

AGREEMENT NO. 051-S1211
AGREEMENT BETWEEN EL DORADO COUNTY AND
DAIN WEINER, ESQ. FOR
CONFLICT INDIGENT DEFENSE SERVICES
(WEST SLOPE)

This Agreement ("Agreement") is made and entered into this ___ day of _____, 2011, by and between DAIN WEINER, ESQ., a California licensed attorney ("Attorney") and the County of El Dorado ("County").

WHEREAS, persons charged with commission of a crime have a constitutional right to be represented by competent defense counsel; and

WHEREAS, California Penal Code Section 987 provides that if a defendant is unable to employ counsel, the court shall assign counsel to defend him or her; and

WHEREAS, Section 987.2(a)(3) of the Penal Code provides that in a case where the court finds that because of a conflict of interest or other reasons, the Public Defender has properly refused to represent a defendant in a criminal trial, proceeding or appeal, the court shall assign other counsel to represent the defendant; and

WHEREAS, Section 987.2(b) of the Penal Code provides that counsel assigned pursuant to Penal Code Section 987.2(a) shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the County; and the sum provided for in subdivision (a) may be determined by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the total amount of compensation and expenses to be paid, which shall be within the amount of funds allocated by the board of supervisors for the cost of assigned counsel in those cases; and

WHEREAS the County has authority to enter into a contract for legal services pursuant to Government Code §31000; and

WHEREAS the County has determined to provide defense counsel to indigent defendants for whom the Public Defender has properly refused to represent by contracting for a set fee with a limited number of qualified attorneys each of whom has agreed to accept their proportionate share of assigned conflict indigent defense cases (the "Conflict Indigent Defense Panel"); and

WHEREAS, Attorney is willing, competent and available to provide the legal services required of Attorney by this Agreement, and has competently provided similar services to indigent criminal defendants for at least the past three years; and

WHEREAS the appellate court in *Phillips v. Seeley* (1974) 43 Cal. App. 3d 104 held that the judicial act of assigning an attorney to represent an indigent defendant with knowledge of the compensation contract between the board of supervisors and that attorney constitutes judicial approval and ratification of the contract and recognition that the contract provides reasonable compensation to the attorney;

NOW, THEREFORE, in recognition of the above facts, the County and Attorney agree as follows:

I. SERVICES TO BE PROVIDED BY ATTORNEY

A. Attorney shall provide competent legal services in the defense of indigent defendants charged with one or more misdemeanors (including appeals), noncapital felonies, juvenile offenses, and any collateral civil proceedings related thereto, in the courts located on the west slope area of El Dorado County, in those cases in which the Public Defender has properly declared a conflict of interest, as assigned to Attorney by the El Dorado County Superior Court (hereafter "Court"). A charge of violating probation filed after the effective date of this contract will be considered as a case falling within this contract regardless of which attorney represented the defendant on the case resulting in the grant of probation.

The parties recognize that the assignment of conflict indigent defense cases to attorneys is a matter entirely within the discretion of the Court. This Agreement is based on the understanding that the Court will endeavor to assign cases to those attorneys who have contracted with the County to provide conflict indigent defense services for similar services (the "Conflict Indigent Defense Panel") on a proportionate basis, so that the amount of legal work per Panel attorney is roughly equal over the time period covered by this Agreement. Attorney agrees that the nature and amount of work devoted to the defense of any individual defendant is a matter within the sole discretion of Attorney, and that the amount of work in any one case or group of cases will inevitably fluctuate over time. Attorney agrees to accept his or her proportionate share of conflict indigent defense assignments in the courts located in the west slope area of El Dorado County in return for the monthly flat rate compensation provided herein, and agrees that this Agreement provides reasonable compensation in each such case. If at any time Attorney feels that the cases assigned to Attorney do not result in an overall roughly proportionate share of legal work among the Panel attorneys handling similar cases, Attorney agrees that Attorney's only recourse is to approach the Court for an adjustment of assignments that will achieve rough proportionality of workload among the Panel attorneys handling similar cases over the term of this Agreement.

All legal services required of Attorney by this Agreement shall be provided in a manner fully consistent with all applicable laws regarding the provision of competent legal defense and with the Rules of Professional Conduct and other statutes, regulations, and rules of practice applicable to members of the State Bar of California.

B. In providing the legal services required by this Agreement, Attorney will provide, at his or her own expense, all appropriate office and legal staff as necessary to provide competent legal services in the cases covered by this Agreement. This staff may consist of such attorneys, paralegals, clerks, and any and all secretarial services, as are necessary to fully discharge in a professional manner all obligations herein assumed by Attorney. Attorney represents and warrants that at all time his personnel shall be competent and that all services rendered will be sufficient to meet all constitutional requirements relating to legal services. County expects that Attorney will provide the legal services required under this Agreement personally, and Attorney must appear personally at all mandatory appearances, but Attorney may from time to time use other equally-competent attorneys as temporary substitutes at non-mandatory appearances if acceptable to the Court.

C. In providing the legal services required by this Agreement, Attorney will bear at his or her sole expense all normal office costs, such as and including telephone, copy expenses, computerized legal research, in-state travel, malpractice and other insurance, etc. Attorney will be entitled to reimbursement from County for reasonable ancillary services such as the costs of experts, investigators, testing services, transcripts, etc., as provided in this Agreement.

II. COMPENSATION AND REIMBURSEMENT OF EXPENSES

A. **Compensation- Cases Within the Contract.** For the services described in Section I Attorney shall be paid \$5,951 monthly at the beginning of each month for County fiscal years 2011-12 thru 2012-13. The parties may agree to renegotiate the monthly rate if economic conditions improve.

B. **Compensation- Ancillary Services.** Attorney will be entitled to reimbursement from County for the reasonable cost of ancillary services, such as psychiatrists and other expert consultants or witnesses, interpreters, investigators, testing services, transcripts, out-of-state travel, etc., as necessary to provide a constitutionally competent legal defense. Attorney agrees that the costs for ancillary services shall be reimbursed at a rate that does not exceed what the Public Defender's Office pays for similar services and that, prior to utilizing any ancillary services in any individual case, Attorney will obtain the approval of the Court that the ancillary services are required for the case and that the cost is reasonable. County will be obligated to reimburse attorney monthly upon receipt of an accumulated invoice and a court order for reimbursement that complies with this Agreement. Attorney understands that the County does not have unlimited funds to reimburse for such ancillary services. No other expenses incurred by Attorney in the performance of this Agreement shall be reimbursed. If the County contracts with one or more investigators, Attorney agrees to use the contracted investigators.

C. **Trials Exceeding Three Weeks.** It is anticipated that the trial in an average case will not exceed three weeks. The flat monthly rate established above is intended to compensate Attorney for legal services in all assigned cases up to and including three trial weeks per case. For the purpose of this section, a trial week will consist of a minimum of three full days of actual

trial. If the trial in any individual assigned case exceeds three trial weeks, Attorney will be entitled to additional compensation of \$1,500 per additional trial week above three trial weeks, payable at the conclusion of each additional trial week upon receipt of an acceptable invoice. Extended trial payments cease when verdict is given, jury is discharged, or trial is concluded, whichever is earlier in time.

D. Extraordinary and Excluded Cases. In those rare instances of an assigned indigent defense case involving unusual circumstances which demand a truly extraordinary amount of legal work, Attorney may seek a court order declaring the case to be extraordinary, in which instance Attorney's services in that case over the amount usually devoted to a normal case will be paid at a rate to be negotiated but not to exceed \$70 per hour subject to court approval and upon receipt of an acceptable invoice. Death penalty cases are not included in this contract, so if Attorney is assigned and accepts a death penalty case then compensation for that case shall be separately negotiated.

E. Change in Venue. In cases to which Attorney has been assigned by the Court where the Court has ordered venue change from El Dorado County, compensation for Attorney's services and costs accrued following the court-ordered change in venue are not included in the terms of this Agreement and will be separately negotiated.

III. DISPUTES

Any dispute arising under this Agreement shall be decided by the County Counsel who shall put his decision in writing and mail a copy thereof to the address provided herein for notices to Attorney. The decision of the County Counsel shall be final for purposes of administrative review. Attorney shall diligently perform the duties required by this Agreement in accordance with the decision of the County Counsel.

IV. TERM AND TERMINATION

Unless otherwise terminated in accordance with this Section, the term of this Agreement shall be from July 1, 2011 through June 30, 2013.

Should either party fail to substantially perform its obligations in accordance with this Agreement, the other party shall thereupon have the right to terminate this Agreement by giving written notice and specifying the date of such termination, at least five (5) business days before the effective date of such termination. Either party may terminate this Agreement for any reason by giving at least thirty (30) calendar days advance written notice to the other party of the effective date such termination. County has the unilateral right to terminate this Agreement on five days notice if in the County's judgment the Court does not assign a proportionate share of cases to Attorney. Attorney shall be entitled to payment for acceptable services rendered to and inclusive of the specified date of termination.

The termination of this Agreement does not affect the assignment of Attorney by the Court in any case, nor the continuing obligation of Attorney to represent his or her clients. The County has no ability to relieve Attorney from his or her assignment to represent any individual defendant. Attorney shall maintain in his possession for at least five (5) years following completion of the cases all files and records related to the case.

V. APPLICABLE LAWS

In the performance of the services required by this Agreement, Attorney shall comply with all applicable Federal, State, or County statutes, ordinances, regulations, directives, and laws. This Agreement shall be deemed to be executed within the State of California and construed in accordance with and governed by the laws of the State of California. Any action or proceeding arising out of this Agreement shall be filed in El Dorado County, California.

VI. COUNTY ADMINISTRATOR AND NOTICES

The administrator of this Agreement for the County is the Chief Administrative Officer. All notices shall be deemed to have been given when made in writing and delivered or mailed to County and Attorney at their respective addresses as follows:

ATTORNEY

Dain Weiner, Esq.
Attorney at Law
3350 Country Club Dr. Ste 202
Cameron Park, CA 95682

COUNTY:

Chief Administrative Officer
El Dorado County
330 Fair Lane
Placerville, CA 95667

VII. ATTORNEY QUALIFICATIONS

Attorney agrees that he or she shall not accept appointments to matters for which he or she is not qualified. Attorney and all persons who perform services for or through Attorney shall exercise the care and judgment consistent with all applicable professional standards in the performance of the services required by this Agreement. In some cases, Attorney may not be available to represent a defendant in an assigned case because such representation would violate the Canons of Professional Ethics, and in such event, Attorney will notify the Court of the conflict and will request that the Court alter the assignment of Attorney, and also adjust assignments among the members of the Conflict Indigent Defense Panel in order to maintain an approximately equal workload for similar cases.

VIII. INDEMNITY

Attorney shall indemnify, defend, and hold harmless the County of El Dorado, its elected representatives, officers, agents, and employees from and against any and all claims, demands, losses, defense costs, expenses (including attorney fees) or liability of any kind or nature, for personal injury or property damage arising out of or, as a result of litigation or administrative proceeding(s), alleged to arise wholly or in part out of any negligent or intentional act, error, or omission of Attorney, its offers, agents or employees, in performing the services responsibilities, or duties required of Attorney by this Agreement, or any breach of any statutory, regulatory, contractual, or legal duty of any kind related, directly or indirectly, to the services, responsibilities, or duties required of Attorney by this Agreement, or any claim of negligent retention or similar claim against County arising out of this Agreement.

IX. INSURANCE

During the term of this Agreement, Attorney shall at all times maintain, at his or her expense, professional malpractice insurance in a minimum amount of \$100,000 per claim and \$300,000 per occurrence, or in whatever type and limit as may be established in the future by the Court for assigned counsel. Attorney shall submit proof of insurance acceptable to County at the commencement of this contract and annually thereafter.

X. STATUS OF ATTORNEY

Attorney, and those who perform services for or through Attorney, are independent contractors, and no relationship of agency or employer-employee exists between County and Attorney or those who perform services for or through Attorney. Neither Attorney nor those who perform services for or through Attorney shall be entitled to any benefits payable to employees of County. Attorney has no right to act on behalf of County in any capacity whatsoever as an agent, or to bind County to any obligation whatsoever. County has no right to determine case assignments, nor to supervise or control the services provided by Attorney or those who perform services for or through Attorney under this Agreement. Attorney shall file a State of California Form 590 or County shall be required by law to withhold seven percent (7%) of each payment to attorney.

XI. AMENDMENT AND WAIVER

This Agreement may be amended only by written agreement executed by County and Attorney. The waiver by County or any of its officers, agents, or employees or the failure of County or its officers, agents, or employees to take action with respect to any right conferred by, or any breach of any obligation or responsibility of this Agreement shall not be deemed to be a waiver of such obligation or responsibility, or subsequent breach of same, or of any terms, covenants, or conditions of this Agreement.

XII. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between County and Attorney and supersedes all prior negotiations, representations, of agreements, whether written or oral. In the event of a dispute between the parties as to the language of this Agreement or the construction or meaning of any term hereof, this Agreement shall be deemed to have been drafted by the parties in equal parts so that no presumptions or inferences concerning its terms or interpretation may be construed against any party to this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year above set forth.

Dated: _____

COUNTY OF EL DORADO

By: _____
Chair, Board of Supervisors

ATTEST: SUZANNE ALLEN de SANCHEZ
Clerk of the Board of Supervisors

By _____
Deputy Clerk

Dated: _____

ATTORNEY: _____
Dain Weiner, Esq.