CITY CLERK
ORIGINAL

C-7349-2
07/01/2012

# CITY OF GLENDALE

## PUBLIC DEFENDER FULL-TIME AGREEMENT

This Public Defender Full-Time Agreement ("Agreement") made and entered into this 1st day of July, 2012, by and between the City of Glendale, an Arizona municipal corporation ("City") and Cary Lackey, Attorney at Law ("Attorney").

## RECITALS

A. The City Manager of the City of Glendale is authorized and empowered by provisions of the Glendale City Charter to execute contracts and contract amendments; and

B. The City desires to provide legal counsel for the representation of indigent defendants ("Defendants") in the Glendale City Court ("Court"), where such representation is required by the United States Constitution, the Arizona Constitution, and the Rules of Criminal Procedure for the State of Arizona; and

C. Attorney is licensed to practice law in the State of Arizona, is a member in good standing with the State Bar of Arizona ("Bar"), is otherwise professionally qualified to provide the desired services and is ready, willing and able to do so; and

D. City and Contractor desire to memorialize their agreement with this document.

## AGREEMENT

1. **Term of Agreement.** The term of this Agreement shall be for the period commencing July 1, 2012 and expiring on June 30, 2013 ("Term").

2. **Renewal.** Not less than 30 days prior to the end of the Term, City may extend this Agreement for up to one additional one year period with the consent of Attorney. City may change the rate of compensation applicable to each extension period.

3. **Fees**. From July 1, 2012 to June 30, 2013, the City will pay Attorney for all full-time legal services provided pursuant to this Agreement, at the rate of $42,000 per annum, payable monthly at the rate of $3,500. If less than a full calendar month is included at any time within the Term of this Agreement, the monthly base compensation will be prorated for that month at a daily rate. Attorney must submit a monthly invoice for payment to the Agreement Administrator no later than the tenth day of the following calendar month for which Attorney is billing. The invoice must be substantiated with the appropriate statistical reports as referenced herein. In the event of termination prior to the expiration date of this Agreement, Attorney will submit a final billing.

   3.1 Additional Fees. Upon written approval of the Presiding City Judge or his/her designee ("Presiding Judge"), Attorney will be paid enhanced compensation at the rate of $40.00 per hour for extraordinary cases that because of the complexity of facts, legal issues or proceedings, create significant additional work for Attorney. The filing of an appeal or a complaint for Special Action will not, by itself, support a decision to approve additional fee compensation.

3.2 Costs. Attorney will pay all costs and expenses incurred in the representation of Defendants, except as otherwise expressly provided in this Agreement. Costs for which the Attorney is responsible include, but are not limited to, office rent, telephone, computer, expenses related to the maintenance and operation of an office, transportation, photographs, photocopies, secretarial services, law clerks, transcripts (other than appeal transcripts), depositions and preparation of reports required by this Agreement.

3.3 Court Costs and Third Party Fees. The Court will pay costs of interpreters and appellate transcripts. Subject to prior motion and approval, the Court may agree to pay reasonable compensation for other necessary support services such as expert witnesses, investigators, out of court interpreters, and blood samples, when a finding is made by a judge or judge pro-tem of the Court that such services are indispensable to the interests of justice.

**4. Services.** Attorney will provide legal representation to Defendants when appointed to do so by a judge or judge pro-tem of the Court.

4.1 Quality of Representation. Attorney will conduct the defense of assigned Defendants diligently and professionally, consistent with standards set forth in the Arizona Rules of Professional Conduct and case law defining the duties of defense counsel in criminal cases.

4.2 State Bar of Arizona Membership. Attorney must at all times remain an active member in good standing with the Bar. Attorney must immediately inform the Court Administrator of any changes in Attorney's active membership status and of any adverse Bar rulings. Failure to maintain membership status and/or failure to promptly apprise the Court Administrator of changes may result in the immediate termination of this Agreement.

4.3 Availability. Attorney will maintain an office, or make arrangements to use an office, that is located within a 20 mile radius of the Court, to meet with Defendants, to accept telephone calls and to take messages during regular business hours.

4.4 Caseload. No more than 300 cases will be assigned to Attorney during the Term of this Agreement, except at the request of Attorney and with written permission of the Court Administrator. If Attorney is appointed to represent a Defendant who has more than one court case pending, Attorney will be credited with one appointment for each additional court case associated with each Defendant.

a. Ethical Limitations. Attorney agrees not to accept representation of clients, other than Defendants represented pursuant to this Agreement, to the extent that such representation would increase the caseload beyond the guidelines set forth in *State of Arizona v. Joe U. Smith,* 140 Ariz. 355, 681 P.2d 1374 (1984). On cases that Attorney views as unusually complicated, Attorney may make written requests to the Presiding Judge, requesting said case to be counted as more than one case toward Attorney's 300

caseload limit. Final determination will be made by the Presiding Judge. At no time shall Attorney's private practice caseload reach such a level, during his or her service as Public Defender, so as to jeopardize Attorney's ability under *State v. Smith* to complete the 300 court cases specified in this Agreement.

b. Review of Caseload. To ensure effective representation of Defendants, Attorney will review the assigned caseload quarterly during the Term of this Agreement. The ABA standards and the guidelines set forth in *State v. Smith* will be employed and Attorney will consider the number and complexity of cases assigned during the quarter, the amount of time spent on those cases and Attorney's capability to handle the caseload assigned. Additionally, Attorney must provide a caseload report to the Presiding Judge on a quarterly basis stating the number of completed cases and the number of open cases for that quarter. The caseload report must be submitted to the Presiding Judge no later than April 10th, July 10th, October 10th, and January 10th of each year. The caseload report will be compiled in spreadsheet format and submitted electronically to the Presiding Judge.

c. Change in Defendant's Financial Circumstances. If Attorney becomes aware of a material change in financial circumstances of any assigned Defendant, Attorney must notify the Court. If Attorney requests a re-determination of the indigence of any Defendant that Attorney represents, and if the Court makes a determination of non-indigence of such Defendant and allows Attorney to withdraw, Attorney agrees he or she will not represent that Defendant in that case for a fee.

d. Suspension of Appointments. Should Attorney experience a caseload that prevents Attorney from giving effective assistance of counsel to each Defendant, Attorney must file a motion requesting the Presiding Judge for a suspension of further appointments until such congestion clears. Notice of any motion filed pursuant to this provision must be given to the Glendale City Prosecutor.

(1) Hearing to Suspend Appointments. The Presiding Judge, upon receipt of a motion filed pursuant to this section, will set it for hearing not later than five days from its receipt. Should the Presiding Judge find at such hearing that the indigent caseload is excessive, and is adversely interfering with the Attorney's ability to give effective legal assistance, the Presiding Judge may suspend further appointments to Attorney for a period not to exceed 30 days, when such suspension is deemed necessary in the interest of justice. During any suspension imposed under this section, the Presiding Judge will appoint such additional private counsel as

may be necessary to represent Defendants and will compensate such private counsel for services rendered.

(2) Reporting. During any period of suspension of appointments granted or imposed by the Presiding Judge, the Attorney must notify the Presiding Judge in writing every Monday (or Tuesday if Monday is a legal holiday) as to the status of the caseload and congestion. The Attorney must notify the Presiding Judge immediately when the congestion that was the basis upon which the suspension was imposed has been relieved sufficiently to permit reinstatement of the regular appointment procedure.

(3) Hearing to Terminate Suspension. At the expiration of any suspension period ordered by the Presiding Judge, or earlier if so notified by Attorney, the Presiding Judge will set and conduct a hearing for the purpose of determining whether such suspension should be lifted or if a further suspension of appointments not to exceed 30 days should be granted.

(4) Continued Representation. Suspension of appointments under this section affects only the appointment of new Defendants to Attorney and in no way releases either party from other duties or obligations pursuant to this Agreement, or Attorney from obligations to Defendants already assigned to Attorney.

4.5 Appearances. Attorney must appear personally for Defendants whom they represent in all matters set in the Court, including but not limited to: pretrial dispositions; motions; evidentiary hearings; oral arguments; calendar calls; trials; sentencings; sentence reviews; orders to show cause hearings; revocation of probation proceedings; court sessions; appeals and special actions unless the personal appearance by the Attorney is excused by a judge or judge pro-tem before whom the matter is to be heard or decided.

a. Jail Court. Attorney must appear personally to represent Jail Court Defendants as assigned. Jail Court Defendants will not be counted toward the maximum 300 cases assigned to Attorney.

b. Treatment Court Program. Attorney must appear personally to represent Defendants in the Court's Treatment Court Program as assigned. Treatment Court Program Defendants will not be counted toward the maximum 300 cases assigned to Attorney.

c. Association of Counsel. Attorney must provide for substitution of counsel when Attorney is unable for any reason to appear in Court. Substitute counsel shall not be used routinely and in no event no more often than in approximately 30% of all court appearances in cases assigned to Attorney. Attorney must provide names, addresses and telephone numbers of substitute counsel who will be responsible to the

same effect and extent as Attorney for performance of the services contemplated and enunciated in this Agreement. It will be the responsibility of the Attorney to compensate any substitute counsel under this paragraph of this Agreement. Substitute counsel will not be offered as a substitute or employed in the performance of this Agreement without the written consent of the Presiding Judge, which consent may be withdrawn at the Presiding Judge's discretion. The names of all attorney(s) who may be employed as substitute counsel in the performance of this Agreement, including those offered as substitute counsel, must be on file with the Presiding Judge during the Term of this Agreement. Substitute counsel will not conduct any jury trial or bench trial unless, pursuant to Rule 6.3, Arizona Rules of Criminal Procedure, a motion for substitution of attorney is granted by the Court.

4.6 Defendant Contact. Attorney must provide personal consultation with Defendants prior to pretrial disposition conferences unless extraordinary circumstances prevent such a meeting. Attorney must use reasonable diligence in maintaining personal contact with each Defendant until the Defendant's case or cases are terminated, and will use reasonable diligence in notifying Defendants of official court action resulting from Defendant's nonappearance at scheduled court sessions.

4.7 General and Appellate Court Representation. Attorney must appear in courts of general and appellate jurisdiction on behalf of Defendants when it is necessary and appropriate to do so, including but not limited to appearance for purposes of appeal, special action, or Rule 11 hearings.

4.8 Precedence of Cases. Attorney agrees that court settings in the Court will take precedence over civil cases and all other criminal cases in other courts that do not have precedence as provided by the Arizona Rules of Criminal Procedure.

4.9 Defendant Conflicts. In the event a case involves two or more Defendants, the Court will appoint such additional counsel as is necessary to avoid a conflict of interest, the appearance of impropriety or as otherwise required in the interest of justice.

4.10 Non-exclusivity. The Attorney acknowledges and agrees that this Agreement to accept court appointments and provide legal services to Defendants is non-exclusive and the City may enter into other similar agreements with other private attorneys as may be deemed reasonably necessary to provide legal services to criminal Defendants.

4.11 Reports, Auditing and Evaluation. Attorney must maintain current case logs, disposition records, time sheets, and provide written reports containing sufficient and pertinent information requested and required by the Presiding Judge for the purpose of audit and evaluation of Attorney under this Agreement. Monthly statistical reports must be submitted on forms approved by the Court and must accompany monthly invoices. The Presiding Judge and the Agreement

Administrator reserves the right to revise the information required on the format of the monthly statistical form at any time. Any such revision will operate prospectively. Failure to provide accurate and timely statistics may result in the City withholding payment to the Attorney until Attorney complies with reporting requirements.

4.12 Continuing Representation. It is understood by Attorney that the duty to represent an assigned Defendant continues until the case is terminated by dismissal, acquittal, sentencing, or satisfaction of appeal except that Attorney will be required to continue to represent Defendant for any restitution or other hearing set at the time of sentencing. The date that a case is assigned to the Attorney will be the sole factor in determining an Attorney's continuing obligation to provide legal representation under this Agreement. The obligation to provide legal representation in a case under this Agreement will continue until a case is closed regardless of the length of time necessary to complete the case after the Agreement is terminated. In the event Attorney's Agreement expires and is not renewed at the end of the Agreement period, or if for any other reason it is terminated by either party to this Agreement, then Attorney must remain obligated to provide legal representation and to report to the Court in all cases assigned during the Agreement year, or assigned up to the date the Agreement was terminated. Attorney further understands that some cases will not so terminate until after the expiration date of this Agreement or termination of Agreement, and that Attorney is obligated to provide continued representation to assigned defendants until their cases are terminated as described in this paragraph.

**5. Termination.**

5.1 By City. This Agreement may be terminated by the City, without cause and for convenience, by a 30 day written notice of termination. In the event of termination for convenience, City's sole obligation to Attorney will be to pay the fees incurred for services performed as of the date of termination, except as provided below.

5.2 By Attorney. Attorney may terminate this Agreement upon a 60 day written notice of termination to the Presiding Judge or the Court Administrator.

5.3 For Cause. The City may also terminate this Agreement without notice for cause. Any of the following may constitute an event of default by Attorney which may constitute cause and entitle the City to terminate this Agreement immediately without notice for: (a) failure to comply with any of the terms and conditions of this Agreement, including but not limited to, all the reporting requirements in this Agreement; (b) unsatisfactory performance in the opinion of the Agreement Administrator or judges; (c) failure to maintain malpractice insurance; (d) failure to abide by current rules of professional ethics; (e) performance that falls below the guidelines set by the Arizona Supreme Court for legal services; (f) suspension or disbarment by the Arizona Supreme Court; and (g) failure to provide the City,

upon request, reasonable assurances of future performance. In the event of termination for cause, the City will not be liable to Attorney for any damages sustained by reason of the default which gave rise to the termination, and the Attorney will be liable to the City for any and all damages sustained by the City by reason of the default which gave rise to the termination.

5.4 Conflicts of Interest. This Agreement is subject to the provisions of A.R.S. § 38-511. It may be canceled by the City, without penalty or further obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating this Agreement on behalf of the City is, at any time while this Agreement, or any extension, is in effect, Attorney's employee, agent or consultant, or consultant to the City with respect to the subject of this Agreement.

5.5 Funds Appropriation Contingency. If funds are not appropriated by the City Council for payment of charges hereunder, the City may terminate this Agreement.

**6. Insurance.** Attorney will provide the Court Administrator a certificate of insurance for malpractice coverage in an amount not less than $100,000/$300,000 within ten days of award. The deductible will be displayed on the certificate. The Court Administrator may require a financial statement so as to evidence the ability of the Attorney to fund the deductible. Insurance must remain in force during the Term of this Agreement. In the event the Attorney's insurance is terminated, Attorney must immediately notify the Court Administrator and this Agreement may be terminated. Insurance coverage must be written through a carrier possessing an A.M. Best rating of not less than A-.

**7. General Conditions.**

7.1 Modification of Agreement. This Agreement will be deemed modified to comply with any subsequent changes regarding indigent representation imposed by case law or rules promulgated by the Arizona Supreme Court.

7.2 Indemnification. Attorney will defend, indemnify, and hold harmless the City and any of its departments, agents, officers, and employees from all damages, claims, or liabilities and expenses, including attorney fees, arising out of or resulting from the performance of professional services under this Agreement and caused by any error, omission or negligent act of the Attorney, or anyone for whose acts the Attorney is legally liable.

7.3 Waiver of Liens. Attorney expressly waives any and all Attorney's liens that may arise in the course of performance under this Agreement.

7.4 Independent Contractor. The relationship created herein between Attorney and the City will be solely that of independent contractor, and nothing contained herein may be construed to create a relationship of principal/agent, employer/employee, partnership, joint venture, or any relationship of any kind other than independent contractor.

7.5 Integration. Except as stated herein, this Agreement constitutes the entire understanding of the parties and no representation or agreements, oral or written, made prior to this execution will vary or modify the terms herein.

7.6 Governing Law. This Agreement will be governed and interpreted according to the laws of the State of Arizona.

7.7 Amendments. Any amendment or modification of the terms of this Agreement must be in writing and signed by the parties.

7.8 Assignment. Services covered by this Agreement will not be assigned in whole or in part, except as necessary to provide for substitution of counsel as required herein.

7.9 Time of the Essence. Time is of the essence with respect to fulfillment of all obligations set forth herein.

7.10 Public Record. Attorney is hereby informed that this Agreement is a public record and is subject to full disclosure under Arizona law.

7.11 Agreement Administrator. The Agreement Administrator for the City will be the Presiding Judge or his/her designee. The Agreement Administrator will oversee performance of this Agreement, audit billings, and approve payments. The Attorney will submit reports, notices, requests, and other correspondence to the Agreement Administrator.

7.12 Immigration Law Compliance.

a. Attorney, and on behalf of any substitute attorney, warrants, to the extent applicable under A.R.S. § 41-4401, compliance with all federal immigration laws and regulations that relate to their employees as well as compliance with A.R.S. § 23-214(A) which requires registration and participation with the E-Verify Program.

b. Any breach of warranty under this section is considered a material breach of this Agreement and is subject to penalties up to and including termination of this Agreement.

c. City retains the legal right to inspect the papers of any Attorney or substitute attorney who performs work under this Agreement to ensure that the Attorney or any substitute attorney is compliant with the warranty under this section.

d. City may conduct random inspections, and upon request of City, Attorney shall provide copies of papers and records of Attorney demonstrating continued compliance with the warranty under this section. Attorney agrees to keep papers and records available for inspection by the City during normal business hours and will cooperate with City in exercise of its statutory duties and not deny access to its business premises or applicable papers or records for the purposes of enforcement of this section.

e. Attorney agrees to incorporate into any subcontracts under this Agreement the same obligations imposed upon Attorney and expressly accrue those obligations directly to the benefit of the City. Attorney also agrees to require any substitute attorney to incorporate into each of its own subcontracts under this Agreement the same obligations above and expressly accrue those obligations to the benefit of the City.

f. Attorney's warranty and obligations under this section to the City is continuing throughout the Term of this Agreement or until such time as the City determines, in its sole discretion, that Arizona law has been modified in that compliance with this section is no longer a requirement.

g. The "E-Verify Program" above means the employment verification program administered by the United States Department of Homeland Security, the Social Security Administration, or any successor program.

7.13 Foreign Prohibitions. Attorney certifies under A.R.S. §§ 35-391 et seq. and 35-393 et seq., that it does not have, and during the Term of this Agreement will not have, "scrutinized" business operations, as defined in the preceding statutes, in the countries of Sudan or Iran.

**ATTORNEY:**

Cary Lackey,
Attorney at Law

**CITY OF GLENDALE:**

Honorable Elizabeth R. Finn
Presiding City Judge

ATTEST:

City Clerk (SEAL)

APPROVED AS TO FORM:

City Attorney



(06/16/11)