Contracting for Indigent Defense: Providing Another Forum for Skeptics to Question Attorney's Ethics

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CONTRACTING FOR INDIGENT DEFENSE: PROVIDING ANOTHER FORUM FOR SKEPTICS TO QUESTION ATTORNEY'S ETHICS

I. INTRODUCTION

The reality of tight budgets and increased caseloads of public defenders have forced local governments to implement contract systems as a method for providing assistance of counsel to indigent defendants.\footnote{See infra text accompanying notes 11-13.} Under a contract system, private attorneys contract with the municipality to provide counsel in a specific number of cases at a fixed fee.\footnote{See infra notes 20 & 21 and accompanying text.} Arguably, when the cost to an attorney to defend a case under a contract exceeds the fixed fee allocated for that case, the constitutional rights of defendants are threatened and the ethical obligations of attorneys are challenged. For attorneys, the issue is whether the contract system encourages them to expedite cases in order maximize their hourly fee.\footnote{See infra note 24 and accompanying text.} For defendants, contract systems raise the issue of whether the economics of a fixed-fee contract preclude a defendant from receiving effective “Assistance of Counsel” as required by the Sixth Amendment.\footnote{4. The Sixth Amendment provides that: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic]. U.S. CONST. amend. VI; McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).}

A. Origins of the Right to Counsel

In 1964, the Supreme Court held that the Sixth Amendment right to counsel in felony proceedings is a fundamental right which applies to the states through the Due Process Clause of the Fourteenth Amendment.\footnote{5. Gideon v. Wainwright, 372 U.S. 335, 342 (1964).} The Court held that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”\footnote{6. Id. at 344.} Thirty-two years later, despite the fact that the Court has expanded the right to counsel, the Court’s failure to provide for its enforcement threatens to
preclude the very right it sought to protect.

Eight years after Gideon, in Argersinger v. Hamlin,7 the Court expanded the Sixth Amendment right to counsel to apply to misdemeanor proceedings based on an imprisonment-in-fact standard.8 The imprisonment-in-fact standard affords indigents the right to counsel in misdemeanor proceedings in which a loss of liberty is involved; it requires a pre-trial determination by the judge of whether incarceration would be imposed upon conviction.9 If incarceration would be imposed, the defendant has a constitutional right to counsel.10

B. Evolution of the Contract System

Since Argersinger, state and local governments have struggled to provide effective representation for indigent defendants. Caseloads of public defenders increased 40% from 1982-1986 and continue to grow at an alarming rate.11 Department of Justice reports indicate that more than 80% of the defendants filtering through the system are indigent.12 Despite these increases, funds available to provide representation for indigent defendants has remained unchanged, increased marginally compared to the number of cases, or decreased as a result of budget cuts.13

In response to the need to provide constitutionally mandated counsel for indigents more economically, states and municipalities have employed various forms of contract systems.14 The concept of contracting is not

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8. Id. at 40. Wisconsin does not follow the imprisonment-in-fact standard; rather the state adopted the imprisonment-in-law standard for use in misdemeanor proceedings in State ex rel. Winnie v. Harris, 249 N.W.2d 791 (Wis. 1977). Under the imprisonment-in-law standard, a defendant is afforded the right to counsel whenever he or she is prosecuted for an offense punishable by imprisonment as a matter of statutory law. No pre-trial determination of whether incarceration is imposed is necessary.
9. Id.; see also Scott v. Illinois, 440 U.S. 367 (1979) (upholding the imprisonment in law standard and announcing actual imprisonment as the defining line in the Sixth Amendment right to counsel).
10. Id.
12. Id. at 4.
13. Id. at 10.
new. Contract systems surfaced in the late 1970's and have experienced a tumultuous history. Under San Diego's contract system, established in 1978, contracting was the sole method by which the county provided counsel for indigent defendants. Instead of producing cost savings, the contract system increased the cost of defending indigent defendants by 32% in three years. Accordingly, county officials abandoned contracting in favor of a public defender office.

Implementation of a contract system involves a jurisdictional determination of several factors including, but not limited to: the types of cases subject to contracting, the payment method to be used, and the rate per case. Once these decisions have been reached, the contracting entity submits Requests for Proposals (RFP) to local practitioners. Contracts are then awarded based on the proposals by weighing criteria defined by the contracting entity. Attorneys awarded contracts then become contractors under the contracts with the state or municipality. Although several different types of contract systems exist, a discussion of each is beyond the scope of this article. The discussion of issues raised with regard to contract systems is relevant, however, to all types of contract systems, though the issues may vary in application based on the structure of a particular system.

Scholars and practitioners criticizing contracting assert two main concerns. First, they argue that a set price per case causes conflicts of interest and poor representation, and secondly, they argue that contract-
An additional concern is the potential obstruction of indigents' other constitutional rights in an attempt to enforce their Sixth Amendment right to counsel more economically. Statistics indicate that, frequently, contracting fails to address or satisfy either the fulfillment of a defendant's constitutional rights or the government's economic objectives.

Despite these concerns, contract systems represented the largest percentage growth in defense services from 1980 to 1990 and continue to gain favor with state governments looking to stabilize the costs of defending indigent persons. The National Legal Aid and Defender Association (NLADA) and the American Bar Association (ABA) have acknowledged this trend and conceded that, while contract systems are not favored, they will remain a part of the programs utilized to provide counsel to indigent defendants. Therefore, both organizations developed guidelines by which contract systems should operate, and each suggests that contracts should be utilized as a "viable" component of indigent defense services in addition to a public defender office and a panel of assigned counsel.

If contract systems are to remain as part of an overall system which provides counsel to indigent defendants, the constitutional and ethical issues raised by contracting must be addressed. Improvements must be made in order to satisfy the effective assistance requirement mandated by the Sixth Amendment and to preserve the constitutional rights of indigent defendants.


25. A defendant who pleads guilty waives the following rights: the Fifth Amendment right against self-incrimination, the Sixth Amendment right to cross-examine witnesses, the right to call witnesses, the Sixth Amendment right to a jury trial, the right to have the state prove the defendant's guilt by evidence beyond a reasonable doubt to each element of the crime charged, the right to challenge the arrest, the suppression of physical evidence, the suppression of identification, and challenges to the sufficiency of the charging instrument. See Guilty Plea Questionnaire and Waiver of Rights Form (Milwaukee Cty. Circuit Court, 1996) (on file with author).

26. See Wilson, supra note 14, at 3-6.


28. ABA STANDARDS 5-1.2; See GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES (1984) [hereinafter NLADA GUIDELINES].

29. See ABA STANDARDS 5-3.3. For a detailed discussion of the guidelines enunciated by both the ABA and NLADA, see infra part III.
This Comment examines the constitutional and ethical issues raised by contracting for counsel to defend indigent persons and discusses whether contract systems can be utilized effectively to maintain indigents’ rights and minimize potential ethical conflicts. The economic objective of cutting costs, while always at the forefront of discussions surrounding contracting, will not be addressed other than acknowledging it as a motivating factor behind the implementation of contract systems.

Part II of this Comment will examine the constitutional issues that arise as the result of early disposition of cases under a contract system. Part III considers the potential ethical problems that arise for contractors attempting to provide effective representation at a low, fixed cost. Part IV outlines Wisconsin’s new fixed-fee contract system implemented in 1995 and discusses how the history of contracting as well as the NLADA and ABA Guidelines have impacted the Wisconsin State Public Defender’s office in designing its contract system.

II. CONSTITUTIONAL ISSUES

Inherent in any contract system is the danger of compromising indigent persons’ constitutional rights while attempting to enforce their Sixth Amendment right to counsel. Critics argue that paying contractors a flat rate per case encourages hurried disposition of cases, notwithstanding the increased risk that defendants’ other constitutional rights may be sacrificed.\textsuperscript{30} Statistics indicate that contractors file fewer motions to suppress, request fewer jury trials, file fewer appeals, and that their clients enter guilty pleas more often and at earlier stages in the process.\textsuperscript{31} The statistics raise constitutional issues in two respects: first, indigent defendants often enter guilty pleas too early in the proceedings, and second, defendants’ Sixth Amendment right to effective assistance of counsel, as announced in \textit{United States v. Cronic}\textsuperscript{32} and \textit{Strickland v. Washington},\textsuperscript{33} is threatened.

A. Guilty Pleas

A guilty plea is an admission by a defendant that his or her actions/conduct satisfied each of the elements of the crime charged in the

\begin{itemize}
  \item \textsuperscript{30} Spangenberg, et al., \textit{supra} note 20, at 17.
  \item \textsuperscript{31} Nelson, \textit{supra} note 14 at 1152; Wilson, \textit{supra} note 14 at 16 (citing Norman Lefstein, Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing (1981)).
  \item \textsuperscript{32} 466 U.S. 648 (1984).
  \item \textsuperscript{33} 466 U.S. 668 (1984).
\end{itemize}
criminal complaint or other charging instrument. The decision to
enter a guilty plea is, therefore, one of the single most important
decisions in a criminal case. The attorney's role is to inform the
client of his options and the merits of his case. However, the ultimate
decision whether to plead should be the defendant's. The consequences of a
plea are not always apparent to a defendant. It is, therefore, the
responsibility of counsel to inform a defendant of all the consequences
of a plea. In contract cases, cost considerations may force attorneys to
invest less time and effort on behalf of a client or spend less effort
investigating the facts alleged in the charging document, thus denying a
defendant information regarding the consequences inherent in pleading
guilty. Such consequences may include automatic parole revocation from
a prior sentence, or automatic application of a repeater statute.

The Supreme Court has held that in order to be valid, a guilty plea
must be made knowingly and voluntarily and that a valid plea constitutes
a waiver of the Fifth Amendment right against self-incrimination, and the
Sixth Amendment rights to a jury trial and confrontation. Once the
knowing and voluntary requirements for a valid guilty plea are satisfied,
the Supreme Court restricts a defendant's challenges to the conviction to
the validity of the plea itself.

1. Knowledge Requirement

A guilty plea is knowingly entered if the defendant understands the
nature of the charge against him. In Henderson v. Morgan, the Court
upheld the reversal of Henderson's conviction on the grounds that
Henderson's guilty plea was not knowingly entered. Henderson, who

35. ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL
CASES § 201 (1988).
36. Id.
37. Id. at § 204.
39. Broce, 488 U.S. at 569 (holding that when a defendant seeks to reopen proceedings
after a conviction from a guilty plea, the inquiry is confined to whether the plea was knowing
and voluntary).
41. Id. at 647. The Court actually gave the basis for reversing the conviction as an
involuntary plea, but failed to make the distinction between the knowing requirement of
understanding the charge, and the voluntary requirement of understanding the consequences
of a plea including the waiver of constitutional rights. In failing to make that distinction, the
Court inadvertently classifies the understanding of the charge and the consequences as part
of the voluntary requirement. See Id. at 645 & 645 n.13.
was retarded, pled guilty to second degree murder after his attorney failed to successfully negotiate an opportunity to enter a guilty plea to the lesser charge of manslaughter. Although the court instructed Henderson as to the direct consequences of his plea, the record disclosed that neither the court nor defense counsel informed Henderson that the second degree murder charge included the element of intent to kill. The Court held that Henderson's lack of knowledge of the element of intent made the plea unknowing and rendered the conviction invalid.42

In a footnote to Henderson, however, the Court stated that understanding the nature of the charge does not always mean that the defendant must be aware of all of the elements of the crime to which he pleads guilty: “[i]there is no need in this case to decide whether notice of the true nature, or substance, of every charge always requires a description of every element of the offense; we assume it does not.”43 This statement leaves the door open for states to determine whether a knowledgeable guilty plea requires an understanding of the elements of the charge against a defendant. Such a statement is inconsistent with the rights waived by a plea and affords the states too much latitude in determining how to distinguish guilty pleas knowingly entered from those entered without such knowledge.

This concern is especially apparent in the context of fixed-fee contracts when contractors already face economic pressures to expedite cases. For instance, a defendant who is persuaded to plead guilty before a complete investigation of his case, may challenge his conviction only on the basis that he entered his plea unknowingly. However, no clear standard exists for determining what “knowingly” means.

2. Voluntary Requirement

A plea is voluntary if the defendant is fully aware of the direct consequences of the plea, including the actual value of any promises made to him by the court, prosecutor or defense counsel, unless the plea is induced by threats or misrepresentations.44 The purpose of the “voluntary” requirement is to ensure the plea is not the result of threats

42. Id. at 647.
43. Id. at 647 n.18.
44. Brady v. United States, 397 U.S. 742, 755 (1970). See also Boykin, 395 U.S. at 243 n.5 (citing McCarthy v. United States, 394 U.S. 459, 466 (1969)). The Court in Boykin held that “because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.” Boykin, 395 U.S. at 243 n.5.
or promises. However, the Court has upheld guilty pleas obtained where the state has threatened a defendant with a more serious charge or more severe penalty if the defendant refuses to plead guilty as part of the "give and take" of the plea bargaining system. For example, in *Bordenkircher v. Hayes*, the prosecutor instructed Hayes that if he did not plead guilty to a forgery charge which carried a potential sentence of two to ten years, the prosecutor would charge him under the repeater statute. Hayes later refused to plead guilty, and the prosecutor charged him as an habitual criminal. The trial court sentenced Hayes to life in prison. On review, the Supreme Court reasoned that within the bargaining system the prosecutor must be afforded some bargaining power.

In light of *Bordenkircher*, the voluntariness requirement provides defendants little protection. Contracted indigent defendants face an even greater risk of being unable to challenge their convictions after pleading guilty if counsel recommends an early guilty plea in an effort to expedite disposition of the case. The Supreme Court has held that absent a showing that a plea was not entered knowingly or voluntarily, a defendant may not challenge a conviction based on the constitutionality of the composition of the grand jury, or the constitutionality of previous state convictions used to enhance his sentence. Similarly, in *United States v. Broce*, the Court held that a defendant also waives his Fifth Amendment right against double jeopardy by entering a valid guilty plea.

Over 90% of defendants are convicted based on a plea of guilty.

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47. *Id.* at 364.
48. "Contracted indigent defendants" refers to indigent defendants represented by counsel under a contract.
50. *Custis v. United States*, 114 S. Ct. 1732, 1738-39 (1994); but see *Lefkowitz v. Newsome*, 420 U.S. 283 (1975). The Court in *Lefkowitz* upheld a state law which specifically preserves a defendant's right to pursue constitutional claims in habeas corpus proceedings. The Court found that failure to allow the defendant to appeal his federal constitutional claim of an illegal search in light of the state law would deprive the defendant of a federal forum despite having satisfied all the requirements for invoking federal habeas corpus jurisdiction and would frustrate the intent of the state in providing post-guilty plea appellate review of pretrial motions to suppress. *Lefkowitz*, 420 U.S. at 292-293.
The Supreme Court's requirement that a guilty plea be knowing and voluntary does not provide sufficient protections for defendants when compared to the rights waived by entering a plea. Placing such defendants within a contract system that encourages early disposition of cases, then, potentially usurps what little protections may have been provided by defense counsel.

**B. Ineffective Representation of Counsel**

Aside from an attack on the validity of the plea, the only remaining challenge in a defendant's arsenal is a claim for ineffective assistance of counsel. Since *Gideon* and *Argersinger*, the Supreme Court has held that the Sixth Amendment right to counsel includes the right to effective assistance of counsel, and affords indigent defendants the same rights to effective representation as criminal defendants represented by retained counsel. This right applies to all "critical stages" of a criminal proceeding, including the first appearance before a magistrate, the preliminary hearing, the arraignment, and the trial. Until 1984, however, the Court had never established a standard for effective representation of counsel under the Sixth Amendment.

In *Strickland v. Washington*, the Court announced that defendants must establish two things to succeed on an ineffective assistance claim:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction... resulted from a breakdown in the adversary process that renders the result unreliable.

Yet experience reveals that this standard is virtually impossible to satisfy.

53. See supra note 25 and text accompanying notes 49-52.
56. *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980) (holding that no basis existed for the contention that criminal defendants with retained counsel were entitled to greater protections than those defendants appointed counsel by the court).
57. LAFAVE AND ISRAEL, supra note 45, at 535.
A. Prejudice Prong

Because a defendant must satisfy both prongs of the test to succeed on an ineffective assistance claim, the Supreme Court has encouraged lower courts to evaluate the prejudice component first, since the object of an ineffective counsel claim "is not to grade counsel's performance." 60 Since the prejudice prong is more difficult to prove, a defendant who fails to meet it would not be allowed to challenge counsel's performance. To show prejudice, the defendant must demonstrate that there is reasonable probability that but for counsel's errors, the defendant would not have been convicted. 61

In ruling on whether sufficient prejudice exists, a court may not consider the possibility of any "arbitrariness," or depend on any of the "idiosyncracies" of the decisionmaker, even though these factors may have entered into counsel's mind and affected the performance inquiry. 62 According to the Court, although these factors may have a significant impact on the outcome of an initial appearance, arraignment, trial, or sentencing hearing, "they are irrelevant to the prejudice inquiry." 63 Even evidence of the actual decisional process, if not a part of the record, will fail consideration as part of the prejudice inquiry. 64 The only consideration reached in the prejudice component, then, is whether the fact finder correctly applied the law to the facts before the court. 65

The Supreme Court's refusal to allow any of the "arbitrariness" that accompanies most judicial proceedings into the prejudice inquiry essentially potentially eliminates what might be relevant evidence in an ineffective assistance claim. By restricting this "arbitrariness" to the performance inquiry and encouraging the lower courts to begin with a prejudice analysis, the Court almost guarantees that such findings, whether demonstrative of ineffective counsel or not, will never come to light.

The Supreme Court applied the two part Strickland test to ineffective assistance claims arising out of the plea process in Hill v. Lockhart. 66

60. Id. at 697.
61. Id. at 694.
62. Id. at 695.
63. Id. at 695.
64. Id.
65. Id.
In *Hill*, the Court adopted the objective reasonableness standard for the performance inquiry and held that the prejudice inquiry must focus on whether the errors of counsel affected the outcome of the plea process. In order to satisfy the prejudice prong, a "defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial." The Court compared this analysis to that used for claims of trial ineffectiveness and gave the following examples:

If the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

These two examples are completely contradictory to the Court’s previous statement that the prejudice requirement depends on whether the defendant would have elected to go to trial but for counsel’s errors. The examples indicate that the focal point of the prejudice requirement is the recommendation of the attorney, and not the defendant’s decision. The client, however, has the ultimate decision to enter a guilty plea or not.

Further, permitting an attorney’s word to govern whether his recommendation would have changed had new evidence been discovered discounts the possibility that other factors might influence a client’s decision to go to trial when new evidence is revealed. Defense attorneys, unless privately retained, rarely have the opportunity to spend enough time with a client in the initial stages of a case to discuss all potentially relevant facts that might make other defenses plausible.

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67. See infra Part I.B.
69. *Id.*
70. *Id.*
71. AMSTERDAM, *supra* note 35, at § 201.
72. Many of the observations in this article are the result of the author's experiences as an intern for the Milwaukee County District Attorney's office. As a student, and pursuant to the Wisconsin Student Practice Rules, the author worked for 9 months in the misdemeanor
If new evidence were revealed, a defendant might recall facts not previously disclosed because he or she felt them irrelevant or simply did not remember. New evidence might also prompt defense counsel to ask questions not previously relevant in an effort to elicit important information from a defendant. Asking an attorney to determine, without knowing the answers to those questions, whether his recommendation would have changed based on new evidence borders on ludicrous. New facts based on new evidence might provide leverage for negotiations with a prosecutor or cause a defendant to choose to proceed to trial in the hopes of being cleared, even if a plea would be in his best interest. Requiring such a high standard of proof to meet the prejudice prong, however, effectively removes the decision to plead from a defendant and leaves it to the attorney. Placing a contractor in this setting only increases the likelihood that the defendant will be advised to plead and allows the prejudice requirement to insulate the attorney from any claim of ineffective assistance.

B. Performance Prong

Should a defendant meet the prejudice component, in order to succeed he must still satisfy the second part of the test. To do this he bears the burden of establishing that the performance of counsel fell below an objective standard of reasonableness. A defendant must overcome the presumption that “counsel's conduct falls within the wide range of reasonable professional assistance; that is...under the circumstances, the challenged action 'might be considered sound trial strategy.'”

The presumption created by the Supreme Court is devastating to indigent defendants represented by contract attorneys. In essence, the Court presumes that counsel acted reasonably and fails to enunciate any guidelines for an objective standard of reasonableness. Accordingly, it effectively creates a roadblock to meeting one prong of the ineffective assistance claim, and serves to further insulate the contractor from ineffective assistance claims when his contract encourages a hurried

courts of Milwaukee County conducting witness interviews, advising pro se defendants, and conducting pre-trial dispositions with defense attorneys. In this author's observations, many of the misdemeanor cases were resolved (i.e. a plea was entered) after defense counsel met with a client about their case for less than an hour. Of course, the author was not privy to any meetings that took place on other occasions.

73.  *Strickland*, 466 U.S. at 688.

74.  *Id.* at 689 (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).
disposition of cases.

The Court noted that the inquiry is whether the actions of counsel were reasonable considering all the circumstances, but stated that "[m]ore specific guidelines are not appropriate" and that the Sixth Amendment right "refers only to 'counsel,' not specifying particular requirements of effective assistance." Instead of announcing particular requirements comprising effective assistance, the Court deferred to "the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions."

The Court looked to the American Bar Association Standards for Criminal Justice as the "prevailing norms of practice," but stated that the Standards are merely guides to determining reasonableness. In fact, no particular set of rules would suffice to apply on a case by case basis. According to the Court, "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."

Such rules would also "dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."

Despite the Court's failure to establish standards, however, its deference to the ABA in this regard represents a ray of hope for indigent defendants represented by contract attorneys. Since states are free to adopt the ABA standards or establish their own, state bar associations may adopt standards which articulate minimum requirements to protect contracted indigent defendants from being summarily processed through the system. However, should states fail to adopt guidelines which articulate the boundaries within which counsel must operate, one of a defendant's only available challenges to his conviction may be lost.

Given the magnitude of the constitutional rights waived by a defendant who pleads guilty, the Court has created such burdensome obstacles to challenging the plea that they simply cannot be reconciled.

75. Id. at 688.
76. Id.
77. Id.
78. Id. at 690.
79. Id. at 689.
80. Id. at 690.
81. See supra note 25 for a list of the constitutional rights waived by a defendant by entering a guilty plea.
Moreover, looking to the Supreme Court for relief on this issue is a lost cause. Reconciling these two issues would require expanding the means available to defendants' for challenging guilty pleas, and opening the floodgates to claims of ineffective assistance of counsel. Instead, the Court leaves the decision to the states to provide greater rights to indigent defendants.  

C. Federal Sentencing Guidelines

In addition to threatening defendants' constitutional rights, a guilty plea may also impact on the length of a defendant's incarceration under the federal sentencing guidelines. Under these guidelines, the range of a possible sentence in federal court is determined by calculating two coordinates on a grid. The first coordinate is determined by calculating the offense level. The second coordinate is determined by calculating the defendant's criminal history. A defendant's criminal history is based primarily on the number and nature of the defendant's past convictions as well as the length of imprisonment for each offense. The two coordinates are then used to locate the range for sentencing on the grid. Under the federal guidelines, then, a failure by a contractor to negotiate a lesser charge because he or she failed to investigate the facts of a case may severely impact a repeat offender charged in federal court, resulting in a much longer sentence.

III. Ethical Issues

While contract systems raise issues related to indigent defendants' constitutional rights, such systems also challenge the limits of the ethical standards imposed on the legal profession. Contract systems raise ethical issues in the context of both their implementation and their execution that may adversely impact the attorney's ability to ensure quality representation as required by the Sixth Amendment. Both the ABA

82. Many states have responded by enacting statutes that preserve defendants' constitutional challenges to a plea for hearing on a post-conviction motion. See, e.g., Wis. STAT. ANN. § 976.04(1) (West 1993-94).
88. Give example here of how offense charged and offense plead to may have different impacts on future sentence under Guidelines.
89. See Wilson, supra note 14, at 19-21.
and the NLADA have developed standards addressing the role of contracting in indigent defense representation. In 1984, after a four-year effort and with the cooperation of the ABA, the NLADA promulgated the Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services. In 1990, the ABA added Part III, entitled Contract Defense Services, to Chapter 5 of the Standards for Criminal Justice. Both the ABA Guidelines and the NLADA Standards encourage the use of contracts only as a component of indigent defense programs and urge strict compliance with the guidelines to ensure effective representation. Part IV of this comment follows with a discussion of Wisconsin’s fixed-fee contract system adopted in 1995 both to briefly explore the evolution of contract systems and to determine whether the strict guidelines established by those two agencies have trickled down to the state level to ensure that effective representation.

A. Standards for Awarding Contracts

One of the primary concerns with respect to contracting is establishing standards by which contracts can be awarded. In 1984, in State v. Smith, the Arizona Supreme Court struck down the low-bid contract system employed by Mohave County as violative of the Fourteenth Amendment Due Process Clause and the Sixth Amendment right to counsel. Mohave County’s contract system awarded contracts solely on the basis of the lowest bid submitted without regard to attorney qualifications, caseload, or the types of cases each attorney was expected to handle. The court also held that Mohave County’s system violated the existing ABA Standards and the newly established NLADA Guidelines by failing to consider the time each attorney would spend on a case under the contract, and by omitting support costs for investigators, paralegals and law clerks.

Both the ABA Standards and the NLADA Guidelines prohibit the

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92. State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984). Only one bid was ever rejected by Mohave County’s system. The attorney who submitted the rejected bid had been the subject of repeated complaints and was held in contempt for failing to file an appellate brief. Id. at 1379.
93. Id. at 1379.
94. Id. at 1379-81.
awarding of government contracts solely on the basis of cost.\textsuperscript{95} Instead, the standards require that the contracting entity consider the following factors to ensure quality representation: the categories of cases the attorney will handle under the contract, the term of the contract, identification of the attorney to perform legal representation under the contract and a prohibition of substitute counsel without prior approval, specific workload standards, minimum levels of experience, a policy for conflict of interest cases and the provision of funds necessary to resolve such conflicts, limitations on the private practice of law outside the contract, and reasonable compensation levels and a designated method of payment. Both organizations also call for sufficient support services and reasonable expenses for investigative services, expert witnesses, supervision and professional development, protection of client confidences, a system of case management reporting, and grounds for termination of the contract by the parties.\textsuperscript{96} These requirements are designed to ensure that contracts are awarded to competent attorneys, and that competitive bidding under low-bid systems will be eliminated.

\textbf{B. Length of Contracts and Payment Schedules}

The length of contracts for indigent defense has been cited as a potential problem contributing to poor representation of indigent defendants by contract attorneys. Jurisdictions utilizing one year contracts may experience "lag" time between the date of RFP submissions and the date contracts are awarded. This "lag" time may create tremendous chaos in a system where defendants, who require counsel, must go before a judge with counsel within 48 hours of arrest.\textsuperscript{97} The

\begin{itemize}
\item 95. ABA STANDARDS 5-3.1; NLADA GUIDELINES preamble & IV.3.
\item 96. ABA STANDARDS 5-3.3.
\item 97. Wilson, supra note 14, at 19. The Sixth Amendment guarantees a defendant the constitutional right to counsel at the initial appearance. FED. R. CRIM. P. 44(a); Argersinger, 407 U.S. at 37 n.5. A defendant who remains incarcerated after arrest (warrantless) must appear before a judge within 48 hours. \textit{Cty. of Riverside v. McLaughlin}, 500 U.S. 44, 56 (1991). In a contract system where a defendant must be assigned counsel, "lag time" may occur while the assigning agency processes the paperwork to assign counsel, counsel is assigned, counsel accepts the assignment, is notified of the pending court date, and finally appears in court. This "lag time" may result in a delayed initial appearance, or a defendant appearing without counsel. Because bail is usually addressed at the initial appearance, a defendant without representation may remain incarcerated even though he can post bail. Contracting does not present a "lag time" problem in Milwaukee County (Milwaukee, Wisconsin). In Milwaukee County, two public defenders are assigned to share the load in representing each defendant that appears without counsel in Intake Court (the initial appearance in Milwaukee County) as well as conduct an indigency review. The public defender then notes in the file whether an attorney should be assigned, and the appropriate action is taken
\end{itemize}
NLADA Guidelines suggest that a two-year contract is "an absolute minimum" for establishing independence and stability for the attorney.\textsuperscript{98} Contracts of a duration longer than one year also provide the funding source and the contractor sufficient time to evaluate cost and quality.\textsuperscript{99} While a contract with a large number of cases may appear to be cost effective during the first few months of operation, this occurs because many easy cases are disposed of up front.\textsuperscript{100} Costs skyrocket later, when more complex cases proceed to trial. Shorter contracts allow for less time to plan for such a dramatic shift in costs.\textsuperscript{101}

Payment schedules can also place serious burdens on the implementation of a contract system if not well conceived. In San Diego's now defunct contract system, contractors received payment upon final disposition of a case.\textsuperscript{102} This system created enormous cash flow problems for contractors attempting to pay salaried employees and overhead costs.\textsuperscript{103}

\textbf{C. Conflicts of Interest}

High on the list of ethical considerations are the potential conflicts of interest raised by contracting. Conflicts may arise in two ways: through representation of multiple defendants under the same contract, or when heavy caseloads create a conflict by forcing an attorney to chose between zealously representing a paying client or channeling efforts into the representation of the contracted indigent defendant.\textsuperscript{104} NLADA Guideline III-13 addresses conflicts of interest and states that a contract "should avoid creating conflicts of interest between the Contractor or individual defense attorney and clients."\textsuperscript{105} The ABA requires that

\begin{itemize}
\item \textsuperscript{98} NLADA GUIDELINES III-4; GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS, Cal. (1990). The ABA Standards make no recommendation on the length of a contract.
\item \textsuperscript{99} Spangenberg et al., supra note 20, at 17.
\item \textsuperscript{100} Id.
\item \textsuperscript{101} See Id.
\item \textsuperscript{102} Id.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Wilson, supra note 14, at 20.
\item \textsuperscript{105} NLADA GUIDELINES III-13. The Guideline states, in relevant part: The contract should avoid creating conflicts of interest between the Contractor or individual defense attorney and clients. Specifically:
\begin{itemize}
\item (a) expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys or other personnel; and
\item (b) contracts should not, by their provisions or because of low fees or compensation to
contracts contain a policy for conflict of interest cases and the provision of funds outside the contract to compensate conflict counsel for fees and expenses. 106

Representation of multiple defendants may pose an actual conflict of interest as opposed to the potential conflicts created by the fact that the attorney will receive only a predetermined fee. Where actual conflicts arise, ethics standards require a contractor to withdraw from representation. 107 However, conflicts created by burdensome caseloads are not as easily resolved. Instances may arise in which a contractor faces pressure to work on two separate cases, one for a contracted indigent defendant, and one for a paying client. The fixed rate may encourage the contractor to forego an indigent defendant's case in favor of a paying client. Both the ABA and the NLADA have attempted to avoid these potential conflicts by recommending caseload requirements and restricting the practice of law outside the contract. 108 However, success in avoiding conflicts depends in large part on the moral fiber of contractors who must acknowledge existing conflicts or accept only as many cases under a contract as they are equipped to handle.

D. Support Services, Monitoring Contractors, and Professional Development

Inadequate support services, failure to monitor contracts, and failure to provide for training and professional development have also caused problems in contract systems. In State v. Smith, the Arizona Supreme Court cited the lack of support services, including insufficient access to investigators and paralegals, as well as the failure of the County to monitor caseloads as two reasons for striking down Mohave County's contract system. 109 ABA Standard 5-1.4 requires that a legal representation plan provide for "investigatory, expert and other services necessary to quality legal representation... at every phase of the attorneys, induce an attorney to waive a client's rights for reasons not related to the client's best interest; and (c) contracts should not financially penalize the Contractor or individual attorneys for withdrawing from a case which poses a conflict of interest to the attorney.

Id. 106. ABA STANDARDS 5-3.3.(b)(vii).
107. See, e.g., Wis. Sup. Ct. R. § 20:1.7(a) (West 1996) (stating that [a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client).
108. See ABA STANDARDS 5-3.3(b)(v), (viii); NLADA GUIDELINES III-6 & III-12.
Standard 5-1.5 requires that a plan also provide for the effective training and professional development of all counsel providing defense services, and Standard 5-3.3 requires sufficient support services as an element of the contract. Provisions for support services, monitoring contractors, and continued professional development are extremely vital to the survival of a contract system providing quality representation. Critics of contracts assert that a fixed-fee system enables young, inexperienced attorneys to take on contracts to jump-start their careers at the cost of indigent defendants' access to quality representation. Often, these young attorneys, whether operating in a firm or as sole practitioners, do not have the resources or the practical experience to provide quality representation for defendants. The ABA requirements, if adopted by the states and followed by them in the execution of contract systems, can, at a minimum, establish that resources will be available to contractors. Monitoring contractors regularly is important to force accountability and to prevent contractors from obtaining contracts merely to turn a profit. Requiring continuing legal education (CLE) ensures that contractors will remain current on the latest developments in criminal law and encourages a sharing of experience and knowledge with other contractors. Such a sharing of information is crucial to the implementation and development of a successful contract system.

E. Private Bar Representation

Contract systems are also criticized because they fail to encourage participation from the private bar. The nature of contracting requires that, to be effective, economies of scale must be utilized in awarding contracts. This system, therefore, has the effect of awarding contracts to a small number of firms or practitioners rather than dispersing the cases throughout the private bar, as occurs with a system of appointment. The ABA Standards of Criminal Justice require private bar participation as fundamental to the makeup of any legal defense plan, but suggest that participation may include contracts for services in addition to a coordinated assigned counsel system and a full-time defender organization. It is also important to note that jurisdictions

110. ABA STANDARDS 5-1.4.
111. ABA STANDARDS 5-1.5 & 5-3.3. (b)(6).
112. Spangenberg et al., supra note 20, at 17.
113. Wilson, supra note 14, at 20; Eisenberg, supra note 24, at 164.
114. ABA STANDARDS 5-1.2(b).
with a public defender as the primary provider of indigent defense have limited the number of opportunities available for members of the private bar to represent indigent defendants.\textsuperscript{115} The level of private bar involvement also depends on whether a particular jurisdiction contracts for all types of cases, or retains some assigned counsel provisions. According to the ABA, the ideal plan for providing legal defense in a jurisdiction utilizing contracts does retain some appointments to private counsel, even if only to cover conflict of interest cases.\textsuperscript{116}

\textbf{F. Fixed Fees}

By far, the most important factor contributing to the ethical dilemmas facing contractors is the fixed fees paid to attorneys on either a per case or per contract basis. Critics argue that fixed costs encourage hurried disposition of cases, thereby encouraging attorneys to deny indigent defendants' their right to effective assistance of counsel in their effort to turn a profit.\textsuperscript{117} Both the ABA and the NLADA have adopted standards which require reasonable compensation for attorneys under contract.\textsuperscript{118} ABA Standard 5-3.3 requires reasonable compensation under contracts as well as a designated method of payment.\textsuperscript{119} The NLADA suggests compensation for attorneys at a rate which reflects customary compensation in the jurisdiction for similar services, the time and labor required by the attorney, and the degree of professional skill and experience of the attorney.\textsuperscript{120}

Arguments concerning fixed rates generally arise in the context of systems that contract either for all cases of a particular type in a jurisdiction for a specific period (i.e. all misdemeanors in Milwaukee County for 1996), or for every case in a jurisdiction requiring appointment for a specific period of time.\textsuperscript{121} Contracts which include all cases in a jurisdiction for a period of time often fail to project the number of cases that will be assigned during the contract period. As a result, caseloads are often much higher than anticipated.\textsuperscript{122} Contractors, then,
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are faced with having to provide quality representation on a significantly increased number of cases for the original fixed rate. Such a situation may encourage a contractor to dispose of cases in a hasty and unethical manner. Following applicable ABA Standards and NLADA Guidelines regarding caseloads for contractors will reduce the likelihood that contract attorneys will be tempted to compromise ethical representation in order to make contracting profitable.

IV. WISCONSIN'S FIXED-FEE CONTRACTING SYSTEM

In 1995, after the Wisconsin State Legislature mandated the use contracts in an effort to shave one million dollars a year from the cost of defending indigents, the Wisconsin State Public Defender's office implemented a contract system for misdemeanor cases. Wisconsin's new system is a far superior to many similar systems enacted in the past, and provides inherent protections for contracted indigent defendants.

Under Wisconsin's first contract in the new system, entitled Contract #95, the SPD considers six separate categories of criteria in awarding contracts and assigns points to each category: qualifications/experience (25), ethical track record/reputation (20), proposed cost per case (10), ability to handle cases (30); financial stability (10), and facility (5).

123. Spangenberg et al., supra note 20, at 17.
124. ABA STANDARDS 5-3.3(b)(v); NLADA GUIDELINES III-6 & III-12.
125. Doege, supra note 14, at B3; See WIs. STAT. ANN. § 977.08 (West 1995-96). The statute provides, in relevant part:

(3)(f) The state public defender shall enter into as many annual contracts as possible, subject to par. (fg), with private local attorneys or law firms for the provision of legal representation. Under any such contract, the state public defender shall assign cases . . . , shall set a fixed-fee total amount for all cases handled and shall pay that amount except, that the state public defender may not pay an attorney more for a case that he or she would receive according to the rates under sub.(4m). The contract shall include a procedure authorizing the state public defender to make additional payments for a case or to reassign a case if the circumstances surrounding the case justify the additional payment or reassignment.

(3)(fg) The total number of cases that may be subject to the annual contracts under par. (f) for a given year may not exceed 33% of the total number of cases at the trial level that are assigned by the state public defender to private counsel under this section for that year.

Wis. STAT. ANN. § 977.08 (West 1995-96). Although the statute authorizes contracts in all types of cases, the State Public Defender issued contracts only in misdemeanor cases otherwise appointed out through the private bar appointment process. See State of Wisconsin—Office of State Public Defender, Request for Proposal for Private Bar Fixed-Fee Contracting Part I, §1.1, Attachment A: Wisconsin Contact #95 [hereinafter “Contract #95”]. Other types of cases will continue to be appointed to private bar attorneys under Wis. Stat. § 977.08.

126. Contract #95 RFP Part I, § 1.25.
Each category is subdivided into as many as six elements and requires a comprehensive outlay of the firm or practitioner’s resources and experience in handling State Public Defender (SPD) appointments. Contract #95 includes all the elements required by ABA Standard 5-3.3, except for specific workload standards and limitations on the practice of law outside the contract. Contract #95 also includes the contracting parties as suggested by the ABA.27

Wisconsin’s Contract #95 requires a significant amount of information regarding a contractor’s experience, past caseload and available resources.28 That information should provide the SPD with a stable basis for awarding contracts to qualified criminal defense attorneys with the experience to know how many cases they can handle and at what cost. In accordance with ABA and NLADA Guidelines, under Contract #95, a contractor is required to identify and report any case which, in his or her professional opinion, constitutes a conflict pursuant to the Wisconsin Supreme Court Rules.29

Contract length and payment schedules under Wisconsin’s system are also in line with NLADA standards.30 Contracts under the new system run for a two-year period.31 Under the payment schedule, two months of the projected annual payment of a contract is paid as an advance on the day a contractor begins representation under the contract. Thereafter, the contractor bills the SPD every two months for all cases opened, and payments thereon are adjusted by the SPD to recoup the advance.32 A final bill is tendered at the end of the contract.

127. Contract #95 does, however, limit the number of cases an attorney may contract for to the number permitted for a public defender under Wis. Stat. Ann. § 977.08 (West 1995-96). Contract #95 RFP, Attachment A, Part I(h). As of January 1, 1993, the misdemeanor caseload for an assistant public defender was reduced from 492 to 411. WIS. STAT. ANN. § 977.08 (5)(b) & (5)(bd) (West 1995-96). This number is just slightly over the standards recommended by the National Advisory Commission. See ABA STANDARDS 5-5.3 commentary. With regard to minimum levels of experience, the SPD requires that each attorney be SPD certified under Wis. ADMIN. CODE § PD 1.04 (July 1995) to receive cases. While no limitations are placed on contract attorneys for practice outside the contract, a monitoring of the number of cases an attorney or firm had the previous calendar year is required with submission of a proposal. See supra note 87.

128. ABA STANDARDS 5-3.2; Contract #95 1.

129. See supra note 87, and accompanying text.

130. Contract #95 Part I(f); WIS. SUP. CT. R. § 20:1.7 (West 1996); see NLADA GUIDELINES III-13; ABA STANDARDS 5-3.3. (viii).

131. See NLADA GUIDELINES III-4.


133. Id. at Part III(b)(f).

134. Id. at Part III(b)(2)-(3).
contract for any remaining charges owed under the contract.\footnote{Id. at Part III(b)(4).} This method allows a buffer for the contractor's start-up costs while ensuring that the contractor is paid only for the actual number of cases completed.

Wisconsin's Contract #95 also contains provisions for support services, monitoring contractors, and professional development as required by the ABA.\footnote{See ABA STANDARDS 5-1.4, 5-1.5 & 5-3.3.} Contract #95 requires contractors to meet certification requirements for each type of case handled, and requires the completion of fifteen hours of CLE each calendar year, six of which must be in criminal law courses approved by the SPD.\footnote{Contract #95 RFP, Attachment A, Part VI.}

Support services are also provided for under Contract #95.\footnote{See Contract #95 RFP, Attachment A, Exhibit C, Request for Approval to Hire Expert or Investigator.} To receive approval to hire an expert, an investigator, or approval of any other expenditures associated with routine discovery or transcripts, an attorney must submit a request to the SPD detailing the nature of the case and the impact the expert or expenditure will have on the case.\footnote{Requests for transcripts under Contract #95 are to be completed separately. See Contract #95 RFP, Attachment A, Exhibit C, State Public Defender Request for Transcripts.} The form requires a detailed breakdown of costs and requires a recitation of all action taken on the request by the SPD.\footnote{Id.} The Contract does, however, provide that with the exception of the above services, all remaining costs associated with representation are to be paid from the fixed-fee under the attorney's contract.\footnote{Id. at Part XVI.}

Wisconsin has also added a component to contracting not previously utilized. The SPD employs two full-time auditors of contractors who travel throughout the state monitoring contractors beginning six months after a contract takes effect.\footnote{Interview with Frederick H. Miller, Deputy State Public Defender, State of Wisconsin, in Madison, Wis. (Jan. 30, 1996).} Contractors are required to give full cooperation to the auditors under the terms of their contract.\footnote{See Contract #95 RFP, Attachment A, Part IV.} Contract #95 also requires contractors to maintain time sheets for each case detailing the time, date, resources used, and any unusual costs incurred in the case. These time sheets must be submitted in support of each bi-monthly billing.\footnote{Id. at Part XVII.}

However, Contract #95 conflicts with the ABA suggestions in that it
does not provide funds to cover CLE. Forcing contractors to comply with these CLE requirements out of their own pocket tests their commitment to providing quality representation to indigent defendants. Contractors who are simply out to make a profit from contracting will find the costs of CLE prohibitive, especially if they maintain a diverse practice and must earn CLE credits in other areas as well.

The fact that Wisconsin utilizes this form of contracting only for misdemeanor cases leaves the assigned counsel system intact for all other types of cases. Private bar participation, then, remains an integral part of indigent representation in Wisconsin, although on a smaller scale than before the implementation of contracts for misdemeanor cases.

Under Wisconsin’s plan, fixed-fee contracting remains as an essential and necessary ingredient in stabilizing costs for indigent defense. Wisconsin contracts with attorneys for a fixed number of cases at a fixed cost per case. The total value of the contract equals the rate per case multiplied by the number of cases awarded under the contract. The rates payable to contractors under Wisconsin’s system vary by county. Each potential contractor receives a breakdown of the rate paid per case by each county as part of the RFP and bases all budgeting on that fixed rate. The rates per case for Contract #95 vary from $147 (Columbia County) to $525 (Richland County). Costs are determined based on figures from attorneys practicing in each county and from county public defender offices.

Critics continue to question whether contractors can provide quality representation at these rates. In response to these questions, the SPD stated the following:

[I]t has long been the position of the State Bar of Wisconsin that private bar attorneys who accept case appointments at [fixed rates] per hour often contribute pro bono time in such cases in order to provide competent representation. Following that presumption, it is certainly possible that contracting lawyers might make pro bono contributions in cases with inadequate funding . . . . There is every reason to believe that

145. See Contract #95 RFP, Part I § 1.1.
146. Contract #95 RFP, Attachment A, Part I(a).
147. See Contract #95 RFP, Attachment C, Private Bar Contracting Cost Schedule.
149. See Letter from Daniel L. Shneidman, Chair Committee on Professional Ethics, State Bar of Wisconsin, to Nicholas L. Chiarkas, Wisconsin State Public Defender (June 30, 1995) (on file with the Wisconsin State Public Defender).
contracting lawyers would be just as likely to offer pro bono services or to zealously explore alternative avenues for funding experts, etc., as other private bar and staff attorneys.\textsuperscript{150}

While the SPD acknowledges that a contract system certainly gives rise to a cost versus quality concern, the fact remains that the State of Wisconsin is in the midst of a legislative push for decreased costs in providing for indigent defense.\textsuperscript{151} The SPD does not condone a compromise to quality representation, but rather advocates that such representation must now be achieved under more constrained costs.\textsuperscript{152}

V. CONCLUSION

While the implementation of contract systems certainly gives rise to several constitutional and ethical concerns, such concerns are not new. The compromise of indigent defendants’ constitutional rights has long been a problem in this country and will continue to be regardless of the existence or nature of contract systems. Similarly, conflicts of interest are inherent in the practice of law, and have existed in the practice of indigent defense since \textit{Gideon} and \textit{Argersinger}. Representing poor people has never been a money making venture; lawyers willing to give their time to represent indigents have historically been undercompensated.

The question of whether contractors will expedite cases or enter into contracts solely for profit will always remain, as will the threat of actual and potential conflicts of interest inherent in any system designed to provide legal representation to indigent defendants. However, a blanket statement that contracting will lead to any greater threat of ethical violations invites the presumption that all attorneys are unethical. And to begin with, that presumption would threaten to cripple the entire criminal justice system. Such a presumption is completely at odds with the Supreme Court’s holding in \textit{Strickland v. Washington},\textsuperscript{153} in which the Court found that a defendant must overcome the presumption that an attorney acted reasonably to meet the performance requirement for

\textsuperscript{151} Doege, \textit{supra} note 14, at B3.
\textsuperscript{152} Doege, \textit{supra} note 14, at B3; Interview with Frederick H. Miller, Deputy State Public Defender, State of Wisconsin, in Madison, Wis. (Jan. 30, 1996).
\textsuperscript{153} 466 U.S. 668 (1984).
an ineffective assistance claim. An opposite presumption would open the floodgates to litigation by unhappy defendants that would overwhelm our courts.

Certainly, contracting prompts further inquiry into these ethical concerns as well as the impact on a defendants' constitutional rights. However, economic pressures will continue to force the implementation of contract systems. Therefore, the path to minimizing these problems lies in designing and constantly modifying systems to construct as many protections as humanly and economically possible.

The success of such an endeavor will require the cooperation of government, judges, public defenders, district attorneys, contractors, the private bar, and state bar associations (ethics committees). The Government must begin by allowing for a slow and steady implementation process. Economic objectives must be realistic, and incorporate an initial outlay of funds and a plan to recoup losses at such time as costs stabilize. The private bar must be willing to participate in the system both in the capacity of representation and by providing feedback on the implementation of programs. Better cooperation between district attorneys, public defenders, and contractors could expedite almost every aspect of the process, saving countless hours and dollars for all parties; dollars that could be devoted to enhancing the compensation and support services available for attorneys representing indigent defendants.

In theory, Wisconsin's new contract system appears to abide not only by the guidelines suggested by the ABA and the NLADA, but also provides several layers of protection to ensure that defendants' constitutional rights are not unfairly compromised and that potential ethical violations by attorneys are minimized. Consistent with ABA directives, the State has shied away from competitive bidding schemes, choosing instead to require a detailed dossier from potential contractors and considering proposed bids as only 10% of the value of a proposal. Contract #95 includes provisions to provide for ample support services, intensive monitoring of contractors, and establishes a payment scheme that allows a buffer for contractors incurring start up costs when undertaking contract representation.

The effects of Wisconsin's contract system will not be detectable for at least a couple of years. However, like all contract systems, its success in providing quality representation at a fixed cost rests largely on the shoulders of contractors. In the long run, only they will know whether

154.  Id. at 689.
they provided their clients effective representation as guaranteed by the Sixth Amendment.

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