

MAY 05 2008

IN THE SUPREME COURT OF THE STATE OF NEVADA
BY *[Signature]*
CLERK OF SUPREME COURT
CHIEF DEPUTY CLERK

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ADKT No. 411

IN THE MATTER OF THE REVIEW
OF ISSUES CONCERNING
REPRESENTATION OF INDIGENT
DEFENDANTS IN CRIMINAL AND
JUVENILE DELINQUENCY CASES.

THE SECOND JUDICIAL DISTRICT COURT – INDIGENT DEFENSE REPORT

Administrative plan for the Second Judicial District Court to meet the requirements set forth in the order entered by the Supreme Court of Nevada on January 4, 2008, in ADKT 411.

1. **OBJECTIVE**

- A. This plan has taken into account all aspects of and acknowledges the statement of policy presented in the Model Plan developed by the Supreme Court Sub-committee to formulate a Model Plan for Indigent Representation in Nevada.
- B. This plan relates to the appointment of trial counsel, appellate counsel in appeals not subject to the provisions of Nevada Rules of Appellate Procedure 3C, counsel in Post-Conviction matters, counsel in Juvenile matters, and counsel in certain Family Division matters; the approval of expert witness fees, investigation fees, and attorney fees; and the determination of Indigency in the Courts within the Second Judicial District Court, including the District Court and all Washoe County Justice Courts where applicable.

II. **DEFINITIONS:**

- A. **"Representation"** includes counsel and investigative, expert and other services.

08-33181

1 B. "Appointed attorney" includes private attorneys, both contracted and hourly,
2 Public Defender, Alternate Public Defender, and staff attorneys of the Public
3 Defender and Alternate Public Defender's offices in Washoe County.

4 III. PROVISION OF REPRESENTATION

5 A. Mandatory Appointment

6 Representation shall be provided for any financially eligible person who:

- 7 1. is charged with a felony;
- 8 2. is charged with a gross misdemeanor in which the prosecution
9 is seeking jail time (incarceration);
- 10 3. is alleged to have violated probation or other supervision and a
11 jail or prison sentence of confinement may be imposed;
- 12 4. is a juvenile alleged to have committed an act of juvenile
13 delinquency;
- 14 5. is subject to commitment pursuant to NRS 433A.310;
- 15 6. is seeking relief from a death sentence pursuant to NRS
16 34.724(1);
- 17 7. is in custody as a material witness;
- 18 8. is entitled to appointment of counsel under the Sixth
19 Amendment to the United States Constitution or any provision
20 of the Nevada Constitution, or when due process requires the
21 appointment of counsel, or the Court is likely to impose jail or
22 prison time;
- 23 9. faces loss of liberty in a case and Nevada law requires the
24 appointment of counsel;
- 25 10. faces loss of liberty for criminal contempt;
- 26 11. has received notice that a grand jury is considering charges
27 against him/her and has requested counsel.

28 B. Discretionary Appointment

Whenever a court determines that the interests of justice so require,
representation shall be provided for any financially eligible person who:

1. is charged with a misdemeanor, infraction or code violation for
which a sentence of confinement is authorized;

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- 2. is seeking post-conviction relief, other than from a death sentence, pursuant to NRS 34.724(1);
- 3. is charged with civil contempt and faces loss of liberty;
- 4. has been called as a witness before a grand jury, a court, or any agency which has the power to compel testimony, and there is reason to believe, either prior to or during testimony, that the witness could be subject to criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;
- 5. any other case in which the court determines in the interest of justice appointment of counsel is appropriate.

C. Timing of Appointment of Counsel

Counsel shall be provided to eligible persons:

- 1. within 72 hours of formal charges being filed against the person held in custody or as soon as feasible;
- 2. when they appear before a judge;
- 3. when they are formally charged or notified of charges, if formal charges are sealed; or
- 4. when a District Judge or Justice of the Peace otherwise considers appointment of counsel appropriate.

D. Number and Qualifications of Appointed Counsel

- 1. one attorney shall be appointed consistent with Section IV and V herein, except in Capital Cases;
- 2. two attorneys shall be appointed consistent with Section IV and V herein, as soon as possible in all open murder cases which are reasonably believed to result in a Capital Case;
- 3. at least one of the two attorneys appointed to represent defendants charged in Capital Cases must meet the minimum standard for lead counsel pursuant to Nevada Supreme Court Rule 250 and both attorneys appointed must conform to the performance guidelines or standards as adopted by the Nevada Supreme Court for Capital Cases.

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E. Eligibility for Appointed Representation

1. All persons found indigent shall be financially eligible for appointed representation:
 - a. a person shall be deemed "indigent" who is unable, without "substantial hardship" to himself or his dependents, to obtain competent, qualified legal counsel on his or her own;
 - b. "substantial hardship" is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, reside in public housing, or earn less than 200 percent of the Federal Poverty Guideline;
 - c. a person is presumed to have a "substantial hardship" if he or she is currently serving a sentence in a correctional institution or housed in a mental health facility or is a minor;
 - d. persons not falling below the presumptive threshold for indigency will be subject to a more rigorous screening process to determine if their particular circumstances, including seriousness of charges being faced, monthly expenses, and local private counsel rates, would result in a "substantial hardship" were they required to retain private counsel.

2. Screening for Eligibility:
 - a. The Pretrial Services Division of the Second Judicial District Court shall conduct the screening for financial eligibility of all persons who:
 1. due to the nature of their charges in the Second Judicial District Court or a Washoe County Justice Court, if indigent, are mandated to have counsel appointed at public expense;
 2. due to their indigency are requesting investigative fees, expert fees, or other services, be paid at public expense for a case pending in the Second Judicial District Court or a Washoe County Justice Court; or
 3. when a District Court Judge or Washoe County Justice of the Peace requests a screening by Pretrial Services to determine whether a person is indigent.

 - b. Pretrial Services shall provide notification to the Court having jurisdiction over a person's case of the results of Pretrial Services screening with regard to financial eligibility for

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representation at public expense.

- c. Appointed counsel may assist in providing information during the screening but shall not be asked to make a recommendation with regard to eligibility.

3. Partial Eligibility:

- a. If a court determines that a person is able to afford counsel or has actually retained counsel but cannot be effectively represented due to inability to pay for necessary services such as investigators, experts or other services, the court shall order that these services be provided at public expense;
- b. The extent and cost of these services shall be approved by the Appointed Counsel Administrator;
- c. The determination of the extent and approval of the amounts made by the Appointed Counsel Administrator may be appealed to the Washoe County Manager or their designee;
- d. Appeals from the determination of the County Manager or their designee, as to the extent and amount allowable for these fees, may be made to the Chief Judge of the Second Judicial District Court.

4. Disclosure of Change in Eligibility:

- a. Counsel shall advise the Chief Judge of the Second Judicial District for matters pending in the District Court or the Administrative Judge for matters pending in a Washoe County Justice Court of the change in their clients' eligibility for public payment for representation;
 - 1. if, at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal or other services in connection with his or her representation; and
 - 2. the source of the attorney's information is not protected as privileged communication.

5. Reimbursement:

- a. Adult Matters:

1 the Court having jurisdiction over the matter may order
2 the reimbursement to Washoe County for all or part of
3 the representation at public expense of a person for
4 services provided by the Public Defender, Alternate
Public Defender, contract, hourly or capital case
appointed counsel.

5 b. Juvenile Matters:

6 the Second Judicial District Court Family Division
7 Juvenile Judge may order the parents of a juvenile to
8 reimburse the county for the reasonable attorney fees
9 and costs of the juvenile's representation, whether
10 provided by the Public Defender, Alternate Public
11 Defender, contract, or hourly appointed counsel (NRS
62E.300).

12 IV. APPOINTMENT OF THE PUBLIC DEFENDER

13 A. Initial Appointment:

- 14 1. the District Court Judge or Justice of the Peace having jurisdiction
15 over a case that is pending in Washoe County shall appoint the
16 Washoe County Public Defender to represent a party if:
- 17 a. the person has requested representation;
 - 18 b. the case is of the nature described above as mandating
19 appointment of counsel;
 - 20 c. the person has been found eligible by Pretrial Services for
21 representation at public expense;
 - 22 d. the case is not a post conviction proceeding.
- 23 2. The District Court Judge or Justice of the Peace having jurisdiction
24 over a case that is pending in Washoe County may appoint the
25 Washoe County Public Defender to represent a party if:
- 26 a. the person has requested representation;
 - 27 b. the case is of the nature described above as being
28 discretionary as to appointment of representation at public
expense;
 - c. the person has been found eligible by Pretrial Services for
representation at public expense;
 - d. the case is not a post conviction proceeding.

- 1 3. Unless there is a valid, Court approved, written waiver from co-
2 defendants, the Public Defender shall not be appointed to represent
3 co-defendants in a case.

4 B. Determination of Conflict of Interest:

- 5
- 6 1. The Public Defender shall, as soon as practicable, upon appointment,
7 conduct a conflict check to determine whether any conflict of interest
8 exists which would prevent representation of the client.
- 9 2. If such a conflict is determined by the Public Defender to exist, such
10 fact shall be brought to the attention of the Alternate Public Defender
11 as soon as possible.
- 12 3. The Alternate Public Defender shall undertake representation in all
13 cases which are in Justice Court unless a conflict check determines
14 that there exists a conflict of interest which would prevent
15 representation of the party:
- 16 a. if such a conflict is determined by the Alternate Public
17 Defender to exist, such fact shall be brought to the attention of
18 the Appointed Counsel Administrator, as soon as practicable;
19 and
- 20 b. the Appointed Counsel Administrator shall select counsel from
21 the contract, hourly or capital case appointed counsel lists to
22 take over the representation.
- 23 4. If the Alternate Public Defender is notified that continued
24 representation of a party would create a conflict for the Public
25 Defender in cases which are in District Court, the Alternate Public
26 Defendant shall file a written Substitution of Counsel replacing the
27 Public Defender's office, unless:
- 28 a. the Alternate Public Defender determines that representation
would create a conflict of interest:
1. the Alternative Public Defender shall notify the
Appointed Counsel Administrator as soon as
reasonable, include in that notification enough
information for the Appointed Counsel Administrator to
determine if a contract, hourly, or capital case qualified
attorney should be selected to replace the Alternate
Public Defender;
- (a) upon notification, the Appointed Counsel
Administrator shall:

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- (1) select an attorney(s) pursuant to Section V, which is appropriate for appointed representation in the case;
- (2) prepare a written Substitution of Counsel substituting in the selected attorney in place of the Alternate Public Defender, indicating whether it is pursuant to an indigent appointment contract, hourly or capital case list attorney; and
- (3) cause the Substitution of Counsel to be filed in the District Court prior to the first appearance by new counsel.

- b. the Alternate Public Defender requests a hearing in District Court regarding the Public Defender conflict prior to accepting the appointment of representation.
 - 1. If the Court approves the Public Defender request for relief from representation, the Alternate Public Defender shall file a substitution of counsel and undertake representation;
 - 2. if the Court does not approve the Public Defender request for relief from representation, the Public Defender will continue representation until relief is granted.

C. Assignment of Attorneys

- 1. The determination of assignment of which attorney within the office of the Public Defender or Alternate Public Defender will represent an indigent person rest solely within the discretion of the Public Defender and/or Alternate Public Defender.
- 2. The determination of which contract, hourly or capital case attorney(s) is substituted in for the Alternate Public Defender shall rest within the Appointed Counsel Administrator in accordance with this plan and specifically Section V, herein.

D. Complaints by Clients

- 1. The Public Defender and Alternate Public Defender shall maintain a system for receipt and review of written complaints made by clients.
- 2. The Appointed Counsel Administrator shall maintain a system for receipt and review of written complaints made by clients.

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2 V. APPOINTMENT OF PRIVATE ATTORNEYS

3 A. Selection of Panel of Attorneys

- 4 1. The Second Judicial District Court - Court Administrator shall establish
5 the Appointed Counsel Selection Committee within fifteen (15) days of
6 May 5, 2008;
- 7 a. the Appointed Counsel Selection Committee shall be made up
8 of five (5) attorneys who:
- 9 (1) have no pecuniary interest in the outcome of the
10 attorney selection or performance evaluation process;
- 11 (2) have no legal, financial or familial relationship to any
12 attorney whose qualification or performance will be
13 evaluated;
- 14 (3) are not directly related to the judiciary or any
15 prosecution function; and
- 16 (4) have an interest in the variety of types of cases that are
17 represented by the appointed counsel lists to be
18 selected by the Committee.
- 19 2. The Appointed Counsel Selection Committee shall establish within
20 thirty (30) days of its establishment, the minimum qualifications for all
21 appointed counsel lists, taking into effect the additional qualifications
22 required for exceptionally difficult cases involving life penalties and
23 capital cases, and unique case types such as juvenile and
24 dependency cases.
- 25 3. The Appointed Counsel Selection Committee shall create the
26 Appointed Counsel lists (contract, hourly and capital) and sub-lists as
27 the committee deems appropriate within sixty (60) days of its
28 establishment.
4. Attorneys may be selected for inclusion on multiple lists and sub-lists.
5. On an ongoing basis, the Appointed Counsel Selection Committee shall:
- a. review the lists created and modify membership as the
Committee deems appropriate;
- b. annually review the performance and qualifications of attorneys
on the Appointed Counsel lists including:
- (1) annually solicit input from Judges, and others familiar
with the practice of criminal defense, juvenile and family
law where appointed counsel are utilized;

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- (2) review any complaints from clients;
- (3) review the history of participation in training of each new applicant and each contract, hourly and capital case list attorney receiving appointments; and
- (4) determine eligibility and selection of appointed counsel for new or continued participation.

B. Contract, Hourly and Capital Case Attorneys:

1. Contract Attorneys:

- a. Washoe County shall contract for appointment of counsel;
- b. Washoe County contract attorney compensation may be based either on an hourly basis, a flat fee basis, or a combination of both;
 - (1) if the contract is based on a flat fee basis, the contract should consider, but not be limited to, the following factors:
 - (a) the average overhead for criminal defense practitioners in the locality;
 - (b) the number of assignments expected under the contract;
 - (c) the hourly rate paid for all appointed counsel; and
 - (d) the ability of the appointed attorney to comply with the Performance Standards for Appointed Counsel as adopted.
 - (2) Washoe County shall contract with attorneys as appointed counsel only after the attorney has been qualified to enter into such a contract by the Appointed Counsel Selection Committee; and
 - (3) the contract must be subject to termination annually or sooner, if determined by the Appointed Counsel Selection Committee that a contract attorney is not abiding by the standard guidelines for qualification of appointed counsel; and
 - (4) the payment of fees and expenses of contracted appointed counsel by Washoe County shall be governed by contract between counsel and Washoe County subject to appeal as described in III. E. 3. b., c., and d.; and

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(5). the contract shall exclude appointment in cases with the potential of a life sentence and capital cases.

c. In all cases which cannot be handled by the Public Defender or the Alternate Public Defender, an attorney from the contract attorney list will be assigned by the Appointed Counsel Administrator, except in cases carrying a penalty of life imprisonment, death, post conviction or when the court, or the Appointed Counsel Administrator determines the complexity of the case or the severity of the penalty are such as to necessitate the appointment of an hourly attorney.

d. Contract Appointed Counsel shall be selected in consecutive order from the Contract attorney list by the Appointed Counsel Administrator.

2. Hourly and Capital Case Attorneys:

a. If the Washoe County Public Defender, Alternative Public Defender and contract counsel can not handle the case; or the Appointed Counsel Administrator determines the case is not appropriate for contract counsel to handle, alternative counsel will be selected by the Appointed Counsel Administrator as follows:

- (1) the Appointed Counsel Administrator shall select this alternative appointed counsel, in consecutive order, from the "Hourly" list; except
- (2) if the nature of the case requires lead counsel be selected from the "Capital Case" list, the Appointed Counsel Administrator, in consecutive order, shall select from the "Capital Case" list;
- (3) the Appointed Counsel Administrator shall select "Second Chair" counsel for a capital case: counsel may be selected next in order from the "Hourly" list, if the attorney qualifies under Supreme Court Rule 250 for "second chair" selection, or the "Capital Case" list.

b. The payment of fees and expenses of "Hourly" and "Capital Case" appointed attorneys shall be approved by the Appointed Counsel Administrator subject to appeal in the same way as discussed in Section III. E. 3. b., c., and d.

3. Delegation of Responsibilities:

a. Appointed counsel cannot delegate responsibilities for representation to another attorney.

- 1 b. Appointed counsel may receive assistance from associate
2 attorneys, mentees, or other Selection Committee qualified
3 attorneys, in carrying out his/her responsibilities.
4 c. All substantive court appearances must be made by an
5 attorney who has been determined to be qualified by the
6 Selection Committee to handle the type of case counsel has
7 been appointed to handle.

8 C. Post Conviction:

- 9 1. The Chief Judge of the District shall determine eligibility, using the
10 same standards as discussed herein for determination of indigency, in
11 forma pauperis applications filed in the District Court for post
12 conviction cases and notify the Appointed Counsel Administrator, if
13 application is granted.
14 2. In mandatory appointment cases:
15 a. the Appointed Counsel Administrator shall select, in
16 consecutive order, counsel from the "Hourly Post Conviction"
17 list; and
18 b. prepare an Order for Appointment for the assigned District
19 Judge's signature.
20 3. In non-mandatory appointment cases, the assigned District Judge
21 shall notify the Appointed Counsel Administrator, if the Judge's
22 decision is to appoint counsel.
23 a. the Appointed Counsel Administrator shall select, in
24 consecutive order, counsel from the "Hourly Post Conviction"
25 list; and
26 b. prepare an Order for Appointment for the assigned District
27 Judge's signature.
28 4. All attorney fees and investigation, expert or other fees shall be
approved by the Appointed Counsel Administrator for payment by the
State Public Defender.
5. Appeals from these fee determinations by the Appointed Counsel
Administrator shall be made to the Chief Judge of the District.

VI. MENTORSHIP AND TRAINING

A. Mentoring Programs:

If the Selection Committee determines that the ends of justice will be served by selection of attorneys who do not possess the requisite experience as determined by the committee, a mentoring program

1 must be established to insure that the inexperienced attorney will be
2 provided supervision and mentoring from an experienced attorney. In
3 no instance shall an attorney who has not tried at least one felony jury trial
4 be permitted to try a felony case without an experienced criminal
5 defense attorney sitting as "second chair."

6 B. Annual Training:

7 An intensive training program shall be conducted for all private
8 attorneys who receive appointments to cases. The program shall
9 include training in bail and release, motion practice, search and
10 seizure, evidentiary issues and trial practice, appeal, post-
11 conviction practice, juvenile, and family law, as deemed appropriate.
12 All contract, hourly and capital case appointed attorneys will be
13 encouraged to attend.

14 C. Periodic Training:

15 Periodic training events will be conducted on issues of interest to
16 appointed counsel.

17 D. Creation and Coordination of Training:

18 The Public Defender, Alternate Public Defender and the Appointed
19 Counsel Administrator shall be responsible for coordinating,
20 scheduling and creating the training events described above.

21 VII. DUTIES OF APPOINTED COUNSEL

22 A. Standards:

23 The services to be rendered to a person represented by appointed
24 counsel shall be commensurate with those rendered if counsel were
25 privately employed by the person. Representation shall be provided in
26 compliance with the Performance Standards for Representation of
27 Indigent Defendants adopted by the Supreme Court, or as the same
28 may be amended.

B. Professional Conduct:

Attorneys appointed under this Plan shall conform to the highest
standards of professional conduct, including but not limited to the
provisions of the Nevada Rules of Professional Conduct.

C. No Receipt of Other Payment:

1 Appointed counsel may not require, request, or accept any payment or
2 promise of payment or any other valuable consideration for
3 representation under the appointment, unless such payment is
4 approved by Order of the Court.

5 D. Continuing Representation:

6 Once counsel is appointed, counsel shall continue representation until
7 substitute counsel has filed a notice of appearance; until an order has
8 been entered allowing or requiring the person represented to proceed
9 pro se; or until the appointment is terminated by court order. If
10 appointed counsel is relieved, such counsel must assist successor
11 counsel in securing the file and other necessary information to insure
12 that all deadlines are met, including those applicable to appeal and
13 post-conviction matters.

14 VIII. APPOINTED COUNSEL ADMINISTRATOR

15 A. Selection:

- 16 1. Washoe County will contract with a lawyer on or before July 1, 2008,
17 to serve as the Appointed Counsel Administrator. The terms of this
18 contract will be determined by this plan, Washoe County and the
19 Appointed Counsel Administrator, but in no event will this Appointed
20 Counsel Administrator be directly involved in direct representation in
21 appointed counsel cases.

22 B. Duties:

- 23 1. The Appointed Counsel Administrator shall have all the duties and
24 responsibilities stated in the various sections of this plan.
25 2. The Appointed Counsel Administrator shall maintain the list of all
26 attorneys approved by the screening committee for contract, hourly
27 and capital case appointment. In addition, the Appointed Counsel
28 Administrator shall maintain appropriate records to reflect the cases
and dates to which each attorney has been appointed.
3. When notified of the need for representation, the Appointed Counsel
Administrator, shall select, in order and as more fully described herein,
the next available attorney from the list of those attorneys qualified to
provide representation as approved by the screening committee.

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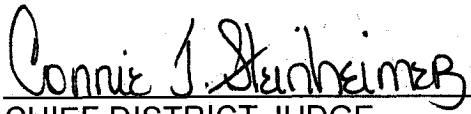
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4. The Appointed Counsel Administrator shall be responsible for approving the claim for payment of each attorney and any expert or other service fees at the conclusion of appointed counsel's representation or, if appropriate, periodically during appointed counsel's representation, as specifically discussed herein.

Dated: May 1, 2008.



CHIEF DISTRICT JUDGE
SECOND JUDICIAL DISTRICT COURT