

**ORIGINAL**

**GIBSON & KUEHN, LLP**

**NYE/ESMERALDA COUNTY PUBLIC DEFENDERS**

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March 12, 2008

**FILED**

Nevada Supreme Court  
Attn: Clerk, Tracie K. Lindeman  
201 So. Carson Street  
Carson City, NV 89701

MAR 14 2008

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

**Re: IN THE MATTER OF THE REVIEW OF ISSUES CONCERNING  
REPRESENTATION OF INDIGENT DEFENDANTS IN CRIMINAL  
AND JUVENILE DELINQUENCY CASES  
ADKT NO. 411 - FILED JANUARY 04, 2008**

Dear Honorable Justices:

On February 1, 2008 and consistent with the January 4, 2008 Order of this Court (hereinafter "the Order"), the Honorable Robert Lane, District Judge in and for the Fifth Judicial District, Dept. 2, chaired a meeting with a goal of reviewing and implementing the directives detailed in said January 4, 2008 Order. Attending the meeting were representatives of most of the affected entities in Nye, Mineral and Esmeralda counties. The Honorable John P. Davis, District Judge, Dept. 1, was not able to attend, but he did previously provide Judge Lane with his written input. With the consent of the attendees and Judge Lane, I volunteered to draft this letter regarding a portion of the outcome of our meeting. This letter has been circulated to every attendee for review and approval.

By way of introduction, I am a partner in the firm of GIBSON & KUEHN, LLP, the entity selected by Nye and Esmeralda counties to provide public defender services in both counties. In one form or another, I have provided public defender services for Nye and Esmeralda counties for most of the years from 1993 to present. I had the opportunity during those years to occasionally provide indigent representation in the two courts in Mineral County. There was also a brief hiatus where I was the elected district attorney of Esmeralda County. There is probably no one more familiar with the way indigent representation "works" in the Fifth Judicial District.

At the aforementioned February 1, 2008 meeting, the unanimous opinion was that the Order imposed an unfunded mandate upon counties already financially struggling. None of the attendees believed that the state legislature and the Governor would adopt legislation for the state to substantially fund a public defender system in each county in this state. Secondly, it was agreed without exception that the Order should apply only to counties with

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400,000+ population because the problems cited in the Order exist only in the two largest counties. The indigent defense system in place in the Fifth Judicial District has worked and is working just fine. [This will be discussed further below.] Finally, it was again unanimously agreed that if the Order's mandates were optional, all in attendance would vote to take "no action."

At the aforementioned meeting I advised the attendees that GIBSON & KUEHN had been invited, but neglected, to participate with the Indigent Defense Commission. It was then discussed that perhaps the failure of the firm and other "cow" county representatives to fully participate may have left a void in the Commission's understanding of how well the indigent defense system works in the Fifth Judicial District. Judge Lane agreed with my suggestion that this letter include an overview as to how things are done in Mineral, Esmeralda and Nye counties.

**MINERAL COUNTY** - The county seat is in Hawthorne, where the one justice court and the district court are located. The district attorney's office has two attorneys, and sometimes only one. The county is served by a lawyer from Fallon, with whom the county has contracted to provide public defender services. Indigent parties who cannot be represented by the public defender are generally appointed "conflict" attorneys located in Yerington and Fallon, some 65 miles and 70 miles distant, respectively. Because of the town's remote location, the justice and district courts must often telephone attorneys located even further from Hawthorne to "beg" that they accept an appointment. As a result, those attorneys who have previously expressed a willingness to travel to Hawthorne are often the first to be called. Historically, jury trials are few and the needs of those requiring counsel have been more than adequately met. Because of less frequent trials and the more amicable nature of things, the district judges have seldom, if ever, had issue with the authorization of expert witnesses for the defense.

**ESMERALDA COUNTY** - Nevada's smallest county in population, the Esmeralda County seat is in Goldfield, where the one justice court and the district court are located. The district attorney currently has a deputy, but historically the district attorney has solely conducted all prosecutions. The county has contracted with GIBSON & KUEHN to provide public defender services. "Conflict" attorneys almost always are procured from Las Vegas and Henderson, some 185 to 220 miles distant, respectively. No private attorneys reside in Tonopah, or otherwise within 185 miles in any direction. As in Mineral County, jury trials are conducted quite infrequently and the needs of those requiring counsel have been more than adequately met. Because of less frequent trials and the more amicable nature of things, the district judges have seldom had issue with the authorization of expert witnesses for the defense.

**NYE COUNTY** - Nye County encompasses over 18,200 square miles. Tonopah is the county seat, and home to the Tonopah Justice Court and the district court. The county has also contracted with GIBSON & KUEHN to provide public defender services. A deputy public defender is generally in Tonopah from Monday through Wednesday, inclusive, each week. That same deputy public defender covers the two courts in Goldfield and the Beatty Justice Court, some 93 miles south from Tonopah on US Highway 95. By agreement, the justice courts in Tonopah, Goldfield [in Esmeralda County] and Beatty stagger their public defender court days to allow the one deputy public defender to efficiently cover the workload.

The Tonopah and Beatty Justice Courts generally secure "conflict" attorneys from Clark County, approximately 215 and 125 miles distant, respectively. Because of the great travel distance, a group of 5-10 attorneys who have historically indicated their willingness are generally appointed to indigent defendants conflicted from representation by the public defender.

The Pahrump Justice Court processes about 85-90% of the criminal [non-traffic] matters in Nye County. The majority of the indigent matters are handled by GIBSON & KUEHN, the contractual public defender. Because Pahrump is only about 66 miles from Las Vegas, a greater number of "conflict" attorneys who have previously expressed a willingness are appointed to those other matters which cannot be handled by the public defender. A public defender is generally present in this court every day of the week for court.

Because the population has reached a certain statutory threshold, a second justice court will be created and in place in January 2009. It is anticipated that the Nye County Commissioners will promptly authorize the hiring of an additional deputy public defender to make the daily court appearances anticipated in that new court.

As elsewhere in the Fifth Judicial District, the district judges presiding in Pahrump have rarely ever had issue with the authorization of expert witnesses for the defense. Similarly, because of the relatively "small" indigent defense bar, all of the county judges have readily and fairly been able to monitor attorney expenses.

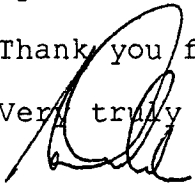
In the course of drafting this letter, a copy of a January 14, 2008 letter from the Honorable Richard Wagner, district judge in the Sixth Judicial District, was received. It was addressed to the Humboldt and Pershing county commissions and detailed Judge Wagner's concerns about the Indigent Defense Order. A copy is attached. The content of Judge Wagner's letter very closely parallels the concerns of the Fifth Judicial District.

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In summary and in our collective opinion, a "one size fits all concept" to address the publicized problems and concerns of Las Vegas and Reno should not, for the most part, be made applicable to the Fifth Judicial District. There were and continue to be valid reasons why Nye, Mineral and Esmeralda counties have chosen to opt out of the State Public Defender system. The indigent defense system is working just fine here.

Thank you for your attention to and consideration of this matter.

Very truly yours,

  
HAROLD KUEHN, Esq.  
Partner - GIBSON & KUEHN, LLP  
Nye/Esmeralda counties - public defender

**ATTENDEES with facsimile**

cc: The Honorable Robert Lane [775/751-4218]  
The Honorable John Davis [775/482-7345]  
The Honorable Tina Brisebill [775/751-7059]  
The Honorable Joe Maslach [775/482-7349]  
The Honorable Gus Sullivan [775/553-2136]  
Nye County Commissioner Joni Eastley [775/482-8568]  
Nye County Commissioner Andrew Borasky [775/751-8193]  
Ron Kent, Esq., DDA Nye County [775/751-5234]  
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Sandra Merlino, Nye County Clerk [775/482-8133]  
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Christine Hoferer, Mineral Co. Recorder [775/945-1749]  
Carl Joerger, Esq. [775/751-2552]



# SIXTH JUDICIAL DISTRICT COURT

RICHARD A. WAGNER  
DISTRICT JUDGE

DEPARTMENT 1  
RD. BOX 11  
LOVELOCK, NEVADA 89419  
775.273.2105 • FAX 775.273.4921

January 14, 2008

Humboldt County Board of Commissioners  
50 West Fifth Street  
Winnemucca, Nevada 89445

Pershing County Board of Commissioners  
P.O. Box E  
Lovelock, Nevada 89419

Dear County Commissioners:

As you may be aware, the Supreme Court of the State of Nevada, through an order filed January 4, 2008, ordered that by May 1, 2008 each judicial district shall formulate and submit to the Nevada Supreme Court for approval an administrative plan for appointment of indigent counsel. As you are aware, a cooperative agreement was reached between Humboldt and Pershing Counties through an interlocal agreement setting up a County Public Defender office for the two counties as a result of the anticipated increase in costs from the State Public Defender's office as well as the quality of services being rendered by that office to indigent defendants. There are numerous concerns that I have as it relates to this latest Supreme Court order. They are as follows:

1. The plan being ordered by the Nevada Supreme Court, in my opinion, will actually result in a substantial loss in quality for the representation of indigent defendants. One of the main reasons we all chose to go with a County Public Defender's Office was that the quality of service rendered by the State Public Defender was, in my opinion, substandard with no local control by the judges over such representation. In my view from the bench, very often the attorneys from the State Public Defender's Office never saw their client prior to court, did not visit their clients in jail, continually asked for continuances in cases, failed to recognize important legal

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defenses or file appropriate motions and plea bargain cases simply for expediency.

Since the creation of the County Public Defender's Office, it is my belief that there is better preparation and representation of indigent defendants in criminal cases. Many services which are being provided by State agencies in our rural counties seem to get the leftovers of the system, and they are without local control or ability to correct deficiencies in the system. Any suggestion that the rural counties be covered by the Public Defender's Office of Clark and Washoe Counties, in my opinion, would be a disaster, as it is clear which of the attorneys would be assigned to the "outlying areas."

2. Apparently in the order, the Supreme Court failed to recognize the extent of the services that need to be covered by the Public Defenders. The order only covers indigent defendant in criminal and juvenile delinquency cases. What is being overlooked is the fact that we are doing a superior job for representation in other areas where appointment is necessary for indigent persons. It is my understanding, for instance in Clark County, that in abuse and neglect cases of children under Chapter 432B cases, attorneys are appointed in approximately only 50% of the cases with parents who are accused of abuse and neglect also not being provided in all instances with legal counsel. In the Sixth Judicial District, every child has the appointment of an attorney in abuse and neglect cases which is the national standard by federal law. Every child is provided with a guardian ad litem who is not an attorney who actually go into the homes and check on the children and their well-being. Every parent who is indigent and have their children removed from their care who are indigent have appointment of counsel. Every parent who is facing termination of parental rights, which is called the death penalty of the civil law, who are indigent are appointed counsel. In all guardianship cases where a person is facing losing their civil rights and are indigent, they are appointed legal counsel. It is my understanding that we do a far superior job in providing indigent counsel in all of these other cases compared to Clark and Washoe Counties, and many of those services are provided in part through the County Public

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Defender's Office. Under the order of the Supreme Court, such services are not included.

3. Apparently, as a result of some high publicity out of Los Angeles about the judicial system in Clark County, there is a perception that all judges in the state are appointing former law clerks or their cronies to do appointment in criminal cases and independent defendants. As a result, the Supreme Court has ordered that we provide a plan by May 1, 2008 which excludes the trial judge or justice of the peace hearing the case from being a part of trial counsel. Rather than deal with individual judges who are doing such practice, it appears that now we must set up some kind of committee for appointment of such counsel and to approve the fees, including expert witness fees and investigation fees. Although we must comply with the Supreme Court order, I find that the order is offensive and, again, counter-productive. It is not unusual for the district judges in their oversight of appointed counsel to review the billings and requests of counsel in front of them to be sure that such billings are appropriate and reasonable. Very often only the trial judge knows when an attorney is not doing their job or are over-billing. In numerous instances, we, as judges have had to disapprove such billings and be sure that the appointed attorney is doing appropriate representation of their client. I do not believe a judge should continually appoint attorneys who are not doing their job on behalf of the clients. I am deeply concerned as to how such a committee can be appointed with individuals who know nothing about the attorneys or the particular case in making such appointments and determining the appropriateness of whether to allow substantial amounts of monies to be paid for expert witnesses or investigations without some justification. Someone will have to decide those requests without knowing anything about the case. I find this proposal ludicrous.

4. I am concerned about the issue of who is going to pay for the attorneys, investigations and expert witnesses, as the Legislature has not authorized such payment. The reason we withdrew from the State Public Defender's system is that they had informed all of us, including the County Commissioners, of a substantial increase in the costs and that the State would no longer would be paying any portion of the State Public

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Defender's portion of the budget contrary to what had been the previous practice.

These are my own personal views as they relate to the Supreme Court order in this matter, and there certainly may be individuals who disagree with my position. I propose that we, as judges in the district, set up an agenda item to come before each Board of County Commissioner to discuss any input you would like to give in this matter. That input may be moot in that apparently the Supreme Court unanimously is proceeding by court order in this matter. I would invite comments from other judges, attorneys and county commissioners in this regard.

Sincerely



Richard A. Wagner  
District Judge

RAW:js

cc The Honorable John M. Iroz  
The Honorable Matt Stermitz  
The Honorable Steve Cochran  
The Honorable Russell Smith  
The Honorable Max W. Bunch  
The Honorable Hy Forgeron  
The Honorable Jim Shirley  
The Honorable Carol Nelsen  
Mr. John M. Doyle  
Mr. William Macdonald  
Mr. Michael Macdonald  
Mr. Kyle B. Swanson  
Mr. Jack T. Bullock  
Mr. Robert E. Dolan  
Mr. C. Lee Armstrong  
Ms. Illyssa Fogel  
Mr. O. Kent Maher  
Mr. William Schaeffer  
Mr. Theodore Herrera



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Mr. Todd Plimpton  
Mr. Steve E. Evenson  
Ms. Rita Fowler