



Las Vegas Municipal Court Memorandum

To: Justice Michael Cherry, Chairman of the Supreme Court Indigent Defense Commission
From: Dana P. Hlavac, Court Administrator
CC: Cynthia Leung, Chief Judge
Date: September 19, 2018
Re: Public Attorney Access to Means of Confidential Communication with Clients

Justice Cherry,

In the "Call to the Public" during the August 30, 2018 Indigent Defense Commission meeting, Mr. Larry Semenza raised concerns with certain events that he had witnessed during a prior video session in the Las Vegas Municipal Court. Franny Forsman who indicated she had witnessed similar instances in other Las Vegas Municipal Court departments echoed the tenor of his concerns. By all accounts, the issue deals only with appearances by video during which defense counsel is in a physical location roughly 3 miles from the client who remains at the City Detention Center. At the conclusion of the "Call to the Public", you asked Ms. Forsman and Ms. Amy Rose to get with me to review the current processes and concerns to see if changes were possible to reduce or eliminate the underlying concerns.

I immediately reached out to Chief Judge Leung and to our City Attorney advising them of the situation. I was not able to meet with the City Attorney until the following Thursday at which time I requested that we meet with Ms. Rose and Ms. Forsman. The City Attorney set up a meeting, which was held on September 11, 2018. Present at the meeting was City of Las Vegas City Attorney, Brad Jerbic, Ms. Franny Forsman, Ms. Amy Rose, Deputy City Attorney Carly Helbert, Contract Public Attorney Dwayne Nobles, Contract Public Attorney Able Yanez and myself. As a collective group, we discussed the nature of the issue and possible solutions. Afterwards Ms. Forsman, Ms. Rose and I went to review a possible technology that offered at least a short-term solution. It appeared that all parties thought the technology would provide a technological parallel to a face-to-face communication whereby an attorney could speak to a client over a Voice Over Internet Protocol (VOIP) device that would allow the attorney to see the client and the client to see the attorney.

I subsequently met with leadership from the City of Las Vegas Information Technology Department and received their commitment to being able to provide the technological backbone to support the installation of adequate VOIP Video phones at both the Courthouse and the City Detention Center. On Monday September 17, 2018, I met with leadership from the City

Detention center and received their commitment to find appropriate space adjacent to the video arraignment courts to install up to four VOIP Video devices.

It will be the intent of the court to make the VOIP Video devices located in private rooms in the courthouse available to Public Attorneys prior to all video sessions for the purpose of having pre-appearance conversations with their clients. We anticipate being able to install appropriate devices in a period of 60-90 days. While I would like to expedite this process even further, I am trying to be conservative in consideration of the legal procurement and bidding process that may be required. We are currently in the process of planning for the installation of four VOIP connections and appropriate space within the jail to place four incoming VOIP Video connections. We are also initiating the procurement process for 11 VOIP Video devices (6 for the court, 4 for the jail and 1 spare). The project will move forward as quickly as all planning and procurement can allow within the coming months. Anticipated completion is no later than the end of November.

I will file a monthly update on the progress of this project with the Indigent Defense Commission as we move forward.

**MODEL PLAN FOR THE PROVISION OF APPOINTED COUNSEL
FOR URBAN COURTS IN NEVADA**

May 22, 2008

Committee Note: The Model Plan has been recommended for Washoe and Clark County as of its writing due to continuing discussion by rural courts of ADKT 411. The Committee does not recommend that a dual system of representation should be permitted in Nevada for Urban and Rural Courts but recognizes that some practical differences in implementation will be required in carrying out the intent of the order in ADKT 411.

I. STATEMENT OF POLICY

A. Objectives

1. The objective of this Plan is to attain the ideal of equality before the law for all persons. Therefore, this Plan shall be administered so that those accused of crime, or otherwise eligible for services of appointed counsel, will not be deprived, because they are financially unable to pay for adequate representation, of any element of representation necessary to an adequate defense.

2. The further objective of this Plan is to implement the requirements set forth in the Order entered by the Supreme Court of Nevada on January 4, 2008 in ADKT 411: "In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases."

II. DEFINITIONS

A. "Representation" includes counsel and investigative, expert and other services.

B. "Appointed attorney" includes private attorneys, both contracted and hourly, Public Defenders and staff attorneys of the Public Defender offices.

III. PROVISION OF REPRESENTATION

A. Mandatory: Representation Shall be provided for any financially eligible person who:

1. is charged with a felony;
2. is charged with a misdemeanor in which the prosecution is seeking jail time (incarceration);

3. is alleged to have violated probation or other supervision and jail time a sentence of confinement may be imposed;
4. is a juvenile alleged to have committed an act of juvenile delinquency;
5. is subject to commitment pursuant to NRS 433A.310;
6. is seeking relief from a death sentence pursuant to NRS 34.724(1);
7. is in custody as a material witness;
8. is entitled to appointment of counsel under the Sixth Amendment to the U.S. Constitution or any provision of the Nevada Constitution, or when due process requires the appointment of counsel, or the judge is likely to impose jail time;
9. faces loss of liberty in a case and Nevada law requires the appointment of counsel;
10. faces loss of liberty for criminal contempt;
11. has received notice that a grand jury is considering charges against him/her and requests appointment of counsel.

B. Discretionary: Whenever a court determines that the interests of justice so require, representation may be provided for any financially eligible person who:

1. is charged with a misdemeanor, infraction or code violation for which a sentence of confinement is authorized;
2. is seeking post-conviction relief, other than from a death sentence, pursuant to NRS 34.724(1).
3. is charged with civil contempt who faces loss of liberty;
4. has been called as a witness before a grand jury, a court, or any agency which has the power to compel testimony, and there is reason to believe, either prior to or during testimony, that the witness could be subject to criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;
5. faces any other case in which the interest of justice requires appointment of counsel
6. is party to a dependency case in which termination of rights is a possibility

C. When Counsel Shall be Provided

Counsel shall be provided to eligible persons within 72 hours or as soon as feasible after their first appearance before a judge, when they are formally charged or notified of charges if formal charges are sealed, or when a Justice of the Peace, Municipal Judge or District Judge otherwise considers appointment of counsel appropriate.

D. Number and Qualifications of Counsel in Capital Cases

1. Number: Two lawyers must be appointed as soon as possible in all open murder cases which are reasonably believed to result in a capital charge.
2. Qualifications: Appointment of attorneys to represent defendants charged in capital cases shall comport with SCR 250 and ADKT 411.

E. Eligibility for Representation

1. Financial Eligibility: A person shall be deemed "indigent" who is unable, without substantial hardship to himself or his dependents, to obtain competent, qualified legal counsel on his or her own. "Substantial hardship" is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, reside in public housing, or earn less than 200 percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial hardship if he or she is currently serving a sentence in a correctional institution or housed in a mental health facility or is a minor. Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of charges being faced, monthly expenses, and local private counsel rates, would result in a substantial hardship were they to seek to retain private counsel.
2. Screening for Eligibility: [The Pretrial Services Agency, Court Administrator or other administrative agency] shall conduct any screening for financial eligibility and provide a recommendation to the court with regard to eligibility of the defendant for the services of appointed counsel based upon the provisions set forth in subsection (1) above. Appointed Counsel may assist in providing information during the screening but shall not be asked to make a recommendation with regard to eligibility.
3. Partial Eligibility: If a court determines that a defendant is able to afford counsel but cannot be effectively represented due to inability to pay for appropriate services such as investigators, experts or other services, the court shall order reasonably necessary services be provided at no cost to the defendant, subject to the procedures

established in each jurisdiction for the approval and payment of fees and expenses.

4. Disclosure of Change in Eligibility: If, at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal or other services in connection with his or her representation, and the source of the attorney's information is not protected as privileged communication, counsel shall advise the court.

5. Appointment of Counsel in Juvenile Matters: In Juvenile Delinquency matters filed with the court, the juvenile should be presumed to be indigent. The court may order the parents of the juvenile to reimburse the county for the reasonable attorney fees, whether Public Defender, contract, or appointed counsel (NRS 62E.300) based on ability to pay .

IV. APPOINTMENT OF THE PUBLIC DEFENDER

A. Determination of Conflict of Interest

The Public Defender shall, as soon as practicable, upon appointment, conduct a conflict check to determine whether any conflict of interest exists which would prevent representation of the defendant. If such a conflict is determined by the Public Defender to exist, such fact shall be brought to the attention of the court as soon as possible. In no instance, shall the Public Defender be appointed to represent co-defendants in a case.

B. Assignment of Attorneys

The determination of which attorney within the office of the Public Defender shall be assigned to any case rests solely within the discretion of the Public Defender.

C. Complaints by Clients

The Public Defender shall maintain a system for receipt and review of written complaints made by clients.

V. APPOINTMENT OF PRIVATE ATTORNEYS

A. Contract and Hourly Attorneys

1. Contract Attorneys:

a. Compensation of Contract Attorneys

If a contract is employed for appointment of counsel, compensation may be based either on an hourly basis, a flat fee basis, or a combination of both. If the contract is based on a flat fee basis, the contract should consider the following factors: ✓

1. The average overhead for criminal defense practitioners in the locality;
2. The number of assignments expected under the contract;
3. The hourly rate paid for all appointed counsel; and
4. The ability of the appointed attorney to comply with the Performance Standards for Appointed Counsel as adopted and amended by the Nevada Supreme Court.

2. Categories of Assigned Counsel

Qualified Appointed counsel will be selected for appointments in the following areas:

[The [court/contract administrator/Appointed Counsel Administrator] may choose to create lists in specialty areas, e.g. Juvenile, Appellate, Misdemeanor, Life sentence/death-attorneys may be appointed to multiple lists]

3. Assignment of Cases

Assignment of counsel to a courtroom or to a case may not be performed by the judiciary. The assignment shall be made in the following fashion:

a. Non-hourly Representations: In courts using contract attorneys who are not paid hourly, in all cases which cannot be handled by the Public Defender or the Special Public Defender, an attorney will be assigned by [e.g. the Appointed Counsel Administrator, the Contract Attorneys Administrator] except in cases carrying a penalty of life or when the [court/Appointed Counsel Administrator] determines the complexity of the cases or the severity of the penalty are such as to necessitate the appointment of an hourly attorney.

b. Hourly Representations: In all cases that have a possible penalty of life-time imprisonment or death, that cannot be handled by the Public Defender or Special Public Defender, counsel shall be selected from a list of qualified attorneys maintained by [e.g. Appointed Counsel Administrator]. Hourly compensation should be provided for work

directly related to the filing of any notice that a sentence of life imprisonment will be sought under NRS 207.010(b) (Habitual Offender statute).

B. Selection of Panel of Attorneys

1. Appointed Counsel Selection Committee: The [Court Administrator, Assigned Counsel Administrator, or other] shall establish a committee to review the qualifications of applicants for contract or hourly appointments, to review the list of attorneys from which appointments are made in hourly cases, to determine which attorneys shall be selected for appointments in the district and to [other duties].

2. Composition of Selection Committee: The committee shall be made up of [number] members. The committee will be composed of members from a variety of stakeholders concerned with the integrity of indigent criminal defense. No member of the committee should have a pecuniary interest in the outcome of the attorney selection process or be in any way legally or financially related to any attorney whose qualifications will be evaluated. Organizations may designate representatives from bar associations and groups, e.g. State Bar of Nevada, Nevada Attorneys for Criminal Justice, [Clark/Washoe] Bar Associations, National Bar Association, Asian Bar Association [other Associations]. Additionally, a designee of the Public Defender, Special Public Defender and the Federal Public Defender shall be members of the committee. Additionally, the committee will be free from any judicial or prosecutorial involvement.

3. Qualifications of Appointed Counsel: The Selection Committee shall determine the minimum qualifications for all Appointed Counsel and shall determine any additional qualifications required for cases of exceptional difficulty such as death penalty and sexual assault cases. Inquiries on the application should reflect those minimum qualifications.

4. Review of Applications and Continuing Eligibility: The Selection Committee shall meet at least once a year and shall solicit input from judges, and others familiar with the practice of criminal defense, shall review any complaints from clients and the history of participation in training of each applicant and each contract or hourly attorney receiving appointments to determine eligibility and continuing participation.

5. Responsibility Cannot be Delegated: While appointed counsel may receive assistance from associate attorneys, participants in a mentorship program, or other attorneys deemed qualified by the Selection Committee, in carrying out his/her responsibilities, appointed counsel cannot delegate responsibilities for representation to another attorney. All substantive court appearances must be made by an attorney who has been determined to be qualified by the Selection Committee.

6. Complaints by Clients: Complaints from clients, judges or the public about representation by appointed counsel shall be transmitted to [Appointed Counsel Administrator, Court Administrator, other] for consideration by the Selection Committee in evaluation of appointed counsel.

C. Payment of Fees and Expenses of Private Attorneys

[insert details of process of review of fees and expert/investigator expenses]

VI. MENTORSHIP AND TRAINING

A. Mentoring Programs: If the Selection Committee determines that the ends of justice will be served by selection of attorneys who do not possess the requisite experience as determined by the committee, a mentoring program should be established to insure that the inexperienced attorney will be provided supervision and mentoring from an experienced criminal defense attorney. In no instance shall an attorney who has not tried at least one felony trial be permitted to try a felony case without an experienced criminal defense attorney sitting as "second chair."
[insert details here of a mentoring program]

B. Annual Training: An intensive training program shall be conducted once each year for all private attorneys who receive appointments to criminal cases. The program shall include training in bail and release, motions practice, search and seizure, evidentiary issues and trial practice, appeals and post-conviction practice. All contract and hourly appointed attorneys shall attend. Attorneys who are new members of the contract or hourly lists are required to attend in order to receive any further appointments.

C. Periodic Training: Periodic training events will be conducted throughout the year on issues of interest to appointed counsel.

D. Creation and Coordination of Training: [_____] shall be responsible for coordinating, scheduling and creating the training events described above.

VII. DUTIES OF APPOINTED COUNSEL

A. Standards: The services to be rendered a person represented by appointed counsel shall be commensurate with those rendered if counsel were privately employed by the person. Representation shall be provided in compliance with the Performance Standards for Representation of Indigent Defendants adopted by the Supreme Court.

B. Professional Conduct: Attorneys appointed under this Plan shall conform to the highest standards of professional conduct, including but not limited to the provisions of the Nevada Rules of Professional Conduct.

C. No Receipt of Other Payment: Appointed counsel may not require, request, or accept any payment or promise of payment or any other valuable consideration for representation under the appointment, unless such payment is approved by order of the court.

D. Continuing Representation: Once counsel is appointed, counsel shall continue representation until substitute counsel has filed a notice of appearance; until an order has been entered allowing or requiring the person represented to proceed *pro se*; or until the appointment is terminated by court order. If appointed counsel is relieved, such counsel must assist successor counsel in securing the file and other necessary information to insure that all deadlines are met, including those applicable to post-conviction matters.

VIII. APPOINTED COUNSEL ADMINISTRATOR

A. Selection

B. Duties

MEMORANDUM

To: Justice Cherry, Indigent Defense Commission
From: Franny Forsman
Date: September 20, 2018
Subject: Review of Henderson Municipal Court Plan

At the last meeting of the Indigent Defense Commission, I asked that consideration of the Henderson Plan be set over to the upcoming meeting of the IDC so I could compare the Henderson Plan with the Model Plan adopted by the Commission in 2008. I have summarized the provisions of each below:

Model Plan

- Objectives-equality, implementation of ADKT 411
- Mandatory Provision of Representation-probation violation w/possible sentence, likely to impose jail time, loss of liberty for criminal contempt
- Discretionary appointment-misdemeanor, infraction, code violation and sentence of confinement is authorized, civil contempt facing loss of liberty, interest of justice.
- When counsel shall be provided (within 72 hours of first appearance suggested)
- Eligibility-presumptive, screening, partial eligibility
- Contract Attorneys-compensation to be based on factors, overhead, number of assignments expected, ability to comply with Performance Standards; assignment to case or courtroom cannot be performed by the judiciary;
- Selection of Panel of Attorneys-composition of selection committee (no pecuniary interest, no judicial or prosecutorial involvement; review of applications.
- Responsibility for representation cannot be delegated (assistance allowed by attorneys approved by selection committee)
- Complaints by clients shall be collected and considered in selection and retention process
- Training and Mentorship
- Duties of Appointed Counsel-Standards, no receipt of other payment, continuing representation.

Henderson Plan

- No objectives
- All defendants “facing a possible jail sentence” are given an application for Public Defender
- HHS Poverty Guidelines “are used to determine indigency” but no guidance as to how they are to be used.
- Compensation determined by City Council with no factors defined.
- Selection committee created but no identification of its members or who may not serve on committee except judges not permitted to “pre-empt or veto” any selection.
- City reserves the right to award contracts “best suited to the City’s needs” without interviews or presentations.
- Any termination of the contract is solely the decision of the Henderson Municipal Court Administrator
- No limitation on delegation
- Qualifications-includes 3 year minimum criminal litigation experience
- Includes a requirement of compliance with Performance Standards
- Provides that all client records including attorney notes will be turned over to the Henderson Municipal Court Administrator upon termination of a contract (assumption is that is only as to open cases).

While the Model Plan is just a guide to the courts and each court entity can tailor its plan to meet the court’s particular needs, there are some deficiencies in the Henderson Plan which should be addressed.

- (1) The eligibility criteria should be spelled out;
- (2) The factors in the Model Plan should be incorporated into a provision for determining compensation;
- (3) The composition of the Selection Committee should be defined;
- (4) The role of the “City” in awarding a contract without regard to the Selection committee should be spelled out or eliminated.
- (5) Terminations of contracts should not be the sole decision of the Administrator and should involve the selection committee so as to insure independence of the defense function;
- (6) Limitations on delegation of work under the contract should be spelled out to avoid an end-run around the Selection Committee;
- (7) When a contract is terminated, confidential client records cannot be provided to the Administrator and in open cases, should only be provided to new counsel for the defendant.