NATIONAL LEGAL AID & DEFENDER ASSOCIATION

October 2, 2009

Chief Justice James W. Hardesty
Justice Michael A. Cherry
Justice Michael Douglas
Justice Mark Gibbons
Justice Kristina Pickering
Justice Ron D. Parraguire
Justice Nancy M. Saitta

In Care Of:
The Nevada Supreme Court
201 South Carson Street
Carson City, Nevada 89701
(775) 684-1600

Re: ADKT No. 411 Hearing: October 6, 2009 (Caseloads)

Overview: The State of Nevada is experiencing an indigent defense crisis that negatively impacts the ability of the criminal courts to reach verdicts that are fair, correct, swift and final. Though the Supreme Court is applauded for, among other things, creating uniform eligibility standards, removing the judiciary from direct oversight of indigent defense services, instituting attorney performance standards, and providing training on those standards, the crisis continues unabated due in large part to indigent defense providers carrying excessive caseloads beyond a level at which they can provide ethical representation to their clients.

An adequate indigent defense program must have binding workload standards for the system to function, because public defenders do not generate their own work. Public defender workload is determined, at the outset, by a convergence of decisions made by other governmental agencies and beyond the control of the indigent defense providers. The legislature may criminalize additional behaviors or increase funding for new police positions that lead to increased arrests. And, as opposed to district attorneys, who can control their own caseload by dismissing marginal cases, diverting cases out of the formal criminal justice setting, or offering better plea deals, public defense attorneys are assigned their caseload by the court and are ethically bound to provide the same uniform-level of service to each of their clients.[1]

[1] Workload limits have been reinforced in recent years by a growing number of systemic challenges to underfunded indigent defense systems, where courts do not wait for the conclusion of a case, but rule before trial that a defender's caseloads will inevitably preclude the furnishing of adequate defense representation. *See, e.g., State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), *cert. den*. 454 U.S. 1142 (1982); *State v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (1983) *Corenevsky v. Superior Court*, 36 Cal.3d 307, 682 P.2d 360 (1984); *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984); *State v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (1985); *People v. Knight*, 194 Cal. App. 337, 239 Cal. Rptr. 413 (1987); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert den*. 495 U.S. 957 (1989); *Hatten v. State*, 561 So.2d 562 (Fla. 1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit*, 561 So.2d 1130 (Fla. 1990); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991); *City of Mount Vernon v. Weston*,

The American Bar Association's *Ten Principles of a Public Defense System* present the most widely accepted and used version of national standards for indigent defense. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous ABA standards for indigent defense systems to their most basic elements, which officials and policymakers can readily review and apply.[2] ABA's *Principle #5* states unequivocally that defense counsel's workload must be "controlled to permit the rendering of quality representation" and that "counsel is obligated to decline appointments" when caseload limitations are breached.[3]

Since the publication of The Spangenberg Group (TSG) case-weighting report, much debate has ensued in the Supreme Court Indigent Defense Commission meetings about the failure of the report to establish clear caseload guidelines. And, indeed, rational people may argue the validity of using comparison state caseload standards as an acceptable standard. However, what is clear is that the court-ordered Clark and Washoe county-financed case-weighting report is unflinching in its findings that Clark and Washoe counties are in the midst of a caseload crisis. "Based upon all the information available to TSG from Nevada, none of the public defender agencies in these jurisdictions is able to provide competent and diligent legal services to all of its clients due to a substantial excess number of cases and an insufficient number of staff."[4]

The crisis only becomes more glaring when one factors in the court-ordered performance standards: "After completing the 2008 case weighting study in Clark and Washoe Counties, after reviewing previous studies conducted in Nevada, and after performing extensive site visits in Clark and Washoe counties, it is clear to TSG that public defenders in Clark and Washoe counties will be unable to comply with the requirements of ADKT-411."[5] The starkness of the indigent defense caseload crises in Clark and Washoe counties is made obvious by the TSG conclusion that both counties "require additional FTE attorney positions to reach the caseload standards established by comparable jurisdictions and the new performance standards promulgated under ADKT-411," and that Clark County requires between 31 and 90 additional attorneys (an increase of 32% to 82%) while Washoe County requires 19-28 new attorneys (an increase of 22% to73%).[6]

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68 Wash. App. 411, 844 P.2d 438 (1993); *State v. Peart*, 621 So.2d 780 (La. 1993); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996). Many other cases have been resolved by way of settlement.

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

[3] ABA *Principle 5* states: "***Defense counsel's workload is controlled to permit the rendering of quality representation.*** *Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards[3] should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement."*

[4] The Spangenberg Group & The Center for Justice, Law and Society at George Mason University. *Assessment of Washoe and Clark County, Nevada Public Defender Offices: Final Report*. p. 58.

[5] Ibid., p. 57. See also: "There is not sufficient funding in either of the two counties to assure that all public defense attorneys can measure up to the performance standards recently adopted by the Nevada Supreme Court." (P. 58)

[6] Ibid., p. 54.

The TSG study validates the conclusions from NLADA's 2004 report on the Clark County Public Defender office that indicate the caseload crisis in that County is not new or related to their current economic downturn. In 2004, NLADA concluded that the Clark County Public Defender Office "attorney caseloads are in serious breach of nationally recognized workload standards. The office has been historically understaffed and there is a serious crisis in adult felony and misdemeanor representation. Juvenile representation is beyond the crisis point and requires immediate attention to avert constitutional challenges of ineffective assistance of counsel."[7]

Moreover, the focus on Clark and Washoe Counties has overshadowed the workload concerns in the rural counties, where travel concerns exacerbate indigent defense workload. For example, the Rural Subcommittee of the Supreme Court Indigent Defense Task Force surveyed Nevada counties about indigent defense expenditures, delivery system and caseloads. In Douglas County, District Attorney Mark B. Jackson responded to the survey indicating that in 2007 three attorneys received payment for indigent defense representation. The self-reported Douglas County indigent defense caseload for 2007 was: Murder (1); Felony (201); Misdemeanor (3,249); juvenile delinquency (341); and, parole & probation revocation (59).

The National Advisory Commission (NAC) on Criminal Justice Standards and Goals first developed numerical caseload limits in 1973 under the auspices of the U.S. Department of Justice, which, with slight modifications in some jurisdictions, have been widely adopted and proven quite durable in the intervening three decades.[8] NAC Standard 13.12 on Courts states:

> The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.[9]

What this means is that an attorney who handles only felony cases should handle no more than 150 such cases in a single year *and nothing else*. So in Douglas County, comparing the NAC standards to the 2007 caseload reveals that three attorneys were handling the workload of more than 11 FTE attorneys before factoring in the one murder trial and the 59 parole/probation

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[7] NLADA. *Evaluation of the Public Defender Office, Clark County, Nevada.* March 2003. p. 25. See for example: "Since 1983, the juvenile facility has been staffed with only two attorneys. Mr. Cooper added a third in 2002. From 1993 until 2001, the CCPDO juvenile new assignments increased over 397% (from 576 to 2,867) without a single new attorney being added to help with the workload. This is despite the fact that in 1993, the juvenile team was already slightly above the national standard for juvenile cases (200) that an attorney should handle based on new assignments alone (in that year two attorneys divided 576 new assignments – an average of 288 cases per attorney, or 44% above the national standard). Chart 4-6 depicts the number of juvenile assignments per attorney. At the close of 2001, CCPDO's juvenile attorneys were expected to handle more than *seven times* the number of cases recommended by the NAC standards." (p. 30).

[8] *See Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1992), surveying state and local replication and adaptation of the NAC caseload limits.

[9] National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 186.

revocation hearings.[10] The situation is actually much worse in that the county contracts with the defense providers specifically allow them to carry private practices in addition to their public cases. And, the excessive caseloads are compounded by the fact that the contracts are for a single flat fee from which the attorney must cover overhead cost for defense representation (e.g., travel) without additional remuneration, making the probability that attorneys will do what is necessary on behalf of the defendant in every single case unlikely at best.

Initial Recommendations: The obligation to ensure an adequate right to counsel lies with the State of Nevada.[11] While a state may delegate obligations imposed by the constitution, "it must do so in a manner that does not abdicate the constitutional duty it owes to the people."[12] If the counties cannot meet the delegated obligations, the state — as the original obligor — must step in. [13] To date the State of Nevada has refused to act to resolve the indigent defense crisis. As the branch of government charged with the administration of justice, the Court cannot let the crisis continue unabated.

There are four recommendations that the Court can order immediately and that do not require large outlays of financial resources. They are:

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[10] 201 felonies divided by 150 NAC standard = 1.34 FTE attorneys; 3,249 misdemeanors divided by 400 NAC standard = 8.12 FTE attorneys; and, 341 juvenile delinquency cases divided by 200 NAC standard = 1.71 FTE attorneys. Total attorneys = 11.17.

[11] The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the United States Supreme Court stated that "reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." The Court then held that the Sixth Amendment applied to the states - not to county or local governments - by virtue of the Fourteenth Amendment and that the State of Florida thus had an obligation to provide Mr. Gideon with counsel for his defense. National standards incorporate this aspect of the decision, emphasizing that state funding and oversight are required to ensure uniform quality.

The obligation of state government to fund 100% of indigent defense services is supported by American Bar Association and National Legal Aid & Defender Association criminal justice standards. See the American Bar Association, *Ten Principles of a Public Defense Delivery System*, Principle 2: "*Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide"*. See also: Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services, U.S. Department of Justice, 1976), Guideline 2.4.

For more, see: The American Civil Liberties Union Foundation (ACLU), the Charles Hamilton Houston Institute for Race & Justice at Harvard University Law School, the National Association of Criminal Defense Lawyers (NACDL), the NAACP Legal Defense and Educational Fund, Inc. (LDF), and the National Legal Aid & Defender Association (NLADA). *White Paper on Delegation of Indigent Defense Duties to Counties ("White Paper")*. Submitted to the Nevada Supreme Court, September 2, 2008.

[12] *Claremont School Dist. v. Governor*, 147 NH 499, 513 (2002). In other words, the state has an obligation to ensure that the counties are capable of meeting the obligations and that counties actually do so. *Cf Robertson v. Jackson,* 972 F.2d 529 (4th Cir. 1992) (holding that although administration of a food stamp program was turned over to local authorities, "ultimate responsibility . . . remains at the state level."); *Omunson v. State,* 17 P.3d 236 (Idaho 2000) (holding that where a duty has been delegated to a local agency, the state maintains "ultimate responsibility" and must step in if the local agency cannot provide the necessary services). Ibid., *White Paper*.

[13] The state cannot be permitted to abdicate all responsibility to the counties; if a violation of constitutional rights of citizens' rights results, the state remains liable. It is for this reason that, despite statutory delegation of the right to counsel obligations to counties, courts in both Montana and Michigan have held that the state is an appropriate defendant in class actions alleging systemic right to counsel violations. *Duncan v. State of Michigan,* No. 07-242 CZ, Transcript of Hearing on Motion to Dismiss, at 35 (May 15, 2007) ("While it's true the defendants have delegated the responsibility for funding and administering the indigent defense programs to the counties, it does not mean that defendants are off the hook.");*White v. Martz,* No. CDV-2002-133 Memorandum and Order (Mont. Dist. Ct. July 24, 2002). Ibid., *White Paper*.

Recommendation #1: Adopt a uniform definition of a "case." The surveys compiled by the Rural Sub-Committee reveal that jurisdictions count cases differently – some by charging instrument, some by defendant, some by charge, etc. The Conference of State Court Administrators and the National Center for State Courts first established a uniform definition of a case in their joint 1989 publication *State Court Model Statistical Dictionary.* It instructs administrators to "[c]ount each defendant and all charges involved in a single incident as a single case (page 19)."[14] That definition has become the standard of all case-weighting studies, including those conducted by the National District Attorneys Association, American Prosecutor Research Institute for district attorney workload, and by the National Center for State Courts for judicial case-weighting studies. Additionally, it is the definition of a "case" used in developing the NAC public defender caseload standards.

Recommendation #2: Require courts to track pertinent indigent defense data using the uniform definition of a "case." Without data, decision-makers are left to form policy based on anecdotal information, and the formation of public attitudes is consigned to speculation, intuition, presumption, and even bias. The Supreme Court should require all courts[15] to report the following data annually: new assignments by case-type (capitol, felony, misdemeanor, delinquency, appeal, etc.) and by attorney type (public defense provider, private attorney, pro se); dispositions by case-type (capitol, felony, misdemeanor, delinquency, appeal, etc.) and by attorney type (public defense provider, private attorney, pro se); number of trials by case-type (capitol, felony, misdemeanor, delinquency, appeal, etc.) and by attorney type (public defense provider, private attorney, pro se). Additionally, each of these data collection initiatives should identify the race and gender of the defendant.

Recommendation #3: Prohibit the use of flat fee contracting for right to counsel services. Flat fee contracting agreements are oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation,[16] and are prohibited under the ABA *Ten Principles.*[17] Fixed annual contract rates for an unlimited

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[14] Two states have statutorily adopted a uniform definition of a case that complies with this definition: Tennessee and Louisiana.

[15] It is appropriate for courts to collect this data rather than individual public defense systems. Public defense systems are generally behind the technological curve. Moreover, to understand right to counsel services require information on the number of pro se defendants – information the public defenders could not collect.

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

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

number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services,* written by NLADA and adopted by the ABA in 1985. Guideline III-13, entitled "Conflicts of Interest," prohibits contracts under which payment of expenses for necessary services such as investigations, expert witnesses, and transcripts would "decrease the Contractor's income or compensation to attorneys or other personnel," because this situation creates a conflict of interest between attorney and client.[18] Flat fee contracts are at the root of much of the caseload crisis in the rural counties.

In January 2009, the Washington Supreme Court banned indigent defense providers from entering into flat fee contracts because of the inherent conflict of interest it produces between a client's right to adequate counsel and the attorney's personal financial interest.[19]

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18 The same guideline addresses contracts which simply provide low compensation to attorneys, thereby giving attorneys an incentive to minimize the amount of work performed or "to waive a client's rights for reasons not related to the client's best interests." For these reasons, all national standards, as summarized in the eighth of the ABA's *Ten Principles,* direct that: "Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services."

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

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

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

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

Recommendation #4: Create a permanent statewide Right to Counsel Commission to ensure independence of indigent defense systems. ABA *Principle #5* states unequivocally that defense counsel's workload must be "controlled to permit the rendering of quality representation" and that "counsel is obligated to decline appointments" when caseload limitations are breached.[20] In May 2006, the ABA's Standing Committee on Ethics and Professional Responsibility further reinforced this imperative with its *Formal Opinion 06-441.* The ABA ethics opinion observes: "[a]ll lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently."[21] Should the problem of an excessive workload not be resolved by refusing to accept new clients, *Formal Opinion 06-441* requires the attorney to move "to withdraw as counsel in existing cases to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn."[22] In August 2009, the ABA House of Delegates again reaffirmed their position on public defender work overload in a new document, *Eight Guidelines on Public Defense Related to Excessive Workload,* stating: "National caseload standards should in no event be exceeded."[23]

The Nevada Supreme Court in the original ADKT No. 411 order mirrored much of the ethical component of the ABA's positions, stating: "It is hereby ordered that 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 their ability to comply with performance standards in Exhibit A to this order."[24]

Given that the American Bar Association -- through promulgation of standards and adoption of ethics opinions -- has so ardently required attorneys to refuse cases over ethical limits and given the direction of the Nevada Supreme Court in the original ADKT No. 411 order, why do public defenders across Nevada continue to accept new assignments that force them to triage professional services to their clients because of work overload? In most instances, the answer is that the act of challenging the court or county administration over high caseloads would result in a public defender's termination of employment.

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[20] ABA *Principle 5* states: "***Defense counsel's workload is controlled to permit the rendering of quality representation.*** *Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards[20] should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement."*

[21] American Bar Association, Standing Committee on Ethics and Professional Responsibility. *Formal Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*. May 13, 2006. Opinion can be found online at: www.abanet.org/cpr/pubs/ethicopinions.html.

[22] Ibid. (emphasis added).

[23] American Bar Association. *Eight Guidelines on Public Defense Related to Excessive Caseload.* August 2009. p.11.

[24] Nevada Supreme Court. *In the Matter of Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411*. January 4, 2008.

Though there are many indigent defense systems in the country with good caseload controls that meet the standards embraced by the ABA *Ten Principles*, every single one of them have such standards because of a history of well-established independence. Currently 31 states and the District of Columbia have a statewide indigent defense commission (or 63%). Though the responsibilities of the commissions in each state vary somewhat, most are charged with two main functions: 1) promulgating standards; and 2) hiring and firing chief defenders.

All pertinent national standards call for the independence of the defense function, including the ABA *Ten Principles*.[25] To be clear, the Nevada Supreme Court should be commended for adhering to the first part of the ABA *Principle 1* explicitly limiting judicial oversight. But the second half of that principle calls for the establishment of an independent oversight board whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the public defense function.

To help jurisdictions in the establishment of independent public defender boards or commissions, NLADA has promulgated guidelines. NLADA's *Guidelines for Legal Defense Services* (Guideline 2.10) states: "A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented." Additionally, "Commission members should be selected under the following criteria: The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director: a) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics; b) No single branch of government should have a majority of votes on the Commission; c) Organizations concerned with the problems of the client community should be represented on the Commission; d) a majority of the Commission should consist of practicing attorneys; and e) The Commission should not include judges, prosecutors, or law enforcement officials."

Although a single statewide commission overseeing a single state-funded, state administered public defense system with powers to promulgate and enforce binding standards makes the most sense for Nevada, there are arguably potential separation of powers issues that may preclude the Court from ordering such a statewide system outright. At the very least, the Nevada Supreme

[25] ABA *Principle* 1: "**The public defense function, including the selection, funding, and payment of defense counsel,**1 **is independent.** The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard **i**ndependence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff."

National standards address the need for independence in the context of all three basic models for delivering indigent defense services in the United States. Where private lawyers are assigned, the concern is with unilateral judicial power to select lawyers to be appointed to individual cases, and to reduce or deny the lawyer's compensation. Where contracts with nonprofit public defense organizations or law offices are used, the concern focuses primarily on flat-fee contracts which pay a single lump sum for a block of cases regardless of how much work the attorney does, creating a direct financial conflict of interest with the client, in the sense that work or services beyond the bare minimum effectively reduces the attorney's take-home compensation. Where a public defender system is used, the concern is with vesting the power to hire and fire the chief public defender in a single government official, such as the jurisdiction's chief executive or chief judge, a concern compounded when that official must run for popular election.

Court needs to flesh out the statewide commission ordered in the original ADKT No. 411 from January 2008 and create a permanent body to hire/fire the state public defender. For example, a nine-member statewide commission could consist of appointees by: the Governor (2 appointments); the Chief Justice (2 appointments); the Senate President (1 appointment); Speaker of the House (1 appointment); the State Bar president (2 appointments); and, the Boyd Law School Dean (1 appointment). And, to address the state's interest in non-State Public Defender jurisdictions, regional boards representing both state and local interests could be created with the authority to hire/fire county chief defenders and act as a board of trustees for the county systems.[26]

Further Recommendations: Two main questions must be addressed before offering further recommendations: Do orders of the Court that result in new moneys being spent at the state or local level constitute a new unfunded mandate? Would the imposition of binding caseload caps - that could potentially require increased resources dedicated to indigent defense - create a separation of powers dilemma?

First, the right to counsel mandate is far from "new" – the *Gideon* decision is now over 46-years old. The fact that it has been obscured in Nevada for so long does not allow the state and counties to now cry poverty and be absolved of its constitutional responsibilities under the Sixth and Fourteenth Amendments. NLADA well understands the difficulties Nevadan counties face in trying to shoulder the state's responsibility, but the constitution does not allow for rights to be infringed during difficult economic times.

Secondly, the establishment of binding caseload caps does not necessarily result in the court ordering state or local legislative branches to "throw money at the problem," negating any question of separation of powers. For a state with a rich libertarian bent like Nevada, it is important to heed the words of Cato Institute Adjunct Scholar, Erik Luna, who recently testified before the United State House Judiciary Committee, Sub-Committee on Crime, Terrorism & Homeland Security on the failure of states to uphold the right to counsel: "In practice, the states have brought any crisis upon themselves through, *inter alia,* overcriminalization – abusing the law's supreme force by enacting dubious criminal provisions and excessive punishments, and overloading the system with arrests and prosecutions of questionable value. State penal codes have become bloated by a continuous stream of legislative additions and amendments, particularly in response to interest-group lobbying and high-profile cases, producing a one-way ratchet toward broader liability and harsher punishment. Lawmakers have a strong incentive to add new offenses and enhanced penalties, as conventional wisdom suggests that appearing tough on crime fills campaign coffers and helps win elections, irrespective of the underlying justification. Law enforcement also has an interest in a more expansive criminal justice system, with the prospects of promotion (or reelection) often correlated to the number of arrests for police and convictions for prosecutors."

[26] A regional hiring and review board may then consist of a nine person panel consisting of appointments by: the statewide board (4 appointments); one appointment by each County Commission in a region (4 counties to a region); and, one appointment by the local bars in a region to balance state and local interests.

In short, changing prosecution charging practices, creating new criminal justice processes to divert cases out of the formal criminal justice system, and reclassification of crimes to civil infractions are all perfectly acceptable ways to decrease the number of cases needing publicly-paid representation to meet any imposed caseload caps without the state or counties spending one dime more for public defense. Indeed, the establishment of caseload caps may spur on a reevaluation of criminal justice practices that would result in major cost-savings for Nevadan tax-payers across the entire criminal justice system.

Therefore the Court should order the following:

Recommendation #5: Adopt binding caseload caps on capital murder and Felony A sex cases: In *Wiggins v. Smith*, 539 US 510 (2003), the United States Supreme Court recognized that national standards, specifically those promulgated by the American Bar Association (ABA), should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney practices in an environment that provides her with the time, resources, independence, supervision, and training to effectively carry out her charge to adequately represent her clients. *Rompilla v. Beard*, 545 US 374 (2005) echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."[27]

The commentary to the ABA *Death Penalty Guideline 6.1* notes: "In terms of actual numbers of hours invested in the defense of capital cases, recent studies indicate that several thousand hours are typically required to provide appropriate representation. For example, an in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that the total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889." The TSG case-weighting report determined unequivocally that the appropriate annual available work hours in Clark and Washoe County is 1,831.[28] Therefore, the Court should order that an indigent defense provider may work on one active trial level capital case at one time.

For example, Supreme Court Rules in Washington State requiring two capital eligible attorneys for all death penalty cases states: "Both counsel at trial must have five years' experience in the

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

[28] The Spangenberg Group & The Center for Justice, Law and Society at George Mason University. *Assessment of Washoe and Clark County, Nevada Public Defender Offices: Final Report*. p. 25.

practice of criminal law, be familiar with and experienced in the utilization of expert witnesses and evidence, and not *be presently serving as appointed counsel in another active trial level death penalty case (emphasis added)*."[29] In King County, Washington (Seattle), four independent 501(c)3 public defender organizations operate under contract with the County. A public defense organization that has, for example, 32 open death penalty cases would automatically receive funding to maintain 64 attorneys working on those cases. The Nevada Supreme Court should follow the precedent of the Washington Court.

The prosecution of sex offenders has become more comprehensive and the sentences for sex offenses have increased dramatically in severity which seriously restricts the number of such cases a public defender can handle competently. Indeed, the TSG case-weighting report states as much when comparing the amount of work effort it currently takes public defenders in Nevada as opposed to those in similarly situated jurisdictions:

> For sex offenses, the most serious offense specifically measured by the current report, the caseload standard in King County for Felony A Sex offenses is 33.7 cases per FTE attorney per year and 61.2 for felony B sex offenses. In Colorado, the standard is 32.6 for all Felony Sex offenses. In Clark and Washoe Counties, the current workload is 14.4 and 15.0 cases, respectively, being disposed of annually per FTE attorney. This comports with what was reported to TSG by the defenders: that sex offenses are treated very seriously in Nevada, and consume an enormous amount of time to defend. This is the only category for which either Clark or Washoe County's current workloads fall below any of the other jurisdiction's caseload standards, except as seen in Washoe County's representation in Juvenile Delinquencies, which is still on the high side of those established elsewhere, and twenty percent higher than the NAC standards established 36 years ago.[30]

Since objective data is available to the Court in this one case-specific arena, the Court should move to set a binding hard annual caseload cap of 15 Felony A sex cases for any attorney who handles such cases and nothing else.

Recommendation #6: Adopt the NAC standards for all other cases until such time as another case-weighting study can be done: The ABA's call to "never exceed" the NAC standards reflects the fact that public defense practice has become far more complex over the past three decades - significantly lowering the number of cases an attorney can handle competently. Developments in forensic evidence require significant efforts to understand, defend against, and present scientific evidence and testimony of expert witnesses. New and severe sentencing schemes have developed, resulting in many mandatory minimum sentences, more life in prison sentences, and complex sentencing practices that require significant legal and factual research and time to prepare and present sentencing recommendations.

Over the last thirty plus years there also has been a significant increase in the collateral consequences attendant to criminal felony convictions, which has in turn led to a substantial increase in the work which defense attorneys must devote to their cases, including loss of eligibility for public housing and loss of SSI benefits. Probably the most important change regarding collateral consequences has come in the area of immigration consequences of criminal

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[29] SPRC 2. http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=SPRC&ruleid=supsprc2.

[30] The Spangenberg Group & The Center for Justice, Law and Society at George Mason University. *Assessment of Washoe and Clark County, Nevada Public Defender Offices: Final Report*. p. 54.

convictions. Recent changes in U.S. immigration law have dramatically increased the likelihood of deportation and other negative immigration consequences for non-citizen defendants who are convicted of criminal offenses. Today's criminal defense counsel must master the intricacies of a substantial body of U.S. immigration law which did not exist in 1973.

NLADA agrees that the TSG report does not provide the Court with object data it sought to impose unilateral caseload caps for the various case types. And, indeed more study would be required to get such data now that the Court-ordered performance standards have taken effect. However, people of insufficient means have waited over a year and a half since the original ADKT No. 411 order to have the excessive caseload crisis settled. Justice delayed is justice denied. The Court should temporarily adopt the NAC standards until more study can be done to determined exactly how far below that prevailing standard would be appropriate for public defenders in Nevada.

Conclusion: NLADA understands the financial strains Nevada's counties are feeling and we are not immune to arguments regarding cost and efficiencies, especially during difficult economic times. However, the purpose of a public defense system is not to save money or to help the system more quickly move from arrest to prison. It is instead to make certain that before the court removes a citizen's liberty it provides that citizen with the process that is due him or her under the Constitution. In fact, the role of the public defender should be viewed as the quality check - if anything, slowing down the system - to ensure that process serves its purpose. Justice - not cost savings, efficiencies, swiftness, nor politics - is the entire purpose of the American criminal justice system. As the United States Supreme Court stated in *Gideon*: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

Should the Court ultimately be unmoved by arguments presented here, suggesting that there is no separation of powers issue and refuse to impose binding caseload caps, then there seems to be only one thing for the court to do: Create a procedure unequivocally stating that if the state and/or its counties refuse to dedicate appropriate resources to provide adequate representation to people of insufficient means, *then the state cannot prosecute the poor*.

In *Louisiana v. Adrian Citizen* 04-1841 (La. 2005), the Louisiana Supreme Court affirmed that figuring out how to fund indigent defense is a statewide legislative duty. However, the ruling also affirmed that the judicial branch of government is responsible for ensuring the proper – i.e. constitutional – administration of justice. As such, *Citizen* states that if state government does not find some way to ensure the adequate funding and administration of the right to counsel, then the state cannot put the poor on trial. The Nevada Supreme Court should adopt a rule akin to *Citizen* that allows defense counsel to motion the court to halt the prosecution whenever funds are inadequate to meet the Court's performance standards.[31]

[31] Similarly, in 2004 the Massachusetts Supreme Judicial Court ruled in *Lavallee v. Justices in the Hampden Superior Court*, that some indigent defendants were not receiving the constitutionally guaranteed right to counsel because lawyers were not being appointed at the defendant's bail hearings due to excessive caseloads. Many private lawyers found they were not able to provide effective representation at the low-rate the state paid and stopped taking cases – leaving those that did continue to take cases in the unenviable position of having too many cases. The ruling mandated defendants could be jailed for only seven days without a lawyer and that if the defendants were not provided with a lawyer within 45 days, charges must be dropped. As a result, one county judge, despite objections, found that the ruling required that he release three defendants charged with drug offenses.