotiated at "arms length" between two parties of equal status, may be unenforceable on public policy grounds.[213] When analyzing whether public policy weighs against the enforcement of a contract, a reviewing court may examine legislation relevant to the policy, or rely on the need to protect the public welfare against harms such as restraint of trade, impairment of domestic relations, or interference with other protected interests.[214]

1. Violation of the Rules of Ethics—Contracts that violate the canons of legal ethics have been voided on public policy grounds. Courts have voided contracts that provide for a fee splitting agreement between an attorney and a non-attorney,[215] contracts that call for a non-attorney to engage in the unauthorized practice

207. Hillman, *supra* note 204, at 26 (suggesting that the definition "shock the conscience" is frequently employed by the equity courts).

208. Jeffery v. Weintraub, 648 P.2d 914, 920 (Wash. Ct. App. 1982) (quoting Montgomery Ward & Co., Inc. v. Annuity Bd. Of S. Baptist Convention, 556 P.2d 552 (Wash. Ct. App. 1976)).

209. Cross v. Carnes, 724 N.E.2d 828, 837 (Ohio Ct. App. 1998) (citing Orlett v. Suburban Propane, 561 N.E.2d 1066, 1069–70 (Ohio Ct. App. 1989)).

210. Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995) (quoting Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention, 556 P.2d 552 (Wash. Ct. App. 1976)).

211. *See, e.g.*, Municipality of Anchorage v. Locker, 723 P.2d 1261, 1266 (Alaska 1986) (finding that limited liability provision in advertising contract with a telephone utility and directories corporation was unconscionable and void as against public policy).

212. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

213. *See, e.g.*, United States v. Richmond, 550 F. Supp. 605, 609 (E.D.N.Y. 1982) ("Even arms length negotiated commercial contracts between persons of equal power are void if they offend public policy.").

214. RESTATEMENT (SECOND) OF CONTRACTS § 179 (1981).

215. *See* Trotter v. Nelson, 684 N.E.2d 1150, 1152 (Ind. 1997).

of law,[216] or those providing for a contingency fee in a criminal case.[217] An area of debate exists as to whether a non-competition clause in an employment contract or partnership agreement that restricts the right of an attorney to compete with a former law firm or partnership is void on public policy grounds.[218] Courts have found these covenants unenforceable not only on the grounds that they interfere with the lawyer's right to practice law, but also that they restrict a client or potential client's choice of counsel.[219] Thus, the courts recognize the impact of the restrictive covenant upon the third-party beneficiaries of the attorney's expertise: clients and potential clients.

2. Interfering with Rights of Third Parties—Courts have invalidated clauses in contracts when the parties involved in the contract negotiated a clause that interfered with the rights of individuals affected by, but not involved in, the negotiation of the contract. Provisions that interfere with the public right to exercise important fundamental constitutional rights have been held unenforceable on public policy grounds. Thus, provisions in civil settlement agreements[220] and in plea bargains[221] which prohibit one of the parties from running for elected office were voided on the ground that the clause interfered with the constitutional right of voters to elect their public officials.

Courts have also voided contracts that interfered with other important, but not constitutional, rights of third parties to the contract. Certain agreements not to prosecute, such as release-

216. *See* Nat'l Realty Counselors, Inc. v. Tracy, Inc., 713 A.2d 524, 525 (N.J. 1998).

217. *See, e.g.*, O'Donnell v. Bane, 431 N.E.2d 190, 193 (Mass. 1982).

218. *See* Robert M. Wilcox, *Enforcing Lawyer Non-Competition Agreements While Maintaining the Profession: The Role of Conflict of Interest Principles*, 84 MINN. L. REV. 915, 922 (2000) ("[R]ecent practice of rejecting non-competition agreements among lawyers on essentially a per se basis is inappropriate and should give way to a more traditional rule of reason analysis that considers adequately the nature of the law firm's asserted interests, whether those interests would be compromised unfairly by competition from a departing lawyer, and whether the firm, by entering into a non-competition agreement, has improperly put its interests before those of any person to whom it owes a fiduciary duty.").

219. *See, e.g.*, Pettingell v. Morrison, Mahoney & Miller, 687 N.E.2d 1237, 1239–40 (Mass. 1997) (discussing how non-competition agreements between lawyers are of concern because of the need to protect the clients and potential clients of the withdrawing lawyer and the law firm and noting that "[a]n enforceable forfeiture-for-competition clause would tend to discourage a lawyer who leaves a firm from competing with it. This in turn would tend to restrict a client or potential client's choice of counsel").

220. *See* Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1396 (9th Cir. 1991), *cert. denied*, 501 U.S. 1252 (1991) (striking down civil settlement because it interfered with the party's constitutional right to run for office and the constitutional right of the voters to elect him to public office).

221. *See, e.g.*, United States v. Richmond, 550 F. Supp. 605, 609 (E.D.N.Y. 1982) (striking down a plea agreement because it interfered with the people's right to elect their representative).

dismissal agreements, may be unenforceable because of their impact on important public policy issues. According to the Supreme Court's decision in *Town of Newton v. Rumery*,[222] reviewing courts must determine whether the interest in enforcing a release-dismissal agreement outweighs the public policy harmed by enforcement of the agreement.[223] Courts have invalidated release-dismissal agreements in cases when the prosecutor does not engage in any individualized analysis of a case, but rather imposes a blanket policy of requiring release-dismissal agreements.[224] Courts have denied summary judgment when the circumstances indicate there were genuine issues of material fact over whether the agreement was voluntary.[225] Public policy considerations prohibit courts from enforcing release-agreements made between private individuals or entities, since private citizens cannot contract away the public's right to bring criminal charges against someone who commits a crime.[226]

VI. BAR ASSOCIATIONS' ROLE IN CHALLENGING INDIGENT DEFENSE CONTRACTS THAT ARE UNCONSCIONABLE OR AGAINST PUBLIC POLICY

A claim that a contract, or contractual provision, is unconscionable or contrary to public policy is generally raised as a defense to a lawsuit.[227] However, it is unlikely that the parties to the Chelan

222. Town of Newton v. Rumery, 480 U.S. 386 (1987).

223. *Id.* at 391–92.

224. *See* Cain v. Darby Borough, 7 F.3d 377, 382 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1195 (1994) (holding prosecutor's office blanket policy of requiring release-dismissal agreements for candidates participating in a program which led to dismissal of charges was contrary to public policy and therefore unenforceable); Kinney v. City of Cleveland, 144 F. Supp. 2d 908, 917–19 (N.D. Ohio 2001) (holding that blanket nature of the release requirement, which made no attempt to distinguish between frivolous and meritorious litigation, rendered the agreements unenforceable); Cowles v. Brownell, 538 N.E.2d 325, 330 (N.Y. 1989) (holding that the prosecutor's routine demand of waivers to protect a police officer whose misdeeds it knew engendered an appearance of impropriety or conflict of interest and mitigated against enforcing the release agreement).

225. *See, e.g.*, Livingstone v. North Belle Vernon Borough, 12 F.3d 1205, 1211–15 (3rd Cir. 1993) (holding that there was a genuine issue of material fact as to whether plaintiffs had made deliberate, informed, and voluntary waiver of right to bring civil action against officers and municipalities in return for dismissal of criminal charges against plaintiff precluded summary judgment against plaintiffs on ground of release).

226. *See, e.g.*, Y.W. v. Nat'l Super Markets, Inc., 876 S.W.2d 785, 790–91 (Mo. Ct. App. 1994).

227. Williams v. Cent. Money Co., 974 F. Supp. 22, 28 (D.D.C. 1997) ("The claim of common law unconscionability appears to apply only defensively, for example, as a response to an attempt to enforce a contract.").

County contract and other similar contracts would raise this defense in a suit for breach of contract. In other words, the indigent defense contractor would not be inclined to refuse payment for services rendered by conflict counsel, and would avoid claiming that the conflict of interest clause was unconscionable or contrary to public policy. Such an action would subject the contracting lawyer, who entered into the agreement to pay for conflict counsel under the terms of the contract, to explain why she entered into a contract that she believed was unconscionable. Although the indigent defense contract is for the provision of services that benefit third parties—indigent defendants—it is equally unlikely that indigent defendants would bring a lawsuit challenging the provisions of the contract. The indigent defendant could assert rights as third-party beneficiary to the contract.[228] However, a person who lacks the resources necessary to hire a lawyer in a criminal case will presumably lack the resources to bring a lawsuit against the indigent defense attorney or the government.

Bar associations, which exist in every state,[229] have taken leading roles advocating for improved indigent defense services, and are uniquely positioned to challenge contracts such as the one found in Chelan County.[230] Quintin Johnstone examined the activities and missions of state and local bar associations and concluded that all share the goals of benefiting individual lawyers, the legal profession, and the public at large.[231] Certainly the mission of ensuring that individuals receive competent, adequate representation that is free from conflicts of interest falls squarely within these shared goals.[232] State bar associations are situated to use their resources to ensure that members of their profession do not enter into indigent defense contracts that violate the canons of professional responsibility. The state bar associations can pursue this mission through education, advisory opinions, disciplinary proceedings, and litigation.

228. *See generally* 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37 (4th ed. 2000) (discussing the rights of third party beneficiaries of contracts to seek injunctions or equitable relief to enforce their rights under the contracts).

229. *See* Quintin Johnstone, *Bar Associations: Policies and Performances*, 15 YALE L. & POL'Y REV. 193, 195–96 (1996).

230. *See* ABA REPORT, *supra* note 1, at 29–35 (discussing strategies for reform and the role of state bar associations in improving indigent defense services).

231. Johnstone, *supra* note 229, at 195–96.

232. As such, a bar association's efforts on behalf of indigent defense reform fall outside of the activities prohibited by *Keller v. State Bar of California*. Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990) (holding that a bar association that charges mandatory dues may only use those dues to fund activities consistent with the purposes of the association, such as regulating the legal profession and improving the quality of legal services).

A. Education

State bar associations can become active, or continue in their efforts to educate the public regarding the need for indigent defense services reform. Bar associations can convene committees that detail the problems of the indigent defense system, recommend improvements to the system, and work with local and state governments to ensure that indigent defense contracts comply with the canons of professional responsibility. The associations can be active in legislative sessions, meeting with legislators, or testifying at legislative hearings in support of the association's position for indigent defense reform.

B. Advisory Opinions

State bar associations are often asked to issue advisory opinions to resolve ethical dilemmas. In a case involving the provision of indigent defense services, the state bar of Texas was asked to issue an opinion on whether it was permissible for a lawyer to participate in an "attorney of the day" program where an attorney received payment for representation at an arraignment calendar only in the event the defendant elected to plead guilty.[233] The opinion noted that the program presented the lawyer with a potential conflict, by pitting the interests of the attorney in obtaining a fee, against the interests of the client which may or may not be served by pleading guilty. The bar concluded that it would seem highly unlikely that, with the time constraints that would exist, the lawyer could on the day of the consultation provide 'full disclosure' to the criminal defendant concerning the conflict of interest and its implications, obtain a valid consent from the criminal defendant, and then counsel with the criminal defendant as to whether the criminal defendant should plead guilty.[234] Because the scenario presented a conflict of interest that could not be waived by informed consent, the opinion concluded that the state rules of professional responsibility prohibited an attorney from participating in the program.[235]

Contracts such as the Chelan County contract raise ethical issues similar to those addressed by the Texas State Bar Association. As

233. Tex. Sup. Ct. Prof'l Ethics Comm., Ethics Op. 535, 64 TEX. B.J. 78 (Jan. 2001) (on file with the University of Michigan Journal of Law Reform).

234. *Id.*

235. *Id.*

discussed in Section III(C)(2), the contract presents a multi-faceted division of loyalties between the contracting attorney, conflict counsel, and their clients, which cannot be waived through the process of informed consent. Individual members of a state bar could request that their state bar associations issue advisory opinions regarding the permissibility of entering into such contracts under the rules of professional responsibility. Although the opinions are only advisory in nature, they would forewarn lawyers regarding the consequences of undertaking contractual obligations that violate the rules of professional responsibility.[236]

C. Rules of Professional Responsibility

All states prohibit lawyers from undertaking specific types of representation or engaging in business transactions that present impermissible conflicts of interest.[237] State rules of professional responsibility could be amended to unequivocally prohibit lawyers from entering into indigent defense contracts where the contracting attorney agrees to pay for conflict counsel, or from accepting compensation as conflict counsel under such a contract. For example, Model Rules of Professional Responsibility could read:

> 1.8 Conflict of Interest: Current Clients: Specific Rules
>
> (l) A lawyer shall not:
>
> (1) make an agreement with a governmental entity for the delivery of indigent criminal defense services unless the terms of the agreement obligate the governmental entity to compensate conflict counsel for fees and expenses independent of the agreement; or

236. In 1995, the Rules of Professional Conduct Committee of the Washington State Bar Association issued an Informal Opinion addressing the question of whether conflicts of interest arose when a public defender office was required to pay for conflict attorneys out of the public defense contract. WASH. STATE BAR ASS'N, INFORMAL OPINION: 1647 (1995), http://pro.wsba.org/io/print.asp?ID=729 (on file with the University of Michigan Journal of Law Reform). The Committee opined that the plan raised issues under the rules governing conflict of interest, third-party payment, and maintaining confidentiality. *Id.* However, informal opinions do not represent the official opinion of the Washington State Bar Association. *Id.*

237. *See supra* note 68.

(2) accept compensation for the delivery of indigent criminal defense services from a lawyer who has entered into an agreement in violation of paragraph (1)(1).

Incorporating a prohibition against the above agreements into the rules of professional responsibility serves two purposes. First, lawyers are put on notice that agreeing to pay for conflict counsel out of an indigent defense contract budget unquestionably violates the rules of ethics. Second, a rule of professional responsibility prohibiting a lawyer from entering into such agreements will provide clear guidelines to government entities engaging in negotiations for indigent defense contracts. If a government entity proposes that the contracting attorney pay for conflict counsel, the proposal will be rejected on the ground that the agreement will subject the attorney to disciplinary proceedings.

D. Disciplinary Proceedings

Currently, state supreme courts govern the regulation of lawyers in all fifty states.[238] Bar associations can pursue disciplinary proceedings against contracting attorneys who enter into contracts that violate the canons of professional responsibility. Indeed, after *People v. Barboza* was decided, disciplinary proceedings were brought against the public defender involved in the case.[239] The court found he had violated disciplinary rules by failing to obtain the defendants' written consent to joint representation, opposing the appointment of outside counsel in a case where his office had a conflict because of joint representation, and adopting an office policy of not declaring conflicts except when one defendant was to testify against another. The state bar recommended sanctions: a thirty-day suspension from practice, stayed on the condition that the attorney be placed on supervisory probation for one year. However, the court issued a public reprimand through its opinion, rather than imposing the bar's recommendation.[240]

More severe sanctions were imposed against indigent defense providers in Washington State. A lawyer who provided indigent defense services for many years in Grant County was disbarred upon

238. *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1171 (2003).

239. *See* Gendron v. State Bar of Cal., 673 P.2d 260 (Cal. 1983).

240. *Id.* at 270.

proof that he charged clients fees while also representing them as court-appointed criminal defense counsel, failed to explain the choice between appointed counsel and retained counsel, charged unreasonable fees, and voluntarily maintained an excessive caseload.[241] Another attorney from the same county was also disbarred for numerous acts of misconduct, including asking for payment from court-appointed clients over a six-year period of providing indigent defense services.[242]

E. Litigation

Litigation is not the first choice of action to use to dissuade government entities—whether state, county, or municipalities—from entering into indigent defense contracts that are unconscionable or contrary to public policy. However, litigation is an avenue that can be pursued in order to effectuate change that does not come about through the process of education and collaboration.

Bar associations have sought declaratory and injunctive relief, primarily in litigation regarding the unauthorized practice of law, in order to protect the legal profession and to protect the public at large.[243] State bar associations have brought actions against real estate appraisers, seeking injunctive relief on the grounds that the non-attorney appraiser engaged in the unauthorized practice of law when representing a taxpayer in a property tax appeal.[244] They have brought actions challenging a state public utilities commission agency ruling that allowed non-attorneys to act in a representative capacity in proceedings before the commission.[245]

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241. *See* Washington State Bar Association Discipline Notice, *http://pro.wsba.org/PublicView-Discipline.asp?Usr_Discipline_ID=594.* (on file with the University of Michigan Journal of Law Reform).

242. *See In re* Disciplinary Proceeding Against Romero, 94 P.3d 939 (Wash. 2004).

243. Bar associations have also served as amicus curiae to promote improved civil legal services for the poor because that mission serves the interest of their associations. *See* Brown v. Legal Found. of Wash., 538 U.S. 216 (2003).

244. *See, e.g.*, State *ex rel.* Ind. State Bar Ass'n v. Miller, 770 N.E.2d 328, 328–30 (Ind. 2002) (rejecting bar association's request for permanent injunction against non-attorney appraiser representing taxpayers in property tax appeals before State Board of Tax Commissioners, since rules governing representation by non-attorneys before Board, which were passed after appraiser's representation, appeared to address bar association's concerns).

245. *See* Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n, 637 P.2d 1168, 1172–73 (Idaho 1981) (holding that the Commission did not have the authority to promulgate rules empowering non-attorneys to act in a representative capacity before the Commission, except to the extent of allowing representation of a sole proprietorship by the owner, or representation of a partnership by the partners, or representation of a corporation or non-profit organization by the officers of those entities).

They have sought declaratory and injunctive relief against lenders who charged a fee for selection, preparation, or drafting of loan documents and deeds between the purchaser and seller.[246] They have even brought suits to prevent a divorce center from selling "do-it-yourself" divorce kits, alleging that the sales constituted unauthorized practice of law.[247]

In Nevada, the State Bar's lawsuit against a typing service for the unauthorized practice of law brought significant legal reform in the provision of civil legal services for the poor. The typing service appealed from an injunction obtained by the State Bar, claiming that its unauthorized practice of law fell within the state's "public necessity" exception.[248] The typing service argued that because the injunction forbade it from providing any assistance other than verbatim typing services, "indigent, lower and middle class persons, the mentally ill, the developmentally disabled, the self-reliant pro se person and other litigants who cannot afford or can not obtain the services of an attorney" were required to elect to hire an attorney or forgo legal services in connection with their action.[249] Although the court did not lift the injunction, it ordered the State Bar to investigate the alleged unavailability of legal services for low and middle-income Nevadans.[250] The investigation resulted in making a lawyer's pro bono responsibilities more specific through the revision of the Supreme Court rule governing public service work, in the formation of a statewide pro bono program, and in the creation of the State Bar Access to Justice Committee.[251]

These efforts suggest that bar associations pursue litigation when the ends of litigation are consistent with their mission. The associations' litigation against individuals engaged in the unauthorized practice of law is justified on the ground that litigation is necessary

246. *See, e.g.*, Countrywide Home Loans, Inc., v. Ky. Bar Ass'n, 113 S.W.3d 105, 121–22 (Ky. 2003) (issuing advisory opinion stating that laypersons may conduct real estate closings, but may not answer legal questions, or offer legal advice during closing process); Toledo Bar Ass'n v. Chelsea Title Agency of Dayton, Inc., 800 N.E.2d 29, 31 (Ohio 2003) (granting bar association's request to enjoin title insurance agency from preparing warranty and quitclaim deeds).

247. *See* N.J. State Bar Ass'n v. Divorce Ctr. of Atlantic County, 477 A.2d 415, 421–23 (N.J. Super. Ct. Ch. Div. 1984) (holding that sale of do-it-yourself divorce kits did not constitute the unauthorized practice of law, though the sellers did engage in the unauthorized practice of law when they explained or recommended particular forms and made judgments as to how an individual should fill out the form). *See also* Fla. Bar v. Furman, 451 So. 2d 808, 809 (Fla. 1984) (holding in contempt nonlawyer who prepared pleadings and gave legal advice on family law matters after being enjoined from doing so).

248. Greenwell v. State Bar, 836 P.2d 70 (Nev. 1992).

249. *Id.* at 71.

250. *Id.* at 71–72.

251. *See Access to Justice Grows from UPL Case*, NEVADA LAW., Feb. 1997, at 16.

to protect the public against the possibility of receiving incompetent or dishonest advice from laypersons.[252] It is equally important to protect the public against the incompetent and unethical conduct of attorneys. Undertaking litigation to fight for the rights of poor people who stand accused of crimes is a noble endeavor in keeping with the goals of bar associations. These individuals are vulnerable, not only as a result of their poverty, but also because of the criminal charges made by the government. In order to enhance the reputation of lawyers, and to protect the legal profession and the public against unethical conduct, bar associations should contemplate seeking injunctive or declaratory relief to prevent attorneys from contracting for indigent defense services in a manner that is unconscionable and against public policy.

CONCLUSION

The conclusion that we are suffering an "indigent defense crisis" is reached so consistently by those examining the provision of services, that it is almost a cliché. And yet, there are countless instances of extraordinary efforts by lawyers representing indigent defendants that take place on a daily basis in courts across the United States. It was my privilege to be involved in the efforts of such lawyers and law students from the Innocence Project Northwest, whose volunteer efforts succeeded in obtaining the release of clients convicted in the Wenatchee sex-ring investigations. Of the thirteen individuals represented by IPNW, ten were released through the efforts of the legal teams, and three served out their sentences. Doris Green was freed after serving five years in prison.[253]

Practitioners and scholars continue to advocate reform in indigent defense services, whether through the courts[254] or through legislative efforts,[255] in order that every person who is too poor to afford a lawyer can have his or her constitutional rights champi-

252. The public perception that bar associations are merely protecting their own interests in maintaining a monopoly on legal practice by bringing such suits has led to a decline in the past twenty years of bar associations undertaking actions against the unauthorized practice of law. *See* Johnstone, *supra* note 229, at 220.

253. *See* McMurtrie, *supra* note 25, at 18.

254. *See, e.g.*, Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293 (2002).

255. *See* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004) (suggesting that resource parity will not come from the courts acting alone, without the assistance of the legislature).

oned by able counsel. This Article suggests using challenges based on contract theory to supplement, not supplant, the constitutional claims organizations have brought. The constitutional right to counsel jurisprudence establishes that a lawyer's breach of ethical standards in the provision of indigent defense services cannot necessarily be remedied through constitutional challenge. When contracts for indigent defense include clauses that violate the rules of professional responsibility, they are subject to challenge under the contract theories of unconscionability or public policy. If bar associations embark upon such challenges, it will be a step towards improving the indigent defense system and protecting the public against the incompetent and unethical conduct of lawyers. As the Wenatchee cases poignantly illustrate, this needed reform will also be one step towards protecting the innocent from conviction.