Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

SCOTT SOSEBEE
Deputy Director
Information Technology

VERISE V. CAMPBELL
Deputy Director
Foreclosure Mediation

MEETING NOTICE AND AGENDA

Name of Organization:

Indigent Defense Commission

VIDEOCONFERENCE

Date and Time of Meeting: Monday, November 28, 2011, 10:00 a.m.

Place of Meeting:

Carson City	*Las Vegas*	*Reno*
Nevada Supreme Court 201 South Carson Street Law Library, Room 107	Regional Justice Center 200 Lewis Avenue 17th Floor, Room A	Second Judicial District Court 75 Court Street Grand Jury Room 220

Teleconference Dial-In Instructions:
Dial-In # 1-877-336-1829
Access Code: 2469586

AGENDA

I. Call to Order
   a. Call of Roll and Determination of a Quorum
   b. Approval of Meeting Summary from March 21, 2011, Meeting (for possible action)
   c. Housekeeping: Please Turn Off Cell Phones, etc.

II. Washoe County Early Case Resolution (ECR) Program (for possible action)

III. Indigent Defense Data Collection (for possible action)
   a. Discuss Party (ies) responsible for data collection

IV. Urban Plans for the Provision of Appointed Counsel (for possible action)
   a. Plan Review and Amendment Process

V. Flat Fee Contracts (for possible action)
   a. Possible Ban
   b. Regulation

VI. Future of Indigent Defense Commission (for possible action)
   a. Creation of Independent Oversight Commission

VII. Next Meeting Date and Location

VIII. Public Comment

Because of time considerations, the period for public comment by each speaker may be limited, and speakers are urged to avoid repetition of comments made by previous speakers.

IX. Adjournment

Pre-Agenda Notices

- Agenda items may be taken out of order at the discretion of the Chair in order to accommodate persons appearing before the Commission and/or to aid in the time efficiency of the meeting.
- If members of the public participate in the meeting, they must identify themselves when requested under agenda item one. Public comment is welcomed by the Commission but may be limited to five minutes per person at the discretion of the Chair.
- Action items are noted by "for possible action" and typically include review, approval, denial, and/or postponement of specific items. Certain items may be referred to a subcommittee for additional review and action.
- The Commission is pleased to provide reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If assistance is required, please notify Commission staff by phone or by email no later than two working days prior to the meeting, as follows: John McCormick, (775) 687-9813 or email: jmccormick@nvcourts.nv.gov

Notice of this meeting was posted in the following locations: Nevada Supreme Court website: www.nevadajudiciary.us; Carson City: Supreme Court Building, Administrative Office of the Courts, 201 South Carson Street; Las Vegas: Regional Justice Center, 200 Lewis Avenue, 17th Floor.

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MEETING SUMMARY

Prepared by John McCormick

INDIGENT DEFENSE COMMISSION (IDC)

Friday, March 11, 2011
Videoconference*
Regional Justice Center, 17th Floor Courtroom, Las Vegas
Supreme Court Building, Library Room 107, Carson City
2nd Judicial District Courthouse, Room 214, Reno
2:00 p.m.

Attendees

Associate Chief Justice Michael A. Cherry, Chairman
Judge Karen Bennett-Haron
Judge Steve Dahl
Judge Kevin Higgins
Judge Anne Zimmerman
Nancy Becker
John Berkich
Jeremy Bosler
David Carroll
Drew Christensen
Diane Crow
Franny Forsman
Wes Henderson
John Helzer
Phil Kohn
Jennifer Lunt
Tammy Rianda
David Schiek

AOC Staff

Stephanie Heying
Hans Jessup
John McCormick
Robin Sweet

I. Call to Order

Chairman Cherry called the meeting to order at 2:05 p.m., and asked everyone to introduce themselves.

II. Approval of October 13, 2010 Summary

The summary of October 13, 2010, was approved as published.

III. Audit of IDC Voting Members

John McCormick indicated that a membership list is included in the meeting materials and went over the list to compare it to the members added by ADKT 411 Orders from the Court thus far. He said it is a staring place for a discussion on revising the voting membership of the IDC. Franny Forsman commented that she asked for this agenda item to be included, as she thinks that the district attorneys may be over represented in voting when compared to the number of representatives afford their Association in the ADKT 411 Orders. The group discussed issues of district attorney representation and voting rights on the IDC as well as the general size of the IDC. The opinion that the district attorneys are obstructing the progress of the IDC was voiced.

Justice Cherry said that there should be three district attorney representatives on IDC; one from Washoe County, on from Clark County, and one from Rural Nevada.

The group further discussed possible revisions to the make up of the IDC membership. Concerns were voiced that the IDC no longer functioned as a commission to improve public defense, but rather a planning commission because of the inclusion of persons whose primary concern is to save money. Justice Cherry reminded everyone that regardless of the makeup of vote of the IDC that the 7 Supreme Court Justices would ultimately have to approve any recommendations. Justice Cherry suggested requesting an ADKT 411 hearing to discuss these matters further.

Justice Cherry indicated that he and Mr. McCormick would review and revise the IDC membership list.

IV. Implementation of Data Collection with Approved Dictionary

Justice Cherry asked Ms. Forsman and Nancy Becker for their input as to the implementation of data collection procedures. Ms. Forsman commented that she thinks now is the time for the Supreme Court to issue an Order requireing the courts to collect the data contemplated in the dictioanry.

Ms. Becker asked Robin Sweet to let the group know what elements of the indigent defense data the courts already keep under the Uniform System for Judicial Records (USJR).

Ms. Sweet directed everyone's attention to the data collection worksheet in the meeting packet, and indicated that the courts are currently asked to keep a 'beginning pending' case count; however, due to limitations with case management systems, this is an area of low compliance. Ms. Sweet commented that 'new appointments' on line 2 is not currently being tracked. She said that 'returned from warrant' on line 3 is currently required but is not being collected very well due to similar case management system issues as 'beginning pending'. She said that the courts are currently tracking 'adjudicated/disposed/closed' as reflected on line 4. She said that 'warrants' on line 5 are not being tracked and that 'end pending' is the same as 'beginning pending'. She said 'set for review' is not currently collected would be collected in USJR Family and Juvenile Phase II.

Ms. Sweet commented that the courts are currently counting a number of the additional statistics including: death penalty cases, probation evocations, and informal juvenile hearings. She said that the courts are most probably currently counting juvenile detention hearings as a part of the informal hearing count. She commented that the specialty courts collect their case statistics, but said that conflict cases and justice court reductions are new counts.

The group discussed case counting at the municipal court level.

Ms. Sweet said she is concerned that the courts may not be the best place to capture this information and suggested that the defender offices may be better equipped to track this data.

Ms. Forsman commented that she does not understand how the courts could not have the capacity to collect this data, and she indicated that if the data is collected by the public defenders the district attorneys will most likely reject the data. Judge Dahl indicated that courts are currently only counting cases and do not track the attorney on any given case.

David Carroll commented that the Court should just require the courts to collect the data and they will find a way. Ms. Sweet responded that collection of USJR data has been a long standing Court ordered requirement, and yet a number of courts are still unable to comply. She said that it will be a very difficult task, and that the money is extremely tight.

Ms. Sweet said that she understood that the reason that there had been so much time and effort expended on creating data definitions was so that everyone could agree on the data regardless of who collects it.

Diane Crow said that there is already a statutory requirement in NRS 180 or NRS 260 that all public defenders keep statistics and report them to the Legislature.

The group discussed various issues and methodologies related to data collection. Ms. Becker commented that data should not be tracked on an individual basis. Judge Zimmerman commented that the judge may be the best person to track the data on a random sample basis.

Ms. Forsman suggested that each court in the State be required to submit a plan to the Court for implementation of data collection. The group discussed this idea.

Ms. Sweet suggested that she and her staff develop work sheets and resources for data collection and that theses documents be sent out under a cover memo from Justice Cherry asking each jurisdiction to develop a plan for data collection.

Ms. Becker commented that all entities (the courts, the district attorneys, and the public defenders) should all be counting cases in the same way. Mr. Kohn pointed out that there has been some issue with applying the definition of case to all three entities. There was discussion that the district attorneys are moving in this direction.

Justice Cherry indicated that he and AOC would work on a memo to send to the counties asking for a data plan. He also requested that the folks in Clark County meet with him to go over what data they are currently collecting and what they have available. April 15 was set as the date for this meeting. He indicated that he would set up a meeting with the Washoe County folks in the future.

V. Possible Ban of Flat Fee Contracts

Justice Cherry indicated that he had reviewed David Carroll's letter on the subject and that it was excellent. He pointed out that the counties are currently fighting for financial survival and that this may inhibit action.

The group discussed the issue of banning flat fee contracts, and the perceived problems with flat fee contracts.

Justice Cherry suggested putting this topic on an ADKT hearing before the Court. He also commented that this issue may be litigated at some point.

Justice Cherry adjourned the meeting.

WASHOE COUNTY

"Dedicated To Excellence in Public Service"
www.washoecounty.us

CM/ACM
Finance
DA
Risk Mgt.
HR
Other

STAFF REPORT
BOARD MEETING DATE: August 9, 2011

DATE: July 28, 2011

TO: Board of County Commissioners

FROM: John Berkich, Assistant County Manager
Richard Gammick, District Attorney

THROUGH: Katy Simon, County Manager

SUBJECT: Approve Agreement for Provision of Legal Services to Indigent Defendants between the County of Washoe and Washoe Legal Services [not to exceed $80,000] for a six-month pilot period effective September 1, 2011, with the option to renew for an additional term; and if approved, authorize Chairman to execute Agreement. (All Commission Districts.)

SUMMARY

On June 28, 2011 staff and the District Attorney (DA) presented an update on the program to the Board and received direction to develop a contract with Washoe Legal Services (WLS) to implement a pilot program. Staff and WLS have developed the attached agreement, proposed budget for Board consideration and approval. The contract is to become effective September 1, 2011 for a six-month period ending February 28, 2012 with an option to renew for an additional term.

PREVIOUS ACTION

June 28, 2011 – the Board received and update on the program and received direction to develop a contract with WLS for a pilot program

BACKGROUND

On June 28, 2011 staff and the DA presented an update on the program to the Board and received direction to develop a contract with WLS to implement a pilot program. Staff and WLS have developed the attached agreement, proposed budget and business plan for Board consideration and approval. The contract is to become effective September 1, 2011 for a six-month period ending February 28, 2012 with an option to renew for an additional term.

As proposed, once developed and fully-operational, this program may process up to approximately 2000 cases each year and provide for numerous benefits to both defendants and the County as discussed with the Board

Under this proposed contract, WLS would agree to:

- Provide all the necessary personnel including attorneys and support staff
- Provide all facilities and equipment
- Provide all management and administration

AGENDA ITEM # 6D(3)

- Provide all legal services for the early resolution of felony and misdemeanor cases

The County would agree to:

- Provide all funding for startup costs and operating expenses, not to exceed $80,000 for a pilot project period of six months. (WLS estimated budget (attached) is for $87,323 but agrees to the cap.)
- Fully cooperate with WLS in the design and development of the program and its ongoing operation.
- Collaborate with WLS in a comprehensive assessment of the program at the six month interval using performance measures which include:
  - Reduced jail days
  - Reduced court continuances
  - Reduced caseloads in the DA, PD and APD offices
  - Reduced transportation costs at the SO
  - Earlier resolution of cases

In summary, staff and the DA request Board approval of this contract to develop a pilot program for the proposed ECR program with WLS and return prior to the expiration of the contract with a performance report and a recommendation to renew or terminate the contract.

FISCAL IMPACT

Costs would be posted to the Conflict Counsel FY 11-12 budget C101010, GL 710839 Court Appointed Attorneys. Funding would not to exceed $80,000 for a six-month pilot program and will require a transfer from Contingency if savings are not sufficient to cover the pilot program costs.

RECOMMENDATION

Approve Agreement for Provision of Legal Services to Indigent Defendants between the County of Washoe and Washoe Legal Services [not to exceed $80,000] for a six-month pilot period effective September 1, 2011, with the option to renew for an additional term; and if approved, authorize Chairman to execute Agreement.

POSSIBLE MOTION

Motion to approve an Agreement for Provision of Legal Services to Indigent Defendants between the County of Washoe and Washoe Legal Services [not to exceed $80,000] for a six-month pilot period effective September 1, 2011, with the option to renew for an additional term; and if approved, authorize Chairman to execute Agreement.

(All Commission Districts.)

AGREEMENT FOR PROVISION OF LEGAL SERVICES
TO INDIGENT DEFENDANTS

This Agreement, is made and entered into this 9th day of August, 2011, by and between WASHOE COUNTY, a political subdivision of the State of Nevada (hereinafter "County"), and WASHOE LEGAL SERVICES, a Nevada non-profit corporation (hereinafter "WLS").

WHEREAS, the Sixth Amendment to the United States Constitution requires states to provide competent legal defense to indigent persons; and.

WHEREAS, the State of Nevada has delegated its responsibility to provide indigent defense to the counties: and

WHEREAS, in 1997 Washoe County created the first Early Case Resolution (ECR) program which provided expedited due process to thousands of defendants over a period of eleven years during which no successful challenge was ever made against the program; and

WHEREAS, the ECR program was suspended by the Washoe County Public Defender in February 2008, subsequent to the Supreme Court order in ADKT No. 411 and the County and District Attorney now seek to reintroduce the program to minimize the overall indigent caseload;

NOW, THEREFORE, the parties agree as follows:

1. WLS agrees to provide the necessary counsel and support services and all equipment and administrative costs for a period of six months to provide for a pilot program to provide indigent legal services contemplated by the ECR program.

2. Amount of Compensation to be Paid: In consideration of the indigent legal defense and ECR services provided by WLS , County agrees to pay WLS $80,000.00 for the provision of said services for a six-month pilot period. The payments shall be made to WLS on a monthly basis at the address set forth below in six equal payments during the term.

3. Term of Agreement: This Agreement shall be effective on September 1, 2011 and shall remain in effect for a period of six (6) months. The Agreement may be renewed for additional term upon written agreement of both parties entered into before the expiration date of February 28, 2012. This Agreement may be terminated immediately if WLS fails to perform its obligation hereunder, upon thirty days written notice by the County given in accordance with paragraph eight below and a subsequent failure to cure by WLS within a reasonable period of time.

4. Relationships Created: The parties understand and agree that no attorney-client relationship is created under this Agreement between WLS and the County. It is the

intention of the parties only that WLS shall provide the services and assistance outlined in this Agreement, and that the only attorney client relationship that arises from the services provided hereunder shall be between the attorney employed by WLS and the individual represented.

5. Procedure for Provision of Services: The obligation of WLS to provide legal counsel services hereunder shall accrue upon appointment to a case by the Justice Court and a subsequent identification of the case as appropriate for inclusion in the ECR program and shall continue until an order is entered by the Court relieving WLS of its obligation or the case is dismissed.

6. Indemnification and Insurance Requirements: Contractor shall save, hold harmless, and indemnify County, its officers, agents and employees, from and against all claims, causes of action, liabilities, expenses and costs, including reasonable attorneys' fees, for injury or death of any person or damage to property arising out of, or connected with, work performed under this Agreement which is the result of any acts or omissions, whether negligent or otherwise, of Contractor, its officers, agents, subcontractors or employees.

County shall not provide any insurance coverage of any kind for Contractor or Contractor's employees or contract personnel. Contractor shall procure and maintain Professional Liability insurance in the amount of **$1,000,000.00** to cover Contractor's activities with respect to services provided pursuant to this Agreement. This insurance coverage shall remain in force for the duration of this contract.

7. Notices: Any notice to be provided to a party under this Agreement shall be made by ordinary mail (effective three days after deposit in an approved U.S. Mail facility), or by hand delivery as follows:

To the County: Washoe County Manager
P.O. Box 11130
Reno, Nevada 89520

To Washoe Legal Services: Executive Director
650 Tahoe Street
Reno, Nevada 89509

8. Condition of Funding For Enforcement of Agreement: As required by N.R.S. 244.320 and N.R.S. 354.626, the parties acknowledge that the participation of the County in this Agreement is contingent upon the appropriation of public funds to support the activities described herein and that the Agreement will terminate if the appropriation of funds does not occur. In this event, immediate written notice of termination will be given in accordance with paragraph eight above.

9. Sole Agreement: This Agreement contains all the commitments and agreements of the parties related to indigent legal defense and ECR services, and oral or written

commitments not contained herein shall have no force or effect to alter any term or condition of this Agreement, unless modified in accordance with paragraph eleven below.

10. Amendment: This Agreement may be amended or modified only by the mutual written agreement of the parties which has been ratified in accordance with law.

11. Severability: In case any one or more of the terms, sentences, paragraphs or provisions contained herein shall for any reason be held to be invalid, illegal, or non-enforceable, in any respect, such invalidity, illegality, or non-enforceability shall not affect any other terms, sentences, paragraphs, or provisions and this Agreement shall be construed as if such invalid, illegal, or non-enforceable provision had never been contained herein.

12. Waiver: A waiver of any breach of any provision of this Agreement by any party shall not be construed to be a waiver of any preceding or succeeding breach.

13. Governing Law; Venue: This Agreement shall be governed, interpreted and construed in accordance with the laws of the State of Nevada and venue for any action based upon its terms and the parties' performance thereunder shall be in the Second Judicial District Court of Washoe County.

IN WITNESS WHEREOF, the parties have set their hands with the intent to be bound.

WASHOE LEGAL SERVICES

By:_____
Executive Director

WASHOE COUNTY

By:_____
John Breternitz, Chairman,
Washoe County Board of Commissioners

ATTEST:

_____
County Clerk

EXHIBIT A
YEARLY ECR Budget

			ANNUAL Total	Six Month Total
Staff & Benefits				
Attorney (includes Benefits and Taxes)			$ 88,386	$ 44,193
Part-time Assistant (includes taxes)			$ 21,530	$ 10,765
Administration				
Executive Director- Allocation	5%	$ 135,000	$ 7,830	$ 3,915
CFO-Allocation	5%	$ 82,000	$ 4,756	$ 2,378
Other Expenses				
Occupancy Expenses (Includes rent @.75 per square foot, utilities, telephone and janitorial)			$ 14,010	$ 7,005
Translation services			$ 12,000	$ 6,000
Office Supplies			$ 2,500	$ 1,250
IT Expense			$ 3,000	$ 1,500
Postage and Delivery			$ 500	$ 250
Professional Fees/Expenses (includes Training, Professional Dues, Subscriptions and Library)			$ 3,100	$ 1,550
Miscellaneous Expenses			$ 500	$ 250
Workmans Comp Insurance			$ 135	$ 68
Professional Liability Insurance			$ 1,500	$ 750
Payroll Processing Fees			$ 300	$ 150
			$ 160,047	$ 80,023

Start Up Costs not to exceed $7,500:	
2 Computers & Software	$ 3,000
2 Printers	$ 300
Furniture	$ 1,500
Filing Cabinets	$ 500
2 Phones	$ 1,000
Wiring and installation of computers/phones	$ 1,000
	$ 7,300

August 19, 2011

The Honorable Michael Cherry, Justice
Nevada Supreme Court
201 South Carson Street, Suite 250
Carson City, Nevada 89701-4702

Dear Justice Cherry,

I write to you in your capacity as Chair of the Nevada Supreme Court Indigent Defense Commission. On August 9, 2011, the Washoe County Board of County Commissioners approved an $80,000 six-month flat fee contract with Washoe Legal Services (WLS) to provide Sixth Amendment right to counsel services starting September 1, 2011 in a reconstituted version of the county's early case resolution program (ECR).[1] The Washoe County Public Defender had previously determined that his office could not provide adequate representation in the ECR program and still meet the requirements of the Nevada Supreme Court ordered performance standards (ADKT-411 - January 4, 2008). This contract violates the Supreme Court's ADKT-411 order and national standards of justice, as discussed below.

The Contract violates ADKT-411

In order to address the longstanding need for independence of the defense function in Nevada,[2] ADKT-411 ordered that "each judicial district shall formulate and submit to the Nevada Supreme Court for approval by May 1, 2008, an administrative plan" that, among other requirements, provides for the "appointment of trial counsel." Hon. Connie J. Steinheimer, Chief District Judge for the Second Judicial District Court, timely filed such a plan.[3] The plan makes no mention of Washoe Legal Services as an approved provider of indigent defense services.

[1] Contract is available at: http://www.nlada.net/sites/default/files/nv_washoeecr_proposedcontract_07282011.PDF.

[2] See generally: Letter to the Nevada Supreme Court re: the Delegation of Indigent Defense Duties to Counties from The American Civil Liberties Union Foundation (ACLU), the Charles Hamilton Houston Institute for Race & Justice at Harvard University Law School, the National Association of Criminal Defense Lawyers (NACDL), the NAACP Legal Defense and Educational Fund, Inc. (LDF), and the National Legal Aid & Defender Association (NLADA). September 2, 2008. Available at: http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

[3] The Nevada Second Judicial District plan is available at: http://nlada.net/sites/default/files/nv_washoecountyrighttocounselplan_05012008.pdf

Instead, Section IV of that plan clearly states, "the District Court Judge or Justice of the Peace having jurisdiction over a case that is pending in Washoe County shall appoint the Washoe Public Defender to represent a party if … the case is of the nature described above as mandating appointment of counsel." Whereas the plan affirmatively states that all cases mandating the appointment of counsel will, in the first instance, be appointed to the Washoe Public Defender, any appointment made to any other provider in the first instance will violate the plan submitted to and approved by the Court.

The plan goes on to confirm in Section IV.B. that it is the duty of the Washoe Public Defender to determine conflicts of interest as soon as practical and that all cases with conflicts will be reassigned to the Alternate Public Defender. It is only with tertiary conflicts that cases may be assigned to the Appointed Counsel Coordinator, which under the plan submitted to the Court is the only entity that may appoint outside counsel under contract to provide right to counsel services.

Section V.B.1.b.(1) of the Second Judicial District Court plan delineates the conditions that must be met for the county to engage in a flat fee contract for these tertiary indigent defense services. "[I]f the contract is based on a flat fee basis, the contract should consider, but not be limited to, the following factors: (a) the average overhead for criminal defense practitioners in the locality; (b) the number of assignments expected under the contract; (c) the hourly rate paid for all appointed counsel; and (d) the ability of the appointed attorney to comply with the Performance Standards for Appointed Counsel as adopted."

A memorandum[4] dated July 28, 2011, prepared for the Washoe Board of County Commissioners by Assistant County Manager John Berkich and District Attorney Richard Gammick, through County Manager Kathy Simon, acknowledges that approximately 2,000 cases per year are expected to go to Washoe Legal Services in the ECR program -- or approximately 1,000 cases for the intended six-month pilot period (an absurdly low average of $80 per case[5]). In the draft contract attached to the memorandum, however, there is no mention of the "number of assignments expected under the contract" nor language indicating additional compensation would be paid should the actual number of cases exceed expectations. Both the memorandum and proposed contract are completely mute on the other requirements regarding "average overhead," "hourly rates" and, importantly, the ability of Washoe Legal Services to comply with the performance standards adopted in ADKT-411. As the contract does

[4] Memorandum is available at: http://www.nlada.net/sites/default/files/nv_washoeecr_proposedcontract_07282011.PDF.

[5] On November 24, 2010, the Iowa Supreme Court handed down a unanimous decision finding that a rigid fee cap of $1,500 per appellate case would "substantially undermine the right of indigents to effective assistance of counsel" because "[l]ow compensation pits a lawyer's economic interest … against the interest of the client." In reaching this conclusion, the Iowa Court went to great lengths to carefully analyze *Strickland v. Washington*, 466 U.S. 668 (1984). The Court determined that "the *Strickland* prejudice test does not apply in cases involving systemic or structural challenges to the provision of indigent defense counsel." The Iowa Supreme Court deserves recognition for firmly acknowledging that "[w]hile criminal defendants are not entitled to perfect counsel, they are entitled to a real, zealous advocate who will fiercely seek to protect their interests within the bounds of the law." That cannot occur without public defense attorneys having the time, tools, training and resources to treat each client's case appropriately. The decision, in essence, bans flat fee contracting for right to counsel services.

not allocate *any* funds for independent investigations of ECR cases, the likelihood of non-compliance with ADKT-411 is laid bare.

Moreover, Section V.B.1.d. of the Second Judicial District plan indicates that any "Contract Appointed Counsel shall be selected in consecutive order from the Contract attorney list by the Appointed Counsel Administrator." So even in the event that both the primary Public Defender and the Alternate Defender have conflicts with any case, the Appointed Counsel Administrator is precluded from sole sourcing every case to a single provider like Washoe Legal Services.

Section VII.A. of the plan enunciates that "[t]he services to be rendered to a person represented by appointed counsel shall be commensurate with those rendered if counsel were privately employed by the person" and "in compliance with the Performance Standards for Representation of Indigent Defendants adopted by the Supreme Court." No ethical privately-retained counsel would allow their client to accept a plea agreement without first scrutinizing and challenging the police investigation, the lawfulness of any searches and seizures, the arresting officers' tactics, the credibility of the evidence, and the district attorney's theory of the case. Moreover, the primary Public Defender and Alternate Public Defender have determined that they cannot provide representation in the ECR program and still comply with the performance standards.[6] The reconstituted ECR program does not allow defense counsel the time to properly investigate the facts of a case or advise clients of the potential collateral consequences of a conviction, as required under United State Supreme Court law [*Padilla v. Kentucky*, 253 S. W. 3d 482 (2010)].

The Contract violates National Standards of Justice

Policymakers have long recognized that minimum quality standards are necessary to assure public safety in building a hospital, a school, or a bridge. The taking of a person's liberty merits no less consideration.

Each client is constitutionally entitled to be represented by a public defense attorney who has sufficient time and resources to fulfill the basic requirements of attorney performance on behalf of that client. In over-simplified terms, this means the attorney is able to, among other things: meet and interview the client; prepare and file necessary motions; receive and review the prosecution responses to motions; conduct a factual investigation, including locating and interviewing witnesses; engage in plea negotiations with the state; prepare for and enter a plea or conduct the trial; and prepare for and advocate at the sentencing proceeding when there is a guilty plea or conviction following trial. The performance standards adopted by the Nevada Supreme Court reflect this basic premise.

[6] NRS 260.050(3) requires public defense attorneys to "[c]ounsel and defend [the person] at every stage of the proceedings, including revocation of probation or parole" and to "[p]rosecute … any appeals or other remedies before or after conviction that he considers to be in the interests of justice." Indeed, any program that requires counsel to represent a client solely to proffer a plea agreement, only then to withdraw from further representation if the client elects to exercise his right to trial, also violates state law.

Just as there are parameters for ethical criminal defense attorney performance, so too are there minimum standards that every *system* must meet – else the attorneys provided by that system will not be able to fulfill their performance requirements. Foundational standards set the limits below which no public defense system should fall.

The use of national standards of justice to guarantee constitutionally adequate representation meets the demands of the United States Supreme Court. In *Wiggins v. Smith*, 539 US 510 (2003), the Court recognized that national standards, specifically those promulgated by the ABA, should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney practices in an environment that provides her with the time, resources, independence, supervision, and training to effectively carry out her charge to adequately represent her clients. *Rompilla v. Beard*, 545 US 374 (2005) echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."[7]

The American Bar Association's *Ten Principles of a Public Defense Delivery System (Ten Principles)* present the most widely accepted and used compilation of national standards for public defense systems. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous national standards to their most basic elements, which officials and policymakers can readily review and apply. In the words of the ABA Standing Committee for Legal Aid & Indigent Defendants (ABA/SCLAID), the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."[8] United States Attorney General Eric Holder called the ABA *Ten Principles* the basic "building blocks" of a functioning public defense system.[9]

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[7] Citation to national public defense standards in court decisions is not limited to capital cases. See, for example: 1) *United States v. Russell*, 221 F.3d 615 (4th Cir. 2000) (Defendant was convicted of prisoner possession of heroin; claimed ineffective assistance of counsel; the court relied, in part on the ABA Standards to assess the defendant's claim); 2) *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1993) (Defendant convicted of being a felon in possession of a weapon; filed appeal arguing, in part, ineffective assistance of counsel. Court stated: "In addition, under the *Strickland* test, a court deciding whether an attorney's performance fell below reasonable professional standards can look to the ABA standards for guidance. *Strickland*, 466 U.S. at 688." And, "[w]hile *Strickland* explicitly states that ABA standards 'are only guides,' *Strickland*, 466 U.S. at 688, the standards support the conclusion that, accepting Blaylock's allegations as true, defense counsel's conduct fell below reasonable standards. Based on both the ABA standards and the law of the other circuits, we hold that an attorney's failure to communicate the government's plea offer to his client constitutes unreasonable conduct under prevailing professional standards."); 3) *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990) (Defendant pleaded guilty to conspiracy to violate the Arms Control Export Act. The court followed the standard set forth in *Strickland* and looked to the ABA Standards as a guide for evaluating whether defense counsel was ineffective.)

[8] American Bar Association. *Ten Principles of a Public Defense System*, from the introduction, at: http://bit.ly/ggLidF.

[9] United States Attorney General Eric Holder. *Address Before the Department of Justice's National Symposium on Indigent Defense: Looking Back, Looking Forward 2000-2010.* Washington, DC February 18, 2010. http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html.

The ABA *Ten Principles* reflect interdependent standards. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction's compliance with each of the ten criteria and dividing the sum to get an average "score." For example, just because a jurisdiction has a place set aside in the courthouse for confidential attorney/client discussions (*Principle 4*)[10] does not make the delivery of indigent defense services any better from a constitutional perspective if the appointment of counsel comes so late in the process (*Principle 3*),[11] or if the attorney has too many cases (*Principle 5*),[12] or if the attorney lacks the training (*Principles 6 & 9*),[13] as to render those conversations ineffective at serving a client's individualized needs. In other words, a system must meet the minimal requirements of *each and every* of the *Principles* to be considered adequate.

The first of the ABA *Principles* requires an independent non-partisan oversight board, whose members are appointed by diverse authorities, and which is responsible for all aspects of indigent defense services. In this way, no single official, branch of government, or political party has unchecked power over the public defense function. Both the overall public defense system and the individual attorneys who work within it are then free from fear of political reprisal and are able to carry out their constitutional duties to the clients of the system, unfettered by competing allegiances. In this way, policymakers can guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are based solely on the factual merits of the case and ***not*** on a public defender's desire to please a judge or a county administrator or a district attorney in order to maintain his or her job.

This national standard reflects the demands of the United States Supreme Court in *Polk County v. Dodson*, 454 U.S. 312 (1981). The United States Supreme Court stated in that case that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages," noting that a "public defender is not amenable to administrative direction in the same sense as other state employees" and that a "defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client."

[10] ABA *Principle* 4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

[11] ABA *Principle* 3: Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

[12] ABA *Principle 5*: Defense counsel's workload is controlled to permit the rendering of quality representation.

[13] ABA *Principle* 6: Defense counsel's ability, training, and experience match the complexity of the case. ABA *Principle* 9: Defense counsel is provided with and required to attend continuing legal education.

Though the Second District Court Plan section V.A.1.a. calls for a five-person Appointed Counsel Selection Committee to oversee the tertiary appointed counsel system, Washoe County has no independent board overseeing all of indigent defense services. It should be noted, however, that the members of the Appointed Counsel Selection Committee cannot be "directly related to the judiciary or any prosecution function;" an attempt to insulate at least part of the system from undue political interference. Simply put, the Washoe County contract with Washoe Legal Services violates both *Polk County* and the ABA *Ten Principles* by authorizing a prosecutor to hand-select opposing counsel, as is made clear by the District Attorney's July 28, 2 011 memorandum to the Board of County Commissioners.

The contract also violates the eighth of the ABA *Ten Principles,* which explains that "[c]ontracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services." In short, fixed-fee contracts create a direct financial conflict of interest between the attorney and each client. Because the lawyer will be paid the same amount, no matter how much or little he works on each case, it is in the lawyer's personal interest to devote as little time as possible to each appointed case, pocketing the fixed fee and using his time to do other more lucrative private work (particularly so in the circumstances of this contract where the compensation is anticipated to average only $80 per case).

Conclusion

To reiterate, the contract between Washoe County and Washoe Legal Services to provide services in the county's ECR program violates the Nevada Supreme Court's ADKT-411 order and national standards of justice. The Court needs to intercede.

I respectfully request that the Court issue a letter to the Chief Judge of the Second Judicial District advising that the Supreme Court expects the local judiciary to comply with the Second Judicial District Court indigent defense administrative plan, which they submitted per ADKT-411 on May 1, 2008.

And, whereas the state needs to fulfill its "constitutional obligation to respect the professional independence of the public defenders whom it engages," the Court should also issue an order precluding anyone directly related to any prosecution or law enforcement function from any oversight and/or administration of right to counsel services at any stage of any proceeding, including, but not limited to, the selection, hiring or contracting of indigent defense counsel.

Thank you for this consideration.

Sincerely,

David J. Carroll, Director of Research
Justice Standards, Evaluations & Research Initiative
National Legal Aid & Defender Association
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Cc: The Honorable Michael L. Douglas, Chief Justice
The Honorable Mark Gibbons, Justice
The Honorable James W. Hardesty, Justice
The Honorable Ron Parraguirre, Justice
The Honorable Kristina Pickering, Justice
The Honorable Nancy M. Saitta, Justice
Nevada Supreme Court
201 South Carson Street, Suite 250
Carson City, Nevada 89701-4702

Honorable Connie Steinheimer, Chief Judge
Second District Court, State of Nevada - Washoe County
75 Court Street
Reno, Nevada 89501

INDIGENT DEFENSE DATA DICTIONARY
Phase I, Indigent Defense Commission Approved Version, October 14, 2010

OBJECTIVE: To identify and define basic data elements for counting of cases assigned to appointed or indigent defense counsel. Phase I is expected to define those basic cases assigned and disposed categories necessary to begin understanding the caseload of appointed counsel. Future phases will expand data elements to be captured by counsel.

CASES APPOINTED
Appointment: Any time a lawyer is asked or assigned to act on behalf of a person in a criminal or juvenile matter by a judicial officer. An appointment ends when a lawyer is no longer involved in a case for whatever reason. There can be multiple appointments for a single defendant/case during the duration of the case.

Unit of Count - For felony, gross misdemeanor, and misdemeanor criminal cases, the unit of count is a single defendant on a single charging document (i.e., one defendant on one complaint or information from one or more related incidents on one charging document is one case, regardless of the number of counts).[1]. For juvenile cases, the unit of count is a single juvenile defendant on a single petition regardless of the number of counts. For traffic cases, the unit of count is a single case (by defendant) based on an original charging document from a single incident.

For defendants in cases whereby multiple charges are involved, courts will utilize a hierarchy (described below) when classifying the case for statistical purposes. For example, if a defendant is charged on a single charging document with a felony and a gross misdemeanor, for statistical purposes, the case is counted as a felony.

Felony and gross misdemeanor cases in Justice Court are counted when counsel is appointed to the case by the Court.

Misdemeanor and traffic cases in Justice and Municipal Courts are counted when counsel is appointed to the case by the Court.

Additional charges such as failure to appear or habitual criminal are not counted at this time because those are added after the initial charging document.

Felony Case: A subcategory of criminal cases in which a defendant is charged with the violation of a state law(s) that involves an offense punishable by death, or imprisonment in the state prison for more than 1 year.

Gross Misdemeanor Case: A subcategory of criminal cases in which a defendant is charged with the violation of state laws that involve offenses punishable by imprisonment for up to1 year and(or) a fine of $2,000.

[1] This definition varies form the national standard as promulgated by the National Center for State Courts in that it counts a single defendant on a single charging document, while the national standard counts a single defendant with a single incident/transaction. This means that the Nevada measure herein, will under report caseload at times when one defendant is charged with separate crimes from separate incidents that may necessitate indigent defense counsel to treat the appointment as multiple cases. In the event that the capacity to accurately count cases in line with the national model becomes available in Nevada, the intent of the Subcommittee is that this definition be revisited.

Misdemeanor Non-Traffic Case: A criminal subcategory in which a defendant is charged with the violation of state laws and/or local ordinances that involve offenses punishable by fine or incarceration or both, the upper limits of which are prescribed by statute (NRS 193.120, generally set as no more than 6 months incarceration and/or $1,000 fine).

Misdemeanor Traffic Case: A criminal subcategory for Justice and Municipal Courts in which a defendant is charged with the violation of traffic laws, local ordinances pertaining to traffic, or federal regulations pertaining to traffic.

Juvenile Case: A subcategory of juvenile cases that includes cases involving an act committed by a juvenile, which, if committed by an adult, would result in prosecution in criminal court and over which the juvenile court has been statutorily granted original or concurrent jurisdiction.

CASES ADJUDICATED/DISPOSED

Unit of Count - For felony, gross misdemeanor, and misdemeanor criminal cases, the unit of count is a single defendant on a single charging document (i.e., one defendant on one complaint from one or more related incidents is one case, regardless of the number of counts).[2]
A criminal case is considered disposed when final adjudication for that defendant or case occurs. For statistical purposes, final adjudication is defined as the date of sentencing, date of adjudication, or date charges are otherwise disposed, whichever occurs last. A case may be considered closed for an appointed attorney when the appointment ends regardless of adjudicatory status.

Counsel should count the case adjudicated or disposed in the same category as it was counted in (felony in, felony out).

CASELOAD INVENTORY

Unit of Count - For felony, gross misdemeanor, misdemeanor, and traffic criminal cases, the unit of count is a single defendant on a single case. The ending pending number for one month should be the beginning pending number for the next month.

Beginning Pending: A count of cases by defendant that, at the start of the reporting period, are awaiting disposition.

New Appointments: A count of cases by defendant that have been assigned counsel for the first time of each new appointment.

Warrant (Placed on Inactive Status): A count of cases in which a warrant for failure to appear has been issued, a diversion program has been ordered, or other similar incident that makes the case inactive.

[2] This definition varies form the national standard as promulgated by the National Center for State Courts in that it counts a single defendant on a single charging document, while the national standard counts a single defendant with a single incident/transaction. This means that the Nevada measure herein, will under report caseload at times when one defendant is charged with separate crimes from separate incidents that may necessitate indigent defense counsel to treat the appointment as multiple cases. In the event that the capacity to accurately count cases in line with the national model becomes available in Nevada, the intent of the Subcommittee is that this definition be revisited.

Returned from Warrant (Re-activated): A count of cases in which a defendant has been arrested on a failure to appear warrant and has appeared before the court, returned from diversion program, or other similar occurrence that makes the case active.

Adjudicated/Disposed/Closed Cases: A count of cases by defendant for which an original entry of adjudication has been entered or for which an appointment has ended.

Ending Pending: A count of cases by defendant that, at the end of the reporting period, are awaiting disposition.

Set for Review: A count of cases that, following an initial Entry of Judgment during the reporting period, are awaiting regularly scheduled reviews involving a hearing before a judicial officer. For example, if a status check hearing is ordered to review post adjudication compliance.

ADDITIONAL STATISTICS

Death Penalty: The number of defendants for which the District Attorney's Office has filed the notice of intent to seek the death penalty, in accordance with Supreme Court Rule 250.

Probation Revocations: The number of defendants for which post-adjudication criminal activity involving a motion to revoke probation due to an alleged violation of one or more conditions of probation (usually from the Department of Parole and Probation) or suspended sentence. The unit of count for revocation hearings is a single defendant, regardless of the number of charges involved. Revocation hearings are counted when the initiating document (e.g., violation report) is received by the court.

Informal Juvenile Hearing (involving a judicial officer): The number of hearings/events involving a juvenile in which no formal charge has been filed with the court. Only record an informal hearing if it is held on a matter that is not a part of an existing case. The court may impose a disposition as a result of the informal hearing.

Juvenile Detention Hearing: The number of hearings requesting a juvenile to be held in detention, or continued to be held in detention, pending further court action(s) within the same jurisdiction or another jurisdiction. Only record a detention hearing if it is held.

Conflicts: The number of defendants during the reporting period that a lawyer's appointment to case ended because of a conflict that necessitated the transfer of the case to another lawyer.

Specialty Court Cases: A count of cases in which a lawyer represents a defendant in a specialty court program, i.e., drug court or mental health court. This type of case should be counted in this additional category when the defendant appears during a specialty court session within the reporting period or if the indigent defense counsel is assigned to the defendant for specialty court.

Justice Court Felony/Gross Misdemeanor Reductions: A number of defendants for which any felony or gross misdemeanor charge was totally (and only) adjudicated in justice court.

Reporting Unit: _____

Reporting Period: _____
MMM / YYYY

Indigent Defense Caseload Inventory Worksheet

	Felony	Gross Misdemeanor	Misdemeanor Non-Traffic	Misdemeanor Traffic	Juvenile	
1. Beginning Pending	5	5	5	10	5	
2. New Appointments	1	0	3	1	3	(+)
3. Returned From Warrant (Re-activated)	1	1	1	1	1	(+)
4. Adjudicated/Disposed/Closed	0	0	4	1	3	(-)
5. Warrant (Placed on Inactive Status)	1	0	3	1	0	(-)
6. End Pending	6	6	2	10	6	
7.Set for Review						

Indigent Defense Additional Statistics

Death Penalty (S.C.R. 250) **CASES**	Probation Revocations **HEARINGS**	Informal Juvenile **HEARINGS** (Involving a Judical Officer)	Juvenile Detention **HEARINGS**	Conflicts **CASES**	Specialty Court **CASES**	Justice Court Felony/Gross Misdemeanour Reductions **CASES**

Prepared by: _____

Approved by: _____

Analysis of the Urban Court Plans for the Appointment of Counsel

2nd Judicial District Court
Substantial Compliance

8th Judicial District Court
Substantial Compliance

North Las Vegas Municipal Court

- Currently using six (6) attorneys selected 'throughout various years' approved by the City Council.
- Will have Court Administrator, City Attorney (prosecutor), and HR Director select counsel 'should a vacancy occur'.
- Paid $250 per case under flat fee contract, $200 per appeal under flat fee contract
- Presumes defendants are indigent if they are in custody
- Defendants not in custody must fill out application and Court Administration will determine if defendants meets ADKT 411 definition of indigency.

Reno Municipal Court

- Judges select counsel
- Attorneys self assign defendants
- Court Clerk reviews defendant application to determine indigency and review charges to assess risk of jail time
- Administrative judge determines necessity of requested investigative, etc. fees
- Flat fee contract

Sparks Municipal Court

- Judges select one attorney who subcontracts with other attorneys as needed
- Judge determines indigency
- Flat fee contract
- Attorneys self assign defendants
- Judge determines necessity of requested investigative, etc. fees

Las Vegas Municipal Court

- City Council/Admin administers contracts
- Selection committee selects attorneys (good committee make-up, no prosecutors or judges)
- Set qualifications
- Presumption of indigency for in-custody defendants
- Attorney reviews financial declaration and determines indigency
- Flat fee contract

Henderson Municipal Court

- Selection committee, however prosecutor included
- Set qualifications

- Presumption of indigency for in-custody defendants
- Presiding Judge reviews financial declaration and determines indigency
- Flat fee contract

NLADA
National Legal Aid & Defender Association

March 10, 2011

To: The Nevada Supreme Court
Chief Justice Douglas
Justice Cherry
Justice Saitta
Justice Gibbons
Justice Pickering
Justice Hardesty
Justice Parraguirre

Re: Flat Fee Contracts

Dear Nevada Supreme Court Justices,

The National Legal Aid & Defender Association (NLADA) presents the following discussion paper on the legal grounding for banning attorneys from entering into flat fee contracts. Although the paper highlights how two states have already banned such contracts (Washington and Iowa), you should not consider these to be the only states to have done so. The structure of right to counsel services in many states simply precludes the consideration of contracting for services and so there has been no legislative or judicial need to institute a prohibition.

The Importance & Value of National Standards of Justice

The concept of using standards to assure uniform quality is not unique to the field of indigent defense. Strong pressures on public officials from favoritism, partisanship, and/or profit all underscore the need for standards to assure quality in every facet of government. Policymakers have long recognized that minimum quality standards are necessary to assure public safety in building a hospital, school or bridge. The taking of a person's liberty merits no less consideration.

The use of national standards for justice is reflected in the mandates of the United States Supreme Court as set forth in *Wiggins v. Smith*, 539 US 510 (2003) and *Rompilla v. Beard* 545 US 374 (2005). In *Wiggins*, the Court recognized that national standards, including those promulgated by the American Bar Association (ABA), should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define what is required for counsel to be competent, addressing not only the attorney's personal abilities and qualifications, but also the systemic environment in which the attorney practices – the system that provides the time, resources, independence, supervision and training to effectively carry out the charge to adequately represent clients. *Rompilla* echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."

The American Bar Association's *Ten Principles of a Public Defense Delivery System* presents the most widely accepted and used compilation of national standards for indigent defense. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous national standards for indigent defense

systems to their most basic elements, which officials and policymakers can readily review and apply.[1] In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."[2] Our nation's top law enforcement officer, United States Attorney General Eric Holder, recently stated that the ABA *Ten Principles* are the basic "building blocks" of a functioning public defense system.[3]

Prohibition on Flat Fee Contracting

Flat fee contracting agreements are oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation,[4] and are prohibited under the ABA *Ten Principles.*[5] Fixed annual contract rates for an unlimited number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services,* written by NLADA and adopted by the ABA in 1985. Guideline III-13, entitled "Conflicts of Interest," prohibits contracts under which payment of expenses for necessary services such as investigations, expert witnesses, and transcripts would "decrease the Contractor's income or compensation to attorneys or

[1] The *Ten Principles of a Public Defense System* is based on a paper by James Neuhard, State Appellate Defender of Michigan and former NLADA President, and H. Scott Wallace, NLADA Director of Defender Legal Services, which was published in December 2000 in the *Compendium of Standards for Indigent Defense Systems* www.ojp.usdoj.gov/indigentdefense/compendium/.

[2] American Bar Association. *Ten Principles of a Public Defense System*, from the introduction. at: http://72.14.207.104/search?q=cache:li1_aP9C2sJ:www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf+ABA+Ten+Principles&hl=en&gl=us&ct=clnk&cd=1

[3] Remarks of Attorney General Eric Holder to the Department of Justice National Symposium on Indigent Defense, Feb 18, 2010. Available at http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html.

[4] See generally, Lemos, Margaret H. "Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense." New York University Law Review Vol. 75:1808 (December 2000), available at: http://www.law.nyu.edu/journals/lawreview/issues/vol75/no6/nyu606.pdf. See also *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984), in which the Supreme Court of Arizona found that the lowest bid system for obtaining indigent defense counsel in Mohave County violated the defendant's right to due process and right to counsel under Arizona and U.S. Constitutions. Citing NLADA's "Guidelines for Negotiating and Awarding Indigent Defense Contracts," and other national standards, the court found a systemic failure in low-bid contracting as: 1. The system does not take into account the time that the attorney is expected to spend in representing his share of indigent defendants; 2. The system does not provide for support costs for the attorney, such as investigators, paralegals, and law clerks; 3. The system fails to take into account the competency of the attorney. An attorney, especially one newly-admitted to the bar, for example, could bid low in order to obtain a contract, but would not be able to adequately represent all of the clients assigned; and, 4. The system does not take into account the complexity of each case.

[5] ABA *Principle* 8 states: "Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services."

other personnel."[6] Flat fee contracts are at the root of much of the caseload crisis in Nevada's rural counties.

In January 2009, the Washington Supreme Court banned indigent defense providers from entering into flat fee contracts because of the inherent conflict of interest it produces between a client's right to adequate counsel and the attorney's personal financial interests.[7]

[6] The same guideline addresses contracts which simply provide low compensation to attorneys, thereby giving attorneys an incentive to minimize the amount of work performed or "to waive a client's rights for reasons not related to the client's best interests."

[7] RULE 1.8 - CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES "… (m) A lawyer shall not: (1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm: (i) to bear the cost of providing conflict counsel; or (ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel; or (2) knowingly accept compensation for the delivery of indigent defense services from a lawyer who has entered into a current agreement in violation of paragraph (m)(1)."

The decision was the result of the great disparity of services provided by Washington's counties. For example, King County, Washington (Seattle) has a high quality indigent defense system. Poor people charged with crimes in Seattle are assigned to one of four independent, non-profit private law firms that contract with the county to provide right to counsel services. The contracts with the county government limit the number of cases to reasonable levels. If, for instance, the district attorney's office finds reason to charge a defendant with a crime carrying the possibility of a death sentence, the public defender automatically receives additional money from the county to put two attorneys solely on that one case until its completion. Oftentimes this results in the public defender offering mitigation evidence to the prosecutor in advance of a formal filing of death penalty charges to persuade law enforcement that it is not in the best interest of justice to continue to pursue death as a sentencing option. The executive director of at least one office is clearly seen as an equal partner in the administration of justice and the setting of criminal justice policy.

Contrast that with Grant County, Washington — a jurisdiction of approximately 80,000 that is situated two counties east of King County. Grant County contracted with a single public defender to administer the indigent defense caseload for a predetermined dollar amount — regardless of the number of cases opened within that year — as a means of controlling rising criminal justice costs. The public defender administrator retained the authority to farm out any portion of the work for whatever price he could negotiate. As a spotlight series conducted by the Seattle Times described it, "[t]he more cases [the administrator] kept for himself, the fewer he had to dole out. The fewer he doled out, the more money he kept." [Ken Armstrong, Florangela Davila and Justin Mayo. "The Empty Promise of an Equal Defense: Part 2: Attorney profited, but his clients lost." The Seattle Times, Local News: Monday, April 05.]

In one year, the administrator made $225,000 — though to do so he had to handle 415 felony cases himself, or more than 175% above the prescribed number of felony cases any one attorney should ethically handle in a given year according to all nationally- recognized caseload standards. The Grant County indigent defense provider spent on average four hours on each case — including those cases that went to trial. Grant County's problems were addressed as a result of an American Civil Liberties Union of Washington class action lawsuit against this system, alleging that the overwhelming caseload compelled the attorney to take short cuts, like failing to investigate cases, failing to file credible motions, and failing to meet with the clientele. The case was settled after Superior Court Judge Michael Cooper found that indigent defendants in Grant County have a "well-grounded fear" of not receiving effective legal counsel. Under the terms of the settlement, the county had to hire sufficient staff to meet national caseload guidelines, provide effective supervision and training, and hire a magistrate to ensure standards are met. Moreover, a client who spent months in jail due to the deficient work of his Grant County public defender was awarded $3 million that held his public defender personally responsible for the inadequate service. The public defender was also disbarred. Grant County settled with this one client for $250,000.

Flat Fee Contracts provide "non-representation," not "ineffective representation"

On May 6, 2010, New York's highest court ruled that the class action lawsuit brought by the New York Civil Liberties Union (NYCLU) against five counties is an allegation "not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*." The Court declared that *Strickland* "is expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State." The Court found that, where "counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients[,]" this is at heart "non-representation rather than ineffective representation."

On November 24, 2010, the Iowa Supreme Court reached much the same conclusion. They unanimously decided that a rigid fee cap of $1,500 per appellate case would "substantially undermine the right of indigents to effective assistance of counsel" because "[l]ow compensation pits a lawyer's economic interest … against the interest of the client." The decision, in essence, bans flat fee contracting for right to counsel services.

In reaching this conclusion, the Iowa Court went to great lengths to carefully analyze *Strickland v. Washington*. The Court determined that "the *Strickland* prejudice test does not apply in cases involving systemic or structural challenges to the provision of indigent defense counsel." The Iowa Supreme Court firmly acknowledged that "[w]hile criminal defendants are not entitled to perfect counsel, they are entitled to a real, zealous advocate who will fiercely seek to protect their interests within the bounds of the law." That cannot occur without public defense attorneys having the time, tools, training and resources to treat each client's case appropriately.

What these two cases point out is the presumption in *Strickland* that is rarely discussed or challenged. *Strickland* requires that courts "must be highly deferential …. and indulge a strong presumption that counsel's performance was within the wide range of reasonable professional assistance." The *Strickland* presumption of "reasonable" assistance of counsel cannot be applied where states do not in fact provide effective right to counsel systems that meet the demands of *Gideon v. Wainwright* and its progeny. The majority of states, including Nevada, do not.

So did the United States Supreme Court blindly assume that states followed prior right to counsel rulings in setting up *Strickland*? The answer is "no," because on the same day that *Strickland* was handed down, the Court also ruled in *United States v. Cronic*, 466 U.S. 648 (1984), delineating the criteria under which a client receives "non-representation" as opposed to "ineffective representation."

The *Cronic* Court observed that the most obvious instance of this is the denial of counsel altogether. The complete absence of counsel is most glaringly obvious in our country's lower courts where misdemeanor cases are heard and felony cases are begun. It is a common occurrence for such courts to attempt to save money and expedite the processing of cases by pressuring the accused to forego his right to legal representation without adequately informing him of the consequences of doing so (such as potential loss of public housing, deportation, inability to serve in the armed forces, and/or ineligibility for student loans). Other courts impose large fines and costs if a client insists on legal representation, or, simply refuse to appoint an attorney altogether in direct violation of the Sixth Amendment.

Beyond this, the *Cronic* Court determined that circumstances may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. The Court suggests that systemic issues in the case of *Powell v. Alabama* were such an instance. This is the case of the Scottsboro Boys, in which a judge appointed the entire bar to represent the defendants and allowed representation at trial by unqualified defense attorneys who met their clients on the eve of trial and failed to devote sufficient time to zealously advocate for clients in the face of the state court's emphasis on disposing of cases as quickly as possible.

In flat fee contract systems, attorneys have a financial incentive to dispose of cases as quickly as possible. As the United States Supreme Court correctly pointed out in *Powell*: "The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob."

Conclusion

Each client is constitutionally entitled to be represented by a public defense attorney who has sufficient time and resources to fulfill the basic parameters of attorney performance on behalf of that client. As the performance standards adopted by the Nevada Supreme Court point out, this means the attorney is able to, among other things: meet and interview the client; prepare and file necessary motions; receive and review the prosecution responses to motions; conduct a factual investigation, including locating and interviewing witnesses; engage in plea negotiations with the state; prepare for and enter a plea or conduct the trial; and prepare for and advocate at the sentencing proceeding when there is a guilty plea or conviction following trial.

Each attorney within a public defense system represents numerous clients, all at the same time, but the attorney owes these same full duties to each one of those clients. Attorneys operating under flat fee contracts, particularly in rural counties, are disinclined to provide sufficient time due to their financial conflicts and thus are providing non-representation to their clients. The National Legal Aid & Defender Association respectfully asks the Nevada Supreme Court to ban attorneys from entering into flat fee contracts for indigent defense services under ADKT-411.

NLADA recognizes that this will have a financial impact on counties and suggests that the proper response is to reduce the number of cases coming into the formal criminal justice system. But, cost cannot be the courts' guiding principle in determining whether to ban flat fee contracts. As Chief Justice Douglas correctly stated in his recent state of the Judiciary Speech, "the Judicial Branch must be independent of politics and personalities and concerns as to public popularity. The Judicial Branch – the Court – has but one true allegiance – that is to the Constitution and the rule of law. … It's just that simple. Former United States Supreme Court Justice Lewis Powell once remarked: 'It is perhaps the most inspiring ideal of our society .... It is fundamental that justice should be the same in substance and availability, without regard to ... status.'"[8]

[8] Chief Justice Michael L. Douglass. *State of the Judiciary Address to the Nevada Legislature.* March 7, 2011.

Thank you.

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Cc: Nevada Supreme Court Task Force on Indigent Defense