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Supreme Court Clerk's Office
201 South Carson Street
Carson City, Nevada 89701

TRACEE K. ANDEMAN
CLERK OF SUPREME COURT
BY *J. Carville*
CHIEF DEPUTY CLERK

RE: INDIGENT DEFENSE ORDER ADKT No. 411

This letter is on behalf of the Nevada Prosecutor's Advisory Council and the Nevada District Attorney' Association.

Prosecutors cannot carry out their responsibility to see justice done if defendants do not receive effective assistance of counsel. Furthermore, not only do we defend Petitions for Writ of Habeas Corpus (Post Conviction), but decisions by the Court that effect criminal defense counsel may also have an impact on prosecutor's work load, staffing and budget, which, as explained below, is the case with the Indigent Defense Order.

I. General Concerns:

1. If the Court desires to set guidelines or items which should be considered when representing a criminal defendant, then they should apply to all criminal representation, not just indigent representation.

2. The Order reference Nevada Rules of Professional Conduct 1.1 and 1.3 when discussing the duty of a lawyer to refrain from taking on too many cases. We agree that no attorney, whether public or private, should accept a case he or she cannot handle under these Rules. However, the standard applies equally to prosecutor caseloads and their representation of the citizens of Nevada and victims. The Rules cannot be the basis, however, for a governmental agency to simply "go on strike" and reject new cases. Thus the State and County governments need to assess what resources are necessary for the public defenders and prosecutors to be reasonably, diligently and competently handle individual cases.

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3. The Nevada Rules of Professional Conduct 1.1 and 1.3 state that a lawyer must provide competent representation and this is defined as the knowledge, skill, thoroughness and preparation reasonably necessary for representation. In addition a lawyer must use reasonable diligence and promptness in representing a client. The term "reasonable" as used in the Rules means a reasonably prudent and competent lawyer. NRPC 1.0(h). Thus the Rules mirror the standard set by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

Throughout the Order and the Standards, the Court uses the word "quality" or "high quality" representation. This language is inconsistent with *Strickland* as it suggests something more than an ordinarily prudent attorney. Both the U. S. Supreme Court and this Court have consistently stated that one is entitled to a reasonably competent average attorney and adequate representation. If the Court wishes to use these terms, then we suggest you define them consistent with *Strickland* so as to avoid creating a second standard for post-conviction ineffective assistance of counsel claims.

4. The Order and Standards were based on the report of the Indigent Defense Commission. The Court should insure that the representations and data contained in the report are accurate and current. We have been informed that some of the information regarding Humboldt Court is incorrect and there may be other inaccuracies respecting caseload data.

5. The Court has designated the Standards as guidelines and used the word "should" in many cases. Yet they appear to be mandatory directives of procedures that must be used in every case, regardless of the facts and the wishes of the client. This amounts to unfunded mandates. Instead we would ask the Court to eliminate the term standards and instead make it clear that these are matters which should be considered in every capital or non-capital case respectively. More specific suggestions are given below.

6. The Order and Standards are replete with requirements for actions in every case that constitute unfunded mandates and are inconsistent with the *Strickland* standard of adequate, not superior, representation.

II. ORDER filed January 4, 2008.

1. Under Performance Standards on page 4, the Court ordered that the performance standards be implemented effective April 1, 2008. Considering the impact of this order on operations and budgets, the assigned date does not leave sufficient time to put this order into effect. The procedural changes resulting from

this order were not anticipated during the budget process for the current, 2007-2008, budget and the 2008-2009 budget will not take effect until July 1, 2008.

RECOMMENDATION: Change the implementation dates so the process for appointment of counsel occurs before the Standards become effective and extends the entire process so there is adequate time to bring it on line smoothly.

2. Impact on Early Case Resolution: In 1995, Washoe County adopted an Early Case Resolution procedure for handling criminal cases in an efficient manner while protecting the rights of the defendant. The District Attorney and the Public Defender have been identifying those cases that may resolve early in the process through the efforts of experienced attorneys. Not only do the attorneys meet early to discuss a resolution, but the defense reviews all available discovery and meets early with their client. As a separate matter, they also discuss the release of the defendant. If the defendant, with advice of counsel, agrees to an early settlement, these cases are resolved within 48 to 72 hours after arrest. Transportation is handled by the Sheriff's Office and the Courts become active in the process as soon as charging documents are filed. At any time the defendant or counsel do not want to participate in the process, the ECR portion of the case is closed and it is returned to the normal case flow.

In the 14 years this system has been used, an average of 34 to 38% of the criminal case load has been resolved through ECR and there has been only one challenge to the procedure, which was unsuccessful. For reasons discussed below, this process was stopped on Tuesday, February 19, 2008, which has resulted in a substantial increase in caseload per attorney in both the Public Defender's and District Attorney's offices. All involved offices are still assessing the impact, but it is clear that the result will be a substantial increase in staffing or a reduction in caseload by not filing criminal matters.

RECOMMENDATION: Change "thorough" when discussing investigations to "reasonable" and modify Standard 7 to allow a defense attorney to recommend a plea negotiation after considering all available information to include the wishes of his client. This gives discretion to the defense counsel, helps make the system more efficient and those attorneys who do not perform competently can be dealt with by the State Bar and /or the Courts.

3. There has been a concern expressed among the rural counties with the resources of the State Public Defender's Office and their ability to furnish adequate representation. Most of the rural counties currently contract with private attorneys. As this office is funded by the Legislature, implementation without funding will on decrease the current level of representation.

Another issue consider is the lag time recruiting additional attorneys, which is currently very difficult throughout the State.

4. It also seems that the scheduled dates for the implementation of the order and the indigent attorney appointment process are backwards. By proceeding as scheduled, the Public Defender would be able to inform the county commission of an inability to take further cases without the appointment process being on line.

5. We are also having difficulty statewide recruiting competent attorneys for public service. The Order does not seem to take that in account when it comes to implementation.

III. Exhibit A - CAPITAL CASE REPRESENTATION: Page 1

Standard 7: Relationship With the Client: Page 6

It is not understood why the defense attorney should communicate with the prosecutor regarding the client's rights against self-incrimination, to the effective assistance of counsel and to the preservation of the attorney-client privilege. Paragraph (a) 3.

Standard 9: Investigation: Page 8

In sentence (a) replace the word "thorough" with "reasonable" which would remove the ambiguity of the original language and bring this section in line with the long standing standard enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984).

Standard 10: Duty to Assert Legal Claims: Page 8

Replace "thoroughly" with "reasonably" in order to conform to the *Strickland* standard. (a)2.

Standard 11: Duty to Seek an Agreed-Upon Disposition: Page 9

Paragraph (a) reads: "Counsel at every stage of the case has an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these standards to achieve an agreed-upon disposition." Request that this language be added to the FELONY AND MISDEMEANOR TRIAL CASES Section. Page 10

Paragraph 8.(C) may be applicable to the Federal Courts, but it is not applicable to the State of Nevada. Page 11

Paragraph 9.(G) is also not applicable to the courts or prosecutors in the State of Nevada.

Standard 15: Defense Case Concerning Penalty: Page 16

Add language to paragraph (1) which reads "while taking into consideration all ethical and legal requirements." As written, this paragraph seems to invite defense misconduct.

Standard 18: Duties of Trial Counsel After Conviction: Page 17

The same language is recommended for paragraph (b) as suggested immediately above for the same reason.

3. Exhibit A - APPELLATE AND POST-CONVICTION REPRESENTATION:
Page 20

No further concerns or recommendations.

4. Exhibit A - FELONY AND MISDEMEANOR TRIAL CASES: Page 25

Standard 5: Pretrial Release Proceedings: Pages 27 and 28

Under this section the defense counsel is required to present to the appropriate judicial officer any and all information to include testimony in an attempt to secure the release of the client. Since there is nothing mentioned about opposing counsel, there is an argument to be made that this process is ex parte.

Standard 6: Preliminary Hearings/Grand Jury Representation: Page 28

Paragraph (b) 5. requires a defense attorney to consider the tactics of proceeding with a preliminary hearing without full discovery. As the Court is aware, a preliminary hearing is for a finding of probable cause and is not a trial. Very seldom is full discovery available within the statutory 15 day period, which is going to result in numerous delays in the process.

Standard 7: Case Preparation and Investigation: Page 29

Add to subsection (a) the word "reasonable" when discussing investigation.

"The duty to investigate exists regardless ... of the accused's stated desire to plead guilty" is in conflict with the language of subsection (d) "In the decision-making process, counsel should:

2. not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client."

The seven areas that define the investigation are both time and resource consuming and may not be in the client's best interest. While defense counsel is doing this investigation, so

is the prosecution a beneficial offer may go away as the prosecution discovers more about the defendant or the case.

Section (b) 5. requires the attorney to "request and secure discovery" and then spells out numerous examples. Suggest that the paragraph read "request and secure discovery pursuant to the Nevada Revised Statutes, Federal Statutes and applicable case law." As written some of these provisions violate federal law and procedures, particularly where they pertain to criminal histories and federal witnesses.

On pages 50 and 51, in the Juvenile Section under Standard 7, counsel is required to "be mindful of all requirements for reciprocal discovery and be sure to provide such in a timely manner."

RECOMMENDATION: This language should be added to the Case Preparation and Investigation of the Felony and Misdemeanor Trial Cases. There should be more emphasis on the ethical training and conduct of defense counsel during the entire process, especially during the trial.

Standard 8: Pretrial Motions and Writs: Page 30

Paragraph (b) 5., as in other locations in the order, requires counsel to make a "thorough" investigation. It is believed that this burden will lead to a substantial amount of litigation. We respectfully suggest that "thorough" be replaced with "reasonable", which has been defined and refined by the Courts, starting with *Strickland*.

Standard 9: Plea Negotiations: Page 33

Same comments regarding use of word reasonable investigation and timing as with adult proceedings above.

In paragraph (f) 1. defense counsel should argue and persuade that the release of his client post plea is warranted and appropriate. This may not be the situation where the attorney believes that his client may commit further crimes or abscond.

5. Exhibit A - JUVENILE DELIQUENCY CASES: Page 44

No further concerns or recommendations.



RICHARD A. GAMMICK

WASHOE COUNTY DISTRICT ATTORNEY

ON BEHALF OF THE NEVADA PROSECUTOR'S ADVISORY COUNCIL AND THE NEVADA DISTRICT ATTORNEY'S ASSOCIATION