

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

JAN 04 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER

WHEREAS, the United States and Nevada constitutions provide that every individual charged with a serious crime is entitled to legal representation, even if that individual cannot afford counsel, and competent representation of indigents is vital to our system of justice; and

WHEREAS, on April 26, 2007, the Nevada Supreme Court ordered that the Indigent Defense Commission be created for the purposes of studying the issues and concerns with respect to the selection, appointment, compensation, qualifications, performance standards and caseloads of counsel assigned to represent indigent defendants in criminal and juvenile delinquency cases throughout Nevada and designated the Honorable Michael A. Cherry, Associate Justice, as chair of the Commission; and

WHEREAS, the Commission conducted a statewide survey of indigent defense services in June and July 2007, met numerous times between May 2007 and October 2007, formed subcommittees, and completed a report on the matter; and

WHEREAS, on November 20, 2007, the Commission filed its report with this court making numerous unanimous recommendations to promote the independence of the court-appointed public defense system,

establish performance and caseload standards for public defenders,¹ and ensure the consistency of indigent defense in the rural counties; and

WHEREAS, this court conducted public hearings on December 14, 2007, and December 20, 2007, to consider the Commission's report and hear public comment on the issues concerning the defense of indigents; accordingly,

IT IS HEREBY ORDERED that the following recommendations from the Commission's report are adopted.

Determination of Indigency

WHEREAS, any defendant charged with a public offense who is indigent may request the appointment of counsel by showing that he is without means to employ an attorney and suffers a financial disability;² and

WHEREAS, the methods utilized in Nevada's courts and public defender offices to determine who is eligible for defense services at public expense vary widely;

IT IS HEREBY ORDERED that effective immediately, the standard for determining indigency shall be:

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 or her own. 'Substantial hardship' is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid,

¹The Commission's report included two separate minority reports specifically relating to uniform caseload standards and opposing the imposition of such standards.

²NRS 171.188

Disability Insurance, reside in public housing, or earn less than 200 percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial hardship if he or she is currently serving a sentence in a correctional institution or housed in a mental health facility.

Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of charges being faced, monthly expenses, and local private counsel rates, would result in a substantial hardship were they to seek to retain private counsel.

Independence of the Court-Appointed
Public Defense System from the Judiciary

WHEREAS, participation by the trial judge in the appointment of counsel, other than public defenders and special public defenders, and in the approval of expert witness fees and attorney fees creates an appearance of impropriety; and

WHEREAS, the appointment of counsel, approval of fees, and determination of indigency should be performed by an independent board, agency, or committee, or by judges not directly involved in the case;

WHEREAS, the selection of lawyers, other than public defenders and special public defenders, to represent indigent defendants should be made by the administrators of an indigent defense program; and

WHEREAS, the unique circumstances and case management systems existent in the various judicial districts require particularized administrative plans to carry out the recommendations of the Commission contained on page 11 of the Report;

IT IS HEREBY ORDERED that each judicial district shall formulate and submit to the Nevada Supreme Court for approval by May 1,

2008, an administrative plan that excludes the trial judge or justice of the peace hearing the case and provides for: (1) the appointment of trial counsel, appellate counsel in appeals not subject to the provisions of Nevada Rule of Appellate Procedure 3C, and counsel in post-conviction matters; (2) the approval of expert witness fees, investigation fees, and attorney fees; and (3) the determination of a defendant's indigency in the courts within the district; and

IT IS FURTHER ORDERED that each municipal court shall submit any existing administrative plan or formulate and submit to the Nevada Supreme Court for approval by May 1, 2008, an administrative plan that excludes the trial judge or justice of the peace hearing the case and provides for: (1) the appointment of trial counsel and appellate counsel; (2) the approval of expert witness fees, investigation fees, and attorney fees; and (3) the determination of a defendant's indigency in each of their courts.

Performance Standards

WHEREAS, 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; and

WHEREAS, the performance standards unanimously recommended by the Commission provide guidelines that will promote effective representation by appointed counsel;

IT IS HEREBY ORDERED that the performance standards contained in Exhibit A to this order are to be implemented effective April 1, 2008.

Caseload Standards

WHEREAS, the average caseload for attorneys in the Clark County Public Defender's Office was 364 felony and gross misdemeanor cases in 2006, and the average caseload for attorneys in the Washoe County Public Defender's Office was 327 felony and gross misdemeanors; and

WHEREAS, the National Legal Aid and Defender Association has set the recommended caseload standard for attorneys handling felony cases at 150 per attorney;³ and

WHEREAS, a majority of the Commission concludes that caseloads in Clark County and Washoe County substantially exceed recommended caseloads and that a caseload standard of no more than 192 felony and gross misdemeanors per attorney should be implemented; and

WHEREAS, by any reasonable standard, there is currently a crisis in the size of the caseloads for public defenders in Clark County⁴ and Washoe County; and

WHEREAS, Nevada Rule of Professional Conduct 6.2(a) provides that good cause exists for a lawyer to seek to avoid appointment to represent a person where accepting the appointment is likely to result in violation of the Rules of Professional Conduct or other law; and

WHEREAS, Nevada Rules of Professional Conduct 1.1 and 1.3 require a lawyer to refrain from taking on more cases than he or she can competently and diligently handle; and

³We note that, contrary to the statement in the Commission's report, the American Bar Association has not adopted the NLADA's standards, which have been in existence since 1973 without any material change.

⁴Notwithstanding the excessive caseload for public defenders in Clark County, we note that the Clark County Commission added only a single deputy public defender position in the most recent budget.

WHEREAS, the public defenders in Clark County and Washoe County have deferred advising the county commissioners of their unavailability to accept appointments even if accepting further appointments might compromise the ability of the public defenders to represent their clients; and

WHEREAS, Clark County and Washoe County requested the opportunity to perform and have agreed to fund a weighted caseload study prior to the adoption of any uniform caseload standards; and

WHEREAS, the court believes such a study would benefit the Nevada State Public Defender's Office; and

WHEREAS, the performance of a recognized weighted caseload study requires extensive timekeeping which will impose additional work on the public defenders, further limiting the public defender's ability to represent indigent defendants in criminal and juvenile delinquency cases;⁵ and

WHEREAS, the public defenders recognize that the adoption of uniform caseload standards would require a period of gradual implementation; accordingly,

IT IS HEREBY ORDERED that the public defenders in Clark County and Washoe County shall advise the county commissioners of their respective counties when they are unavailable to accept further appointments based on ethical considerations relating to the their ability to comply with the performance standards contained in Exhibit A to this order and to represent their clients in accordance with the Rules of Professional Conduct, and that

⁵The Nevada State Public Defender's Office already maintains timekeeping records from which a weighted case study can be prepared for that office.

the decision to advise the county commissioners of unavailability shall take into consideration any additional requirements placed on the public defenders' offices in order to prepare a weighted caseload study; and

IT IS FURTHER ORDERED that the Clark County Public Defender and the Washoe County Public defender shall each perform weighted caseload studies for their offices according to a recognized protocol for both criminal and juvenile delinquency cases, taking into consideration the approved performance standards, and submit the results to the Nevada Supreme Court by July 15, 2008; and

IT IS FURTHER ORDERED that the Nevada State Public Defender's Office shall perform a weighted caseload study according to a recognized protocol for both criminal and juvenile delinquency cases, taking into consideration the approved performance standards, and submit the results to the Nevada Supreme Court by July 15, 2008;⁶ and

IT IS FURTHER ORDERED that consideration of the implementation of caseload standards will be continued at a hearing to be held at 2:00 p.m. on Friday, September 5, 2008; and

IT IS FURTHER ORDERED that the Administrative Office of the Courts shall develop a method of retrieving uniform statistics regarding the nature and quality of services to indigent defendants including, but not necessarily limited to, demographic data regarding the age, sex, race and ethnicity of each defendant represented; and

⁶The Commission unanimously recommended that indigent defendants in all counties, except Clark, Elko and Washoe, be represented by the Nevada State Public Defender's Office, which office should be funded entirely by the state general fund. The court has directed supplemental briefing from the Nevada State Public Defender's Office on this issue and will further consider the Commission's recommendation on August 26, 2008.

IT IS FURTHER ORDERED that a permanent statewide commission for the oversight of indigent defense shall be established and appointed by the Nevada Supreme Court with the advice of the Indigent Defense Commission.

Dated this 4th day of January, 2008.

Hardesty, J.
Hardesty

We concur.


Gibbons, J.
Gibbons

Parraguirre, J.
Parraguirre

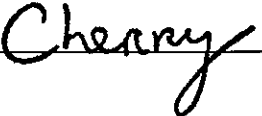
Douglas, J.
Douglas


MAUPIN, C.J., with whom CHERRY and SAITTA, JJ., agree, dissenting in part:

I agree with the majority with one exception. Based upon my own experience as a practicing lawyer and a former public defender, I believe that any weighted caseload study will confirm the validity of the Commission's recommendations for the implementation of caseload standards. In my view, these standards should be adopted effective July 1, 2008.⁷


_____, C.J.
Maupin

We concur:


_____, J.
Cherry


_____, J.
Saitta

cc: Members of the Indigent Defense Commission
Kathy A. Hardcastle, Chief Judge, Eighth Judicial District
Charles J. Short, Court Executive Officer
Hon. Jerome M. Polaha, Chief Judge
Howard W. Conyers, Washoe District Court Clerk
All District Court Judges
Administrative Office of the Courts

⁷In this, I suspect that the caseload standards may actually be too rigorous to satisfy the Sixth Amendment to the United States Constitution.