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Honorable A. William Maupin
Chief Justice, Supreme Court of Nevada
201 South Carson Street, Suite 300
Carson City, Nevada 89701-4702

ADKT 411

Dear Chief Justice Maupin,

On behalf of the American Bar Association, I want to express my appreciation to you and to your colleagues for the opportunity to address the Supreme Court of Nevada at the public hearing held last Friday respecting proposed performance and caseload standards for indigent defense representation.

Based upon questions asked of me and comments of subsequent speakers, I have listed below several questions to which I would like to respond in the hope that my observations might be useful to the Supreme Court:

- Is it appropriate for the Supreme Court to adopt caseload standards with fixed numbers since "one size" may not fit all defense attorneys?
- Is it appropriate to rely on the caseload standards of the National Advisory Commission on Criminal Justice Standards and Goals (NAC) since they were published in 1973 and technology and other efficiencies may have rendered them obsolete?
- Has any other state Supreme Court adopted caseload standards?

In my judgment, the answer to the first question is that it makes perfectly good sense to use fixed numbers as *maximum caseloads* that an attorney should handle over a twelve-month period when it is clear that the numbers are at the outer limit of what is reasonable. Moreover, I believe there is no real doubt that the caseload standards of the NAC are extremely high. For some years, the debate in the defender community has been about whether the numbers need to be reduced. As I commented during my remarks last Friday, lawyers in well-funded public defender programs in the United States (e.g., Washington, D.C. and Massachusetts) handle caseloads over the course of a year that are well below the NAC caseloads standards.

The ABA has never formally adopted the NAC caseload standards because we wanted to emphasize the importance of assessing a lawyer's total workload. Thus, Principle 5 of the *ABA's Ten Principles of a Public Defense Delivery System*, approved by the ABA House of Delegates in 2002, provides

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that "[d]efense counsel's workload ... [should be] controlled to permit the rendering of quality representation." However, the commentary to this statement, although not technically ABA policy, provides that "[n]ational caseload standards should in no event be exceeded." The footnote accompanying this statement makes clear that the reference is to the NAC caseload standards. This language was included because of a belief that the NAC standards were at the outer limit of a reasonable caseload.

The second question is whether the NAC caseload standards are obsolete due to technological changes and other efficiencies. An effective answer to the question is contained in the enclosed "American Council of Chief Defenders (ACCD) Statement on Caseloads and Workloads," adopted August 24, 2007. As you will see, the ACCD reaffirmed their commitment to the NAC standards as "maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified. If a defender or assigned counsel is carrying a mixed caseload which includes cases from more than one category of cases, these standards should be applied proportionally."

Much of the commentary to this ACCD statement demonstrates that the practice of criminal law has become increasingly complex since 1973 when the NAC caseload standards were adopted and that these changes, which have expanded the duties of defense counsel, have more than offset technology improvements and other advances. Thus, beginning at page six, the commentary discusses issues with which defense counsel did not have to be concerned more than 30 years ago, such as the need to understand various scientific developments, the collateral consequences of criminal convictions, complex sentencing schemes, and death penalty law.

Finally, I want to comment about whether the Supreme Courts of other states have adopted caseload standards. More than 20 years ago, the Arizona Supreme Court in the case of *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984), favorably cited the NAC standards. In *Smith*, the Arizona Supreme Court held that the system for awarding contracts to private lawyers to provide defense representation in Mohave County, which resulted in very heavy caseloads of the lawyers, "violates the right of a defendant to due process and right to counsel as guaranteed by the Arizona and United States Constitution." Since this decision, the NAC standards often have been invoked as the basis for measuring attorney caseloads in Arizona. To illustrate, last Thursday, December 13, I testified as an expert witness in a case in Arizona in which the public defender sought to withdraw from cases because his caseloads were in excess of the NAC standards. Yesterday the trial court granted the public defender's motion, which will require the county to set aside additional funds for the payment of private attorneys.

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Although it appears that state Supreme Courts have not adopted caseload standards by rule, I believe the reason is because in approximately half the states in the country, unlike Nevada, there are statewide commissions that have been in a position to do so. My own personal experience illustrates the point. From January 1990 until July 2007, I chaired the Indiana Public Defender Commission (IPDC), which is authorized to reimburse Indiana counties for a portion of their indigent defense costs *if* the counties comply with Commission standards, including the Commission's caseload standards. Effective January 1, 1995, the IPDC adopted two sets of caseload standards, with one set applicable to defender programs *with* adequate support services and the other set applicable to defender offices *without* adequate support. The standards for programs without adequate support services – the situation confronting most Indiana counties – do not permit caseloads as high as those specified in the NAC standards. The IPDC standards can be found at <http://www.in.gov/judiciary/pdc/>

In addition to the ACCD statement referred to above, I also have enclosed for your information a copy of the opinion of the ABA Standing Committee on Ethics and Professional Responsibility dealing with excessive public defender caseloads and a copy of an article about the opinion that I co-authored. If I can be of any additional assistance to the court, please do not hesitate to let me know.

Respectfully,

A handwritten signature in cursive script that reads "Norman Lefstein".

Norman Lefstein

Enclosures

Copies to:

Hon. Mark Gibbons
Hon. James W. Hardesty
Hon. Ronald Parraguirre
Hon. Michael A. Cherry
Nancy M. Saitta
Michael L. Douglas