**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
**IN AND FOR THE COUNTY OF MARICOPA**

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| IN THE MATTER OF ADOPTING A PLAN FOR REVIEW OF APPOINTED DEFENSE COUNSEL | ) ) ) ) | ADMINISTRATIVE ORDER NO. 2020-156 |

WHEREAS, Rule 6.2 of the Arizona Rules of Criminal Procedure requires the Presiding Judge to establish procedures for appointment of counsel; and

WHEREAS, Rule 6.5 of the Arizona Rules of Criminal Procedure provides that appointments shall take into account "the skill likely to be required in handling a particular case;" and

WHEREAS, Rule 6.8 of the Arizona Rules of Criminal Procedure sets standards for appointment and performance of defense counsel in capital cases,

**IT IS ORDERED** adopting the Plan for Review of Appointed Defense Counsel, attached as Exhibit A.

**IT IS FURTHER ORDERED** this Administrative Order supersedes Administrative Order No. 2019-165.

Dated this 13th day of November, 2020.

Hon. Joseph C. Welty
Presiding Judge

Original: Clerk of the Superior Court

Copies: Hon. Patricia Starr, Criminal Presiding Judge
Superior Court Judges and Commissioners – Criminal Department
Hon. Mark Brnovich, Attorney General
Hon. Alister Adel, County Attorney
Christina Phillis, Public Defense Services
James Haas, Public Defender
Sherri McGuire Lawson, Legal Defender
Rosemarie Pena-Lynch, Legal Advocate
Sabrina Ayers Fisher, Public Advocate
Raymond L. Billotte, Judicial Branch Administrator
Bob James, Deputy Court Administrator
Shawn Haught, Criminal Court Administrator

# PLAN FOR REVIEW OF APPOINTED DEFENSE COUNSEL

## AUTHORITY

This Plan for Review of Appointed Defense Counsel (the "Plan") is created pursuant to the Arizona Rules of Criminal Procedure. The Rules of Criminal Procedure assign certain judicial functions to the Presiding Judge of the Superior Court in relation to the appointment of counsel in criminal cases. Rule 6.2 provides that the Presiding Judge shall establish procedures for appointment of counsel. Rule 6.5(c) provides that appointments shall take into account "the skill likely to be required in handing a particular case." Rule 6.8 sets standards for appointment and performance of defense counsel in capital cases. The persons implementing and carrying out this Plan, specifically including the members of the two review committees, are acting under the authority of the Presiding Judge of the Superior Court of Arizona in Maricopa County to assist the Presiding Judge in carrying out his or her judicial responsibilities.

## PURPOSE OF PLAN

This Plan is intended to further the goals articulated in the "Resolution on Indigent Defense Services Provided by the Court to Juveniles and Adults" adopted by the Maricopa County Board of Supervisors and approved by the Superior Court of Arizona in Maricopa County in 1992. The Plan establishes "performance requirements" and "a system which allows for regular evaluation of contract attorneys . . . including provisions leading to contract termination when performance is below standard." It creates "Review Committee[s]" to assist in "reviewing, selecting and monitoring indigent legal services contracts." These mechanisms are "consistent with . . . applicable standards of the National Legal Aid and Defenders Association (NLADA) and the American Bar Association (ABA)," which require institutionalized quality control for indigent defense services.

The Plan is intended to ensure, to the extent possible, that attorneys appointed to represent indigent defendants by the Superior Court of Arizona in Maricopa County provide skilled, knowledgeable and conscientious legal representation to their clients. That representation should be commensurate with the gravity of the charges and the severity of the potential consequences for the defendant. These principles shall inform the operation and administration of the Plan. With respect to capital cases, the Plan is intended to serve as a "Legal Representation Plan" as described in Guideline 2.1 of the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases; and the Capital Defense Review Committee is intended to perform some of the duties of a "Responsible Agency" as provided in Guideline 3.1 of the Guidelines.

The Plan will at all times be administered in a manner consistent with and in furtherance of an attorney's ethical and professional obligations under Supreme Court Rule Rules 41 (obligations of lawyers including respect for courts and professionalism) and 42 (Arizona Rules of Professional Conduct). Nothing in this Plan is intended to confer on any attorney any right to enter into or continue under or renew a contract for indigent defense services, or any right or benefit of any kind not provided for by such contract including (without limitation) the right to receive case assignments or to be appointed to represent a criminal defendant.

## REVIEW COMMITTEES

A Felony Defense Review and a Capital Defense Review Committee shall be established. Each Committee shall be composed of:

- The director of OPDS and the heads of the three Maricopa County adult indigent criminal defense offices, or their designees;
- A Maricopa County Superior Court Judge designated by the Criminal Presiding Judge; and
- At least four members of the criminal defense bar, appointed by the Criminal Presiding Judge, who do not a hold a current OPDS contract or have a contract application currently pending and who are not currently employed by a Maricopa County indigent defense agency.

All members of the Felony Defense Review Committee must have substantial experience in the defense of felony cases or experience presiding over felony trials. All members of the Capital Defense Review Committee must have substantial experience in the defense of capital cases or experience presiding over capital trials. Current active membership in the Bar is not required.

Where this Plan refers to "the Committee," the reference is intended to apply to both the Capital Defense Review Committee and the Felony Defense Review Committee unless the context requires otherwise.

### Committee Procedures

The Committee Chair and Vice-Chair shall be appointed by the Criminal Presiding Judge from among the current Committee members for a term of one year, which can be renewed for up to three consecutive years

Upon the establishment of each Committee, the Criminal Presiding Judge shall appoint one criminal defense bar member for a one-year term, one for a two-year term and the other two for three-year terms. All subsequent appointments or re-appointments shall be for three-year terms.

Each Committee shall establish guidelines for its operation, with the approval of the Criminal Presiding Judge. Operating guidelines may be reviewed and revised from time to time at the discretion of the Chair with the approval of the Criminal Presiding Judge. Proposed guidelines shall be submitted to the Director of OPDS before adoption, to ensure compliance with applicable laws, rules and contract provisions.

## FUNCTION OF THE COMMITTEES

The Capital Defense Review Committee and the Felony Defense Review Committee shall determine whether attorneys holding contracts to provide indigent defense services in Maricopa County are qualified for appointment under the criteria established in this Plan. Based on those determinations, the Committee shall make recommendations to the Criminal Presiding Judge concerning the assignment of contract holders to the types of cases provided for in their respective contracts.

Except as otherwise provided in this Plan, an attorney shall not be eligible for assignment to felony or capital cases under a Maricopa County indigent legal services contract unless the attorney has completed the evaluation or re-evaluation required by this Plan and has been approved for assignment by the Criminal Presiding Judge in the applicable category or categories of cases. Capital post-conviction attorneys will not be subject to this eligibility requirement until January 1, 2023.

**Review of Qualifications – Felony Defense Review Committee**

The Felony Defense Review Committee shall review the qualifications of each attorney as to whom OPDS requests evaluation or re-evaluation for assignment to non-capital felony cases and recommend to the Presiding Criminal Judge, based on its review of qualifications, what cases (if any) the attorney should be assigned from the following categories:

Major Felony
Felony
Appeal/Post Conviction Relief

To be deemed qualified for assignment to felony cases, the attorney must demonstrate that he or she meets the following criteria:

- The attorney is a member in good standing of the State Bar of Arizona.
- The attorney meets, and can be expected to continue to meet, the minimum qualifications established by the Arizona Rules of Criminal Procedure.
- The attorney complies with, and can be expected to continue to comply with, Arizona Supreme Court Rule 41 (Rules of Professional Conduct) and Rule 45 (continuing legal education), and OPDS contract obligations.
- The attorney provides, and can be expected to continue to provide, skilled, knowledgeable, thorough and conscientious representation to his or her clients, commensurate with the gravity of the charges and the severity of the potential consequences for the defendant.
- The attorney meets, and can be expected to continue to meet, the performance and practice standards of the profession and this Plan.

**Review of Qualifications – Capital Defense Review Committee**

The Capital Defense Review Committee shall review the qualifications of each attorney as to whom OPDS requests evaluation or re-evaluation for assignment to capital cases and recommend to the Criminal Presiding Judge, based on the Committee's review of qualifications, what type of cases (if any) the attorney may be assigned from the following categories:

Capital – Lead Counsel
Capital – Co-Counsel
Capital Appeals
Capital Post-Conviction

To be deemed qualified for assignment to capital cases the attorney must demonstrate that he or she meets all of the criteria for assignment to felony cases, and the following additional criteria:

- The attorney meets, and can be expected to continue to meet, the minimum eligibility requirements of Criminal Rule 6.8.
- The attorney possesses the qualifications set forth in Guideline 5.1 of the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.
  The attorney has a demonstrated history of practice, and can be expected to continue to practice, in accordance with the performance and practice standards set forth in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (collectively the "ABA Guidelines").

An attorney approved for appointment as capital trial lead counsel will also be eligible for appointment as capital trial co-counsel unless the Committee has expressly recommended that the attorney should not be approved for appointment as co-counsel and the Criminal Presiding Judge has expressly approved that recommendation.

An attorney who does not meet the experience-based qualifications set forth in Criminal Rule 6.8(b)(1) (lead trial counsel), 6.8(c) (appellate counsel) or 6.8(d) (post-conviction counsel), but otherwise demonstrates that he or she is qualified for assignment to capital cases, may be approved for assignment conditioned on: 1) meaningful association in each assigned case with an attorney who is qualified under Rule 6.8(b)(1) (lead trial counsel), 6.8(c) (appellate counsel) or 6.8(d) (post-conviction counsel) 2) appointment of the Rule 6.8 (b)(1), (c), or (d) qualified counsel for that purpose; 3) approval of the appointment of associating counsel by OPDS; and 4) consent of the Arizona Supreme Court pursuant to Criminal Rule 6.8(e)(1).

**Evaluation**

When OPDS submits a request for attorney evaluation, the Committee shall initiate a review of the attorney's qualifications to determine whether the attorney meets the criteria established by this Plan and therefore should be recommended for case assignment.

The Committee shall require an attorney undergoing review of qualifications to complete a written application separate from the contract application. The application form shall be created by the Committee and revised from time to time as necessary.

The Committee shall review applications, check references, evaluate work product, and conduct additional inquiry to determine whether an attorney applicant possesses the qualifications required by this Plan. The Committee also may review and consider information that the Maricopa County Adult Criminal Contract requires the attorney to submit to OPDS, such as case logs, final disposition records, time sheets, and requests for approval of expenditures. OPDS shall make such

information available to the Committee, except that OPDS may in its discretion withhold information relating to ongoing cases as necessary to protect a defendant's confidentiality interests.

The inquiry by the Capital Defense Review Committee shall include, and the inquiry by the Felony Defense Review Committee may include, interviews of persons not listed as references who are familiar with the applicant's work. The Committee may solicit input or comments from judges, attorneys, and others. The Committee shall not inquire into, and Committee members shall take reasonable precautions to avoid disclosure of, privileged attorney-client communications.

The Capital Defense Review Committee shall interview an attorney applicant before recommending the attorney for assignment to capital cases. The Felony Defense Review Committee may interview attorney applicants at its discretion.

Upon completion of its inquiry, the Committee shall meet and discuss each attorney applicant. The Committee shall recommend whether an attorney applicant should receive assignments in each category to which the attorney has requested assignment under the attorney's Maricopa County Adult Criminal Contract(s). The Committee may recommend that an attorney's eligibility for assignment be conditioned on additional training and/or experience, meaningful association with a more experienced attorney, or otherwise as necessary to ensure that the assignment furthers this Plan's goal of ensuring skilled, knowledgeable and conscientious legal representation commensurate with the gravity of the charges and the severity of the potential consequences.

An attorney whom the Committee has tentatively decided not to recommend for assignment, in one or more of the categories of cases for which the attorney is eligible shall be notified in writing of the tentative adverse recommendation and given an opportunity to be heard as to his or her qualifications either in writing or by in-person meeting with the Committee or both, before the Committee makes a final recommendation.

The Committee shall issue a final recommendation as to whether an attorney should receive case assignments within 180 days of receipt of the attorney's written application, unless the circumstances make action within 180 days impracticable. The Committee chair shall transmit the Committee's final recommendations to the Criminal Presiding Judge in writing. The Criminal Presiding Judge may meet with the Committee chair to discuss the recommendations, at the Criminal Presiding Judge's discretion.

When the Committee recommends to the Criminal Presiding Judge that an attorney should not receive case assignments in one or more of the categories of cases to which the attorney has asked to be assigned, the Criminal Presiding Judge shall give the attorney an opportunity to submit a written statement or other written information concerning his or her qualifications before making a final decision. The Criminal Presiding Judge may decline to consider a submission from an attorney who did not exercise the opportunity to be heard by the Committee after receiving notice of a tentative adverse recommendation.

After reviewing and considering the Committee's recommendations and any attorney submissions, the Criminal Presiding Judge shall determine which of the attorney applicants OPDS may assign to represent indigent criminal defendants, and the category or categories of cases to which each attorney may be assigned. The Criminal Presiding Judge shall direct OPDS to condition the attorney's eligibility for assignment as recommend by the Committee, unless the Criminal Presiding Judge

determines that the imposition of the recommended condition(s) is not necessary for furtherance of the goal of this Plan or for compliance with the Rules of Criminal Procedure.

OPDS shall notify attorney applicants in writing of the Criminal Presiding Judge's final decision.

An attorney whose application for approval to receive case assignments has been denied may not submit a new application for 36 months from the date on which the Criminal Presiding Judge made the final decision, unless the Committee in its discretion permits the applicant to reapply sooner.

The Maricopa County Superior Court shall maintain and make available to the public a current roster or list of attorneys approved for the assignment of cases through OPDS, and the category or categories of cases to which each attorney may be assigned. The roster shall note any conditions that have been placed on the attorney's eligibility for assignment.

**Routine Re-evaluation**

The Committee shall periodically re-evaluate the attorneys approved for case assignments under this Plan, at intervals of not more than six years, to ensure that each attorney continues to meet the criteria established by the Plan. OPDS shall notify the Committee that an attorney is due for periodic re-evaluation at least 270 days before the six-year re-evaluation deadline for that attorney.

The Committee shall require an attorney undergoing re-evaluation to update the attorney's prior written application, using a form created by the Committee. After reviewing the information provided by the attorney, the Committee shall decide whether further review is necessary to determine whether the attorney has met or will continue to meet the applicable criteria for appointment. If the Committee decides that further review is not necessary, the Committee shall recommend approval of the attorney to continue to receive case assignments in each category of cases for which assignment is authorized under the attorney's Maricopa County Adult Criminal Contract. If the Committee decides that further review is necessary, the Committee shall utilize the same review process as during an initial review of qualifications, to the extent required for a full and fair evaluation.

Decision-making on re-evaluation and memorialization of the re-evaluation decision by the Committee and the Criminal Presiding Judge, including the affected attorney's opportunity to be heard during the process, shall be the same as an initial evaluation.

**For-Cause Re-Evaluation**

The Committee may re-evaluate a previously approved attorney at any time, at the request of the Criminal Presiding Judge or at the Committee's discretion, when there is reason to believe that the attorney has not met or may not continue to meet the applicable criteria. Grounds for for-cause re-evaluation may include (but are not limited to) Bar discipline; sanctions imposed by a court; a complaint from a judge, a member of the bar or a client; misconduct or gross negligence in the representation of a client, or a pattern of inadequate representation of clients; excessive caseload; failure to comply with training requirements; or violations of contract terms. Before the Committee commences a for-cause re-evaluation, the attorney being re-evaluated shall be notified in writing of the reason or reasons for the re-evaluation, and given an opportunity to submit a written statement or other written information addressing the issues raised.

When re-evaluating an attorney for-cause, the Committee shall utilize the same review process as during an initial review of qualifications, to the extent required for a full and fair evaluation. Decision-making on for-cause re-evaluation and memorialization of the for-cause re-evaluation decision by the Committee and the Criminal Presiding Judge, including the affected attorney's opportunity to be heard during the process, shall be the same as an initial evaluation.

An attorney approved for assignment but subsequently disbarred, suspended from the practice of law for more than six months or placed on disability inactive status, or who has had his or her contract terminated for-cause, must submit a new application and undergo the same evaluation as an attorney who has not previously been approved for assignment.

**Records**

Committee operating guidelines, final and approved meeting agendas and minutes (if any), and final written recommendations to the Criminal Presiding Judge, shall be open to the public and available for inspection upon appropriate public records request. These records shall be maintained for seven years by the Court Administrator as custodian of the records.

All other records relating to the attorney review process shall remain confidential except as otherwise specifically provided in this Plan. In order for the evaluation process to be effective and fair, the Committee must obtain complete, reliable, and accurate information from the attorneys being evaluated, as well as the judges, attorneys, and others from whom information is sought. The Committee then must evaluate the information thoroughly and discuss it candidly. The potential for public disclosure would chill the flow of reliable information and discourage candid discussion. Moreover, both the attorney applicants and the third party information providers have legitimate confidentiality and privacy interests, some of which derive from their professional obligations to others.

## PERFORMANCE AND PRACTICE STANDARDS

For purposes of determining whether a trial attorney possesses "the skill likely to be required" in handling the cases to which the attorney will be appointed, as required by Rule 6.5(c), the Committee shall apply the following performance and practice standards.

I. Attorney represents clients in accordance with applicable ethical rules and standards of professional conduct, including but not limited to:
   a. Personally conferring with the client concerning the representation promptly upon notice of assignment;
   b. Maintaining reasonable contact and adequately communicating with the client, including personal consultation at times and places other than court proceedings as reasonably necessary for effective representation, and until the representation is terminated

c. Using reasonable diligence in notifying the client of necessary court appearances including any court action that arises out of the client's non-appearance;
d. Conducting all out-of-court preparation required for competent representation of the client, including a prompt and thorough client interview and such additional interviews and investigation as may be appropriate;
e. Appearing in court on time and prepared for scheduled proceedings;
f. Displaying appropriate respectful professional demeanor and conduct in all dealings with the court, opposing counsel, victims and witnesses, and the client.

II. Attorney demonstrates and maintains proficiency in all applicable aspects of substantive law, procedural rules, and trial advocacy, including but not limited to the following:

a. Recognition of legal issues;
b. Effective legal research and use of pretrial motions;
c. Effective case development including thorough client interviews, appropriate use of investigators and timely and comprehensive witness interviews;
d. Thorough knowledge of the Rules of Criminal Procedure;
e. Effectiveness in plea negotiations;
f. Effective use of experts when necessary;
g. Thorough and effective trial preparation including anticipation of key legal issues, evaluation of admissibility of evidence, discussion of the defendant's role including possible testimony, and preparation of witnesses including the defendant if necessary;
h. Willingness to try cases;
i. Effective working knowledge of the Rules of Evidence and the legal rules concerning trial practice;
j. Advocacy skills;
k. Effective sentencing presentation

III. Attorney manages law practice efficiently and effectively in relation to assigned clients and complies with OPDS contract obligations.

For purposes of determining whether an appellate attorney or post-conviction attorney possesses "the skill likely to be required" in handling the cases to which the attorney will be appointed, as required by Rule 6.5(c), the Committee shall apply the following performance and practice standards.

I. Attorney represents clients in accordance with applicable ethical rules and standards of professional conduct, including but not limited to:

a. Notifying the client concerning the representation immediately upon notice of assignment and conferring with the client promptly thereafter;

b. Maintaining reasonable contact, including telephonic or in-person consultation, and otherwise adequately communicating with the client until the representation is terminated;
c. Using reasonable diligence in notifying the client of all court actions, deadlines and orders;
d. Conducting all out-of-court preparation required for competent representation of the client, including a prompt and thorough review of the relevant record and such additional development or supplementation of the record as may be appropriate;
e. Appearing in court on time and prepared for scheduled proceedings;
f. Displaying appropriate respectful professional demeanor and conduct in all dealings with the court, opposing counsel, victims and witnesses, and the client.

II. Attorney demonstrates and maintains proficiency in all applicable aspects of substantive law, procedural rules, and appellate advocacy, including but not limited to the following:

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a. Recognition of legal issues;
b. Effective legal research, briefing and motion practice;
c. Thorough knowledge of Arizona special action and appellate procedure and practice and/or Arizona post-conviction procedure and practice as applicable;
d. Working knowledge of certiorari practice in the United States Supreme Court, and the law controlling the scope of and entitlement to federal habeas corpus review;
e. Effectiveness in plea negotiations;
f. Advocacy skills.

III. Attorney manages law practice efficiently and effectively in relation to assigned clients and complies with OPDS contract obligations.

The Capital Defense Review Committee shall apply, in addition to the foregoing performance and practice standards, the performance and practice standards set forth in the ABA Guidelines.

## OTHER ASPECTS OF INDIGENT DEFENSE REVIEW

### Training and Professional Development

An attorney seeking assignment to capital cases must have attended and successfully completed a comprehensive training program in the defense of capital cases within the two years immediately preceding approval. The Committee in its discretion may allow an applicant to defer the required training until after the attorney has been approved for assignment, but in no event shall an attorney actually be assigned to a case until the training requirement has been met. In order to maintain eligibility for assignment to capital cases, the attorney must attend and successfully complete, at least once every two years, at least twenty-four hours of continuing legal education specifically relating to the defense of criminal cases, at least twelve hours of which shall consist

of specialized training in the defense of capital cases. The attorney also must comply with the specific training requirements set out in Rule 6.8(a)(4).

An attorney seeking assignment to non-capital felony cases must have attended and successfully completed twelve hours of continuing legal education specifically relating to the defense of criminal cases within the two years immediately preceding approval for assignment. The Committee in its discretion may allow an applicant to defer the required training until after the attorney has been approved for assignment, but in no event shall an attorney actually be assigned to a case until the training requirement has been met. In order to maintain eligibility for assignment to non-capital felony cases, the attorney must attend and successfully complete, at least once every two years, at least twelve hours of continuing legal education specifically relating to the defense of criminal cases.

An attorney receiving case assignments under this Plan shall maintain records demonstrating compliance with training requirements. The Committee may require an attorney to show satisfactory evidence of compliance at any time.

Although each Committee (or the two of them together) may present or facilitate relevant continuing legal education and training, each attorney is responsible for his or her own compliance with training requirements. It is not anticipated that the Superior Court of Arizona in Maricopa County will underwrite or subsidize attorney training.

**Collection and Reporting of Information**

An attorney receiving case assignments under this Plan shall create and maintain all records required by the Maricopa County Adult Criminal Contract, including detailed and accurate case logs, final disposition records, and time sheets relating to client representation. The attorney also shall comply with contract requirements relating to OPDS approval of case-related expenditures (for expert witness fees, travel expenses, investigators, mitigation specialists in capital cases, service of process, court transcript fees, and other reasonable and necessary expenditures) and notice to OPDS of requests for judicial approval of expenditures or additional compensation. Copies of required records and documentation shall be retained by the attorney and provided to the Committee on request.

The Criminal Presiding Judge shall work with the Clerk of the Court to create a process by which OPDS and the appropriate Committee routinely receive notice that a defendant has asked to terminate an assigned OPDS attorney's representation, and the result of that request.

**Complaints**

Upon receipt by OPDS of a complaint about an attorney, from any person, OPDS shall forward or refer the complaint to the Chair of the appropriate Committee if, in the judgment of the Director of OPDS, the contents of the complaint may establish reasonable cause to believe that the attorney has not met or may not continue to meet the applicable qualifications criteria in the Administrative Order.

The Chair and the Director of OPDS in their discretion may meet with the attorney who is the subject of a complaint, or take such other steps as they deem appropriate, in an effort to resolve the complaint informally. If informal action does not resolve the matter to the satisfaction of the Chair and the Director of OPDS, the Chair shall bring the matter to the attention of the Committee, and the Committee shall take action as necessary under this Plan.

Before the Committee commences a for-cause re-evaluation of an attorney based on a complaint, the affected attorney shall be given an opportunity to submit a written statement or other written information to the Committee addressing the issues raised in the complaint.