NATIONAL LEGAL AID & DEFENDER ASSOCIATION

1140 Connecticut Ave. NW, Suite 900
Washington, DC 20036-4019
T: 202.452.0620
F: 202.872.1031
www.nlada.org

March 14, 2008

FILED

MAR 17 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Chief Justice Mark Gibbons
Justice Michael A. Cherry
Justice Michael Douglas
Justice James W. Hardesty
Justice A. William Maupin
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: Implementation of ADKT No. 411

My name is David Carroll and I am the Director of Research for the National Legal Aid & Defender Association (NLADA). Created in 1911, NLADA is a membership association dedicated to equal justice for people of insufficient means in civil and criminal proceedings. Recognizing that the effectiveness of public policy depends upon its successful implementation and enforcement, NLADA has long played a leadership role in the development of national standards for indigent defense systems[1] and processes for evaluating a jurisdiction's compliance with said standards.[2]

---

[1] Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services, U.S. Department of Justice, 1976); The Ten Principles of a Public Defense Delivery System (adopted by the ABA, 2002) Standard for the Appointment and Performance of Counsel in Death Penalty Cases (NLADA, 1988; ABA, 1989), Defender Training and Development Standards (NLADA, 1997); Performance Guidelines for Criminal Defense Representation (NLADA, 1995; 4th Printing, 2007); Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services (NLADA, 1984; ABA, 1985); Standards for the Administration of Assigned Counsel Systems (NLADA, 1989); Standards and Evaluation Design for Appellate Defender Offices (NLADA, 1980); Evaluation Design for Public Defender Offices (NLADA, 1977); and Indigent Defense Caseloads and Common Sense: An Update (NLADA, 1994). NLADA's leadership in promoting consistent, quality representation through indigent defense standards was most recently recognized by the United States Supreme Court in *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). In that case, the Court recognized that national standards, including the American Bar Association's (ABA) *Standard for the Appointment and Performance of Counsel in Death Penalty Cases* (written by NLADA), should serve as guideposts for assessing ineffective assistance of counsel claims.

[2] See for example: *Justice Impaired: The Impact of the State of New York's Failure to Effectively Implement the Right to Counsel[Franklin County]* (2007); *An Assessment of the Idaho State Appellate Public Defender's Office* (2007); *A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana's Criminal Courts* (2006); *An Assessment of Indigent Defense Services in the State of Montana* (2004); *In Defense of Public Access to Justice: An Assessment of Trial-level Indigent Defense Services in Louisiana 40 Years after Gideon* (2004); *Pilot Assessment in Santa Clara County, California* (2004); *Evaluation in Clark County, Nevada* (2003); *Indigent Defense in Venango County, Pennsylvania* (2002).

08-33158

In 1999, I had the great privilege to travel across Nevada documenting the state of indigent defense services for a Supreme Court Task Force on the Elimination of Racial, Gender and Economic Bias in the Criminal Justice System under a grant from the United States Department of Justice and the American Bar Association.[3] In 2003, I was the principle author of an NLADA assessment of the Clark County Public Defender. NLADA subsequently contracted with Clark County to help implement the recommendations. I was an *ex oficio* member of the Nevada Supreme Court Indigent Defense Commission (IDC) and am currently serving in the same capacity with Indigent Defense Committee to Develop a Model Plan for Conflict/Track Attorneys for Judicial Districts.

I write today to express my opinion on the implementation of ADKT Order Number 411. First, the Nevada Supreme Court is to be congratulated for issuing such a sweeping mandate addressing so many of the state's systemic deficiencies in the delivery of constitutionally-mandated right to counsel services. Creating uniform indigency standards, enumerating the basic standards of performance and removing undue judicial interference are amongst the most basic principles of an adequate public defense system.[4] The Court's action upholds the fundamental belief that the level of justice a person receives should not be dependent on the amount of money in one's pocket. On behalf of the national client community, NLADA thanks the Court for its leadership.

However, ADKT Order No. 411 does present practical problems to county governments in its prescribed implementation timelines. Specifically, Nevada's urban counties cannot recruit, hire, train and house the appropriate number of attorneys and support staff necessary to meet the parameters of the Court's performance standards within a few months time. To be clear, that does not mean that the substantive parts of ADKT No. 411 should be curtailed, abandoned or otherwise watered down. Rather, it is a pragmatic acknowledgement that the present indigent defense crisis has been allowed to fester for so long that rectifying the issues cannot be done overnight.

Moreover, Nevada's rural counties cannot implement ADKT No. 411 at all without causing severe financial strains at the local level. Again, this does not mean that the Court should rescind its order as it applies to Nevada's rural counties, as suggested in Pershing County's motion. Allowing a single county to opt out of the ADKT No. 411 performance standards will establish a precedent that will lead to the level of justice a person receives to be entirely dependent on which side of a county line his crime is alleged to have been committed. ADKT No. 411 only errs in its assumption that counties can implement its mandates without substantial involvement by state government.

---

[3] The work was conducted while I was employed as Senior Research Associate of The Spangenberg Group (TSG). TSG is a national and international research and consulting firm specializing in criminal justice reform, and the research arm of the American Bar Association's Standing Committee on Legal Aid and Indigent Defense. While at TSG, I was also selected to provide technical assistance under the DOJ/ABA grant to statewide task forces in Illinois, Alabama and Vermont.

[4] 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 2005, 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. In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney." ADKT No. 411 mandates regarding independence, performance standards, and eligibility adhere to *Principles 1, 3,* and *10.*

The State of Nevada's Responsibility for the Indigent Defense Crisis

One of the critical but often overlooked aspects of the United States Supreme Court's landmark ruling in *Gideon v. Wainwright* is that the Sixth Amendment's guarantee of counsel was "made obligatory upon the States by the Fourteenth Amendment"[5] -- not upon county or local governments. National standards incorporate this aspect of the decision, emphasizing that state funding and oversight are required to ensure uniform quality.[6] Though some may argue that it is within the law for state government to pass along its constitutional obligations to its counties, it is also the case that the failure of the counties to meet constitutional muster regarding the right to counsel does not absolve state government of its original responsibility to assure its proper provision.[7] In my opinion, state government policies are *primarily* responsible for the current right to counsel crisis in Nevada (as explained below).

Nevada statutes require county governments to pay for the state's responsibilities under *Gideon* unless the counties are willing to pay into a deficient State Public Defender program (more on that later). Even then, counties still have to shoulder the majority financial percentage of the state's obligations. This stands in contradistinction to the majority of states, thirty of which have met *Gideon*'s mandate to relieve counties entirely from paying for the right to counsel.[8] Another three states subsume the vast majority of funding their public counsel systems.[9] Nevada is one of only seventeen states that still place the majority burden for funding right to counsel services on its counties as an unfunded mandate – ranking only ahead of Arizona, Pennsylvania and Utah in percentage of state spending on indigent defense services.[10]

The necessity of state funding for the right to counsel is premised on the fact that county governments rely to a large extent on property tax as their main source of revenue. When property values are depressed because of factors such as high unemployment or high crime rates,

---

[5] *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963) at 342 (emphasis supplied).

[6] The onus on 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), *supra* note 1, Guideline 2.4.

[7] This would be true even if the counties had the financial wherewithal to adequately fund the right to counsel but simply chose not to do so.

[8] Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Louisiana, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

[9] Kansas (state funds 77.3% of total $23.4 million expenditure); Oklahoma (state funds 61.6% of total $28.4 million expenditure); and, South Carolina (state created statewide circuit public defender system in the 2007 legislative session. State is expected to fund the majority of indigent defense services.) State expenditures and percentages are based on 2005 data collected by The Spangenberg Group under the auspices of the American Bar Association. See: *50 State and County Expenditures for Indigent Defense Services: Fiscal Year 2005.* (November 2006).

[10] The seventeen states that provide less then half of indigent defense funding are as follows (percentage of state funding shown): Indiana (41.15); Georgia (39.5%); New York (39.2%); Ohio (24.5%); Illinois (19.5%); Mississippi (12%); Idaho (11.3%); Texas (11.3%); South Dakota (10.3%); Michigan (7.1%); Washington (5.5%); California (4.8%); Nebraska (3.6%); Nevada (2.6%); Arizona (0.8%); Pennsylvania (0%); and, Utah (0%).

poorer counties find themselves having to dedicate a far greater percentage of their budget toward criminal justice matters than more affluent counties.[11] And, since less affluent counties also tend to have a higher percentage of their population qualifying for indigent defense services, *the counties most in need of indigent defense services are often the ones that least can afford to pay for it.*[12]

This dynamic is especially true in a state like Nevada where the counties are not only expected to shoulder the majority of indigent defense costs, but indeed the vast majority of all criminal justice expenditures. The Committee to Develop a Model Plan for Conflict/Track Attorneys tasked NLADA with gathering information on indigent defense in rural Nevada. I was alarmed to find that, on average, criminal justice expenditures account for the *majority* of the rural counties' budgets – and in many instances the *vast* majority of county budgets.[13] Imposing additional criminal justice costs will only serve to further restrict counties from using local funds to invest in social services and public safety initiatives that may result in reduced crime rates.

The state's complicity in the right to counsel crisis, however, goes beyond this basic funding structure. In the 2000 ABA/DOJ-sponsored report, the Nevada State Public Defender system was depicted as in a perpetual state of "crisis." Nevada is the only state that has found it proper to create a state public defender system as a sub-department of another Executive Branch agency – in this case the Department of Health & Human Services (HHS).[14] This means to secure

---

[11] This, in turn, limits the amount of money these poorer counties can dedicate toward education, social services, healthcare, and other critical government functions that could positively impact and/or retard rising crime rates. The inability to invest in these needed government functions can lead to a spiraling effect in which the lack of such social services increases crime, further depressing real estate prices, which in turn can produce more and more crime -- further devaluing income possibilities from property taxes. Nevada counties also rely extensively on sales tax revenues which can account for some 30-40% of a county's total revenues. The volatility of sales tax revenues makes budgeting even more challenging even in the urban parts of the state.

[12] See, for example: The National Legal Aid & Defender Association. *Indigent Defense Assessment of Venango County, Pennsylvania.* June, 2002, at pp. 54-55. "In conclusion, NLADA believes that Venango County has the personnel to make the tough criminal justice decisions that lay ahead to ensure adequate representation to its indigent citizens. Unfortunately, the economic realities of the county are such that should all of the recommendations detailed in this report be enacted, we still believe that it is only a matter of time until the adequacy of indigent defense services is again put in jeopardy. The number of cases entering the Venango County criminal court system is growing and becoming more serious in nature with each passing year, despite a declining population. Thus, the burden of paying to protect the rights of defendants will continue to increase as the county tax-base further declines."

[13] Collectively, rural counties spent 52% of their entire budget on criminal justice matters ($137.46 million of $266.25 million – figures reflect all rural counties, except White Pine where complete financial data was not received). Mineral County spends 71% of its entire budget on criminal justice matters ($1,333, 274 of $1,745, 833). Indigent defense services make up the vast minority of criminal justice expenditures, averaging only 3.6% of all criminal justice expenditures in the fourteen rural counties. All information was gathered through phone interviews, electronic surveys and/or publicly available information on the Internet. In most instances, numbers have been self-reported by the counties.

[14] Over the past twenty years there has been a slow but steady trend to the creation of statewide indigent defense commissions across the United States. Ideally, these commissions should have full regulatory authority to promulgate, monitor and enforce binding standards over the entire indigent defense system. Currently, 23 states have commissions that oversee the entire indigent defense system. As an interim step to a full statewide indigent defense commission, some states -- California, Idaho, Illinois, Michigan and Washington -- have created state funded, appellate defender offices overseen by commissions though trial-level services remain funded and administered at the county level. Other states (Indiana, Louisiana, Ohio, South Carolina and Texas for example) have what is classified as "partial" commissions – or centralized, statewide indigent defense assistance boards that offset local indigent defense funding (to varying degrees) *if* the counties meet certain state standards but lacking regulatory authority to enforce compliance. Finally, eight states have statewide public defender systems without a commission, but the agencies are not a sub-department of another Executive branch agency. As such, Nevada is one of only eight states (Alabama, Arizona, Maine, Mississippi, New York, Pennsylvania, and South Dakota are the others) that lack any type of commission and/or a statewide structure of any sort.

adequate funding, the State Public Defender must first advocate amongst the various departments within HHS and secondly the HHS budget must compete against the other executive branch funding priorities. The State Public Defender has no independence to fight for appropriate resources without risking his own employment.

What has happened over the past seven years since the ABA/DOJ report put the state on notice of the prevailing "crisis" is that the current State Public Defender has presided over the devolution of the office -- taking it from a crisis to a catastrophe in the form of a willful denial of people's constitutional rights. Whereas the state originally paid for 47% of the state public defender system, the Nevada Legislature affirmatively voted two years ago to cut the funding to only 20%. For better or worse, right to counsel services are not like other governmental agencies. As opposed to "trash collection" that can reduce services or not purchase a new truck according to the dictates of budget restrictions, indigent defense providers must provide adequate representation to each and every client found indigent and facing a potential loss of liberty in your criminal courts under *Gideon* regardless of other governmental priorities.[15]

The State government actions have forced rural counties into a Hobson's choice: either remain in a crippled state public defender system or removed themselves in favor of -- in most instances -- flat-fee contracts that force defense providers to carry exorbitant caseloads to hold down costs. Upon further review, I do believe that the Supreme Court's Indigent Defense Commission (IDC) report underemphasized the fact that the rural counties' exodus from the state public defender system was as much over quality concerns as it was over cost control. However, this oversight by the IDC does not absolve the state from the prevailing crisis still existent in the rural counties (both for those remaining in the state system and for those that opted out). The Court should hold state government responsible for meeting the precepts of ADKT No. 411 and remedying the indigent defense crisis in rural Nevada.

National standards call for the creation of independent oversight commissions as a means of insulating the defense function from these types of undue political and judicial interference. See generally, ABA *Ten Principles* #1. NLADA has promulgated guidelines to assist jurisdictions in establishing independent oversight boards at either the state or local level. 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.
>
> 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.
> e. The Commission should not include judges, prosecutors, or law enforcement officials."

[15] Public defender workload is impacted by a convergence of decisions made by other governmental agencies beyond the control of the indigent defense system itself. The legislature may approve new crimes 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, etc., 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 no matter what.

What about the Urban Counties?

The right to counsel crisis experienced in rural Nevada is different only in kind to the crisis taking place in your state's two main urban jurisdictions. The Clark County Public Defender office self-reported that each felony attorney averages 392 cases per year. With caseloads more than double the threshold recommended under national standards,[16] how much time can a public defender dedicate to each client, on average, when working under such excessive workloads? If one assumes that a public defense attorney works 1,920 hours per year,[17] then one can determine

---

[16] Regulating an attorney's workload is perhaps the simplest, most common and direct safeguard against overloaded public defense attorneys and deficient defense representation for low-income people facing criminal charges. 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 modifications in some jurisdictions, have been widely adopted and proven quite durable in the intervening three decades. 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." 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*. The ABA's *Ten Principles* support these national standards with their instruction that caseloads should "under no circumstances exceed" these numerical limits.

National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 276, Standard 13.12. The National Advisory Commission accepted the numerical standards arrived at by the NLADA Defender Committee "with the caveat that particular local conditions – such as travel time – may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction." *Id. at 277.* Because many factors affect when a caseload becomes excessive, other standards do not set numerical standards. *See, e.g. Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (NYSDA, 2004), Standard IV.B. ABA Principle 5 notes in commentary that national numerical standards should in no event be exceeded and that "workload" – caseload adjusted by factors including case complexity, availability of support services, and defense counsel's other duties – is a better measurement.

The NAC workload standards have been refined, but not supplanted, by a growing body of methodology and experience in many jurisdictions for assessing "workload" rather than simply the number of cases, by assigning different "weights" to different types of cases, proceedings and dispositions. *See Case Weighting Systems: A Handbook for Budget Preparation* (NLADA, 1985); *Keeping Defender Workloads Manageable*, Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series #4 (Spangenberg Group, 2001) (www.ncjrs.org/pdffiles1/bja/185632.pdf).

Workload limits have been reinforced in recent years by a growing number of systemic challenges to under funded public 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*, 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.

[17] It is necessary for any workload analysis to establish some baseline for a work year. For employees defined as non-exempt under the Fair Labor Standards Act who are compensated for each hour worked, the establishment of a baseline work year is quite simple. If an employee is paid to work a 35-hour workweek, the baseline work year is 1,820 hours (or 35 hours times 52 weeks). For exempt employees who are paid to fulfill the parameters of their job regardless of hours worked, the establishment of a work year is more problematic. An exempt employee may work 35 hours one week, and 55 hours the next. NLADA measures workload using a 40-hour workweek for exempt employees for two reasons. First, a 40-hour work week has become the *maximum* workweek standard used by other national agencies for determining workload capacities of criminal justice exempt employees (See: National Center for State Courts, *Updated Judicial Weighted Caseload Model,* November 1999; The American Prosecutors Research Institute, *Tennessee District Attorneys General Weighted Caseload Study,* April 1999; U.S Department of Justice, Office of Juvenile Justice and Delinquency Programs, *Workload Measurement for Juvenile Justice System Personnel: Practice and Needs,* November 1999); The Spangenberg Group, *Tennessee Public Defender Case-Weighting Study;* April 1999.) Second, discussions with Mr. Don Fisk and Mr. Arthur Young of the U.S. Department of Labor, Bureau of Labor Statistics suggest that using a 40-hour work week for measuring workload of other local and state government exempt employees is the best method of approximating staffing needs. Therefore, I start the calculation of available number of work hours for an attorney at 40 hours per week for 52 weeks of the year (or, 2,080). Allocating two weeks of paid vacation and ten holidays reduces the available hours to 1,920 per year.

the average number of hours the average felony case takes from assignment to disposition, for example, by dividing in the national felony caseload standard (150 cases per year) into the average attorney work year. In this instance, national workload standards suggest that, on average, approximately 13 hours of attorney time is needed per the average felony case (1,920/150 = 12.8).

In Clark County the public defender workload means that on average an attorney can spend approximately only 4.9 hours per felony case; that means less than five hours regardless of whether the case involves a bad check or the most complex homicide. This figure also assumes that an attorney never gets sick, never has need of personal leave, and/or never performs any other duty that is non-case related -- like training, performance review, administration, supervision, or community education. With the termination of the early resolution program in Washoe County seriously impacting attorney workload, the situation there is just as serious.

My discussions with representatives of the Washoe County administration make it plain that their jurisdiction is experiencing similar fiscal constraints as the rural counties – approximately 60% of their budget is already taken up with criminal justice expenditures. Washoe County reported that sales tax revenues have declined month after month for 17 of the past 18 months with a net affect of creating a $21 million shortfall in next year's budget.[18] This makes it extremely difficult to hire appropriate staff in just a couple of months without putting the counties fiscal health in jeopardy. And, I agree.

One solution put forth by Washoe County is to push back the start date for the performance standards to July of 2009. They argue – correctly in my opinion -- that the performance standards create *de facto* caseload limits. It is simply impossible, on average, to complete the parameters of performance set out in ADKT No. 411 on a felony case in under five hours. But even if the county were not to experience any hardship in coming up with the requisite resources to fully implement ADKT No. 411 with necessary additional public defender staff, the real world realities are such that they could not responsibly recruit, hire, and train such staff before the current April 1st start date. Washoe County acknowledges that their public defender will be forced to declare himself to be unavailable based on the order and his ethical requirements at whatever point the performance standards take effect. This will immediately increase costs beyond what it would cost to hire full-time staff were it possible to do so quickly. Therefore, they argue, push back the start date for the performance standards and let them put together an implementation plan that will allow the county to meet the standards in one-year's time.

Though I empathize with the position the county administration is placed in, and though I do believe that it is unfair to charge them with the impossible task of fixing in a few months time a problem that was 45-years in the making, and though I do believe the state should be held responsible for meeting the requirements of ADKT No. 411 instead of the counties, I simply cannot support a delay in the formal implementation of the performance standards. The performance guidelines of ADKT No. 411 are the basic thresholds that all attorneys should be following -- *indeed should have been following all along*. The Court, having now gone on the record that the enumerated performance standards are the basic foundations of adequate

---

[18] This serves to underscore the problems of expecting counties to be able to fund constitutionally-mandated right to counsel services detailed earlier in the letter.

representation, cannot now condone the continued trampling of poor people's rights through the delayed implementation. Though it is true that state and local policy-makers must balance other important demands on their resources, the Constitution does not allow for justice to be rationed to the poor due to insufficient funds.

The Court needs to move forward in resolving the indigent defense crisis in urban Nevada in a way that takes into account the actual amount of time and financial resources needed by Clark and Washoe to staff up to meet ADKT No. 411's performance standards. I therefore advise the Court to allow the urban jurisdictions to present an implementation plan that allows the jurisdictions to pragmatically increase staff over a two-year period. The plans should be presented to the Court after the normal budgeting process has been completed and no later than June 15th, 2008 (with plans to be revisited after the completion of the case-weighting study). I think a two-year implementation timetable is a reasonable amount of time to implement the needed changes.

But changing the performance standards start date will not limit counties' exposure to a class action lawsuit in the interim -- successful litigation around such standards has occurred in Montana and elsewhere whether or not performance standards where promulgated in Court rules prior to the suits.[19] Were it possible for the Court to offer some sort of blanket protection against lawsuits to any county showing a good faith effort to meet the performance standards in a reasonable amount of time, I would support that proposal. Unfortunately, state government has placed its counties in the unenviable position of risking exposure to a lawsuit or suffering severe financial constraints. It is my sincere hope that state policy-makers act quickly to remove the counties from the predicament the counties now find themselves in.

Where Do We Go From Here?

What is the best vehicle to get state government to resolve the current indigent defense crisis? I have read commentary that one proposed solution is to have a special legislative session be called just on the right to counsel. Though I believe that legislative action is the eventual

---

[19] In Montana, the ACLU lawsuit *White v. Martz* was postponed to allow the Attorney general to advocate for sweeping legislative reforms. For more information, see: "ACLU Files Class-Action Lawsuit against Montana's Indigent Defense Program." ACLU Press Release (Feb. 14, 2002) at www.aclu.org/crimjustice/indigent/10127prs20020214.html. Washington -- see generally: www.aclu.org/rightsofthepoor/indigent/24078prs20060202.html.

This was the third successful ACLU lawsuit. The ACLU successfully sued the State of Connecticut in *Rivera v. Rowland.* The settlement agreement significantly increased the staff of the state's public defender system, doubled the rates of compensation paid to special public defenders, and substantially enhanced the training, supervision and monitoring of its attorneys. For more information see: www.aclu.org/crimjustice/gen/10138prs19990707.html?s_src=RSSS. Prior to *Rivera,* The ACLU sued Allegheny County, Pennsylvania (Pittsburgh) reaching similar reform in the settlement decree for *Doyle v. Allegheny County Salary Board.*

In 2004, National Association of Criminal Defense Lawyers (NACDL) filed a class action lawsuit against the State of Louisiana alleging systemic denial of counsel in Calcasieu Parish (*Anderson v. Louisiana*). For more information see: "Justice Failing in Calcasieu Parish: Lawsuit Seeks Systemic Reform and Relief for Defendants Deprived of Constitutional Rights." NACDL News Release (2004) at www.nacdl.org/public.nsf/DefenseUpdates/Calcasieu. See also: "Virginia and National Criminal Defense Lawyers Associations Delay Filing of Federal Suit Enjoining Court-Appointed Lawyer 'Fee Caps': Legislative Move Stalls Federal Suit." NACDL News Release (Feb. 1, 2006) at www.nacdl.org/public.nsf/newsreleases/2006mn003?OpenDocument.

New York City and State were sued in 2002 for claims relating to the low rate of compensation paid to assigned counsel who represent minors and indigents in both family and criminal actions in *New York County Lawyers' Association v. State, 763 N.Y.S.2d 397, 414* (N.Y. Sup. Ct. 2003). The action was supported through pro bono legal assistance provided by the law firm of Davis Polk & Wardwell. The trial judge ultimately ruled for the plaintiffs, entered an injunction against the City and State and ordered that assigned counsel compensation rates be raised.

remedy, such a call for a special convening of the legislature seems premature. The fact of the matter is that although the judicial branch of government is immersed in the crisis -- and although local government is now aware of the crisis -- I am not so sure that either the legislative or executive branch understands the true scope of the crisis. It is critical to the health of the criminal justice system in Nevada to convene a new group that involves both the executive and legislative branches to resolve the crisis in such a way as the mandates of ADKT No. 411 can be met uniformly throughout the state.

There appears to be two existent avenues for such state involvement: 1) the Statewide Commission created by ADKT No. 411; and, 2) Justice Hardesty's Rural Courts Committee. Thirty-one states and the District of Columbia have some sort of permanent statewide indigent defense commission overseeing all or a part of defense services in their jurisdiction. The ADKT No. 411 statewide commission could be established with the sole goal of making legislative recommendations for permanent fixes. My experience in other states suggests that for the Legislature to buy-in to recommendations of such a commission, legislators or their appointees must be on the commission itself. National standards call for diversity in appointment authorities on such commissions to ensure that no one of the three branches exerts unequal influence over the system. This is in addition to having appointments from other agencies with a vested interest in the proper administration of justice (e.g., the State Bar and/or the Boyd Law School). I respectfully suggest that the Court consider establishing a statewide commission consisting of appointees by: the Governor (1 appointment); the Attorney General (1 appointment); the Supreme Court (2 appointments); the Senate President (1 appointment); Speaker of the Assembly (1 appointment); the State Bar president (2 appointments); and, the Boyd Law School Dean (1 appointment). Such a committee could work throughout the summer and hear testimony from public defense practitioners, county management, trial judges, prosecutors, and the client community in crafting an appropriate legislative fix in anticipation of the 2009 legislative session.[20] Hopefully, a permanent statewide commission will become part of the legislative fix.

I think this is better than simply going through Justice Hardesty's Rural Court Committee for the simple fact that the resultant remedies will have ownership by both the executive and legislative branches. That is not a critique of the Rural Court Committee and how it functions. Rather, I do not think that the Court wants to be seen as trying to force further change without the active buy in of the state legislature. In fact, the Court may even want to consider remaining in a position of "watchdog" – holding periodic hearings on the progress of meeting the mandates of ADKT No. 411 – without participating in work of the commission itself. In such an instance, I would advise that the Court use its status to influence the Governor and/or Legislature to convene such a group.

What Might the State Fix Look Like?

The state Legislature currently has little impetus to consider the financial impact of their criminal justice policies since whatever laws are passed must be dealt with at the local level. If indigent defense services were a state function, the state would be more likely to adequately fund the statewide indigent defense systems to handle whatever new cases are brought about by statutorily created new crimes. Seeing the immediate impact of their actions may lead to different criminal justice policies. For instance, the legislature may consider creating more

[20] And, of course, legislative remedies could be debated and passed in a special session if called in advance of the 2009 legislative session.

diversion programs or other such programs that deal with aberrant behavior in a non-criminal justice setting.

Any statewide solution to the current indigent defense crisis should consider both Clark and Washoe Counties its scope. Though ADKT No. 411 eliminates the judiciary from exerting undue interference it remains mute on political interference. Today, for example, the Clark County Public Defender and Washoe County Public Defender could evoke the American Bar Association, Standing Committee on Ethics and Professional Responsibility *Formal Opinion 06-441* or the ABA's *Ten Principles* or ADKT No. 411 and refuse to accept any more cases above national standards without any further action by the Supreme Court. Nationally, it has been my experience that when public defenders do not take such actions it is oftentimes due to their belief that the perceived action creates a realistic risk that they, and members of their staffs, may have their employment terminated.[21]

A comprehensive statewide fix starts from a simple premise that there is no single cookie-cutter model delivery system (staffed public defenders, assigned counsel, contract attorneys) that can guarantee adequate representation. What is important is that whatever system emerges meets all of the American Bar Association's *Ten Principles.* And, though I am confident that the people of Nevada can figure out the most appropriate delivery system for the various counties, I do suggest that reviving the State Public Defender is one that should be taken off the table. After discussing the rural dilemma with various people I believe that a top-down, staffed public defender office will never work in most of Nevada. The new state system should be flexible enough to employ staffed defenders in those areas that have the caseload to support it, but assigned counsel and/or contract defenders should remain the primary services provider in most of rural Nevada.

The creation of a single statewide system could most efficiently assure that the standards of ADKT No. 411 can be met. Rather than trying to create 17 individual oversight boards with 17 administrators overseeing defense practitioners, the Nevada Legislature could look at best practices from other states. For example, Massachusetts provides indigent defense services through the Committee on Public Counsel Services (CPCS). CPCS has statutory oversight of the delivery of services in each of Massachusetts's counties and is required to monitor and enforce standards. Private attorneys, compensated at prevailing hourly rates, provide the majority of defender services.

At the local level, attorneys accepting cases must first be certified by CPCS to take cases.[22] Attorneys seeking assignment to felony cases must be individually approved by the Chief

---

[21] In my opinion, Nevada public defenders' lack of independence was best exemplified during the work of the IDC when defense providers' rejected the idea of "attorney time-keeping" because it would document their ineffective representation of clients. In short, they are caught in a Catch-22. Public defense providers cannot declare unavailability because they may lose their job; therefore, they perform triage representation due to high caseloads -- the documentation of which could result in the termination of their employment.

Unless county administration were willing to cede hiring and firing authority over the chief public defender to an independent board (as prescribed in all relevant national standards), I believe that the tension between duty to clients and duty to employer will remain. Moreover, even if the current county administration favors providing adequate defense representation the next administration may not triggering yet another constitutional crisis over the right to counsel.

[22] To accept District Court cases (misdemeanors and concurrent felonies), attorneys must apply, be deemed qualified and attend a five-day state-administered continuing legal education seminar offered several times throughout the year. No attorney may be a member of more than two regional programs (unless she is certified as bilingual).

Counsel of CPCS, whose decision is informed by the recommendation of a Certified Advisory Board composed of eminent private attorneys from each geographical region. To be certified for these more serious cases, attorneys must have tried at least six criminal jury trials within the last five years or have other comparable experience. Proof of qualification, including names of cases, indictment numbers and charges, names of judges and prosecutors, dates, and a description of the services provided must be included in the application. Recommendations from three criminal defense practitioners familiar with the applicant's work are also required. Certification is only valid for a term of four to five years, after which all attorneys must be revaluated.[23]

By being certified, an attorney agrees to abide by the set of performance guidelines that set out attorney responsibilities at every stage of the case, for each specific type of case the attorney is qualified to handle, and to participate in on-going training. CPCS assesses "quality" through a formal evaluation program based on the written performance guidelines and overseen on a regional level by compliance officers. These supervisors are given training in how to evaluate staff, and their ability to assess performance fairly is a subject of their own performance review by CPCS.

All of this is to show, that it is simply impractical to try to replicate such programs on a county-by-county basis.

Conclusion

I want to comment on the question of ADKT No. 411 being a new unfunded mandate the imposition of which raises separation of powers issues. First, the Court should remind state and local policy-makers that providing adequate right to counsel services is a mandate that is far from "new" – the U.S. Supreme Court's mandate is now over 45-years old. The fact that it has been obscured in Nevada for so long does not allow the state to cry poverty and be absolved of their constitutional responsibilities.

Second, though enumerating basic performance standards is clearly within the purview of the Court, I do understand that there are serious fiscal implications that some may argue presents a separation of powers issue. After all, is not the judicial branch of government, in effect, ordering the legislative branch how to spend money? To resolve this potential question, I respectfully suggest that the Court follow the lead of the Louisiana Supreme Court. In *State v. Citizen*, the Louisiana Supreme Court affirmed that figuring out how to fund indigent defense is clearly a 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 for the right to counsel, 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.[24]

---

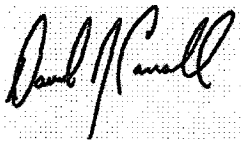
[23] First and second degree murder cases require proof of five years of criminal litigation experience, familiarity with Massachusetts criminal courts, service as lead counsel in at least ten jury trials of a serious and complex nature over the preceding five years, at least five of which have been life felony indictments resulting in a verdict, decision or hung jury. As with Superior Court certification, applicants must submit information along with recommendations of three criminal defense lawyers.

[24] 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

In closing, the right to counsel is one of the most basic rights of our cherished democracy. As Justice Black opined 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." As our American troops are engaged oversees fighting for democratic principles we must ask ourselves what message we are sending the world when we do not meet our own constitutionally-enshrined values here at home?

Thank you for your continued leadership on this issue.

Sincerely,



David J. Carroll, Director of Research
National Legal Aid & Defender Association
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036
www.nlada.org

Contact: (202) 329-1318; d.carroll@nlada.org

cc: Members of the Nevada Supreme Court Indigent Defense Commission
Members of Indigent Defense Committee to Develop a Model Plan for Conflict/Track Attorneys for Judicial Districts

---

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 that 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.