

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE REVIEW OF
ISSUES CONCERNING
REPRESENTATION OF INDIGENT
DEFENDANTS IN CRIMINAL AND
JUVENILE DELINQUENCY CASES.

ADKT No. 411

FILED

NOV 20 2007

JANET M. BLOOM
CLERK OF SUPREME COURT
BY *J. Castello*
CHIEF DEPUTY CLERK

FINAL REPORT AND RECOMMENDATIONS OF SUPREME COURT
INDIGENT DEFENSE COMMISSION

COMES NOW, the Honorable Michael A. Cherry, Associate Justice of the Nevada Supreme Court, and states as follows:

1. On April 26, 2007, the Nevada Supreme Court established a study committee to be known as the Indigent Defense Commission and appointed the undersigned as chair of the Commission.
2. The court directed the Commission to conduct hearings and study the issues and concerns with respect to the selection, appointment, compensation, and qualifications of counsel assigned to represent indigent defendants in criminal and juvenile delinquency cases throughout Nevada. The court further directed the Commission to recommend appropriate changes for the court's consideration.
3. A statewide survey of indigent defense services was conducted in June and July 2007.
4. The Commission met in May, July, September, and October 2007. Summaries of the meetings are attached as Exhibit A.
5. At the Commission's first meeting, three subcommittees were formed: (a) the Caseload and Performance Standards Subcommittee,

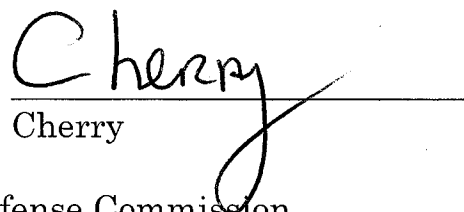
which focused on determining the number of cases that can be effectively handled and what is necessary to provide adequate and competent defense services; (b) the Independence From the Judiciary Subcommittee, which examined how to insulate judges from appointing and assigning contract attorneys who appear in their courtrooms; and (c) the Rural Courts Subcommittee, which examined how the rural counties approach indigent defense and whether the existing systems in those counties provide adequate services. The subcommittees held separate meetings and prepared reports that were presented and approved at Commission meetings and have been included in the Commission's report.

6. The Commission has completed its report on the representation of indigent defendants in criminal and juvenile delinquency matters in Nevada, including recommendations to the court regarding appropriate changes to the system and processes of indigent representation. The Commission's report is attached as Exhibit B.

7. Two minority reports have been prepared. A minority report prepared by representatives of Washoe County and Clark County management is attached as Exhibit C. A minority report by Commission member Stewart Bell, District Judge, and joined by Commission member Kevin Higgins, Justice of the Peace, is attached as Exhibit D.

On behalf of the Commission, I submit the attached exhibits for the court's consideration.

Respectfully submitted,


Cherry, J.

cc: Members of the Indigent Defense Commission
Administrative Office of the Courts

Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

Supreme Court Building
201 South Carson Street, Suite 250
Carson City, Nevada 89701-4702



RONALD R. TITUS
Director and
State Court Administrator

EXECUTIVE SUMMARY
Prepared by Gloria Quinn
Administrative Office of the Courts

INDIGENT DEFENSE COMMISSION MEETING
Tuesday, May 15, 2007
Videoconference
Regional Justice Center, 17th Floor Courtroom, Las Vegas
Supreme Court, Room 107, Carson City
10:00 a.m. – 3:00 p.m.

MEMBERS PRESENT:

Hon. Michael Cherry, Chairman
Hon. Stewart L. Bell, Eighth Judicial District Court
Jeremy T. Bosler, Washoe County Public Defender
James Carmany, Las Vegas Municipal Court
Hon. Stephen Dahl, North Las Vegas Justice Court
Hon. Kevin Higgins, Sparks Justice Court
Philip J. Kohn, Clark County Public Defender
John C. Lambrose, Deputy Federal Public Defender
Robert Langford, Esq.
Jennifer J. Lunt, Washoe County Alternate Public Defender
Gary Peck, American Civil Liberties Union
Hon. Jerome M. Polaha, Second Judicial District Court
Africa Sanchez, Clark County Education Association
David Schieck, Clark County Special Public Defender
Hon. Deborah Schumacher, Second Judicial District Court
Charles J. Short, Clark County Court Administration
Cordell Stokes, Communications and Governmental Affairs, Las Vegas
Hon. William O. Voy, Eighth Judicial District Court
Hon. Ann Zimmerman, Las Vegas Justice Court

EX-OFFICIO MEMBERS PRESENT:

Hon. A. William Maupin, Chief Justice of the Supreme Court
David Carroll, National Legal Aid & Defender Association

MEMBERS ABSENT:

Ronald Longtin, Second Judicial District Court

OTHERS PRESENT:

Bill Gang, Administrative Office of the Courts
Gloria Quinn, Administrative Office of the Courts
Robin Sweet, Administrative Office of the Courts

Chairman Cherry called the first Indigent Defense Commission meeting to order at 10:00 a.m. Chairman Cherry welcomed the group to this inaugural meeting. The commission was established under the auspices of the Nevada Supreme Court. Introductions were made in both Carson City and Las Vegas.

REVIEW OF GOALS AND TIME FRAME

Deputy Director Robin Sweet stated the time frame and initial goals of the committee. An initial summary of current indigent defense practices throughout the state will be drafted by July 1, 2007. The final summary and new protocols should be completed by early September.

Chief Justice Maupin explained the primary goal is to effect compliance with ABA standards for indigent defense statewide. To accomplish this, problems need to be assessed. Issues are different in the rural areas where compliance becomes more problematic. Staffing was developed to bring the most knowledgeable people in the system into this process.

REPORT FROM DAVID CARROLL

David Carroll explained his participation in this process. He is currently Director of Research and Evaluation for the National Legal Aid and Defender Association in Washington, D.C. Mr. Carroll travels to various jurisdictions in the country to assess the current status of indigent defense against national standards, including the ABA standards. A PowerPoint presentation was shown with compiled statistics on indigent defense in Nevada as well as other states.

ROUND TABLE DISCUSSION

There was discussion of rural and urban challenges that need to be met. Current caseloads far exceed ABA standards. More police were added in Clark County beginning in 2005, which caused caseloads throughout the justice community to skyrocket. There is a need for more public defenders. A 5-year strategic plan in Washoe County could add 12 new attorneys to public defender office, which would also need more support staffing. More prosecutors are needed. There is a short list of qualified attorneys to handle capital cases. There needs to be quality representation across the board.

Clark County Court Executive Officer Chuck Short reported on a recently completed audit of invoices submitted by three attorneys in Las Vegas. Findings showed some over billing. There must be accountability. A full audit report should be available next month.

Current processes were reviewed by the commission. For some areas, each judge has their own list of contract attorneys. The 1-1 relation between judges and track attorneys needs to be eliminated. It was suggested that the lists be consolidated and a committee developed to appoint these attorneys to cases. Processes in rural areas are much different from Clark and Washoe Counties. It was suggested the District Attorneys need to weed out groundless cases.

It was agreed that the Clark County revised procedures would be re-evaluated based on these discussions. The new procedures would be taken to the Clark County judges for their approval and implementation for fiscal year 2008.

Independent selection of contract attorneys would remove the appearance of impropriety. A 1-year study of contract attorney assignments could be made. A litigation specialist might be needed. There is a fluctuation of attorney skills and abilities.

There was discussion of contract attorneys versus hourly rate. Both types need to be adequately compensated with appropriate safeguards in place. It was suggested that attorneys keep track of their billable hours daily and submit an end of month bill for a defined period of time. Billings fluctuate and this procedure would make auditing easier. This could be requested for a period of 2 to 3 months to evaluate charges. It was suggested that an alternate public defender's office might replace the contract system. Another suggestion was to have the county manager's office oversee appointments of contract attorneys. This might lessen internal conflicts.

Courts should not have to bear the budgetary brunt of the resource issue related to indigent defense. That is, in many courts, their budgets are reduced elsewhere if indigent defense costs exceed budgeted amount. These costs should be separate from the court budget.

Clark County Court Administration processes these activities similar to other purchases. Contracts are prepared, invoices are reviewed and submitted for payment; and in some instances interim billing is allowed.

Rural courts are getting inadequate council. There seems to be different levels of justice throughout Nevada that must be changed. Citizens of this country have a constitutional right to adequate council. It was thought that Clark County was making progress and moving away from conflict attorneys and more toward public defenders. However, caseloads are back at dangerous levels. This state has grown faster than any other state. Most states in the west have a second public defender's office. This committee has a need to promulgate standards that must be adhered to.

It was suggested that sub-committees be developed to work on issues. Chief Justice Maupin suggested that subcommittees meet every month and the full committee meet every 2 months. Subcommittee members would participate via conference calls. It was recommended that subcommittees meet as soon as possible. The next full committee meeting will be determined and members will be advised as soon as possible.

David Carroll was asked for his opinion of the discussions. Mr. Carroll stated the discussions were very encouraging. There is no single model and every state and jurisdiction is different, calling for different action. Mr. Carroll did mention that ABA standards prohibit flat fee contracts. Contracts are acceptable otherwise if they include amount of work load and training standards. The Nevada tax base makes state funding of contract attorneys unrealistic. Mr. Carroll told the commission that indigent defense in Nevada has two major challenges – judicial interference in the public defender system and the increased caseload in Washoe and Clark Counties.

Mr. Carroll also suggested Nevada consider a separate Commission to monitor and address issues related to indigent defense as done in many other states. This commission should create a system of checks/balances, audits, and other strict standards. Most other states commissions are voluntary with per diem and travel paid only. All three branches of government have appointments. No one on the commission can have a financial stake in the system. Other representatives could come from State Bar, Law School, and community groups.

The committee agreed to consult again with Mr. Carroll and will look into funding his travel expenses for the next full committee meeting. He will be able to offer proposals and models to help develop standards.

SUBCOMMITTEE ASSIGNMENTS

The following list reflects those asked to join the commission as new members and those who volunteered:

Steve McGuire, NV Public Defender
David Amesbury
David Lockie, Elko
District Judge Dan Papez
District Judge Mike Villani
District Judge Jerome Polaha
Liz Quillin, Clark County, ad hoc member
John Berkich, Washoe County, ad hoc member
Franny Forsman, ad hoc member

Subcommittee assignments were developed as follows:

ABA Standards for Caseloads

Phil Kohn, Chair
District Judge Michael Villani
Justice of the Peace Stephen Dahl
Charles Short
Gary Peck
Robert Langford
Jeremy Bosler
Jennifer Lunt
Franny Forsman, ad hoc member

ABA Standards for Judiciary Independence

David Schieck, Chair
District Judge Jerome Polaha
Robert Langford
Justice of the Peace Kevin Higgins
Jennifer Lunt
Justice of the Peace Ann Zimmerman
Jim Carmany
Liz Quillin, ad hoc member
John Berkich, ad hoc member

Rural Issues

John Lambrose, Chair
District Judge Dan Papez
Jeremy Bosler (or a staff representative)
David Lockie

At this time no future meeting was scheduled. There was no public comment or further business to discuss; therefore the meeting was adjourned at 3:00 pm.

Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

Supreme Court Building
201 South Carson Street, Suite 250
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RONALD R. TITUS
Director and
State Court Administrator

EXECUTIVE SUMMARY
Prepared by Gloria Quinn
Administrative Office of the Courts

INDIGENT DEFENSE COMMISSION MEETING
Tuesday, July 24, 2007
Videoconference
Regional Justice Center, 17th Floor Courtroom, Las Vegas
Supreme Court, Room 107, Carson City
10:00 a.m. – 3:00 p.m.

MEMBERS PRESENT:

Hon. Michael Cherry, Chairman
David C. Amesbury, Law Offices of Amesbury & Schutt
Hon. Stewart L. Bell, Eighth Judicial District Court
Jeremy T. Bosler, Washoe County Public Defender
Hon. Stephen Dahl, North Las Vegas Justice Court
Franny Forsman, Federal Public Defender (Ad Hoc Member)
Hon. Kevin Higgins, Sparks Justice Court
Philip J. Kohn, Clark County Public Defender
John C. Lambrose, Deputy Federal Public Defender
Robert Langford, Esq.
Ronald Longtin, Second Judicial District Court
Jennifer J. Lunt, Washoe County Alternate Public Defender
Hon. Dan Papez, Seventh Judicial District Court (via speakerphone)
Gary Peck, American Civil Liberties Union
Hon. Jerome M. Polaha, Second Judicial District Court
Liz Quillin, Assistant Clark County Manager (Ad Hoc Member)
David Schieck, Clark County Special Public Defender
Hon. Ann Zimmerman, Las Vegas Justice Court

EX-OFFICIO MEMBERS PRESENT:

Hon. A. William Maupin, Chief Justice of the Supreme Court
David Carroll, National Legal Aid & Defender Association (via speakerphone)

MEMBERS ABSENT:

James Carmany, Las Vegas Municipal Court
Africa Sanchez, Clark County Education Association
Hon. Deborah Schumacher, Second Judicial District Court
Charles J. Short, Clark County Court Administration
Cordell Stokes, Communications and Governmental Affairs, Las Vegas
Hon. William O. Voy, Eighth Judicial District Court

OTHERS PRESENT:

Bill Gang, Administrative Office of the Courts
John McCormick, Administrative Office of the Courts
Gloria Quinn, Administrative Office of the Courts
Robin Sweet, Administrative Office of the Courts

Chairman Cherry called the meeting to order at 10:00 a.m. and asked for a motion to approve the May 15, 2007, meeting summary. Jeremy Bosler motioned to approve the summary; motion passed.

STATUS OF EIGHTH JUDICIAL DISTRICT CONTRACT ATTORNEY PROGRAM

Judge Stewart Bell explained that their group proposed to Assistant Clark County Manager Liz Quillin to increase the pay for contract attorneys. These attorneys would be responsible for all misdemeanor cases to relieve the burden on the Clark County Public Defender Office. There will be 36 contract attorney positions available. A draft contract will be drawn up and presented to the County Commission for their approval.

Pending County Commission approval, Chief Judge Kathy Hardcastle has extended the contracts of the existing lawyers on a month-to-month basis until the proposal is addressed. If approved, the proposal will remain in place until this commission develops another strategy.

Generally, the contract attorneys would be appointed cases at random. Judges could give input to pre-empt an attorney, and an attorney could likewise state if they have a problem being assigned to a certain judge's courtroom. A switch could be made to make it work, but the idea is to avoid any real relationship between the lawyer and the judge.

Discussion continued about possible ways to include or exclude judicial involvement on the selection and appointment of contract attorneys. Additionally, some discussion followed on the location of the indigent defense costs - they should not be included in the courts budget, it should be a separate item. Judge Bell agreed to share the discussions with the other judges on his committee and at the next judges meeting.

Justice Cherry, on behalf of this commission, thanked Judge Bell for the status report and asked that his subcommittee continue their discussions with Ms. Quillin and the County on the contract attorney program.

REPORTS FROM SUBCOMMITTEES

Independent Judiciary Subcommittee – David Schieck, Chair

To minimize the negative implications of judicial influence over the indigent defense system in Nevada, this subcommittee proposes that there be no judicial interference or participation in the process of appointments for indigent defense attorneys. This is in conformity with ABA standards. A panel would be needed consisting of members of the community with no judges appointed to the committee. This committee would then make selections for contract and hourly appointments. This committee would work with findings of the other committees and of this commission having to do with caseload and qualifications.

The long-term recommendation calls for a board consisting of 3 to 13 members; judges and prosecutors would help make the selections. That committee would then select an administrator to supervise the contractors, fees, reimbursements, and payments made out of the committee.

One suggestion was to include the chief judge on such a committee in a non-voting position. However, that would go against ABA standards, which state there should be no judicial involvement in the process. It was agreed there are some problems in Clark County that would help judges argue against conformance with the ABA standards.

Judge Polaha explained that contract attorneys are selected and expenditures are monitored in Washoe County by the judges. Court appointed lawyers are used as needed, except for the capital cases. The numbers are not anywhere near to those in Clark County so any comparison would not be fair.

Also recommended was that the Justices of the Peace and District Court judges meet quarterly with their track attorneys. Judges could formally contact the selection committee with any serious complaints. It was then suggested that a confidential list of attorney candidates could be circulated to the judges for comment before the top 36 are selected.

Phil Kohn motioned to approve David Schieck's subcommittee report; motion passed unanimously.

Caseloads Subcommittee – Phil Kohn, Chair

Standards of performance and caseload standards were proposed. Defense attorneys need to better prepare their clients for sentencing. This is one element that prompted the

drafting of the subcommittee report, which was distributed to the committee by email in the meeting materials and one follow-up email.

One change had been made to the document after distribution, which is on page 5. Because clients can be illiterate or mentally ill, the wording 'and consent' was deleted from (e), so the sentence now reads: Requests or agreements to continue a trial date shall not be made without consultation of the client.

The Standards of Performance guidelines will require attorneys to spend more time with their clients, which will necessitate limitation of caseloads. Implementation of the caseload standards and performance guidelines would be over a 3-year period. Committee reviewed and discussed the caseload recommendations. Adopting these caseload standards would necessitate more attorneys and support staff.

Questions were asked about the 150 figure mentioned as a maximum annual caseload for non-life cases. David Carroll of the National Legal Aid & Defender Association offered the following as background. This figure was arrived at in the early 1970's through a scientific Delphi method in which the amount of time to handle each type of case was estimated. Since then, an updated methodology was created called case weighting, in which attorneys keep track of time and figure out case weights for each type of case. What the breadth of science has proven over the years is that the 150 number is one that has survived this 30-40 year span. However, Mr. Carroll did express an understanding of why the state might consider using a 150-190 range and that capital cases could be 3-4 instead of 3. It was mentioned that some jurisdictions have adopted caseload standards significantly lower than the 150 number. It was suggested that public defender felony cases could be limited to 192 per year. Mr. Carroll explained that the caseload figures are not just aspirational goals; there are many county and statewide jurisdictions in which these are hard and fast rules.

At the request of Commission, David Carroll will compile a report on the process other states have used to implement new caseload standards. This report will include how it was implemented, how it was funded, and how long it took to actually meet those standards.

After discussion, a motion was made by John Lambrose to accept the revised performance standards and caseload ranges with information supplied by the Chief Justice as to what tasks would be after approval; motion passed. Liz Quillin voted against the standards as she feels voting on this is premature. Judge Stuart Bell and Judge Kevin Higgins also voted against it as they felt it should not be voted on in pieces.

Rural Subcommittee – John Lambrose, Chair

Mr. Lambrose gave a brief history of the State Public Defenders Office. The creation of the State Public Defenders Office began 25-30 years ago. At that time the state funded almost all the expense for indigent defense. Now it is only 20 percent state funded.

Options to expand or simply change location of the Public Defenders Office to include some rural areas was discussed. Elko County has adopted a model similar to the Clark and Washoe County models even though they are a county with less than 100,000 people.

This subcommittee has some stats from some counties and is still gathering information. Now that the committee discussed performance standards and caseloads, this subcommittee will be ready to make more general recommendation at the next meeting with regard to the rural courts.

Judge Dan Papez was available on speakerphone and addressed the committee on his experiences. Some issues in the Seventh Judicial District regarding public defenders include costs, quality, and turnover rates. Caseload is not an issue in the rural areas. The hundreds of miles public defenders must travel every day is the problem. There are about 1,350 inmates at maximum security Ely State Prison. The Public Defenders Office also provides services for those prison inmates who are charged with offenses. When there is some type of a conflict, the court turns to attorneys outside of the Public Defender system basically in Elko, Las Vegas, and Reno.

Judge Papez advised everyone to look very carefully at appointments to the future commission that will appoint conflict attorneys, and is in favor of judges being on the panel in the rural counties. The ratio that the county pays for public defenders keeps increasing. It is getting close to the half million dollars for White Pine County, which is substantial money for the smaller counties. Lack of consistency and quality are reasons that some districts have opted out of the public defender system.

David Carroll feels the problems in rural Nevada falls to the legislature. The *Gideon* decision says that this is a state mandate that must be funded. They have passed it on to the counties, essentially. The legislature needs to understand that it is an issue and how public safety and taxpayer issues are affected. The fix for the rurals has to be legislative because the statutes currently define it in such a way that it forces the system to fail. This committee could adopt a model to present to the legislature.

The rural subcommittee will meet again and present a final report to this committee at the next scheduled meeting.

DRAFT REPORT FROM SURVEY

Bill Gang reported on the survey sent out by AOC to Public Defenders Offices and courts. Some have responded and some are still to be returned. Thorough information was received from both Public Defender offices. Many of the courts could not provide information on caseloads, number of indigents they address, stating that information was not available. Committee suggested those courts get the information from their accounting staff. The survey in general showed a system somewhat in flux. Washoe County has added an alternate public defender. Las Vegas Municipal Court is considering using public defenders; currently, they are using contract attorneys. The State Public Defenders office had been serving Carson City, White Pine, Eureka, Lincoln, and

Pershing Counties. Pershing County no longer uses that system. The caseload in the State Public Defenders Office has been reduced. The actual impact on the caseload is not evident at this point. As more responses are received, that information will be provided to the Commission.

The larger urban areas have a variety of services including public defenders, alternate public defender, contract attorneys, and hourly attorneys. Some courts in the smaller areas simply use hourly attorneys. The true rural counties are suffering for a variety of reasons, including the expense of bringing conflict attorneys from the urban areas. Almost all of the municipal courts use contract attorneys.

Three public defender offices responded their office is not providing adequate, appropriate, competent defense services for clients. That included the Washoe County Alternate Public Defender's Office, which is a new office.

Robin Sweet will speak with Chief Justice Maupin about sending a letter to the courts who have not responded to the survey. An updated survey report will be available from Bill at the next committee meeting.

Judge Stewart Bell will present a further status check on the Eighth Judicial District contract attorney program.

John McCormick will have another meeting with the rural subcommittee and will also continue to contact the counties and contract attorneys for the number of indigent cases and funding.

Caseloads Subcommittee will continue their work on juvenile, death penalty, and appellate standards.

At this time no future meeting was scheduled. There was no public comment or further business to discuss; therefore, the meeting was adjourned at 1:45 pm.

Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

Supreme Court Building
201 South Carson Street, Suite 250
Carson City, Nevada 89701-4702



RONALD R. TITUS
Director and
State Court Administrator

EXECUTIVE SUMMARY
Prepared by Gloria Quinn
Administrative Office of the Courts

INDIGENT DEFENSE COMMISSION MEETING
Wednesday, September 12, 2007
Videoconference
Regional Justice Center, 17th Floor Courtroom, Las Vegas
Supreme Court, Room 107, Carson City
10:00 a.m. – 3:00 p.m.

MEMBERS PRESENT:

Hon. Michael Cherry, Chairman
Hon. A. William Maupin, Chief Justice
David C. Amesbury, Law Offices of Amesbury & Schutt
Hon. Stewart L. Bell, Eighth Judicial District Court
John Berkich, Washoe County Manager (Ad Hoc Member)
Jeremy T. Bosler, Washoe County Public Defender
James Carmany, Las Vegas Municipal Court
Diane Crow, Nevada State Public Defender's Office
Hon. Stephen Dahl, North Las Vegas Justice Court
Franny Forsman, Federal Public Defender (Ad Hoc Member)
Hon. Kevin Higgins, Sparks Justice Court
John C. Lambrose, Deputy Federal Public Defender
Robert Langford, Esq., Law Offices of Robert Langford
Ronald Longtin, Second Judicial District Court
Jennifer J. Lunt, Washoe County Alternate Public Defender
Hon. Dan Papez, Seventh Judicial District Court (via speakerphone)
Gary Peck, American Civil Liberties Union
Liz Quillin, Assistant Clark County Manager (Ad Hoc Member)
David Schieck, Clark County Special Public Defender
Hon. Deborah Schumacher, Second Judicial District Court
Charles J. Short, Clark County Court Administration
Hon. Michael P. Villani, Eighth Judicial District Court
Hon. William O. Voy, Family Division, Eighth Judicial District Court

EX-OFFICIO MEMBERS PRESENT:

Hon. A. William Maupin, Chief Justice of the Supreme Court
David Carroll, National Legal Aid & Defender Association

MEMBERS ABSENT:

Philip J. Kohn, Clark County Public Defender
Hon. Jerome M. Polaha, Second Judicial District Court
Africa Sanchez, Clark County Education Association
Cordell Stokes, Communications and Governmental Affairs, Las Vegas
Hon. Ann Zimmerman, Las Vegas Justice Court

OTHERS PRESENT:

Bill Gang, Administrative Office of the Courts
John McCormick, Administrative Office of the Courts
Gloria Quinn, Administrative Office of the Courts
Daren Richards, Clark County Public Defender
Robin Sweet, Administrative Office of the Courts
Ken Ward, Esq., Law Offices of Kenneth V. Ward

Chairman Cherry called the meeting to order at 10:00 a.m. Justice Cherry moved to approve the July 24, 2007, meeting summary and the motion passed unanimously.

STATUS OF EIGHTH JUDICIAL DISTRICT
CONTRACT ATTORNEY PROGRAM

Judge Stewart Bell reported that he drafted a proposed contract for review by the County Commission. Assistant Clark County Manager Liz Quillin will be preparing a comprehensive report for the County Manager regarding indigent defense, contract attorneys, and recommendations from this commission. That report will be prepared and may go to the County Commission in early October. With respect to doubling the contract attorney pay, there was concern by the court that the budget line items are augmented to represent that increase. After that issue is resolved, Ms. Quillin will report back to the County Commission and get direction. Their decision should be available in 30 to 40 days. There was discussion that the pay increase is needed to keep attorneys. The contracts in place now are temporary.

There has been a delay in paying some of the attorneys due to a new financial accounting system within the County. Monthly versus quarterly billing was discussed. It was suggested that the whole process needs full time attention. Monthly billing would increase the court administration work load. Too many cases are not getting proper attention at this time. Someone from court administration would administer that, preferably an attorney who knows criminal defense.

Another conflict office is needed in Clark County. An alternative would be to expand the existing office. Long-term planning would allow for both. The Kentucky System has allowed the two most populous and urban counties in the State to retain their own public defender's offices, but has created satellite State offices to provide for indigent defense in Kentucky's rural counties. Implementing this system in Nevada would allow Clark, Washoe, Elko, and any other counties that have their own public defender's office to

retain these offices, but require that the remaining counties enter into the State System. There would be a cost savings in the long run if the public defender's office is expanded.

SURVEY

Bill Gang reported on the surveys that were circulated to the courts and public defender offices. Responses from the courts show diverse systems across the state. Some questions could not be answered. In the future, it may be advantageous to establish statistical reporting standards to allow a better analysis of indigent defense services in Nevada. A summary will be drafted and included in the committee's final report.

REPORTS FROM SUBCOMMITTEES

Independent Judiciary Subcommittee – David Schieck, Chair

This subcommittee's report was approved unanimously at the last meeting and will become part of the final report to the Supreme Court.

Caseloads Subcommittee – Phil Kohn, Chair

The current juvenile delinquency caseload was discussed. Juvenile Performance standards address minimum requirements. The 200-case figure reflects what the caseload should be, not what it is currently. Judge Voy felt the figure was too low. The commission reviewed research that was conducted on a national level and adopted by ten states. Results from that research were consistent across the country. This commission should decide what the standards should be in Nevada. Case weighting studies have been done in other states and courts for decades. Other research was done in Nevada in 2001, which show that even back then the system was broken.

A thorough study can be held at a later date. The system needs a temporary plan. Judge Voy offered to do a report on juvenile caseloads. Mr. Berkich thought a case weighting study would be beneficial; however, Judge Bell noted that the cost to conduct such a study is currently prohibitive. Mr. Berkich has offered to join Clark County in funding such a study in the future.

Those who wish to compile minority reports for inclusion in the final report should submit them to Robin Sweet.

Case weighting methodology looks at each area and compares results against what should be done. Information included would reflect length of time attorneys spend on cases and what should be occurring. The Commission had previously voted to approve the Trial (Felony and Misdemeanor) Standards of Performance and the Caseload Standards. Additional standards to be approved: Appellate/Post-Conviction Standards of Performance, Juvenile Delinquency Standards of Performance, and Capital Case Standards of Performance.

Franny Forsman suggested putting the issue of appellate post convictions to a vote. Robert Langford motioned to adopt the Appellate/Post-Conviction Standards of Performance, Juvenile Delinquency Standards of Performance, and Capital Case Standards of Performance; motion passed.

Rural Subcommittee – John Lambrose, Chair

Mr. Lambrose gave a brief history of the State Public Defenders Office. Caseloads in Nye County have reached 600 cases per attorney. Driving time is a factor for attorneys billing for work done at rural courts. A change in the law would be needed to expand the public defender offices and/or create satellite offices in the rural areas. One committee member suggested centralization of the public defender offices. Some suggested that the cost of hiring contract attorneys in the rurals was an issue, more so than the quality of the work. It was suggested to form coalitions to talk with groups about rural needs. The necessity of creating this committee could be included in the report. The Nevada Supreme Court could, within its constitutional authority, require that Nevada implement such a Commission in order to ensure appropriate counsel and equal access to justice for Nevada's rural citizens. The second option would be by action of the Nevada Legislature.

John Lambrose motioned to adopt the recommendations of the rural subcommittee; motion passed.

Public Comment

Ken Ward, attorney practicing in Lyon County reported being disappointed with attorney representation in the rural areas. Quality representation is low. There are three conflict attorney offices in Lyon County. In the opinion of Mr. Ward, many competent attorneys are not willing to live in small rural areas. He suggested taking the money allocated to expanding the public defenders office and give it to the rural courts to pay contract attorneys fees.

Next Meeting

The next meeting of the Indigent Defense Commission will be October 24 at 10 a.m.

Meeting was adjourned at 2:10 p.m.

Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

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RONALD R. TITUS
Director and
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EXECUTIVE SUMMARY
Prepared by Gloria Quinn
Administrative Office of the Courts

INDIGENT DEFENSE COMMISSION MEETING
Wednesday, October 24, 2007
Videoconference
Regional Justice Center, 17th Floor Courtroom, Las Vegas
Supreme Court, Room 104-105, Carson City
10:00 a.m. – 3:00 p.m.

MEMBERS PRESENT:

Hon. Michael Cherry, Chairman
David C. Amesbury, Law Offices of Amesbury & Schutt
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Gary Peck, American Civil Liberties Union
Liz Quillin, Assistant Clark County Manager (Ad Hoc Member)
David Schieck, Clark County Special Public Defender
Charles J. Short, Clark County Court Administration
Cordell Stokes, Communications and Governmental Affairs, Las Vegas
Hon. Michael P. Villani, Eighth Judicial District Court
Hon. William O. Voy, Family Division, Eighth Judicial District Court
Hon. Ann Zimmerman, Las Vegas Justice Court

EX-OFFICIO MEMBERS PRESENT:

David Carroll, National Legal Aid & Defender Association
Hon. A. William Maupin, Chief Justice

MEMBERS ABSENT:

Hon. Dan Papez, Seventh Judicial District Court
Hon. Jerome M. Polaha, Second Judicial District Court
Africa Sanchez, Clark County Education Association
Hon. Deborah Schumacher, Second Judicial District Court

OTHERS PRESENT:

Bill Gang, Administrative Office of the Courts
John McCormick, Administrative Office of the Courts
Gloria Quinn, Administrative Office of the Courts
Daren Richards, Clark County Public Defender

Chairman Cherry called the meeting to order at 10:00 a.m. Justice Cherry moved to approve the September 12, 2007, meeting summary and the motion passed unanimously.

**STATUS OF EIGHTH JUDICIAL DISTRICT
CONTRACT ATTORNEY PROGRAM**

The contract attorney program is on the Clark County Commission agenda for December 6. Ms. Quillin plans to urge the commission to hire more contract attorneys and approve the recommended raises. The hourly rate for going to trial will be \$100 per hour. This does not include trial preparation. Currently, contract attorneys are paid nothing extra when they go to trial. Misdemeanor cases will be shifted from the Public Defender's Office to the contract attorneys. Typically there have been three contract attorneys per track. These attorneys are asked to do in excess of 100 felonies or gross misdemeanors per year and are paid \$36,000 per year. A comment was made that the contract attorneys are grossly underpaid and should be paid for trial preparation. However, it would be difficult to monitor their hours. Committee had agreed at previous meetings that this only a temporary, quick fix and some action must be taken now as the system is flawed.

The next step is to have the County announce that applications are being accepted for the position of contract attorneys. Members of this commission would meet to review those applications and chose the 36 most capable people to do the job. The County would then sign those people under contract for the remainder of the fiscal year through June 30. In April or May the opportunity would be open again to submit applications and those people can reapply. A contract renewal would not be guaranteed. Renewal would depend upon performance. The American Bar Association recommends that this process not be placed with the judiciary; however, some members still feel one judge should be on that committee in an ex-officio capacity.

REVIEW AND REVISE DRAFT REPORT

John McCormick presented the committee's draft report for discussion. Franny Forsman offered to review the report to check for grammatical errors.

There was discussion on how indigency is determined. Clark County has no set of criteria, and the Public Defender's Office wants the judges to make that determination. One of the recommendations Liz will be making to the commission on December 6 is the use of software like that used by Pre-trial Services in Washoe County. This software makes indigent determination within seconds. Justice of the Peace Ann Zimmerman explained that one Justice of the Peace in Las Vegas uses the federal form and bases indigency on the guidelines used in federal court. Judge Zimmerman felt this was good for the short term. Jeremy Bosler stated that in Washoe County, applicants are asked to sign a statement under penalty of perjury as to assets and liabilities. There are some 'best practices' for screening indigency stated in the 2003 Review of the Clark County's Public Defender's Office. Mr. Bosler suggests those 'best practices' be adopted.

The working poor may be able to pay a portion of expenses, but no one follows up on this. David Carroll has written extensively on eligibility screening and recouping costs. National standards say that the threshold should be a substantial hardship that builds in some flexibility for what the cost of counsel is in a city like Las Vegas versus the rural areas. The collection process must be done on the front side or difficulties arise with the cost of collections and court processing fees. Some courts have instituted up front screening costs of some small amount, which can be waived if the person truly does not have the money. If the screening shows indigent but able to contribute, a determination could be made that a person with a felony case can buy the services of a public defender for a flat fee of \$600, as an example. If a Pre-Trial Services system is set up and staffed correctly, it is the best place to have eligibility screening done.

Mr. Carroll pointed out that there should be uniformity from place to place. Mr. Carroll provided a Primer on Eligibility & Recoupment to the commission, which included very specific language that has been used in different jurisdictions.

Ms. Forsman suggested stronger language when referring to caseloads in the second paragraph, page 10 of 81 of the meeting materials. There was disagreement about placing stronger language in the report itself and the commission agreed to place at the bottom of that page a footnote that reads 'The survey respondents uniformly answered "No" when asked if the office is providing appropriate, adequate, and competent defense services for clients.'

There was a question whether any ethnic demographics were being tracked in the survey or otherwise and Bill Gang answered that it was not. It was agreed that this should be considered for future tracking purposes, to track who is being served. This is necessary as the commission continues to develop. A letter was distributed from the NAACP Legal Defense & Educational Fund, Inc., addressing ethnic demographics. A subcommittee recommendation is in the report that the Nevada Supreme Court or the proposed Indigent Defense Commission put in place a rule that requires courts/clerks of the courts to collect and report data regarding indigent defense services in each county of the state. That recommendation is also in the body of report. Ms. Forsman suggested adding 'including ethnicity' to page 9 and where it is a recommendation on the last page.

Enforcement of performance standards was questioned. It was suggested that the first level of enforcement would be Public Defender's Office, then the indigent Defense Commission that this committee is recommending.

Minority Report

A Minority Report written by John Berkich and Elizabeth Quillin was distributed and read by commission members. The report points out some of the other financial burdens faced by the citizens of Clark County.

Mr. Berkich spoke about the many demands on the counties and their willingness to somehow strike a balance with what can be afforded. The minority report outlines those demands. Court facilities are also needed. There are growing needs on the expenditure side, but also reduction in revenues statewide.

The Minority report does not object to the Indigent Criminal Defense Performance Standards. The report proposes that a decision regarding caseload standards for Nevada be delayed until a comprehensive case-weighting and time management study is performed. It is unclear whether the contract attorneys could adhere to the adopted performance standards with a further increase in their case loads.

It has been noted at prior meetings that such a Nevada study would take 2 to 3 years to complete. The system needs improvement now. A number of studies have been done on Clark County and also throughout the country. Many of those studies come close to the number this commission is recommending. If a case-weighting study is done, the county should be bound by the results. Case loads are presently so high that measuring how much time should be spent on a case based upon double the case loads is not the best way. The case loads need to come down first.

A huge burden was placed on the courts by the More Cops Initiative. The County Commission and the State Legislature allowed the Police Department to have an initiative that brings in 300-400 more police officers per year. This created 200 more cases per month for the courts. There needs to be a balance between law enforcement and indigent defense. Indigent defense is a constitutional mandate.

There is a perceived lack of urgency on the part of the County Commissioners. Judge Stuart Bell went on the record as having voted against the case load standards, and for the performance standards. Judge Bell feels the case load standards are artificial. Different cases take different amounts of time. Others noted that the performance standards are well drafted and should be adopted. Those standards are the driving force to calculate the number of people needed to do the job.

There was an inaccuracy in the second to last paragraph of the Minority Report regarding the State of Michigan. Mr. Carroll explained that Michigan currently is facing a lawsuit filed by the ACLU, National Association of Criminal Defense Lawyers, and private law firms because they are not meeting constitutional standards. The inaccuracy is referring

to the state legislature when it is actually the county legislature's budget for trial level services.

Mr. Carroll feels this Minority Report accurately reflects the restraints on the counties. It is the perfect argument for the need of a statewide system. The Minority Report is a draft and there will be more comments from the county budget office. Mr. Berkich and Ms. Quillin will work on the revised report with input from Chuck Short. The report should be available in about 2 weeks' time.

Justice Maupin suggested the IDC Report include the Minority Report. Franny Forsman offered to draft a response to the Minority Report and circulate that response to Phil Kohn, Jeremy Bosler, Jennifer Lunt, David Carroll, and Gary Peck for comments.

A cost study to implement the caseload standards was suggested. If the Supreme Court Justices implement the caseload standards, they will need to know how much money the counties will need to fund those standards. There was some disagreement about including cost figures. It was thought that another commission could be formed to address the fiscal aspect of providing adequate indigent defense. John Berkich had a fiscal note study done on the caseload limits and the cost was estimated at \$4 million to \$5 million for Washoe County. This figure did not take into account the physical location for the employees. Diane Crow will develop a cost figure for the recommended expansion of the State Public Defender's office. Chuck Short can provide figures to establish an additional public defender's office. Liz Quillin will develop a cost figure for Clark County. A vote failed to approve the suggestion to add a fiscal note to the majority report. Adding these figures to the Minority Report was discussed as a compromise.

A definition of 'indigency' was provided by David Carroll, taken from the State of Louisiana statutes and will be included in the Majority Report on page 9 under 'Recommendations'. Committee agreed that reference to the Nevada statute was warranted and this will be included in the next draft report.

The following language should be added to the Rural Courts Subcommittee recommendations and where appropriate in the report: 'This Commission shall be charged with studying and exploring the possibility of developing a unified statewide public defender system.'

Judge Higgins, Judge Bell, and Judge Dahl will be drafting an additional Minority Report summarizing their opposition to the caseload standards.

General consensus was the report with the previously discussed changes could be moved forward.

There was no public comment.

The meeting was adjourned at 1:30 p.m.

Report of the
Nevada Supreme Court's
Indigent Defense Commission
2007

Justice Michael Cherry, Chair

Nevada Supreme Court

Chief Justice
A. William Maupin

Associate Justices
Mark Gibbons
Michael L. Douglas
James W. Hardesty
Ron Parraguirre
Michael Cherry
Nancy M. Saitta

INDIGENT DEFENSE COMMISSION 2007

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Indigent Defense Commission Members

Chief Justice A. William Maupin, Ex-Officio Member, Supreme Court of Nevada
Justice Michael A. Cherry, Supreme Court of Nevada
Judge Stewart L. Bell, Eighth Judicial District
Judge Stephen Dahl, North Las Vegas Justice Court
Judge Kevin Higgins, Sparks Justice Court
Chief Judge Dan L. Papez, Seventh Judicial District
Judge Jerome M. Polaha, Second Judicial District
Judge Deborah Schumacher, Second Judicial District
Judge Michael P. Villani, Eighth Judicial District
Judge William O. Voy, Family Division, Eighth Judicial District
Judge Ann E. Zimmerman, Las Vegas Justice Court

David C. Amesbury, Esq., Law Offices of Amesbury & Schutt
Jeremy T. Bosler, Washoe County Public Defender
David Carroll, Ex Officio Member, National Legal Aid and Defender Association
Diane R. Crow, Chief Deputy State Public Defender
Philip J. Kohn, Clark County Public Defender
John C. Lambrose, Assistant Federal Public Defender
Robert Langford, Esq., Law Offices of Robert Langford
David B. Lockie, Lockie & Macfarlan, Ltd., Elko
Jennifer J. Lunt, Washoe County Alternate Public Defender
Gary Peck, Executive Director, American Civil Liberties Union
Africa Sanchez, Clark County Education Association
David Schieck, Clark County Special Public Defender
Cordell Stokes, Clark County Urban League

James P. Carmany, Court Administrator, Las Vegas Municipal Court
Ronald Longtin, Court Administrator, Second Judicial District Court
Charles J. Short, Court Executive Officer/Clerk of the Court, Clark County

Ad Hoc members

John Berkich, Washoe County Assistant County Manager
Franny A. Forsman, Federal Public Defender
Liz Quillin, Clark County Assistant County Manager

Administrative Office of the Courts (staff to Commission)

Robin Sweet, Deputy Director
Bill Gang, Public Information Officer
John McCormick, Rural Courts Coordinator
Gloria Quinn, Administrative Assistant

LETTER FROM THE CHAIR

The way we, as a society, deal with the indigent in our court system is a benchmark of our commitment to justice.

Everyone charged with a serious crime is entitled to legal representation, even if that defendant cannot afford to hire counsel. We have heard that information repeatedly on television shows in the Miranda warnings that police give to those they arrest. It all sounds simple enough until we examine how we provide all those lawyers, and who must pay. Then, it is anything but simple.

Ultimately, the issue is access to justice, and how we in Nevada meet our obligation to ensure that access is provided to all. Nevada's counties have been struggling for years to provide indigent defense services. In urban centers, the crime rate grows along with the population. At the same time, rural counties must contend with economic difficulties and, sometimes, a lack of available attorneys to represent those being arrested.

Nevada's counties and courts have worked hard to meet our obligations, and we can be proud of services we have provided. But many believe we can do better. That is why the Nevada Supreme Court created the Indigent Defense Commission on April 26, 2007, "to study the issues and concerns arising from the various methods used across Nevada to appoint counsel to represent those who cannot afford a lawyer, to select counsel, to compensate counsel, to establish the qualifications and experience of the attorneys appointed, and other related issues."

The Nevada Supreme Court recognizes that competent representation of the indigent is vital for our system of justice to operate as it should.

This report details the efforts of the Commission, its conclusions, and recommendations to improve our system of justice. Every Commission member and all those who helped in our task are to be commended.

I hope this report of the Indigent Defense Commission will help Nevada's courts, along with our state, county, and city governments better provide access to justice for all.

Respectfully submitted,

Justice Michael Cherry
Supreme Court of Nevada

Report of the Nevada Supreme Court's Indigent Defense Commission

INTRODUCTION

When a person charged with a serious crime cannot afford the services of an attorney, it falls to Nevada's courts and governmental entities to provide that legal representation. It is a system that levels the field and ensures that the rights of defendants are preserved and protected. It is an integral piece of our nation's system of justice, a basic right.

Nevada, however, is suffering growing pains and its indigent defense structure is in a state of flux. In large part because Nevada has been the fastest growing state in the nation – with a corresponding increase in criminal court cases – the state has struggled to continue providing adequate indigent defense services. This is particularly true in the urban centers of Clark and Washoe Counties, where county public defender offices represent the vast majority of indigent defendants. The Public Defenders heading those offices have admitted their deputies' caseloads are so high that adequate defense services for their clients is extremely challenging.¹ Caseloads for the public defenders in Clark and Washoe Counties are well above the American Bar Association recommended limit of 150 felony cases per attorney.

Counties and courts must also deal with how to provide indigent representation in cases involving multiple defendants. In these and other conflict situations, private attorneys must be brought in to provide needed assistance. The cost can be high, particularly for financially strapped rural counties, but the expense is unavoidable in order to provide conflict-free representation.

The effectiveness of indigent defense across Nevada has been the subject of recent debate and some controversy, involving such issues as:

- How many cases can a public defender be assigned and still effectively represent the clients?
- What performance standards should apply to ensure indigent defendants receive all necessary legal representation?
- Should judges be involved in appointing and assigning attorneys to represent indigent defendants when those attorneys will be appearing in the judges' courtrooms?
- What is the most efficient way for rural communities to provide indigent defense when so few attorneys are available to provide such services?

Criminal caseloads have not only mushroomed in the urban centers of Clark and Washoe Counties, but also in Nevada's smaller but emerging communities, such as Fallon and Fernley. Rural communities, hampered by geographic isolation and economic limitations, have always struggled to provide indigent defense services and are now facing new challenges.

¹ The survey respondents uniformly answered "No" when asked if the office is providing appropriate, adequate, and competent defense services for clients.

SUMMARY OF EFFORTS BY THE INDIGENT DEFENSE COMMISSION

ESTABLISHING THE COMMISSION

In April 2007, the Nevada Supreme Court determined it was time to examine indigent defense services throughout the state and created the Indigent Defense Commission.

As an initial step, a survey was conducted of courts throughout the state to determine how the courts and counties provide indigent defense services. After the initial meeting of the full Commission, three subcommittees were created to examine areas of concern:

Caseload and Performance Standards to address how many cases can be effectively handled by a county or state public defender, or an attorney contracted by a county to provide indigent defense, and what steps should be taken to provide adequate and competent defense services.

Independence from the Judiciary to examine how to insulate judges from the process of appointing and assigning contract lawyers who then appear in their courtrooms.

Rural Courts to examine the different ways Nevada's rural counties approach the issue of indigent defense and determine if the existing systems provide adequate services.

Each subcommittee made a series of recommendations that were voted on by the full Commission. Those recommendations are referenced in this Executive Summary, and included in detail in the subcommittee reports.

In June 2007, surveys were sent by the Indigent Defense Commission through the Nevada Supreme Court, Administrative Office of the Courts, to trial courts and public defender offices throughout Nevada to capture a picture of the way indigent defendants are served.

THE STATE OF INDIGENT DEFENSE IN NEVADA

Generally, one responsibility of the County Commissions in Nevada's 17 counties is to provide indigent defense services in county and state courts for those charged with felony, gross misdemeanor, and some misdemeanor crimes. Those counties vary geographically, demographically, and politically. Because each county has fashioned its own indigent defense system to meet its own needs, the systems differ greatly from county to county.

In incorporated municipalities, the City Councils have the responsibility to provide indigent defense for those defendants in Municipal Court cases who require appointed legal representation – primarily drunken driving, domestic violence, and any other cases in which incarceration is the likely punishment.

Nevada's two urban counties – Clark and Washoe – each have two public defender offices and a contract system to provide attorneys for overflow and conflict. In the event additional attorneys are required, appointed counsel are paid on an hourly basis. An adequate number of attorneys are available for appointment in the urban counties.

By contrast, Nevada's least populous counties struggle to provide constitutionally mandated indigent defense services. Some rural counties have no attorneys residing within their borders and must import defense lawyers from neighboring counties or urban centers, often at considerable expense.

Between those extremes are counties with sufficient population and fiscal means to provide necessary defense services, but insufficient court caseloads to justify establishing salaried public defender offices. Some of these counties contract with local law offices for the bulk of the work.

Elko County has chosen to fund a formal public defender office with four lawyers in Nevada's northeast corner.

For some counties, the Nevada State Public Defender's Office fills much of the need for indigent defense services. During fiscal year 2006, the office served Carson City and Storey, White Pine, Eureka, Lincoln, Humboldt, and Pershing Counties.

Assessing how well Nevada provides one of the most fundamental Constitutional rights, however, is not easy. With each county establishing its own indigent defender system and no standards in place for collecting performance information or uniform caseload statistics, the picture is far from clear.

RECOMMENDATION: The Indigent Defense Commission recommends that the collection and reporting of uniform statistics about the nature and quality of services to indigent defendants be required. The statistical reporting standards should include demographic data regarding the race/ethnicity of each defendant represented.

CASELOAD AND PERFORMANCE STANDARDS SUBCOMMITTEE

CASELOAD STANDARDS

The purpose of establishing caseload standards in indigent defense cases is to ensure that workloads, by reason of their excessive size, do not interfere with the rendering of quality representation or lead to the breach of professional obligations. In short, if caseloads are too high, adequate representation simply cannot be provided and Nevada cannot meet its obligation to provide defense services for those who are unable to afford to retain counsel.

The Subcommittee considered such factors as quality of representation, turnover of cases, percentage of cases that go to trial, support services available, court procedures, and complexity of the cases. Death penalty cases, of course, require considerably more commitment in attorney time than other types of cases.

RECOMMENDATIONS: Although the American Bar Association has set the recommended caseload standard for attorneys handling felony cases at 150 per attorney, the Indigent Defense Commission recommends a felony/gross misdemeanor caseload standard 150 to 192 cases. In all categories, for public defenders, contract attorneys, or appointed counsel, caseloads should not exceed the following ranges:

Capital cases	3-4
Charges carrying automatic life sentences	15
Non-life felonies/gross misdemeanors	150-192
Misdemeanors	400
Juvenile delinquency	200
Capital appeals	5
Non-capital felony appeals	25

PERFORMANCE STANDARDS

FELONY AND MISDEMEANOR CASES:

The paramount obligation of criminal defense counsel in indigent defense cases is to provide zealous and quality representation at all stages of criminal proceedings, adhere to ethical norms, and abide by the rules of the court. The Subcommittee also recommended standards in such cases related to:

- Education, Training, and Experience of Defense Counsel
- Adequate Time and Resources
- Initial Client Interview
- Pretrial Release Proceedings
- Preliminary Hearings/Grand Jury Representation
- Case Preparation and Investigation
- Pretrial Motions and Writs
- Plea Negotiations
- Trial Preparation
- Jury Selection
- Defense Strategy
- Trial and Case Presentation
- Jury Instructions
- Sentencing

CAPITAL CASE REPRESENTATION:

The Subcommittee emphasized the need to have well-qualified attorneys for death penalty cases with adequate non-attorney support staff. The Subcommittee also outlined specific performance standards to ensure effective representation of capital case clients. The Subcommittee recommended standards for:

Makeup of the Defense Team
Appointment, Retention, and Removal of Defense Counsel
Training
Compensation
Time Commitments Per Case
Makeup of the Defense Team
Maintaining a Relationship with the Client
Obligations if the Client is a Foreign National
Duty to Assert Legal Claims
Duty to Explore Plea Bargains
Entry of Guilty Pleas
Trial Preparation
Jury Selection
Penalty Issues and Options
Pre-Sentence Issues
Post-Conviction Issues
Clemency Issues

APPELLATE AND POST-CONVICTION CASES

The obligation of defense counsel in appellate cases is to provide zealous and quality representation at all stages and advise the client of all rights of appeal and any limitations on that right. The Subcommittee also recommended standards for:

Identifying Appellate Issues
Diligence
Duty to Meet with Trial Lawyers
Duty to Communicate with Client
Duty to Seek Release During Appeal
“Fast Track” Appeal Responsibilities
Post-Decision Responsibilities
Post-Conviction Representation

JUVENILE DELINQUENCY CASES

Attorneys representing juveniles in delinquency proceedings should first abide by the performance standards recommended for felony and gross misdemeanor cases. Additionally, the Subcommittee recognized that some additional matters are unique to juvenile delinquency cases. Therefore, the Subcommittee recommended standards for:

Role of the Defense Counsel as a Child Advocate

Education, Training, and Experience

Time and Resources

Client Interviews

Detention Hearings

Diversion/Informal Supervision

Case Preparation

Pre-Trial Motions

Plea Negotiations

Adjudicatory Hearings

Presenting the Case

Objections to Hearing Master Recommendations

Disposition Proceedings

Post-Disposition Responsibilities

Transfer Proceedings to Adult Court

RECOMMENDATION: The performance standards should be adopted as guidelines for representation by appointed counsel.

INDEPENDENCE OF THE DEFENSE FUNCTION SUBCOMMITTEE

An increasing concern statewide, and particularly in Clark County, is the lack of independence from the judiciary of the court appointed public defense system. Elected judges exercise great control over the appointment and selection of attorneys engaged in private practice to represent defendants in criminal matters at public expense. This situation has created the appearance of several problems or improprieties.

In many jurisdictions, local judges play an integral and nearly absolute role in choosing which private defense counsel are appointed to hourly cases and which defense counsel receive track contracts. As such, judges have been criticized for sidestepping the list of appointed counsel and giving a disproportionate number of assignments to certain favored attorneys. Whether justified or not, the system creates an appearance of impropriety and the opportunity for abuse.

Allowing judges to maintain a role in the oversight of indigent defense services can create the false perception that judges are not fair arbitrators. Critical case decisions should be based solely on the merits of the case and not on an attorney's desire to please the judge in order to obtain future appointments. The appearance of fairness is tarnished when the judiciary selects the defense attorney or exercises control over the compensation or expenses of counsel in defending the case.

RECOMMENDATION: The selection of lawyers for specific cases should be made by the administrators of the indigent defense programs, not by judicial officials.

RECOMMENDATION: The appointed counsel system should be administered in a manner that attracts participation from the largest possible cross-section of members of the bar and affords opportunities for inexperienced lawyers to become qualified for assigned cases, while at the same time insuring appointment of qualified counsel in every case.

RECOMMENDATION: A board, agency, or commission should be created to oversee the appointment of counsel and the contract system without judicial interference.

RECOMMENDATION: The County, as the contracting authority, should appoint the board, agency, or commission to establish general policy for the indigent defense program, but not to interfere with the conduct of particular cases. The board, agency, or commission should consist of diverse members, but exclude judges and prosecutors to support and protect the independence of the defense services program.

RURAL COURTS SUBCOMMITTEE

Current caseload levels for attorneys in rural counties contracted to represent indigent defendants generally are not in compliance with the American Bar Association caseload and performance standards. Consequently, providing adequate defense services are a challenge in rural communities. The Subcommittee also determined that there is a lack of oversight over contract attorney systems to ensure quality representation. The focus of county governments has been to minimize the costs involved in providing indigent defense.

The Subcommittee also determined that the State Public Defender's Office has not been as successful as it might be because of two reasons:

Counties must fund 80 percent of the cost of utilization of the State Public Defender, which is a disincentive when less costly alternatives may be available.

Placement of the State Public Defender's Office within the Executive Branch does not allow independence and likely results in under funding.

RECOMMENDATION: Adopt the Kentucky model that would allow the existing county public defender offices in Clark, Washoe, and Elko Counties to remain, but require that indigent defendants in all other counties be represented by the State Public Defender's Office. That office should be funded entirely by a state general fund appropriation to relieve the burden on less financially stable counties.

RECOMMENDATION: A permanent Indigent Defense Commission should be created to provide primary oversight of public defender offices and indigent defense programs utilized when conflicts exist. The permanent Commission would also set appropriate standards, and establish necessary rules. The permanent Commission should have authority to appoint the State Public Defender. This Commission shall be charged with studying and exploring the possibility of developing a unified statewide public defender system.

RECOMMENDATION: The Nevada Supreme Court or the proposed permanent Indigent Defense Commission should establish rules requiring the collection and reporting of data regarding indigent defense including demographic data regarding the race/ethnicity of each defendant represented, in each county.

THE STATE OF INDIGENT DEFENSE IN NEVADA

In June 2007, surveys were sent by the Indigent Defense Commission through the Nevada Supreme Court, Administrative Office of the Courts, to trial courts and public defender offices throughout Nevada to capture a picture of the way indigent defendants are served.

The Surveys

Two surveys were circulated. One sought information from the courts and court administrators about how indigency is dealt with from the bench. The second sought information from public defender offices, which bear the brunt of responsibilities in counties where they exist.

The surveys attempted to gather information that would allow comparisons of services provided to indigent defendants. However, it became apparent from the survey responses that the lack of uniform statistics does not allow for meaningful comparisons. For example, some systems gather statistics based on calendar year, while others base data on the fiscal year. When population, geography, and economics are considered, comparisons become even more difficult. Still, the information that follows provides a preliminary overview of Nevada's indigent defense systems.

Public Defenders

Nevada has a total of six public defender offices – three county public defender offices (Clark, Elko, and Washoe Counties), two conflict public defender offices (Special Public Defender in Clark County and Alternate Public Defender in Washoe County), and the State Public Defender based in Carson City.

The three county public defender offices and the State Public Defender's Office provide full services for indigent defendants, from relevant misdemeanors to felonies to appeals. (Clark County is in the process of removing misdemeanors from its public defender caseload and giving that responsibility to contract attorneys.)

The Alternate Public Defender's Office in Washoe County handles all conflict cases. The Special Public Defender's Office in Clark County is limited to murder cases when conflicts arise, plus indigent parents in contested termination of parental rights or guardianship cases in Family Court.

The following information is summarized from the survey responses. The cases per attorney are averages.

Clark County Public Defender

Attorneys	104
Felony and gross misdemeanor cases per attorney	364 (Calendar 2006) 337 (Calendar 2005) 340 (Calendar 2004)
Misdemeanor cases per attorney	140 (Calendar 2006)
Non-attorney staff	16 investigators 1 paralegal 24 clerical 7 administrators 8 social workers 3 litigation support

Adequate Defense Services

When asked on the survey if the office is providing appropriate, adequate, and competent defense services for clients, the response was "NO." When asked on the survey if the non-attorney staff is sufficient to meet the defense needs of the clients, the response was "NO."

Clark County Special Public Defender

Attorneys	14 (9 criminal, 5 family defense)
Felony and Gross Misdemeanor cases per attorney	8 murder cases (including 4 capital cases)
Non-Attorney staff	4 investigators 1 temp paralegal 4 clerical 2 social workers 1 part-time family services specialist

Adequate Defense Services

When asked on the survey if the office is providing appropriate, adequate, and competent defense services for clients, the response was "YES." When asked on the survey if the non-attorney staff is sufficient to meet the defense needs of the clients, the response was "YES."

Washoe County Public Defender

Attorneys	33
Felony and Gross Misdemeanor cases per attorney	327
Misdemeanor cases per attorney	391
Non-Attorney staff	9 investigators 16 clerical 1 administrative 0 paralegals 0 social workers

Adequate Defense Services

When asked on the survey if the office is providing appropriate, adequate, and competent defense services for clients, the response was “NO.” When asked on the survey if the non-attorney staff is sufficient to meet the defense needs of the clients, the response was “NO.” (Explanation: “We would like to add paralegals and social workers to assist in non-attorney tasks.”)

Washoe County Alternate Public Defender

The Washoe County Alternate Public Defender is a new office and, therefore, is too new for accurate average caseloads to be determined.

Attorneys	9
Felony and Gross Misdemeanor cases per attorney	250 (Projected)
Misdemeanor cases per attorney	25 (Projected)
Non-Attorney staff	2 investigators 4 clerical 0 paralegals

Adequate Defense Services

When asked on the survey if the office will be able to provide appropriate, adequate, and competent defense services for clients, the response was “NO.”

Elko County Public Defender

Attorneys	4
Felony and Gross Misdemeanor cases per attorney	144 (estimated)
Misdemeanor cases per attorney	192 (estimated)
Non-Attorney Staff	2 investigators 3 clerical 0 paralegals

Adequate Defense Services

When asked on the survey if the office is providing appropriate, adequate, and competent defense services for clients, the response was “YES.” When asked on the survey if the non-attorney staff is sufficient to meet the defense needs of the clients, the response was “YES.”

State Public Defender

Attorneys	12
Felony and Gross Misdemeanor cases per attorney	161 (FY 07)
	159 (FY 06)
Misdemeanor cases per attorney	172
Non-Attorney staff	2 investigators
	4 clerical
	1 administrative
	0 paralegals

Adequate Defense Services

When asked on the survey if the office is providing appropriate, adequate, and competent defense services for clients, the response was “YES.” When asked on the survey if the non-attorney staff is sufficient to meet the defense needs of the clients, the response was “YES.”

Urban County Indigent Defense Systems

CLARK COUNTY

Clark County employs a range of defender services to handle indigent cases in its urban and rural courts. The Clark County system is also in the midst of analysis and change.

Public Defender

The Clark County Public Defender’s Office has primary responsibility for indigent cases in the urban county Justice Courts in Las Vegas, North Las Vegas, and Henderson, plus the Justice Courts in the rural townships outside the Las Vegas Valley. The office also has primary responsibility for indigent cases at the District Court level. Currently, this responsibility includes felonies and misdemeanors. A discussion is underway to remove misdemeanor cases and assign them to contract attorneys, thus reducing the overall caseloads of the deputy public defenders, but substantially increasing the caseloads of contract attorneys

Public defenders are appointed at the initial arraignments and represent clients vertically through appeal to the Nevada Supreme Court or, in some cases, to the U.S. Supreme Court. For adult defendants, the office has teams that specialize in cases of sexual assault, homicide/capital murder, and appeals. The office also has a team that provides representation in juvenile delinquency cases.

Special Public Defender

The Special Public Defender’s Office handles murder cases when there are conflicts with the Clark County Public Defender’s Office, and also represents indigent parents in contested termination or guardianship cases in Family Court. The office also represents clients on appeal.

Contract Attorneys

In conflict cases, private attorneys are contracted in specific courts for services. Attorneys are paid a specific amount (currently \$3,000 per month) to provide defense services in an unspecified number of cases. Clark County is considering raising the fee to \$6,000 per month,

with hourly compensation for in-court time in trial, if the attorneys absorb all misdemeanor cases. The attorneys currently are appointed by the judges. However, the creation of a selection committee that will have limited judicial involvement is under consideration.

Hourly Appointments

For cases that require additional work, the courts appoint attorneys on an hourly basis. Generally these attorneys are contract attorneys, but changes to the system are being discussed by the judges to include other attorneys in the pool of those eligible for hourly appointments. Judges would appoint attorneys on a rotating basis, under a system change being considered.

WASHOE COUNTY

Washoe County employs a range of defender services to handle indigent cases in its urban and rural courts.

Public Defender

The Washoe County Public Defender's Office has primary responsibility for indigent cases, including all felonies and gross misdemeanors. The office also represents indigent defendants, outside the incorporated cities of Reno and Sparks, who are charged with misdemeanors in which appointed counsel is required. The office also represents juvenile delinquency cases, including representation in Juvenile Drug Court, juvenile dependency and parental rights termination cases, Family Drug Court, and involuntary commitment proceedings. The office also represents clients on appeal, and in parole hearings.

All indigent defense cases are first assigned to the Public Defender's Office, which screens the cases for conflicts. If a conflict is evident, the case is referred to the Alternate Public Defender's Office.

Alternate Public Defender

This is a new full-service office designed to absorb all types of cases when conflicts exist at the Washoe County Public Defender's Office. This office has a broader function than the Special Public Defender's Office in Clark County, which is limited to homicide/ capital murder cases and indigent parents in certain Family Court cases.

Contract Attorneys

In the event that conflicts exist at both public defender offices, Washoe County contracts with one attorney for a flat fee to provide legal representation for indigent defendants. The contract attorney subcontracts with other attorneys for the actual courtroom representation of defendants. Cases are limited to non-capital felonies and misdemeanors.

Hourly Appointments

When conflicts exist at the Public Defender and Alternate Public Defender offices, attorneys may be appointed on an hourly basis in complex cases or for cases involving trials.

ELKO COUNTY

Public Defender

The Elko County Public Defender's Office handles about 90 percent of all indigent defense cases. The office provides representation in felony, misdemeanor, appellate, death penalty cases, probation/parole hearings, status hearings for non-payment, and status hearings on cases not formally charged.

This is a relatively new office and statistical information has not yet been collected and maintained. The Elko County Public Defender noted that his office is in the process of gathering statistics to better determine the workings and effectiveness of his office.

Hourly Appointments

When conflicts occur, private attorneys are appointed by the courts and paid on an hourly basis.

Carson City-Douglas County Corridor

While the counties along the Carson City-Douglas County corridor are more populous and prosperous than some rural counties, they face the same issues and choices as all other counties.

CARSON CITY AND STOREY COUNTY

Courts in the First Judicial District have chosen to utilize the State Public Defender for most indigent defense services (85 percent). In Carson City, the courts have contracted with three attorneys to handle cases when there is a conflict (14 percent). When conflicts with the three attorneys occur, the courts appoint attorneys on an hourly basis (only about 1 percent of the time). In Storey County, if the State Public Defender has a conflict, alternate attorneys are appointed on an hourly basis by the judges.

CHURCHILL COUNTY

One attorney is contracted as a "public defender" with a second attorney designated as a contract attorney (paid hourly). If both are conflicted off cases, other attorneys are appointed as necessary on an hourly basis.

LYON COUNTY

Three attorneys are contracted as "public defenders," though not from the same office. They are hired based on geography – one for the Dayton area, one from Fernley, and one for Yerington, Silver Springs and Smith Valley. A pool of attorneys is available for appointment in conflict cases on an hourly basis.

DOUGLAS COUNTY

Attorneys are contracted to provide "public defender" services in 85 percent of cases, while other attorneys are appointed on an hourly basis when conflicts occur.

Rural Counties

Small counties outside Clark, Washoe, Elko, and the Carson City-Douglas County corridor, must utilize available resources to provide indigent defense services. In some cases, the State Public Defender provides the primary services (White Pine, Eureka, Lincoln, Humboldt, and Pershing Counties).

The survey responses indicated that other counties establish ad hoc public defender offices by contracting with law offices for defender services. While some of these are referred to in the surveys as "public defender offices," they actually are private law offices. The lawyers are not government employees as they are in the true public defender offices.

When conflicts arise, such as when there are multiple defendants or there is a conflict with a witness, alternate defense attorneys generally are appointed on an hourly basis. This can prove to be costly when these lawyers must be brought in from the urban counties.

While Pershing County was utilizing the State Public Defender, the relationship was severed effective June 30, 2007. A contract has since been awarded to a law office.

Municipal Court Indigent Defense Systems

While the counties fund the Justice and District Courts for indigent defense services, Municipal Courts are city courts that are independent from the counties and must establish their own indigent defense systems. Municipal Courts handle only misdemeanor and traffic cases, but still are constitutionally mandated to provide counsel to defendants who face incarceration.

Urban Cities

LAS VEGAS

Indigent defense services at Las Vegas Municipal Court are provided by contract attorneys who are appointed by individual judges to appear in their courts. This method is under review and is anticipated to be modified to distance the judges from the selection process. About 98 percent of indigent cases are handled by contract attorneys, with rare conflicts assigned to hourly appointment lawyers.

NORTH LAS VEGAS

North Las Vegas Municipal Court utilizes six contract attorneys for indigent defense. For fiscal year 2007, about 450 individuals received the services. Attorneys submit applications for appointment and are screened for experience and general knowledge by the court. A list is provided by the court to the city council for the final determination. Appointments to cases are generally made by the executive secretary to the court administrator, although judges may also directly appoint. A log is kept to ensure that appointments are evenly distributed.

HENDERSON

Contract attorneys handled about 99 percent of the approximately 1,350 indigent defense cases during fiscal year 2007 in Henderson Municipal Court. The contract attorneys are selected by the judges.

RENO

Contract attorneys handled about 95 percent of the approximately 2,300 cases during fiscal year 2007 at Reno Municipal Court. Judges review applications and appoint judges to the contracts. Attorneys are assigned to courtrooms generally on a rotating basis.

SPARKS

Contract attorneys handled all of the approximately 1,000 indigent defense cases at Sparks Municipal Court during fiscal year 2007. The contract attorneys are selected and assigned to cases by the judges.

Rural Cities

ELKO

The Elko County Public Defender provided indigent services for Elko Municipal Court in addition to the Justice and District Courts in Elko County.

FERNLEY

A private attorney is contracted by the Fernley City Council to provide indigent defense services for Fernley Municipal Court.

BOULDER CITY

Indigent defense services are handled by attorneys appointed on an hourly basis. The Boulder City Municipal Judge appoints the attorneys from a pre-determined list. During fiscal year 2007, only 43 cases required defender services at public expense.

YERINGTON

Two or three attorneys work on a contract basis to provide indigent defense services for Yerington Municipal Court. When those attorneys are unavailable or have conflicts, other private attorneys are appointed on an hourly basis by the judge.

MESQUITE

Private attorneys were appointed on an hourly basis on the three occasions during fiscal year 2007 when indigent defense services were required in Mesquite Municipal Court.

Fallon, Carlin, Wells, West Wendover, Ely, and Caliente did not respond to the survey.

Who is Indigent?

The methods utilized in Nevada's courts and defender offices to determine who is eligible for defense services at public expense vary widely. Some counties and courts employ a formal method with some verification of income and ability to retain counsel; others rely on the representation of the defendant as to indigency.

CLARK COUNTY

While NRS 171.188 gives guidance on the issue, Clark County Public Defender Philip Kohn said the mandates are generally ignored in the Clark County courts. He states:

“NRS 171.188 mandates that a defendant may request appointment of counsel through affidavit and the court shall consider the application and make further inquiry. Two years ago a committee consisting of the courts, public defender, and county administration established a protocol to fulfill the statutory requirement. Included in the protocol are indigency standards and a system for the courts to fulfill the statutory requirements noted above. To date, that protocol has not been implemented due to lack of resources. By tradition and contrary to statute, the Public Defender (in Clark County) is presently determining indigency. The present process lacks standards and creates conflicts between the deputy public defender and the client. The defendant fills out a financial disclosure sheet in Justice Court (not by affidavit), which is reviewed by the deputy public defender present in court, who makes a recommendation of indigency based on nebulous standards to the court. The standards generally are that any defendant who makes less than \$2,000 per month qualifies. A defendant who makes more than \$2,000 per month will be further evaluated as to dependents, debts, etc. If it appears that the defendant will not be able to afford to hire a lawyer, he or she will qualify. Not only does the present process violate state law, it is very vague and uncertain. As stated above, after many months of work, a protocol was established to rectify the process. That protocol has not been enacted due to lack of funding for the positions needed.”

Mr. Kohn noted that if it is determined a defendant is capable of contributing to the defense a judge imposes a fee, which is never less than \$50 and seldom more than \$500. Fees are rarely paid and attempts by some judges to incarcerate defendants who do not pay are adamantly opposed by the public defender's office.

WASHOE COUNTY

In Washoe County, Pre-trial Services screens defendants for indigency. It is based on self reporting by defendants during an interview—a review of assets, liabilities, income, and expenses measured against offense-specific rates charged by private counsel. A recommendation is then made to a judge, who makes the final determination.

When a defendant is ordered to contribute to their defense, the amount is related to the offense charged.

ELKO COUNTY

A judge determines indigency and sets any contribution toward defense costs.

State Public Defender Cases

Judges determine indigency, but generally assess a fee. At the Justice Court level it is a flat fee of \$200 and at the District Court level it is \$500. Deputies are able to argue against imposition of any fee if a defendant is truly indigent, and courts have agreed not to issue warrants for non-payment.

RECOMMENDATION: NRS 171.188 mandates that a defendant may request appointment of council through affidavit, and that the court shall consider the application and make further inquiry in order to determine the defendant's ability to pay for such council. With this in mind, it is the recommendation of the Commission that the Supreme Court consider implementing a standard for determining indigency as follows:

“A person will be deemed ‘indigent’ who is unable, without substantial hardship to himself or his dependents, to obtain competent, qualified legal counsel on his 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 earns 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.

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, local private counsel rates, would result in a substantial hardship were they to seek to retain private counsel.”

INDEPENDENT APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS

An increasing concern is the lack of independence of the court appointed public defense system. Unlike any other area or sector of law, elected judges exercise substantial control over the appointment and selection of attorneys to represent indigent defendants in criminal cases. This situation has created the appearance of several problems or improprieties, and has drawn the attention of the media and legal organizations.

To help jurisdictions develop and maintain a more effective public defense system, the American Bar Association developed ten principles to serve as guidelines, including the need for independence. These principles set forth the fundamental elements of a defense system to ensure zealous advocacy and protection of defendants' constitutional rights. Independence of the defense function is considered by the ABA to be essential effective system of indigent defense. The first of the ten principles provides:

*The public defense function including the selection, funding, and payment of defense counsel is independent. **The public defense system should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.***

In Nevada most indigent defense systems lack independence from the judiciary. The most obvious is the involvement and influence is the judiciary in the selection process and appointment of defense attorneys. Although the first principle of the ABA prohibits the supervision of the judiciary to no more than that which is exercised over private attorneys, local judges play an integral and nearly absolute role in choosing which private defense counsel are appointed to hourly cases and which defense counsel receive track contracts. In Clark County, judges have been criticized for sidestepping the list of appointed counsel and giving a disproportionate number of assignments to certain favored attorneys. Whether justified or not, the system creates an appearance of impropriety and the opportunity for abuse.

Allowing judges to maintain a role in the oversight of indigent defense services can create the appearance of partiality, creating the false perception that judges are not fair and neutral. Critical decisions such as whether a case should go to trial, whether motions should be filed on a defendant's behalf, whether expert or investigator costs should be requested, or whether certain witnesses should be cross-examined should be based solely on the merits of the case and not on an attorney's desire to please the judge in order to obtain future appointments. Even with the best of motives by both judges and defenders, the appearance fairness suffers when the judiciary selects the defense attorney or exercises control over the compensation or expenses of counsel in defending the case.

RECOMMENDATIONS: To minimize the negative implications of having judicial influence over the indigent defense system in Nevada, several solutions have been proposed by different organizations. The ABA states that a legal representation plan for a jurisdiction must be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyer

servicing under it should be free from political influence and should be **subject to judicial supervision only in the same manner and the same extent as are lawyers in private practice.** Just as any public defender's office should seek to maintain its office and the performance of its functions free from political pressures that may interfere with its ability to provide effective defense services, so should the court appointed and contract attorney systems. The following recommendations are offered:

1. The selection of lawyers for specific cases should not be made by judicial officials, especially when they are elected officials, but should be managed by the administrator of the indigent defense programs;
2. Appointed counsel should not be selected or assigned on an ad hoc basis. The appointed counsel system should be administered in a manner that attracts participation from the largest possible cross-section of members of the bar and affords opportunities for inexperienced lawyers to become qualified for assigned cases, while at the same time insuring appointment of qualified counsel in every case;
3. A nonpartisan Board, Agency, or Committee should be created to oversee the appointment of counsel and the contract system without judicial interference. This Board should serve as a means of insulating the defense function from undue political or judicial interference;
4. The county or city, as the contracting authority, should appoint the Board. The main function of the Board should be to establish general policy for the indigent defense program, but the Board cannot interfere with the conduct of particular cases. The Board should not have influence on decision making concerning the defense of cases or the cost and expenses for investigation and experts. The Board would make decisions concerning qualifications and training of attorneys to be eligible for appointments. Guidelines for size and manner of selection of the members should assure the independence of the Board.
5. The Judiciary should be encouraged to provide input into the selection and retention of counsel for contracts or hourly appointments but should not participate in the decision-making process.

The Board should consist of 3-13 diverse members. The Board should not include judges or prosecutors, and most members should have a background in criminal law and reflect the race, ethnicity, and gender composition of the community.

Duties of the Board should include:

1. Advising the county or city concerning the terms and minimum requirements of any contract for defense services;
2. Advising the county or city on fee schedules, rate of reimbursements, prevailing attorneys fees and other issues related to the cost of indigent defense services;
3. Supervising the contract award process;
4. Establishing and applying minimum qualifications for lawyers who will receive appointments.

Board members should be appointed using the following criteria:

1. Appointees should be persons who will ensure the independence of appointed counsel;
2. Board members should represent a diversity of factions in order to Ensure insulation from partisan politics;
3. Organizations directly serving the indigent should be a source for board members;
4. Organizations concerned with the problems of the client community should be represented on the Board;
5. A majority of persons on the Board should be practicing attorneys;
6. The Board should not include judges, prosecutors, or law enforcement officials.

CONCLUSION

In compliance with ABA standards set forth in Standard 5-1.3, it is determined that the legal representation plan adopted by this Commission should provide that the lawyers providing indigent defense services should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers that are privately retained. The selection of lawyers for specific cases should not be made by the judiciary or elected officials but by an independent body.

ADDENDUM

The Third Report and Recommendation of the Committee to Review Procedures for Appointment of Counsel for Indigent Defendants of the Eighth Judicial District Court made recommendations concerning the procedures for selecting and awarding of contracts and making appointments for indigent criminal defense services. Those recommendations allow for partial control by the judiciary concerning the counsel that serve on a contract basis in individual departments. It may be possible to reconcile many of those Recommendations with those contained herein so long as the selection of qualified counsel is without judicial interference or influence.

NEVADA INDIGENT DEFENSE STANDARDS OF PERFORMANCE

CAPITAL CASE REPRESENTATION

Standard 1: The Defense Team and Services of Experts in Capital Cases

(a) **The Defense Team**

The defense team should:

- consist of no fewer than two attorneys qualified in accordance with Standard 2, an investigator, and a mitigation specialist; and
- Contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

(b) **Expert and Ancillary Services**

Counsel should:

- secure the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high-quality legal representation at every stage of the proceedings;
- have the right to have such services provided by persons independent of the government; and
- have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

The appointing authority should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

Standard 2: Appointment, Retention, and Removal of Defense Counsel

(a) **Qualifications of Defense Counsel**

1. The appointing authority should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high-quality legal representation.
2. In formulating qualification standards, the appointing authority should ensure that every attorney representing a capital defendant has:
 - obtained a license or permission to practice in the jurisdiction;
 - demonstrated a commitment to providing zealous advocacy and high-quality legal representation in the defense of capital cases; and
 - satisfied the training requirements set forth in Standard 3.

3. The appointing authority should ensure that the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high-quality legal representation. Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:
- substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases and skill in the management and conduct of complex negotiations and litigation;
 - skill in legal research, analysis, and the drafting of litigation documents;
 - skill in oral advocacy;
 - skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
 - skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
 - skill in the investigation, preparation, and presentation of mitigating evidence; and
 - skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

(b) Workload

The appointing authority should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high-quality legal representation in accordance with the Nevada Indigent Defense Standards of Performance and Caseload.

(c) Monitoring; Removal

1. The appointing authority should monitor the performance of all defense counsel to ensure that the client is receiving high-quality legal representation. Where there is evidence that an attorney is not providing high-quality legal representation, the Responsible Agency should take appropriate action to protect the interests of the attorney's current and potential clients.
2. The appointing authority should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high-quality legal representation.
3. The appointing authority should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing high-quality legal representation. Where there is evidence that an attorney has failed to provide high-quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic

defect in a defender office has caused the office to fail to provide high-quality legal representation, the office should not receive additional appointments.

4. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the appointing authority should provide written notice that such action is being contemplated, and give the attorney or defender office opportunity to respond in writing.
5. An attorney or defender office sanctioned pursuant to this Standard should be restored to the roster only in exceptional circumstances.
6. The appointing authority should ensure that this Standard is implemented consistently with Standard 2, so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this Guideline.

Standard 3: Training

- (a) Funds should be made available for the effective training, professional development, and continuing education of all members of the defense team, whether the members are employed by an institutional defender or are employed or retained by counsel appointed by the court.
- (b) Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:
 - relevant state, federal, and international law;
 - pleading and motion practice;
 - pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
 - jury selection;
 - trial preparation and presentation, including the use of experts;
 - ethical considerations particular to capital defense representation;
 - preservation of the record and of issues for post-conviction review;
 - counsel's relationship with the client and his family;
 - post-conviction litigation in state and federal courts;
 - the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.
- (c) Attorneys seeking to remain on the appointment roster should be required to attend and successfully complete, at least once every 2 years, a specialized training program that focuses on the defense of death penalty cases.

Standard 4: Funding and Compensation

- (a) The appointing authority must ensure funding for the full cost of high-quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel.
- (b) Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high-quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.
 - 1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.
 - 2. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
 - 3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.
- (c) Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.
 - 1. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
 - 2. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.
 - 3. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.
- (d) Additional compensation should be provided in unusually protracted or extraordinary cases.
- (e) Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

Standard 5: Obligations of Counsel Respecting Workload

Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high-quality legal representation in compliance with the Nevada Indigent Defense Standards of Performance and Caseload.

Standard 6: Role of the Defense Team

As soon as possible after appointment, counsel should assemble a defense team by selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:

- at least one mitigation specialist and one fact investigator;
- at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments;
- any other members needed to provide high-quality legal representation; and
- at all stages demanding on behalf of the client all resources necessary to provide high-quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.

Standard 7: Relationship with the Client

Counsel at all stages of the case should:

- make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client;
- conduct an interview of the client within 24 hours of initial counsel's entry into the case, barring exceptional circumstances;
- promptly communicate in an appropriate manner with both the client and the prosecution regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards; and
- at all stages of the case, re-advise the client and the prosecution regarding these matters as appropriate.

Counsel, at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

- the progress of and prospects for the factual investigation, and what assistance the client might provide to it;
- current or potential legal issues;
- the development of a defense theory;
- presentation of the defense case;
- potential agreed-upon dispositions of the case;
- litigation deadlines and the projected schedule of case-related events; and
- relevant aspects of the client's relationship with correctional, parole, or other governmental agents (*e.g.*, prison medical providers or state psychiatrists).

Standard 8: Additional Obligations of Counsel Representing a Foreign National

- (a) Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.
- (b) Unless predecessor counsel has already done so, counsel representing a foreign national should:

- immediately advise the client of his or her right to communicate with the relevant consular office; and
- obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.

Standard 9: Investigation

- (a) Counsel at every stage has an obligation to conduct a thorough and independent investigation relating to the issues of both guilt and penalty.
 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.
- (b) Post-conviction counsel has an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.
- (c) Counsel at every stage has an obligation to assure that the official record of the proceedings is complete and to supplement the record as appropriate.

Standard 10: Duty to Assert Legal Claims

Counsel at every stage of the case, exercising professional judgment in accordance with these Standards, should:

- consider all legal claims potentially available;
- thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
- evaluate each potential claim in light of:
 1. the unique characteristics of death penalty law and practice; and
 2. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence;
 3. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and
 4. any other professionally appropriate risks and benefits to the assertion of the claim.

Counsel who decide to assert a particular legal claim should:

- present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and
- ensure that a full record is made of all legal proceedings in connection with the claim.

Standard 11: Duty to Seek an Agreed-upon Disposition

- (a) Counsel at every stage of the case has an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Standards to achieve an agreed-upon disposition.
- (b) Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:
 1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;
 2. any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement, and good-time credits;
 3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing Guidelines or mandatory sentencing requirements;
 4. the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer;
 5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of *nolo contendere*, or other plea that does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;
 6. whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;
 7. the practices, policies, and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim, and any other persons or entities that may affect the content and likely results of plea negotiations;

Concessions that the client might offer, such as:

1. an agreement to proceed waive trial and to plead guilty to particular charges;
2. an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;

3. an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;
4. an agreement to forego in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;
5. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;
6. an agreement to engage in or refrain from any particular conduct, as appropriate to the case;
7. an agreement with the victim's family, which may include matters such as a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution; and
8. agreements such as those described in the foregoing subsections respecting actual or potential charges in another jurisdiction.

Benefits the client might obtain from a negotiated settlement, including:

1. a guarantee that the death penalty will not be imposed;
2. an agreement that the defendant will receive a specified sentence;
3. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;
4. an agreement that one or more of multiple charges will be reduced or dismissed;
5. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
6. an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;
7. an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement; and
8. agreements such as those described in the foregoing subsections respecting actual or potential charges in another jurisdiction.

Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.

Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages, and potential consequences of the agreement.

If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.

Counsel should not accept any agreed-upon disposition without the client's express authorization.

The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

Standard 12: Entry of a Plea of Guilty

- (a) The informed decision whether to enter a plea of guilty lies with the client.
- (b) In the event the client determines to enter a plea of guilty, prior to the entry of the plea, counsel should:
 - make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent;
 - ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which he or she will be exposed by entering the plea;
 - explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions in court, and providing a statement concerning the offense.
 - During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

Standard 13: Trial Preparation Overall

As the investigations mandated by Standard 7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

Standard 14: Voir Dire and Jury Selection

- (a) Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.

- (b) Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding “death qualification” concerning any potential juror’s beliefs about the death penalty. Counsel should be familiar with techniques:
- for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case;
 - for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and
 - for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.
- (c) Counsel should consider seeking expert assistance in the jury selection process.

Standard 14: Defense Case Concerning Penalty

- (a) As set out in Standard 7, counsel at every stage of the case has a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution’s case in aggravation.
- (b) Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.
- (c) Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.
- (d) Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution’s case in aggravation.
- (e) Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.
- (f) In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:
- witnesses familiar with and evidence relating to the client’s life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client’s life, or would otherwise support a sentence less than death;
 - expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural, or other insights into the client’s mental and/or emotional state and life history that may explain or lessen the client’s culpability for the underlying offense(s); to give a favorable opinion as to the client’s capacity for rehabilitation, or adaptation to prison; to explain possible treatment

- programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;
- witnesses who can testify about the applicable alternative to a death sentence and/or
 - the conditions under which the alternative sentence would be served;
 - witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones;
 - demonstrative evidence, such as photos, videos, and physical objects (*e.g.*, trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.
- (g) In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (*e.g.*, motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.
- (h) Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.
- (i) Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading, or not legally admissible.
- (j) If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:
- consider what legal challenges may appropriately be made to the interview or the conditions surrounding it,
 - consider the legal and strategic issues implicated by the client's cooperation or non-cooperation;
 - ensure that the client understands the significance of any statements made during such an interview; and
 - attend the interview.
- (k) Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.
- (l) Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

Standard 15: Official Presentence Report

If an official presentence report or similar document may or will be presented to the court at any time, counsel should become familiar with the procedures governing preparation, submission, and verification of the report. In addition, counsel should:

- where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;
- provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it;
- review the completed report;
- take appropriate steps to ensure that improper, incorrect, or misleading information that may harm the client is deleted from the report; and
- take steps to preserve and protect the client's interests where the defense considers information in the presentence report to be improper, inaccurate, or misleading.

Standard 16: Duty to Facilitate the Work of Successor Counsel

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

- maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;
- providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;
- sharing potential further areas of legal and factual research with successor counsel; and
- cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

Standard 17: Duties of Trial Counsel after Conviction

Trial counsel should:

- be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence;
- take whatever action(s), such as filing a notice of appeal, and/or motion for a new trial, will maximize the client's ability to obtain post-conviction relief;
- not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated. Until that time, Standard 16 applies in its entirety.
- take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

Standard 18: Duties of Post-Conviction Counsel

- (a) Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.
- (b) If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available form.
- (c) Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high-quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.
- (d) The duties of the counsel representing the client on direct appeal should include filing a petition for *certiorari* in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency.
- (e) Post-conviction counsel should fully discharge the ongoing obligations imposed by these Standards, including the obligations to:
 - maintain close contact with the client regarding litigation developments;
 - continually monitor the client's mental, physical, and emotional condition for effects on the client's legal position;
 - keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and
 - continue an aggressive investigation of all aspects of the case.

Standard 19: Duties of Clemency Counsel

Clemency counsel should:

- be familiar with the procedures for and permissible substantive content of a request for clemency;
- conduct an investigation in accordance with Standard 7;
- ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case, and jurisdiction; and
- ensure that the process governing consideration of the client's application is substantively and procedurally just, and if not, should seek appropriate redress.

NEVADA INDIGENT DEFENSE STANDARDS OF PERFORMANCE AND CASELOAD

APPELLATE AND POST-CONVICTION REPRESENTATION

Standard 1: Role of Appellate Defense Counsel

The paramount obligation of appellate criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the appellate process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court. Trial counsel must advise the client of his/her right to appeal and any limits on that right. If the client chooses to proceed with an appeal, even if the attorney believes that the appeal is without merit or is not cognizable, trial counsel will assure that a Notice of Appeal is filed. If the client wishes to proceed with the appeal, against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court.

Standard 2: Identification of issues on appeal

In selecting issues to be presented on appeal, counsel should:

- conduct a thorough review of the trial transcript, the pleadings, and docket entries in the case;
- investigate potentially meritorious claims of error not reflected in the trial record when he or she is informed or has reason to believe that facts in support of such claims exist;
- assert claims of error that are supported by facts of record, that will benefit the defendant if successful, that possess arguable legal merit, and that should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research;
- not hesitate to assert claims that may be complex, unique, or controversial in nature, such as issues of first impression or arguments for change in the existing law;
- inform the client when counsel has decided not to raise issues that the client desires to be raised and the reasons why the issues were not raised;
- consider whether there are federal constitutional claims that, in the event that relief is denied in the state appellate court, would form the basis for a writ of habeas corpus in federal district court. Such claims should raise and argue the federal constitutional claims, unless counsel concludes that there is a tactical basis for not including such claims and the client assents.

Standard 3: Diligence and Accuracy

In presenting the appeal, counsel should:

- be diligent in perfecting appeals and expediting prompt submission to the appellate court;
- be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument;

- not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

Standard 4: Duty to Meet with Trial Lawyers

In preparing the appeal, counsel should consult trial counsel in order to assist appellate counsel in understanding and presenting the client's issues on appeal.

Standard 5: Duty to Confer and Communicate with Client

In preparing and processing the appeal, counsel should:

- assure that the client is able to contact appellate counsel telephonically during the pendency of the appeal including arrangements for the acceptance of collect telephone calls. Promptly after appointment or assignment to the appeal, counsel shall provide advice to the client, in writing, as to the method(s) which the client can employ to discuss the appeal with counsel.
- discuss the merits, strategy and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. When possible, appellate counsel should meet in person with the client and in all instances, counsel should provide a written summary of the merits and strategy to be employed in the appeal along with a statement of the reasons certain issues will not be raised, if any. It is the obligation of the appellate counsel to provide the client with his/her best professional judgment as to whether the appeal should be pursued in view of the possible consequences and strategic considerations;
- inform the client of the status of the case at each step in the appellate process, shall explain any delays, and shall provide general information to the client regarding the process and procedures which will be taken in the matter, and the anticipated time frame for such processing;
- provide the client with a copy of each substantive document filed in the case by both the prosecution and defense;
- respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval;
- promptly and accurately inform the client of the courses of action that may be pursued as a result of any disposition of the appeal, and the scope of any further representation counsel will provide.

Standard 6: Duty to Seek Release during Appeal

Appellate counsel should file appropriate motions seeking release pending appeal when the granting of such motions is reasonably possible.

Standard 7: Responsibilities in "Fast Track" Appeals

If the conviction qualifies for "fast track" treatment under NRAP 3C, counsel shall fulfill the responsibilities set forth in the Rule. In preparing the "fast track" statement, counsel should:

- order a rough draft of those portions of the transcript provided for in NRAP 3C (d) in all cases in which trial counsel is not handling the appeal and in all other cases in which information from the proceedings is necessary for a fair determination of the issues to be raised on appeal;
- thoroughly research the issues in the case and shall set forth all viable issues in the “fast track” statement provided for by NRAP 3C(e); and
- consult with the client as to which issues should be presented in the statement.

Standard 8: Post-Decision Responsibilities

If the decision of the appellate court is adverse to the client, appellate counsel should:

- promptly inform the client of the decision and confer with the client with regard to the availability of rehearing or en banc reconsideration and the benefits or disadvantages of filing such a motion;
- file a Motion for Rehearing and/or Request for en banc reconsideration if grounds for such a motion and/or request exist;
- advise the client whether a petition for writ of certiorari to the United States Supreme Court is warranted and determine whether such a petition will be filed;
- promptly advise the client of any remedies that are available in state or federal court for post-conviction review and shall advise the client of the applicable statute of limitations for filing for such relief;
- advise the client of any claims such as ineffective assistance of counsel that may be available to the client but that will not be pursued by appellate counsel;
- provide the client with any available forms for post-conviction relief and appointment of counsel;
- cooperate with the client and with post-conviction counsel in securing the trial and appellate record and investigation of potential claims for post-conviction relief.

Standard 9: Post-Conviction Representation

Counsel appointed to represent a defendant in post-conviction proceedings should:

- assure that the client is able to contact post-conviction counsel telephonically during the pendency of the appeal including arrangements for the acceptance of collect telephone calls. Promptly after appointment or assignment to the post-conviction case, counsel shall provide advice to the client, in writing, as to the method(s) which the client can employ to discuss the post-conviction proceeding with counsel.
- consult with trial/appellate counsel and secure the entire trial and appeal file;
- seek to litigate all issues, whether or not previously presented, that are arguably meritorious;
- maintain close contact with the client and consult with the client on all decisions with regard to the content of any pleadings seeking collateral or post-conviction relief prior to the filing of any petition for post-conviction relief. When possible, post-conviction counsel should meet in person with the client and in all instances, counsel should provide a written summary of the merits and strategy to be employed in the post-conviction proceeding along with a statement of the reasons certain issues will not be raised, if any;

- investigate all potentially meritorious claims that require factual support;
- secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition;
- raise all federal constitutional claims, along with appropriate citations, that are arguably meritorious;
- advise the client of remedies that may be available should post-conviction relief not be granted including appeal from the denial and federal *habeas corpus* along with any applicable time limits for seeking such relief. Post-conviction counsel shall advise the client in writing if counsel will not be representing the client in any subsequent proceedings and shall provide advice on the steps that must be taken and the time limits that are applicable to appeals or the seeking of relief in the federal courts.

FELONY AND MISDEMEANOR TRIAL CASES

Standard 1: Role of Defense Counsel

The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court.

Standard 2: Education, Training, and Experience of Defense Counsel

- (a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the courts of Nevada. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should also be informed of the practice of the specific judge before whom a case is pending.
- (b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation and should move to be relieved as counsel should counsel determine at a later point that he/she does not possess sufficient experience or training to handle the case assigned.

Standard 3: Adequate Time and Resources

Counsel has an obligation to make available sufficient time, resources, knowledge, and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving collect telephone calls from incarcerated clients.

Standard 4: Initial Client Interview

- (a) Preparing for Initial Interview: Prior to conducting the initial interview the attorney should:
 - be familiar with the elements of each offense charged and the potential punishment;
 - obtain copies of relevant documents that are available, including copies of any charging documents, recommendations, and reports made by agencies concerning pretrial release, and law enforcement reports that might be available;
 - be familiar with legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
 - be familiar with the different types of pretrial release conditions the court may set; and
 - be familiar with any procedures available for reviewing the judge's setting of bail.

- (b) Timing of the Initial Interview: Counsel should conduct the initial interview with the client as soon as practicable and sufficiently before any court proceeding so as to be prepared for that proceeding. When the client is in custody, counsel should attempt to conduct the interview within 48 hours of appointment to the case. The initial interview should be conducted in a confidential setting.
- (c) Contents of the Initial Interview: The purpose of the initial interview is both to inform the client of the charges/penalties and to acquire information from the client concerning pretrial release. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy are overcome.

Information that counsel should consider acquiring from the client includes, but is not limited to:

- the client's ties to the community including the length of time in the community, family relationships, immigration status, employment record, and history;
- the client's physical and mental health, education, and armed services record;
- the client's immediate medical needs;
- the client's criminal history and a determination of whether the client has other pending charges or is on supervision;
- the ability of the client to meet any financial conditions of release; and
- sources of verification-counsel should obtain permission from the client before contacting such sources.

The following information should be provided to the client in the initial interview:

- an explanation of the procedures that will be followed in setting the conditions of pretrial release;
- an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and an explanation that the client should not make any statements regarding the offense;
- an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;
- the charges and the potential penalties;
- a general procedural overview of the progression of the case;
- how and when counsel can be reached;
- when counsel will see the client next;
- realistic answers, where possible, to the client's most urgent questions; and
- what arrangements will be made or attempted for the satisfaction of the client's most pressing needs; *e.g.*, medical or mental health attention, contact with family or employers

Standard 5: Pretrial Release Proceedings

When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release, counsel should:

- present to the appropriate judicial officer information about the client's circumstances and the legal criteria supporting release. Where appropriate, counsel should make a proposal concerning conditions of release that are least restrictive with regard to the client. Counsel should arrange for contact with or the appearance of parents, spouse, relatives, or other persons who may take custody of the client or provide third party surety;
- consider pursuing modification of the conditions of release under available procedures when the client is not able to obtain release under the conditions set by the court; and
- explain to the client and any third party the available options, procedures and risks in posting security if the court sets conditions of release.

Standard 6: Preliminary Hearings/Grand Jury Representation

- (a) Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.
- (b) In preparing for the preliminary hearing, the attorney should consider:
 - the elements of each offense charged;
 - the law for establishing probable cause;
 - the factual information that is available concerning probable cause;
 - the tactics of calling witnesses or calling the defendant as a witness and the potential for later use of the testimony; and
 - the tactics of proceeding without full discovery;
- (c) Counsel should meet with the client prior to the preliminary hearing. The client has the sole right to waive a preliminary hearing. Counsel must evaluate and advise the client regarding the consequences of such waiver and the tactics of full or partial cross-examination.
- (d) Where counsel becomes aware that his/her client is the subject of a grand jury investigation, appointed counsel should consult with the client to discuss the grand jury process, including the advisability and ramifications of the client testifying. Counsel should examine the facts in the case and determine whether the prosecution has fulfilled its obligation under Nevada law to present exculpatory evidence and should make an appropriate record in that regard. Upon return of an indictment, counsel should determine if proper notice of the proceedings was provided and should obtain the record of the proceeding to determine if procedural irregularities or errors occurred that might warrant a challenge to the proceedings such as a writ of habeas corpus or a motion to quash the indictment.

Standard 7: Case Preparation and Investigation

Counsel should conduct, or secure the resources to conduct, a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Counsel should:

- obtain and examine all charging documents, pleadings, and discovery;
- research and review the relevant statutes and case law to identify elements of the charged offense(s); defects in the prosecution such as statute of limitations or double jeopardy; and available defenses and required notices of those defenses;
- conduct an in-depth interview of the client to assist in shaping the investigation;
- attempt to locate all potential witnesses and have them interviewed. (If counsel conducts a witness interview, counsel should do so in the presence of a third person who can be called as a witness.)
- request and secure discovery including exculpatory/impeaching information; names and addresses of prosecution witnesses and their prior statements and criminal records; the prior statements of the client and his/her criminal history; all papers, tapes or electronic recordings relevant to the case; expert reports and data upon which they are based, statements of co-defendants, an inspection of physical evidence, all documents relevant to any searches conducted, 911 tapes and dispatch reports, mental health, drug treatment or other records of the client, victim, or witnesses and records of police officers as appropriate;
- inspect the scene of the offense as appropriate; and
- obtain the assistance of such experts as are appropriate to the facts of the case.

Standard 8: Pretrial Motions and Writs

- (a) Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief, which the court has discretion to grant.
- (b) The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of the case. Among the issues that counsel should consider addressing in a pretrial motion are:
 - the pretrial custody of the client;
 - the constitutionality of the implicated statute(s);
 - any defects in the charging process or the charging document;
 - severance of charges or defendants;
 - discovery issues;
 - suppression of evidence or statements;
 - speedy trial issues; and
 - evidentiary issue.
- (c) Counsel should determine whether a pre-trial writ should be filed challenging the determination that probable cause exists. The decision whether to file a pre-trial writ should be made based upon an examination of the preliminary hearing or Grand Jury transcripts. If transcripts are not available at the time of arraignment, appropriate steps should be taken to secure an extension of time to prepare the writ after the transcripts are received pursuant to NRS 34.700. Counsel shall advise the client as to the effect of filing a pre-trial writ on his speedy trial rights and provide an evaluation of the likelihood of success to assist in the decision, which rests with the client, after consultation with counsel.

- (d) Counsel should only withdraw or decide not to file a motion after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default.
- (e) Motions should be filed in a timely manner and with an awareness of the effect of filing the motion on the defendant's speedy trial rights. When an evidentiary hearing is scheduled on a motion, counsel's preparation for the hearing should include:
 - investigation, discovery, and research relevant to the claim advanced;
 - subpoenaing of all helpful evidence and witnesses; and
 - full understanding of the burdens of proof, evidentiary principles, and trial court procedures applying to the hearing, including the benefits and costs of having the client testify.
- (f) Requests or agreements to continue a trial date shall not be made without consultation with the client.
- (g) Motions and writs should include citation to applicable state and federal law in order to protect the record for collateral review in federal courts.

Standard 9: Plea Negotiations

- (a) Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.
- (b) Counsel should:
 - with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;
 - fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
 - keep the client fully informed of the progress of the negotiations;
 - convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;
 - continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
 - not enter into any admission or disposition agreement on behalf of the client without the client's authorization.
- (c) In developing a negotiation strategy, counsel must be completely familiar with:
 1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:
 - not to proceed to trial on the merits of the charges;
 - to decline from asserting or litigating any particular pretrial motions;
 - an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and
 - providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.

2. Benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:
 - that the prosecution will not oppose the client's release on bail pending sentencing or appeal;
 - that the defendant may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of the conviction;
 - to dismiss or reduce one or more of the charged offenses either immediately or upon completion of a deferred prosecution agreement;
 - that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;
 - that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;
 - that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the Division of Parole and Probation, a specified position with respect to the sanction to be imposed on the client by the court; and
 - that the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement and/or release on parole.
- (d) In the decision-making process, counsel should:
 - inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain advantages, disadvantages, and potential consequences of the agreement; and
 - not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client. Where counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits of this course of action.
- (e) Prior to the entry of the plea, counsel should meet with the client in a confidential setting that fosters full communication and:
 - make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent;
 - make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering the plea; and
 - explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense.
- (f) After entry of the plea, counsel should:
 - be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea,

- counsel should, where practicable, advocate for the client's release on bail pending sentencing; and
- make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

Standard 10: Trial Preparation

The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

- (a) Where appropriate, counsel should have the following materials available at the time of trial:
- copies of all relevant documents filed in the case;
 - relevant documents prepared by investigators;
 - voir dire questions;
 - outline or draft of opening statement;
 - cross-examination plans for all prospective prosecution witnesses;
 - direct examination plans for all prospective defense witnesses;
 - copies of defense subpoenas;
 - prior statements of all prosecution witnesses (*e.g.*, preliminary hearing/grand jury transcripts, police reports/statements);
 - prior statements of all defense witnesses;
 - reports from all experts;
 - a list and copies or originals of defense and prosecution exhibits;
 - proposed jury instructions with supporting authority;
 - copies of all relevant statutes or cases; and
 - outline or draft of closing argument.
- (b) Counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.
- (c) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (*e.g.*, admissibility of evidence, use of prior convictions of defendant) and, where appropriate, counsel should prepare motions and memoranda in support of the defendant's position.
- (d) Throughout the trial process counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all discussions and rulings be made on the record.
- (e) Counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated or is not able to secure appropriate clothing for trial, counsel shall arrange for the provision of appropriate clothing for the client to wear in the courtroom.
- (f) Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek an order to facilitate conferences with the client.
- (g) If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions may only be made in consultation with, and with the consent of the client.

- (h) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Standard 11: Voir Dire and Jury Selection

In preparing for and conducting jury selection, counsel should:

- be familiar with the law governing selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire;
- be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures;
- seek access to any jury questionnaires that have been completed by jurors and should petition the court to use a special questionnaire when appropriate due to unique issues in the case;
- should seek attorney-conducted voir dire and should develop, support, and file written voir dire questions if the court restricts attorney-conducted voir dire;
- consider whether additional peremptory challenges should be requested due to the circumstances present in the case;
- consider whether sensitive or unusual facts or circumstances of the case support sequestered voir dire of jurors;
- consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client; and
- object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecutor.

Standard 12: Defense Strategy

Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

Standard 13: Trial

- (a) Counsel should anticipate weaknesses in the prosecution's proof and consider appropriate motions for judgment of acquittal at all appropriate stages of the litigation.
- (b) Counsel should consider the strategic advantages and disadvantages of entering into any stipulations.
- (c) In preparing for cross-examination, counsel should:
- be prepared to question witnesses as to the existence of prior statements that they may have made or adopted;
 - consider the need to integrate cross-examination, theory, and theme of the defense;
 - avoid asking unnecessary questions that may hurt the defense case;

- anticipate witnesses that the prosecution may call in its case-in-chief and on rebuttal;
- create a cross-examination plan for all anticipated witnesses;
- review all prior statements and testimony of the witnesses in order to be aware of all inconsistencies or variances;
- review relevant statutes, regulations, and policies applicable to police witnesses; and
- consider a pretrial motion or voir dire examination of prosecution experts to determine qualifications of the expert or reliability of the anticipated opinion.

Standard 14: Presenting the Defendant's Case

- (a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
- (b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.
- (c) Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.
- (d) In preparing for presentation of a defense case, counsel should, where appropriate, do the following:
 - develop a plan for direct examination of each potential defense witness;
 - determine the implications that the order of witnesses may have on the defense case;
 - determine which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
 - consider the possible use of character witnesses;
 - consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
 - review all documentary evidence that must be presented; and,
 - review all tangible evidence that must be presented.
- (e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- (f) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.
- (g) Counsel should conduct redirect examination as appropriate.
- (h) At the close of the defense case, counsel should seek an advisory instruction directing the jury to acquit when appropriate.

Standard 15: Jury Instructions

- (a) Counsel should be familiar with the appropriate rules of the court and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of instructions typically given, and preserving objections to the instructions.
- (b) Counsel should always submit proposed jury instructions in writing.
- (c) Where appropriate, counsel should submit modifications to instructions proposed by the State or the court in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Counsel should provide citations to appropriate law in support of the proposed instructions.
- (d) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.
- (e) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including ensuring that a written copy of proposed instructions is included in the record along with counsel's objection.
- (f) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instruction, object to deviations unfavorable to the client, and if necessary, request additional or curative instructions.
- (g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury. Counsel should renew or make new objections to any additional instructions given to the jurors after the jurors have begun their deliberations.

Standard 16: Obligations of Counsel in Final Sentencing Hearings.

Among counsel's obligations in the sentencing process are:

- (a) To correct inaccurate information that is potentially detrimental to the client and to object to information that is not properly before the Court in determining sentence. Counsel should further correct or move to strike any improper and harmful information from the text of the pre-sentence report.
- (b) To present to the Court all known and reasonably available mitigating and favorable information, including relevant expert testimony or reports.
- (c) To develop a plan that seeks to achieve the least restrictive and burdensome sentencing alternative that is most favorable to the client, and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision.

Standard 17: Preparation for Sentencing

In preparing for sentencing, counsel shall:

- inform the client of the applicable sentencing requirements, options, alternatives, and the discretionary nature of sentencing guidelines including the rules concerning parole eligibility;
- maintain contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
- obtain from the client relevant information concerning his/her background and personal history, prior criminal record, employment history, skills, education, medical history and condition, and financial status, and obtain from the client sources which can corroborate the information provided by the client;
- request any necessary and appropriate client evaluations, including those for mental health and substance abuse;
- ensure the client has an opportunity to examine the pre-sentence report;
- inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to deliver to the court;
- inform the client of the effects that admissions and other statements may have upon an appeal, retrial, or other judicial proceedings, such as forfeiture or restitution proceedings;
- inform the client of the sentence or range of sentences counsel will ask the court to consider;
- where appropriate, collect affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence;
- prepare to address victim participation either through the victim impact statements or by direct testimony at sentencing; and
- counsel should advise the client of the difference between testimony and allocution. If the client elects to testify, counsel should prepare the client for possible cross-examination by the prosecution where applicable.

Standard 18: Official Presentence Report.

- (a) Counsel should prepare the client for the interview with the official preparing the presentence report.
- (b) Counsel has a duty to become familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report. In addition, counsel shall:
 - determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of waiving the report;
 - provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the client's version of the offense;
 - attend any interview of the client by an agency presentence investigator where appropriate;

- review the completed report prior to sentencing;
- take appropriate steps to ensure that erroneous or misleading information that may harm the client is deleted from the report;
- take appropriate steps to preserve and protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading; and
- make sure that, if there is a significant change in the information contained in the report by the judge at the sentencing hearing, counsel takes reasonable steps to ensure that a corrected copy is sent to corrections officials.

Standard 19: Sentencing Hearing

- (a) At the sentencing proceeding, counsel shall take steps necessary to advocate fully for the requested sentence and to protect the client's interest.
- (b) Counsel shall endeavor to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the client.
- (c) Where appropriate, counsel shall request specific orders or recommendations from the court concerning alternative sentences and forms of incarceration.
- (d) Counsel should obtain a copy of the judgment and review it promptly to determine that it is accurate or to take steps to correct any errors.

Standard 20: Post-Disposition Responsibilities

Counsel should be familiar with the procedures available to the client after disposition. Counsel should:

- be familiar with the procedures to request a new trial, including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised;
- inform the client of his or her right to appeal a conviction after trial, after a conditional plea or after a guilty plea that was not entered in a knowing, intelligent, and voluntary manner. Counsel should also advise the client of the legal effect of filing or waiving an appeal, and counsel should document the client's decision. If the client wishes to appeal after consultation with counsel, even if counsel believes that an appeal will not be successful or is not cognizable, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the client's right to appeal;
- fulfill the responsibilities set forth in NRAP 3C if the conviction qualifies for "fast track" treatment under the Rule. Counsel shall order a rough draft of those portions of the transcript provided for in NRAP 3C (d) in all cases in which trial counsel is not handling the appeal and in all other cases in which information from the proceedings is necessary for a fair determination of the issues to be raised on appeal. Counsel shall thoroughly research the issues in the case and shall set forth all viable issues in the "fast track" statement provided for by NRAP 3C(e);
- timely respond to requests from appellate counsel for information about or documents from the case, when appellate counsel was not trial counsel;

- inform the client of any right that may exist to be released pending disposition of the appeal;
- consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement, if a custodial sentence is imposed;
- include in the advice to the client, an explanation of the limited nature of the relief available on direct appeal and, where appropriate, an explanation of the remedies available to him or her in post-conviction proceedings. Counsel should provide a pro se habeas packet to any client who needs assistance in preparing his or her pro se habeas corpus petition. Counsel should advise the client of the relevant time frames for filing state and federal habeas corpus petitions and provide information and advice necessary to protect a client's right to post-conviction relief; and
- inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.

JUVENILE DELINQUENCY CASES

Counsel for juveniles in delinquency proceedings should abide by the Nevada Indigent Defense Standards of Performance applicable to felony and misdemeanor cases where applicable. The Performance Standards set forth below recognize the need to meet some concerns particular to representation of juveniles in delinquency proceedings.

Standard 1: The Role of Defense Counsel

The role of counsel in delinquency cases is to be an advocate for the child. Counsel should:

- Ensure that the interests and rights of the client are fully protected and advanced irrespective of counsel's opinion of the client's culpability;
- fully explain to the juvenile the nature and purpose of the proceedings and the general consequences of the proceeding, seeking all possible aid from the juvenile on decisions regarding court proceedings;
- make sure the juvenile fully understands all court proceedings, as well as all his/her rights and defenses;
- upon appointment, counsel should first seek to meet separately with the juvenile out of the presence of the parent;²
- not discuss any attorney-client privileged communications with the parent, or any other person, without the express permission of the juvenile;
- fully inform both the juvenile and juvenile's parents about counsel's role, especially clarifying the lawyer's obligation regarding confidential communications;
- present the juvenile with comprehensible choices, help the juvenile reach his/her own decisions and advocate the juvenile's viewpoint and wishes to the court; and
- refrain from waiving substantial rights or substituting counsel's own view, or the parents' wishes, for the position of the juvenile.

Counsel may request the appointment of a guardian *ad litem*, or may elect not to oppose such an appointment, only when very unusual circumstances warrant such an appointment. Every effort should be made to limit the role of the guardian *ad litem* to the minimum required for him/her to accomplish the purpose for which the appointment was made. In most cases, both the guardian and the client should be instructed not to discuss the facts of the case as this discussion may not be privileged.

Standard 2: Education, Training, and Experience of Defense Counsel

Counsel who undertake the representation of a client in a juvenile delinquency proceeding shall have the knowledge and experience necessary to represent a child diligently and effectively.

Counsel should consider working with an experienced juvenile delinquency practitioner as a mentor when beginning to represent clients in delinquency cases.

² The use of the word "parent" in these Standards refers to parent, guardian, custodial adult, or person assuming legal responsibility for the child.

At a minimum, counsel should attend 4 hours of CLE relevant to juvenile defense annually.

Counsel shall familiarize themselves with Nevada statutes relating to delinquency proceedings as well as the Nevada Rules of Criminal Procedure, Nevada Rules of Evidence, Nevada Rules of Appellate Procedure, relevant case law, and any relevant local court rules. Counsel should be knowledgeable about and seek ongoing formal and informal training in the following areas:

- (a) Competency and Developmental Issues
 - Child and adolescent development;
 - Brain development;
 - Mental health issues, common childhood diagnoses, and other disabilities; and
 - Competency issues and the filing and processing of motion for competency evaluations.
- (b) Attorney/Client Interaction
 - Interviewing and communication techniques for interviewing and communicating with children, including police interrogations and *Miranda* considerations;
 - Ethical issues surrounding the representation of children and awareness of the role of the attorney; and
 - Awareness of the role of the attorney vs. the role of the guardian *ad litem*, including knowledge of how to work with a guardian *ad litem*
- (c) Department of Juvenile Justice Services/Other State and Local Programs
 - Diversion services available through the court and probation;
 - The child welfare system and services offered by the child welfare system;
 - Nevada Department of Child and Family Services facility operations, release authority, and parole policies;
 - Community resources and service providers for children and all alternatives to incarceration available in the community for children;
 - Intake, programming, and education policies of local detention facility;
 - Probation department policies and practices; and
 - Gender specific programming available in the community.
- (d) Specific Areas of Concern:
 - Police interrogation techniques and *Miranda* consideration, as well as other Fourth, Fifth, and Sixth Amendment issues as they relate to children and adolescents;
 - Substance abuse issues in children and adolescents;
 - Special education laws, rights, and remedies;
 - Cultural diversity;
 - Immigration issues regarding children;
 - Gang involvement and activity;
 - School related conduct and zero tolerance policies (“school to prison pipeline” research, search and seizure issues in the school setting);
 - What factors lead children to delinquent behaviors;
 - Signs of abuse and/or neglect;

- Issues pertaining to status offenders; and
- Scientific technologies and evidence collection.

Standard 3: Adequate Time and Resources

Counsel should not carry a workload that by reason of its excessive size or representation requirements interfere with the rendering of quality legal service, endangers the juvenile's interest in the speedy disposition of charges or risks breach of professional obligations. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that he or she has sufficient time, knowledge, experience, and will pursue adequate resources to offer quality legal services in a particular matter. If after accepting an appointment, counsel finds he or she is unable to continue effective representation counsel should consider appropriate case law and ethical standards in deciding whether to move to withdraw or take other appropriate action. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving collect telephone calls from incarcerated clients.

Standard 4: Initial Client Interview

- (a) Preparing for the Initial Interview: Prior to conducting the initial interview, the attorney should:
 - be familiar with the elements of the offense and the potential punishment;
 - obtain copies of relevant documents that are available, including copies of any charging documents, recommendations, and reports made by the Department of Juvenile Justice and law enforcement reports that may be available;
 - be familiar with detention alternatives and the procedures that will be followed in setting those conditions;
 - consider all possible defenses and affirmative defenses and any lesser included offenses that may be available;
 - consider the collateral consequences attaching to any possible sentencing, for example parole or probation revocation, immigration consequences, sex offender registration and reporting provisions, loss of driving privileges, DNA collection, school suspension or expulsion, consequences on public housing, etc.; and
 - review the petition for any defects.
- (b) Counsel shall make every effort to conduct a face-to-face interview with the client as soon as practicable and sufficiently in advance of any court proceedings. In cases where the client is detained or in custody, counsel should make efforts to visit with the client within 24-48 hours after receiving the appointment. Counsel should:
 - interview the client in a setting that is conducive to maintaining the confidentiality of communications between attorney and client;
 - maintain ongoing communications and/or meetings with the client, which are essential to establishing a relationship of trust between the attorney and client;
 - provide the client with a method to contact the attorney including information on calling collect from detention facilities;

- utilize the assistance of an interpreter as necessary and seek funding for such interpreting services from the court;
- work cooperatively with the parents, guardian, and/or other person with custody of the child to the extent possible without jeopardizing the legal interests of the child;
- consider the client's age, developmental stage, mental retardation, and mental health diagnoses in all cases and should understand the nature and consequences of a competency proceeding and shall resolve issues of raising or not raising competency in consultation with the client; and
- be alert to issues that may impede effective communication between counsel and client and ensure that communication issues such as language, literacy, mental or physical disability, or impairment are effectively addressed to enable the client to fully participate in all interviews and proceedings. Appropriate accommodations should be provided during all interviews, preparation, and proceedings, which might include the use of interpreters, mechanical or technological supports, or expert assistance.

Standard 5: Detention Hearing

When appropriate, counsel shall attempt to obtain the pretrial release of any client. Counsel shall advocate for the use of alternatives to detention for the youth at the detention hearing. Such alternatives might include: electronic home monitoring, day or evening reporting centers, utilization of other community based services such as after school programming, etc. If counsel is appointed after the initial detention hearing or if the youth remains detained after the initial detention hearing, counsel shall consider the filing of a motion to review the detention decision.

If the youth's release from secure detention is ordered by the court, counsel shall carefully explain to the juvenile the conditions of release from detention and any obligations of reporting or participation in programming. Counsel should take steps to secure appointment of counsel to juveniles prior to the detention hearing.

Standard 6: Informal Supervision/Diversion

Counsel shall be familiar with all available alternatives offered by the court or available in the community. Such programs may include diversion, mediation, or other informal programming that could result in a juvenile's case being dismissed, handled informally, or referred to other community programming. When appropriate and available, counsel shall advocate for the use of informal mechanisms that could steer the juvenile's case away from the formal court process.

Standard 7: Case Preparation and Investigation

A thorough investigation by defense counsel is essential for competent representation of youth in delinquency proceedings. The duty to investigate exists regardless of the youth's admissions or statements to defense counsel of facts or the youth's stated desire to plead guilty.

Counsel should:

- obtain and examine all charging documents, pleadings, and discovery;
- request and secure discovery including exculpatory/impeaching information;
- names and addresses of prosecution witnesses, their prior statements, and criminal records;
- the prior statements of the client and his/her delinquency history; all papers, tapes, or electronic recordings relevant to the case; expert reports and data upon which they are based, statements of co-defendants, an inspection of physical evidence, all documents relevant to any searches conducted, 911 tapes and dispatch reports, records of the client, including but not limited to, educational, psychological, psychiatric, substance abuse treatment, children services records, court files, and prior delinquency records and be prepared to execute any needed releases of information or obtain any necessary court orders to obtain these records;
- research and review the relevant statutes and case law to identify elements of the charged offense(s); defects in the prosecution; and available defenses;
- conduct an in-depth interview of the client to assist in shaping the investigation;
- consider seeking the assistance of an investigator when necessary and consider moving the court for funding to pay for the use of an investigator;
- attempt to locate all potential witnesses and have them interviewed (if counsel conducts a witness interview, counsel should do so in the presence of a third person who can be called as a witness);
- obtain the assistance of such experts as are appropriate to the facts of the case;
- consider going to the scene of the alleged offense or offenses in a timely manner;
- consider the preservation of evidence and document such by using photographs, measurements and other means; and
- be mindful of all requirements for reciprocal discovery and be sure to provide such in a timely manner.

Standard 8: Pre-Trial Motions

Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the client to relief which the court has discretion to grant. Counsel shall review all statements, reports, and other evidence and interview the client to determine whether any motions are appropriate. Counsel should timely file all appropriate pre-trial motions and participate in all pre-trial proceedings.

- (a) The decision to file pre-trial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of the case. Among the issues that counsel should consider addressing in a pretrial motion are:
- the pre-trial detention of the client;
 - the constitutionality of the implicated statute(s);
 - any defects in the charging process or the charging document;
 - severance of charges or defendants;
 - discovery issues;
 - suppression of evidence or statements;
 - speedy trial issues; and
 - evidentiary issues.

- (b) Counsel should only withdraw or decide not to file a motion after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the client's rights against later claims of waiver or procedural default.
- (c) Motions should be filed in a timely manner and with an awareness of the effect of filing the motion on the client's speedy trial rights. When an evidentiary hearing is scheduled on a motion, counsel's preparation for the hearing should include:
 - investigation, discovery, and research relevant to the claim advanced;
 - subpoenaing of all helpful evidence and witnesses; and
 - full understanding of the burdens of proof, evidentiary principles, and trial court procedures applying to that hearing, including the benefits and costs of having the client testify.
- (d) Requests or agreements to continue a contested hearing date shall not be made without consultation with the client. Counsel shall diligently work to complete the investigation and preparation in order to be fully prepared for all court proceedings. In the event that counsel finds it necessary to seek additional time to adequately prepare for a proceeding, counsel should consult with the client and discuss seeking a continuance of the upcoming proceeding. Whenever possible, written motions for continuance made in advance of the proceeding are preferable to oral requests for continuance. All requests for a continuance should be supported by well articulated reasons on the record in the event it becomes an appealable issue.

Standard 9: Plea Negotiations

- (a) Under no circumstances should defense counsel recommend to a client acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.
- (b) Counsel should:
 - with the consent of the client, explore diversion and other informal and formal admission of disposition agreements with regard to the allegations;
 - fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
 - keep the client fully informed of the progress of the negotiations;
 - convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;
 - continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
 - not enter into any admission or disposition agreement on behalf of the client without the client's authorization.
- (c) In developing a negotiation strategy, counsel must be completely familiar with:
 1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:
 - not to proceed to trial on the merits of the charges;
 - to decline from asserting or litigating particular pre-trial motions;

- an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and
 - providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal/delinquent activity.
2. Benefits the client might obtain from a negotiated settlement, including, but not limited to:
- that the prosecution will not oppose the client's release pending disposition or appeal;
 - that the client may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of the conviction;
 - to dismiss or reduce one or more of the charged offenses either immediately or upon completion of a deferred prosecution agreement;
 - that the client will not be subject to further investigation or prosecution for uncharged alleged delinquent conduct;
 - that the client will receive, with the agreement of the court, a specified sentence or sanction;
 - that the prosecution will take, or refrain from taking, at the time of disposition and/or in communications with the probation department, a specified position with respect to the sanction to be imposed on the client by the court; and
 - that the client will receive, or the prosecution will recommend, specific benefits concerning the clients place and /or manner of confinement and/or release on probation.
- (d) In the decision-making process, counsel should:
- inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain advantages, disadvantages, and potential consequences of the agreement; and
 - not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client; where counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits of this course of action.
- (e) Prior to the entry of the plea, counsel should meet with the client in a confidential setting which fosters full communication:
- make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligently made;
 - make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering the plea; and
 - explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge, and providing a statement concerning the offense.

- (f) After entry of the plea, counsel should:
- be prepared to address the issue of release sending disposition hearing. Where the client has been released, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for the client's release pending disposition; and
 - make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

Standard 10: Adjudicatory Hearing

- (a) Counsel should develop a theory of the case in advance of the adjudicatory hearing. Counsel shall issue subpoenas and obtain court orders for all necessary evidence to ensure the evidence's availability at the adjudicatory hearing. Sufficiently in advance of the hearing, counsel shall subpoena all potential witnesses. Where appropriate, counsel should have the following materials available at the time of the contested hearing:
- copies of all relevant documents filed in the case;
 - relevant documents prepared by investigators;
 - outline or draft of opening statement;
 - cross-examination plans for all prospective prosecution witnesses;
 - direct examination plans for all prospective defense witnesses;
 - copies of defense subpoenas;
 - prior statements of all prosecution witnesses;
 - prior statements of all defense witnesses;
 - reports from all experts;
 - a list and copies of originals of defense and prosecution exhibits;
 - copies of all relevant statutes or cases; and
 - outline or draft of closing argument.
- (b) Counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.
- (c) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (*e.g.*, admissibility of evidence) and, where appropriate, counsel should prepare motions and memoranda in support of the client's position.
- (d) Throughout the adjudicatory process, counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all discussions and rulings be made on the record.
- (e) Counsel should advise the client as to suitable courtroom dress and demeanor.
- (f) Counsel should plan with the client the most convenient system for conferring throughout the contested hearing.
- (g) During the adjudicatory hearing counsel shall raise objections on the record to any evidentiary issues; in order to best preserve a client's appellate rights, counsel shall object on the record and state the grounds for such objection following the courts denial of any defense motion.

- (h) Counsel shall ensure that an official court record is made and preserved of any pre-trial hearings and the adjudicatory hearing.
- (i) Counsel shall utilize expert services when appropriate and petition the court for assistance in obtaining expert services when necessary.
- (j) Counsel should anticipate weaknesses in the prosecution's proof and consider appropriate motions for judgment of acquittal at all appropriate stages of the litigation.
- (k) Counsel should consider the strategic advantages and disadvantages of entering into any stipulations.
- (l) In preparing for cross-examination, counsel should:
 - be prepared to question witnesses as to the existence of prior statements which they may have made or adopted;
 - consider the need to integrate cross-examination, theory, and theme of the defense;
 - avoid asking unnecessary questions that may hurt the defense case;
 - anticipate evidence that the prosecution may call in its case-in-chief and on rebuttal;
 - create a cross-examination plan for all anticipated witnesses;
 - review all prior statements and testimony of the witnesses in order to be aware of all inconsistencies or variances;
 - review relevant statutes, regulations and policies applicable to police witnesses; and consider a pretrial motion or voir dire examination of prosecution experts to determine qualifications of experts or reliability of the anticipated opinion.

Standard 11: Presenting the Client's Case

- (a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
- (b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.
- (c) Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.
- (d) In preparing for presentation of a defense case, counsel should, where appropriate, do the following:
 - develop a plan for direct examination of each potential witness;
 - determine the implications that the order of witnesses may have on the defense case;

- determine which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
 - consider the possible use of character witnesses;
 - consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
 - review all documentary evidence that must be presented; and,
 - review all tangible evidence that must be presented.
- (e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- (f) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.
- (g) Counsel should conduct redirect examination as appropriate.

Standard 12: Objections to the Hearing Master's Recommendations

Counsel shall advise client of the role of the Hearing Master and the procedure and purpose of filing objections to the Hearing Master's findings and recommendations. Counsel shall review the Hearing Master's decision for possible meritorious grounds for objection. If the Hearing Master's decision does not contain finding of facts and conclusions of law, counsel shall request in writing such findings of facts and conclusions of law in accordance with NRS 62B.030(3) Counsel shall ensure that the transcript of the proceeding is timely obtained and objections are timely filed in accordance with NRS 62.B.030(4). Counsel shall draft and file objections and supplemental points and authorities with specificity and particularity, and participate in the oral argument if scheduled.

Standard 13: Preparation for the Disposition Hearing

Preparation for disposition should begin upon appointment. Counsel should:

- be knowledgeable of available dispositional alternatives both locally and outside of the community;
- review, in advance of the dispositional hearing, the recommendations of the probation department or other court department responsible for making dispositional recommendations to the court;
- inform their client of these recommendations and other available dispositional alternatives; and
- be familiar with potential support systems of the client such as school, family, and community programs and consider whether such supportive services could be part of a dispositional plan;

Standard 14: The Disposition Process

During the disposition process, counsel should:

- correct inaccurate information that may be detrimental to the client and object to information that is not properly before the Court in determining the disposition;

- present to the Court all known and reasonably available mitigating and favorable information, including relevant expert testimony or reports;
- develop a plan that seeks to achieve the least restrictive and burdensome disposition alternative and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable disposition and alternatives, and other information pertinent to the disposition decision;
- consider filing a memorandum setting forth the defense position with the court prior to the dispositional hearing;
- maintain contact with the client prior to the disposition hearing and inform the client of the steps being taken in preparation for sentencing;
- obtain from the client and/or his family relevant information concerning his or her background and personal history, prior delinquency record, employment history, education, medical history and condition, and obtain from the client sources that can corroborate the information provided;
- request any necessary and appropriate client evaluations, including those for mental health and substance abuse;
- ensure the client has an opportunity to examine the disposition report;
- inform the client of his or her right to speak at the disposition hearing and assist the client in preparing the statement, if any, to deliver to the court;
- inform the client of the effects that admissions and other statements may have upon an appeal, retrial, or other judicial proceedings;
- collect affidavits to support the defense position when appropriate and prepare witnesses to testify at the sentencing hearing and request the opportunity to present tangible and testimonial evidence;
- prepare to address victim participation either through the victim impact statement or by direct testimony at the disposition hearing; and
- ensure that an official court record is made and preserved of any disposition hearing.

Standard 15: The Disposition Report

Counsel should:

- become familiar with the procedures concerning the preparation, submission, and verification of the disposition report;
- prepare the client for the interview with the official preparing the disposition report;
- determine whether a written disposition report will be prepared and submitted to the court prior to the disposition hearing; where preparation of the report is optional, counsel should consider the strategic implications of requesting report;
- provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the client's version of the offense;
- attend any interview of the client by an agency disposition investigator where appropriate; review the completed report prior to sentencing;
- take appropriate steps to ensure that erroneous or misleading information that may harm the client is deleted from the report;
- take reasonable steps to ensure that a corrected copy of the report is sent to corrections officials if there are any amendments made to the report by the court.

Standard 16: Post-Disposition Responsibilities/Advocacy

Following the disposition hearing, counsel should:

- review the disposition order to ensure that the sentence is clearly and accurately recorded and take steps to correct any errors and ensure that it includes language regarding detention credits and plea agreements;
- be aware of sex offender registration requirements and other requirements, both state and federal, imposed on sex offenders and communicate those requirements to the client;
- be familiar with the procedure for sealing and expunging records, advise the client of those procedures and utilize those procedures when available;
- be familiar with the procedures to request a new contested hearing including the time period for filing such a motion; the effect it has upon the time to file a notice of appeal, and the grounds that can be raised and advise the client of his/her rights with regard to those procedures;
- inform the client of his or her rights to representation and to appeal an adjudication after a contested hearing, after a conditional plea or after an admission that was not entered in a knowing, intelligent, and voluntary manner and should document the client's decision regarding appeal;
- Counsel shall ensure that the notice of appeal and request for appointment of counsel is filed, or that the client has obtained, or the court has appointed, appellate counsel in a timely manner even if counsel believes that an appeal will not be successful or is not cognizable;
- timely respond to requests from appellate counsel for information about or documents from the case, when appellate counsel was not trial counsel;
- inform the client of any right that may exist to be released pending disposition of the appeal;
- consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement, if a custodial sentence is imposed; and
- include in the advice to the client, an explanation of the limited nature of the relief available on direct appeal and, where appropriate, an explanation of the remedies available to him or her in post-adjudication proceedings.

Standard 17: Transfer Proceedings to Adult Court

Transfer proceedings require special knowledge and skill due to the severity of the consequence of the proceedings. Counsel shall not undertake representation of children in these areas without sufficient experience, knowledge, and training in these unique areas. It is recommended that counsel representing children in transfer proceedings have litigated at least 2 criminal jury trials, or be assisted by co-counsel with the requisite experience.

Counsel representing juveniles in transfer proceedings should:

- be fully knowledgeable of adult criminal procedures and sentencing;
- be fully knowledgeable of the legal issues regarding probable cause hearings and transfer proceedings;

- investigate the social, psychological, and educational history of the child;
- retain or employ experts including psychologists, social workers, and investigators in order to provide the court with a comprehensive analysis of the child's strengths and weaknesses in support of retention of juvenile jurisdiction;
- be knowledgeable of the statutory findings the court must make before transferring jurisdiction to the criminal court and any case law affecting the decision;
- be prepared to present evidence and testimony to prevent transfer, including testimony from teachers, counselors, psychologists, community members, probation officers, religious associates, employers, or other persons who can assist the court in determining that juvenile jurisdiction should be retained;
- ensure that all transfer hearing proceedings are recorded;
- preserve all issues for appeal; and
- investigate possible placements for the client if the case remains in juvenile court.

RURAL SUBCOMMITTEE

The Rural Subcommittee of the Indigent Defense Commission, chaired by John Lambrose, has met several times via teleconference to consider the current state of indigent defense in Nevada's Rural Counties.

Data Collection

The Subcommittee initially began working on gathering data on the caseload and other aspects of the rural contract indigent defense system, as opposed to those few counties that still use the Nevada State Public Defender. The data collection activities brought to light several of the major problems with the current system:

1. Caseloads in some counties, especially the fastest growing rural areas, are in the range of 600 cases per year for individual contract attorneys.
2. A lack of available data from contract attorneys and the rural counties points to gaps in oversight and accountability.

Challenges

The current caseload levels, which are not in compliance with either the ABA standards or the standards contemplated by the Commission, make providing adequate defense services a challenge in rural communities, despite a number of highly dedicated and ethical contract attorneys. There is also a lack of oversight in the contract system because the counties primary concern is the cost involved, not the quality of representation.

Public Defenders Office

The Subcommittee also examined the current State Public Defenders Office, which now serves only the counties of the First and Seventh Judicial Districts, and found several flaws in the current administration of the system by the State:

1. The current funding formula, which pushes 80 percent of the costs to counties, provides a disincentive for counties to participate.
2. The current placement of the Office within the Executive Branch (the Department of Health and Human Services) does not offer the independence necessary for an effective public defender's office and makes the budget of the office too susceptible to underfunding.

Options

To correct these serious flaws in the rural indigent defense system, the Subcommittee examined several options, including a revamped State Public Defender's office and asking urban Washoe and Clark Counties to take over representation in their respective adjacent rural counties.

1. First, in order to meet the need for quality rural indigent defense services, implement a system like the one used in the State of Kentucky. The Kentucky System has allowed the two most populous and urban counties in the State to retain their own public defender's offices, but has created satellite State offices to provide for indigent defense in Kentucky's rural counties. Implementing this

system in Nevada would allow Clark, Washoe, Elko, and any other counties that have created their own public defender's office to retain these offices, but require that the remaining counties enter into the State System.

The Subcommittee further recommends that the Nevada State Public Defender's Office be funded entirely by a state general fund appropriation to relieve less financially stable counties from the burden of shouldering the State's constitutional mandate under *Gideon v. Wainwright*. Additionally, the state legislature should ensure adequate funding of the State Office to allow the agency to attract qualified lawyers to rural satellite offices to ensure quality representation. Adequate funding is also necessary to ensure that the revamped Office can meet the caseload standards contemplated by this Commission, and provide constitutionally adequate services.

2. Second, enhance the independence of public defenders in the State of Nevada by creating an Indigent Defense Commission, which would have primary oversight, standard setting, and rule making authority for indigent defense throughout Nevada, as well as appointing authority over the State Public Defender. This Indigent Defense Commission should follow the Montana model with members appointed by all three branches of state government, and from other appropriate entities such as the Boyd School of Law and the National Judicial College, to form an independent commission. The Indigent Defense Commission's membership would necessarily exclude sitting judges and prosecutors. This would mean that the revamped State Public Defender's Office would be an independent Office within the Executive Branch, separate from any other Executive Branch Agency or the Judicial Branch. This Indigent Commission will also be able to set specific standards for contracting practices in order to ensure adequate conflict counsel is provided. This Commission shall be charged with studying and exploring the possibility of developing a unified statewide public defender system. This model would necessitate the creation of local indigent defense commissions to make appointment recommendations or set standards for the selection process for those counties that have their own public defender's office. Currently those counties are Clark, Washoe, Elko, Pershing, and Humboldt.

The implementation of this Indigent Defense Commission can be achieved in two ways:

- The Nevada Supreme Court could, within its constitutional authority, require that Nevada implement such a Commission in order to ensure appropriate counsel and equal access to justice for Nevada's rural citizens.
- The Commission could also be created by action by the Nevada Legislature.

RECOMMENDATIONS:

- It is the recommendation of the Subcommittee that the Nevada Supreme Court create this Commission by court rule or other appropriate means and request sufficient funding from the Legislature's Interim Finance Committee to get the Commission up and running. In so doing, the Court will position the Commission to seek other funding and prepare for the 2009 Session of the Nevada Legislature.

- The Nevada Supreme Court or the proposed Indigent Defense Commission put in place a rule that requires courts/clerks of the courts to collect and report data regarding indigent defense services, including demographic data regarding the race/ethnicity of each defendant represented, in each county of the state.

By implementing these recommendations, the State of Nevada will improve indigent defense in the rural counties, and ensure compliance with constitutional mandate under *Gideon v. Wainwright*.

**MINORITY REPORT TO THE NEVADA SUPREME COURT INDIGENT
DEFENSE COMMISSION**

Submitted by:

John Berkich, Assistant County Manager, Washoe County
Elizabeth Macias Quillin, Assistant County Manager, Clark County
Charles Short, Court Executive Officer, Clark County

Providing constitutionally sound and zealous advocacy for those accused of committing a crime is one of the foundations of our country. This fundamental tenet distinguishes the United States from other countries, where the onus of proving one's innocence against the resources of the state results in manifest injustice, especially for the poor. The Nevada Supreme Court should be lauded for examining the state of indigent defense in Nevada.

The State of Nevada is very diverse. The major metropolitan areas of Washoe and Clark County face unique challenges that are distinct from the challenges facing rural jurisdictions. In rural counties, the provision of justice is challenged by a lack of qualified attorneys that are available to provide legal representation to indigent defendants, as well as lengthy travel times between and within rural jurisdictions that create unique hardships on the attorneys. In contrast, exploding growth in Clark County, along with the ancillary effects of the "More Cops" initiative, has created huge caseloads for the Courts, district attorneys, public defenders, and contract attorneys alike.

The citizens of Clark County are facing a myriad of financial burdens. The current situation in the child welfare arena places many of the most vulnerable children at risk. This crisis has resulted in pending federal litigation that challenges the county to improve child welfare services.

University Medical Center (UMC), another Clark County responsibility, is facing record deficits that are taxing the county's resources. UMC provides quality healthcare to Southern Nevada's indigent population. Ironically, if Clark County is mandated to adhere to the proposed caseload standards for indigent defense, the County's ability to provide indigent healthcare may be compromised. While there is no constitutional right for the indigent to receive healthcare, NRS Chapter 428 mandates that the county provide healthcare to the poor.

Clark County is also facing severe overcrowding at the Clark County Detention Center. The exploding jail population puts defendants and corrections staff at risk of harm. The increase in the detention population is attributable to the tremendous growth experienced in Clark County. Pretrial staff has worked diligently to release those that do not pose a risk of harm to the community nor are at risk of flight. Those in custody are charged with serious offenses and must be detained. Unfortunately, this segment of the offender population continues to grow most rapidly, which is requiring more jail and prison capacity statewide. Clark County recently committed to building an additional low-level offender facility, which should be complete within 18 to 24 months. However, in the

interim, the County is at risk of federal intervention due to the overcrowded conditions. The situation is so severe, that Clark County is renting beds from Lincoln County.

Similarly, in Washoe County, population growth and continuing jail overcrowding has forced the County to begin construction on an addition to the Detention Center increasing its capacity by 260 beds and adding millions of dollars in operating costs. Meanwhile, Pretrial Services has exceeded its operational capacity to divert qualified offenders from incarceration. Within the community, population growth has led to a crisis in funding housing for the homeless while the need for all forms of human services, from child protective services to senior care, continues to climb. New court facilities are desperately needed, including several justice courts that are wholly inadequate, and the District Court, which is housed in an aging and failing facility.

All of this is occurring at a time when fiscal resources have diminished locally and statewide. In November, the Board of County Commissioners will be accepting a revised budget for FY 2008, which reflects a 5% overall reduction in General Fund expenditures causing reductions in programmed service levels throughout the County. At the same time, the State has announced plans to cut its operating budget, which will have a trickle down affect on the Counties who stand to lose millions of dollars in appropriations. While generally the source of these problems is a weakened economy, there are other threats on the horizon that could significantly and permanently affect future property tax revenues and the distribution structure for consolidated taxes that would both serve to measurably reduce County revenues. All of this comes on the heels of the 2007 Legislature, which diverted a portion of the Counties' property tax revenues dedicated to capital improvements to fund highway construction.

The minority does not object to the Indigent Criminal Defense Performance Standards. These Standards clearly articulate tasks and duties that are essential to provide constitutionally sound representation. While some argue that one cannot meet the Performance Standards if caseloads are too high, an argument can be made that each case is different and the time required to zealously represent each client varies depending upon the nature of the charges and prior criminal history. The practice of law does not lend itself to a cookie-cutter approach.

What concerns the Minority, however, is that the Committee adopted the caseload standards without performing an essential assessment of the current caseloads in Nevada. No analysis was performed to determine, with any degree of accuracy, the number of case filings or types of cases that are being filed. Many of the cases begin as misdemeanors, are filed as felonies and are negotiated back down to misdemeanors. The proposed caseload standards do not measure time to final disposition, nor do they track the final outcome.

The proponents of the caseload standards state that the standards are 'time-tested'. Unfortunately, there has been no consideration for the fact that the standards, which were promulgated in 1973, have not been adjusted to include technological advances. The ABA commented on this in its "Standards for the Administration of Defense Services"

Compendium Volume 1 that, “The NLADA guidelines were adopted before the use of computers....and, as a result, are somewhat dated.” To that point, the advent of Westlaw and Lexis-Nexis computer based research has completely changed an attorney’s ability to perform legal research. Moreover, the ability to use computerized tools to ascertain whether a case continues to be good law also has not been considered. These technological changes alone have changed the practice of law by improving the attorney’s ability to perform legal research.

In addition to computerized legal research, word processing capabilities have increased the attorney’s efficiency. The use of computerized brief banks and computerized templates for standard briefs has also resulted in more time efficiencies for attorneys. Other technological advances since 1973 such as digital transcription, voice recognition, and desk-top video visitation technology all serve to create a much different workplace today. At a practical level, these leaps in technology since 1973 have created significant efficiencies for attorneys that have created substantial time savings while virtually eliminating travel time.

While it is true that scientific advances have made the practice of law more complex in certain cases, it is also true that the caseload standards have remained stagnant for 45 years. During the same period, some efficiencies have been introduced into court practices and procedures such as courtroom specialization, electronic filing capabilities, and expedited processes such as the Early Court Resolution program in Washoe County where nearly 10% of all cases reach a negotiated settlement within the initial 72 hours.

Over the past 40 years, the profession of public defense itself has changed as specialization has become common practice, reducing the need for legal research and the time committed to handling the volume of similar cases.

Finally, other jurisdictions have recognized the cost of achieving the goal of quality representation must be balanced against the multitude and magnitude of all the other needs for public services. This was noted by the ABA in the above referenced Compendium, where the State of Michigan limits the “number of appointments that would allow for quality representation and is *within the budget* approved by the Legislature.”

The Minority proposes that a decision regarding the caseload standards for Nevada be delayed until a comprehensive case-weighting and time management study is performed. Without further analysis, it is impossible to determine the number of cases that an attorney can effectively handle and still meet constitutional requirements. It is respectfully submitted that, if the Nevada Supreme Court adopts the proposed caseload standards, an immediate liability will be imposed upon the Counties as every defendant will opt to argue that he or she did not receive zealous representation based upon his or her attorney’s assignments. If these litigants are successful with such arguments, the impending settlements will only further erode the available resources for the justice community.

Minority Report

Submitted by:

Stewart L. Bell, District Judge
Kevin Higgins, Justice of the Peace

I agree completely with setting case performance standards for all attorneys providing defense services to insure, insofar as possible, that all defendants receive quality representation.

I am opposed to artificial caseload limits as they are simply a trap for the unwary, which will create unnecessary post conviction work. Caseload standards, by definition, are meaningless because they fail to account for the amount of work entailed in differing types of cases and the fact that more experienced or efficient attorneys may well be able to meet performance standards while handling dramatically more cases than less experienced attorneys.

My recommendation would be to adopt performance standards only and mandate that government staff the public defender offices and pay appointed council sufficiently to meet those standards. All appointed council should be required to keep some records of what services are provided and if there is not sufficient time in a 40-45 hour work week to meet performance standards for all clients, then the office is understaffed and needs to be augmented. Period.