

**NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS**

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**TESTIMONY BEFORE
THE NEVADA SUPREME COURT**

FILED

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07-28449

I. Introduction

My name is Malia Brink, and I am Indigent Defense Counsel for the National Association of Criminal Defense Lawyers (NACDL). NACDL is the only national bar association working exclusively in the interest of public and private criminal defense attorneys and their clients. NACDL has more than 12,000 members nationwide, including private criminal defense lawyers, public defenders, and law professors committed to preserving fairness within America's criminal justice system. It also has over 90 state, local, and international affiliate organizations, which have, in total, over 35,000 members.

Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has long worked, through public education, litigation and advocacy, to improve indigent defense systems and ensure that those without financial means are afforded the zealous, competent counsel necessary to guarantee a fair trial in our adversarial system. Specifically, NACDL has been involved in successful, comprehensive reform efforts in Louisiana and Virginia. NACDL is involved in ongoing Sixth Amendment litigation in states as widespread as South Carolina, Arizona and Ohio, and NACDL leaders have testified before legislative and judicial bodies on the topic of indigent defense reform in California and Illinois this year alone.

II. Testimony

First, allow me to thank the members of the Court for holding this hearing and for inviting NACDL to participate. Too often, indigent defense problems are ignored until they reach the point of catastrophe. This Court deserves considerable praise for taking on these issues proactively.

A. Indigent Defense in Nevada -- A Outsiders View

As noted above, NACDL has a long history of involvement in indigent defense reform efforts in the states. Before becoming involved in a reform effort, NACDL conducts site visits and comprehensive research to evaluate the system and determine that there is a need for reform. Accordingly, before commenting on indigent defense in Nevada, I reviewed a number of reports – current and historic – on indigent defense services in Nevada, including (1) the majority and minority reports of the Nevada Indigent Defense commission (2007), (2) the NLADA Evaluation of the Public Defender Office in Clark County, Nevada (2003), and (3) the Spangenberg Group report on Indigent Defense Services in the State of Nevada (2000).

I also decided, after consulting with a number of attorneys in Nevada, to undertake a site visit to White Pine County to see, first hand, how the state public defender system compares to other states previously evaluated by NACDL. I understood

from my review of materials and consultations that there was a well-developed understanding of the state of indigent defense services in Washoe and Clark counties, but less of an understanding about the rural counties. Reviewing White Pine allowed me to evaluate the operation of a state public defender office, and it was asserted that the situation in White Pine was fairly typical, if not better, than the situation in other rural counties in Nevada. On my visit to White Pine, I had the pleasure of speaking to both of the county's district judges, the District Attorney, the supervising public defender for the Ely regional office, and the Sheriff, among others.

The Spangenberg Group's evaluation of Nevada in 2000 included a review of the State Public Defender office in White Pine. That report concluded that the system was in crisis. By every objective measure, the circumstances have worsened since the time of that report. The office has the same number of attorneys, but the caseload in White Pine, as well as the other counties covered by the office, continues to increase. The most significant portion of that increase is comprised of felony cases. Many of these cases are drug cases, which has led to the formation of a drug court in White Pine. Everyone agrees that the drug court is an excellent concept, but also agrees that it requires increased attorney involvement and time, even compared to a complex felony case. The number of cases coming out of the state's maximum security prison in White Pine has also increased dramatically. And, there has been a significant rise in cases from the more distant counties, Eureka and Lincoln, requiring the regional public defenders to spend more time traveling.

At the same time, the number of counties covered by the state public defender office has been reduced since 2000, resulting in a decrease in the efficiencies of shared resources within the state system. If the regional office needs an investigator, the investigator must come from the Carson City office, more than 300 miles away. Similarly, the technical support and other services are in Carson City. And the only public defenders qualified under the Nevada rules to be assigned as lead counsel in a death penalty case are in the Carson City office.

The regional office continues to suffer from frequent turnover, as noted in the 2000 report. Attorneys still receive no training. There are no performance standards governing their work, and they receive little oversight. The supervising public defender handles most major felony cases, as well as all drug court cases. There is widespread agreement that his caseload is too high for a full-time practitioner, no less a managing attorney with responsibility for supervising other attorneys, as well as administrative tasks.

At the same time, the county's obligation to fund this system is increasing. In 2000, the state was paying approximately 40% of the costs for those counties using the state public defender system. Next year, that will be down to 20%.

Every person that I spoke with in White Pine agreed that the indigent defense system in the county is "precarious," and I would concur. The system is being held together - barely - under extremely poor circumstances, but one unexpected problem would almost inevitably cause it to collapse. I would say that the situation in White Pine is dangerously like many of the places where NACDL has undertaken reform projects, including litigation, in the past. To the extent that White Pine is typical of, or better off than, other rural counties, as suggested by the individuals I interviewed as well as the

DEC-20-2007 13:27 FROM: FEDERAL DEFENDER 7023886261 TO: 17756841601 P.37

Spangenberg Report, this Court's concerns about indigent defense in Nevada are well-justified.

B. Adoption of Caseload and Performance Standards

In my opinion, the steps proposed in the majority report that can be undertaken by this Court, including the adoption of performance standards and the adoption of caseload standards, would help alleviate many of the problems that I witnessed in White Pine.

1. Caseload Standards

No matter how brilliant and dedicated the attorney, if the attorney is given too large a workload, he or she will not be able to provide clients with appropriate assistance. One methodology of setting caseload standards is a comprehensive case-weighting study. Such a study allows a state or locality to take into account its unique geographic issues, as well as the attributes of its judicial system and the make-up of its criminal docket, when formulating an appropriate workload. Such a study should also analyze current practices against what attorneys ought to be doing in every case, adjusting actual time spent, under current conditions, to the appropriate time that ought to be allowed. I understand that a number of jurisdictions in Nevada are interested in funding this type of comprehensive study. I applaud this effort, however, there is no need to wait until such a study can be completed before taking steps to evaluate and rectify workload issues within the state.

The National Advisory Commission on Criminal Justice Standards and Goals set the following caseload limits for full-time public defenders: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals.¹ Established more than 20 years ago, these standards have withstood the test of time as a barometer against which full-time indigent defender caseloads may be judged. They are viewed by experts as the absolute maximum caseload a well-qualified attorney can handle under the absolute best conditions and comply with the ethical obligations, *e.g.*, to investigate each case appropriately.² Until such time as case-weighting studies can be done in Nevada, these

¹ A number of states also have established caseload standards. For a slightly outdated overview, see Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, available at <http://www.ncjrs.org/pdffiles1/bja/185632.pdf>.

² At the hearing on December 14, 2007, one witness asserted that such numeric standards are impossible to set because circumstances, including the individual capacity of the attorney, their dedication, their experience, as well as the circumstances of the cases, differ considerably. I disagree. Absolute maximums can be set. Even the world's best physician, an expert in his field, can only see a certain number of patients in a day. There is basic information the physician must get before making a diagnosis. And even assuming each case seen in a year is the simplest type of case of its kind, appropriate treatment and monitoring takes a discernable amount of time. Similarly, even an expert lawyer, with the simplest kind of felony, can only meet and interview a certain number of clients, investigate a certain number of cases - even cursorily to confirm basic facts, negotiate a certain number of pleas, discuss the plea and consequences with clients, appear with clients to enter the plea, and complete sentencing. Under such circumstances, assuming all cases are basic, requiring only the minimal investigation to satisfy ethical requirements, and all cases plead easily, even assuming simple sentencing, any attorney would be hard-pressed to complete 150 felonies in

national standards can provide the requisite guidance to defenders on how many cases it is appropriate to undertake.

In no event should caseloads surpass the maximum listed in the NAC standards. There are a variety of reasons, however, that caseloads should, in reality, be lower than those standards. For example, the standards assume that the defender is full-time and works exclusively on cases. Accordingly, any administrative responsibilities allocated to the defender should reduce the expected maximum caseload. Similarly, the caseload standards assume a relatively close proximity between the defender and the courthouse. Any significant distances that must be traveled by the defender in the course of his or her work should reduce the maximum caseload.

The caseload standards also assume appropriate levels of support services. In other words, they assume that the attorney has access to technology and legal research, secretarial, paralegal and investigatory services. For full-time defender offices, the Bureau of Justice Assistance has opined that there should be approximately one paralegal, one secretary and one investigator for every four attorneys. Offices that do not maintain the recommended ratios of support staff to attorneys must reduce their workload expectations for attorneys. See Bureau of Justice Assistance Keeping Defender Workloads Manageable (January 2001), at 10.³ Indiana is but one example of a state that has a lower set of caseload standards for those county offices that do not meet the recommended attorney to support staff ratios.

As mentioned above, the regional public defender office serving White Pine County lacks appropriate access to support services and technology, lacks appropriate training for junior attorneys, and is burdened by extensive distances between the courthouses where the attorneys must practice, among other problems. Accordingly, to be reasonable, the caseloads for the attorneys in that office would have to be considerably lower than national standards. NACDL encourages this Court, in setting caseload standards, to note that there are circumstances that would make even caseloads below the limits excessive.

2. Performance Standards

As there seems to be little dispute about the need for performance standards, I will not belabor on this point. NACDL believes performance standards are essential to the operation of an indigent defense system and concurs with all of the parties heard at the December 14, 2007, hearing that performance standards should be adopted.

As the representative of a group that has, in several jurisdictions, participated in litigation concerning systemic deficiencies of indigent defense systems, I feel compelled to comment briefly on the issue of liability. I concur with my colleagues who have

the 250 working days a year. To do so would require skipping one of these ethically-required steps. For this reason, NACDL firmly believes that maximum caseload standards can and should be established.

³ Available at <http://www.ncjrs.org/pdffiles1/bja/185632.pdf>.

asserted that failure to follow performance standards could not, in and of itself, created liability for ineffective assistance. The performance standards suggested simply articulate the reasonable practice of a criminal defense lawyer,⁴ and therefore, arguably, do not even impact outcome in even the first prong of the *Strickland* test. However, the absence of standards, and the routine failure of public defenders to undertake basic tasks essential to defense representation has the potential of creating enormous governmental liability. Indeed, the liability derived from a single failure that results in a wrongful conviction is potentially massive – as more and more jurisdictions are learning firsthand. For these reasons, in my opinion, the question of benefits versus drawbacks to the adoption of performance standards should not even arise.

III. Closing

There can be no doubt that the indigent defense services in Nevada are at a crisis point. The attention being paid by this Court to this complicated but critical issue is admirable, as is the comprehensive work done by the Indigent Defense Commission. I strongly urge this Court to take the next step of implementing, to the fullest of its powers, rules that will help to improve these decaying systems. Justice in Nevada depends upon it.

Thank you again for the opportunity to address you all. If NACDL can be of further assistance, please do not hesitate to call upon us.

⁴ Indeed, I would argue that the articulation in performance standards is not complete.

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