INDIGENT DEFENSE COMMISSION
MINORITY REPORT

June 23, 2008

At the May 30, 2008 Commission meeting, a motion was made to adopt a preamble to the performance standards issued by the Nevada Supreme Court in its January 4, 2008 Order and affirm the remainder of the standards without any additional changes.[1] The motion passed by a narrow margin. A majority of the individuals who voted against the motion approved of the preamble language, but wished to have the same subcommittee that drafted the preamble meet again to discuss other proposed changes designed to address issues about the standards expressed in writing and at the March 18, 2008 hearing. This would hopefully narrow the issues to be presented at the July 1, 2008 hearing.

The proposed changes discussed below are designed to alleviate the concerns previously expressed by members of the judiciary, funding entities, prosecutor organizations and District Attorneys (in their civil and criminal advisory capacity.) In addition, certain changes were endorsed by some members of the Commission who represent the defense community. Because no vote was taken on each of the proposed changes, the precise stance of a Commission member who voted no on the motion as to any change is unknown.

Not every standard section is discussed below as some proposed changes apply to more than one standard, but attached is a strikeout/underline version of the proposed changes for the Court's consideration.

Some Commission members question why any changes should be made because the standards reflect, for the most part, the language of American Bar Association publications on indigent defense. However, while the research of the ABA is helpful, the ABA is not responsible for implementing and maintaining

[1] Although not subject to a motion, the Commission agreed to re-number the Standards to facilitate citations.

indigent defense systems. Other states have deviated from the ABA language in creating indigent defense commissions and/or adopting performance standards/guidelines. Preambles are one example of such deviations. In addition, most state guidelines or standards do not incorporate or reprint the lengthy commentary that accompanies the ABA publications. Thus there is a greater need for clarification. The suggested changes address legitimate concerns about the scope and use of the Standards and are designed to avoid confusion, misunderstandings or conflicts with existing case law. We ask the Court to give them serious consideration.

I. Delete "Quality" and "High Quality" Terminology

The ABA commentary[2] reflects that the term "quality" refers to a lawyer's general duty to use that knowledge, skill, thoroughness and preparation reasonably necessary for competent representation to a client on a given case or issue. In this regard it is akin to ABA Model Code of Professional Conduct and Nevada Code of Professional Conduct 1.1 and 1.3. The term "high quality" was intended emphasize the need for a greater degree of skill and experience on the part of defense counsel in a capital versus non-capital case due to the complexity and demands of a capital case. It also recognizes that the scope of investigation, need to retain experts and other considerations are greater in a capital case.

The Minority Report notes no problem with the use of the terms in this context. However, at public hearings and at Commission meetings, some Commission members and organization representatives have stated that this language means an indigent defendant is entitled to the same monetary resources per case as a non-indigent defendant. In fact, the argument was made that an indigent defendant has a right to have the same amount spent on his or her case as a millionaire.

[2] The 2003 Death Penalty Guidelines and Commentary, as well as the 1993 ABA Standards for Defense, can be found at the ABA's website. The Death Penalty information can also be found at 31 Hofstra Law Review 913 (2003).

While this is a laudable goal, it is for the Legislative or Executive Branch to implement. The Judicial Branch is responsible for insuring constitutional mandates are met. Indigent defendants are constitutionally entitled to the resources reasonably necessary to provide competent representation. Those resources will be greater in a capital case, but the amount of resources in any case will differ depending upon the nature of the charges, possible penalties, complexity of the evidence, etc. It is an inevitable fact of life that some people can afford to hire more attorneys and experts than others, whether indigent or not. This is not an issue to be addressed in these standards; therefore the Minority Report suggests that the term "competent" be substituted or that some additional language or commentary be added that eliminates this problem. For example the following language could be added:

> "Quality" representation refers to a lawyer's general duty to use the knowledge, skill, thoroughness and preparation reasonably necessary for competent representation of a client on a given case or issue.
>
> "High Quality" representation refers to the need for a greater degree of skill and experience on the part of defense counsel in a capital versus non-capital case due to the complexity and demands of a capital case.

II. Standard 2-1 Defense Team

As written, this standard could be read as an unfunded mandate to the State or counties that, in addition to counsel provided for in SCR 250, mitigation specialists, investigators and mental health screening professionals are required to be employed or retained in every death penalty case. While that may be the view of the ABA, that organization is not responsible for the funding and day-to-day management of the criminal justice system. The Constitutional requirement for the employment or retention of non-attorney professional services is set forth in Ake v. Oklahoma, 470 U.S. 68 (1985) and its progeny. Defense must demonstrate that the professional service is reasonably necessary to provide adequate legal

representation. In fact, the reasonably necessary language is used in Standard 2-1(b)(1)(A).

Large institutional defense offices include line-items in their budgets for retaining all types of professionals, including mitigation specialists, etc. They also request and receive staff positions in these categories based upon projections of the number of death cases those offices expect to handle in a year. When arguing for those positions, or filing motions with a court, the *Ake* standard is used.

The suggested change shifts investigators, mitigation specialist and mental health screening professionals to that subsection and cites to *Ake*. The Minority Report does not dispute that mitigation specialists, investigators or mental health screening may be common and frequently justified under *Ake,* only that the issue should either be decided on a case-by-case basis and/or by a decision of the Legislative or Executive Branches to include lump sum funding in budgets , not in court-enacted standards. Including them in the Standard is the equivalent of the Court finding, absent a case or controversy, that these services are always reasonably necessary under *Ake* regardless of the facts and circumstances of a given case or that the State of Nevada should exceed the Constitutional obligation of *Ake*.

The rest of the suggested edits deal with confusion over the meaning of the confidentiality and independent services language and whether it is intended to change existing case law. For example, NRS 178.415 provides that the Court appoints professionals to determine competency. Such reports are not, and cannot be, confidential. In Estes v. State, 122 Nev. 1123, 146 P.3d 1114 (2006), the Court discussed when, and what type of, information in competency reports is admissible.

It was unclear whether Standard 2.1(b)(1)(B)(C) had any applicability to these situations, or was merely designed to note that resources should be available not just for trial experts, but at pre-trial and not have those experts' findings disclosed unless the expert would be testifying or the findings would be used by a

another expert in their testimony or report. The ABA commentary suggests this language was primarily designed to require ex parte motions and requests under *Ake* so that the prosecution would not be privy to confidential information that the court would need to decide an *Ake* request. If this is the case, then additional language is suggested as follows:

> (D) Any request for the assistance of expert, investigative or other ancillary professional services in a specific case shall be made in an ex parte proceeding before the assigned judge.

The new preamble, which reflects that the Standards do not confer "substantive and procedural rights," may alleviate the need for the proposed clarification language if the Court reiterates that the Standard is not intended to affect existing case law at the July 2, 2008 hearing and any subsequent order.

The final proposed change in this section deals with the appointing authority's need to provide these type of ancillary services in cases where defendants are not indigent and have retained private counsel, but are now claiming there is no money left to hire other service providers. The Minority Report notes this should not be part of the indigent defense standards. Private counsel can file a motion with the appropriate court. If the court wishes to refer the matter to an appointing authority for financial screening, it can do so, but a non-court appointing authority should not be involved without a court directive.

III. Standard 2.2(c)(1); 2.2(c)(4) - Removal

The proposed change in Subsection 1 relates to the authority of the monitoring agency to take action to protect the interests of the attorney's current and future clients. Language has been added that narrows the scope of appropriate action to exclude interference with a particular case or removal of an attorney in a particular case, rather than removing an attorney from any future appointments. There are established procedures and case law for removing an attorney from a case, with or without the clients' consent, and these procedures should be used. The ABA commentary indicates this provision is not intended to be a procedure

for micro-managing counsel's work on a case and does not discuss taking action to remove an attorney from a case, rather than future cases. Certainly the monitoring agency can bring to the court's and prosecution's attention serious issues that would impair counsel's ability to continue representation – but beyond that, the matter should be left to the court.

In subsection 4, the Minority Report suggests the appointing authority must provide notice, so the word "shall" has been substituted for "should" and the funding agency should also be given notice and a chance to respond when a defender office is involved.

IV. Standard 2-3(a) – Training

Currently the language indicates that all members of the defense team are entitled to government paid training and education regardless of whether they are a government employee. Again this may be an ideal goal, but should not be mandated by Supreme Court order. The proposed change indicates defense team members employed by institutional defender offices should be funded for such training. Attorneys on an appointment or conflict panel should be provided such training at government expense if necessary to maintain a pool of qualified attorneys and other non-employee professionals are responsible for their own training costs.

V. Standard 2-4(b)(2); (c)(2) – Compensation

The proposed changes add workload to the provisions regarding salary scales. The defender organization attorneys and non-attorneys pay scale should be commensurate with the salary scale *and workload* of the prosecutor's office. If a prosecutor's office has a greater workload; that should be considered in setting comparable pay. It also indicates retained mitigation specialists and experts should be paid in accordance with private sector scales and employed persons should be compensated in accordance with pay scales for other government employees providing similar services. (Mitigation specialist = social worker or equivalent position in government depending upon classification.).

VI. Standard 2-7(a) – Client Relations

The language seemed confusing as there appears to be no reason why defense counsel would be communicating and advising the prosecution on a client's rights. It was represented at the Commission meeting that defense counsel should let prosecution know about representation (sometimes it occurs outside of court) and that there are occasions when defense counsel is concerned that prosecution agents may be acting in contravention of a client's rights. The rephrasing was done to add clarification.

VII. Standard 2-9(a) – Investigation

The suggested change is to substitute the word "appropriate" for "thorough." The current language suggests that counsel investigate everything exhaustively regardless of any client communications or evidence. The purpose of this section, according to the ABA Commentary, was to address those situations where counsel does nothing simply because a client says the facts as alleged by the prosecution are correct or indicates no mitigation is to be presented. Case law makes it clear that counsel has a duty to do sufficient investigation in order to have enough information to properly advise the client and allow the client to make informed decisions. This includes decisions regarding mitigation evidence. Wiggins v. Smith, 539 U.S. 510 (2003) (investigation insufficient to make reasonable decisions about mitigation); Battenfield v. Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001) (failure to investigate affects ability to advise client); Blanco v. Singletary, 943 F.2d 1477, 1501-03) (insufficient investigation impairs client's ability to make informed decision.) However these cases do not require counsel to explore and investigate every possible issue or avenue regardless of the evidence or client information. Thus the word "appropriate" more accurately reflects the law in this area.

To the extent the word "thorough" is intended to reflect the difference between the need for more extensive investigation in capital versus non-capital

cases, then the language of the preamble together with a statement by the Court to this affect may eliminate the issue and render the change unnecessary.

VIII. Collateral Consequences – Standards 2-11(b); 4-9(e)(2)

The law in Nevada and across the Country does not require counsel to inform clients of collateral consequences of a criminal conviction. Nollette v. State, 118, Nev. 344, 46 P.3d 871 (2002); Barajas v. State, 115 Nev. 440, 991 P.2d 474 (1999). The Minority Report contends any mention in the standards that a criminal defense attorney should consider advising clients about matters outside the expertise of that attorney, is unwise.[3] The Clark County Public Defender agreed with this view in Commission meetings. He does not wish to provide immigration or other services as a part of his office. Robert Langford, a conflict contract attorney indicated that such services are not provided in private practice. If he knows his client is not a United States Citizen, then he advises them to consult with an immigration attorney about collateral consequences and before making decisions on a case.

Some Commission members believe this is unfair because an indigent defendant doesn't have the resources to pay for such consultations and therefore they should be provided at government expense. Again this is a decision for the Legislative and Executive Branches. While the Minority Report indicates all language referencing collateral consequences should be stricken, alternative language is proposed below mirroring the practice followed by the private sector. Similar strike-outs and additions would be made to any standard mentioning "collateral" or "other" consequences.

> **(b)** Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, , and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:

Deleted: the possible collateral consequences

[3] This issue was discussed in depth at the April 23rd Commission meeting and does reflect the views of the individuals who dissented on the motion and may be the view of a majority of Commission members.

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser-included or alternative offenses;
2. the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of the client as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole . . .

Deleted: any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and

(c) If counsel is aware of potential collateral consequences of penalties less than death, such as forfeiture of assets, deportation, civil liabilities, etc., counsel should inform the client of the potential for collateral consequences and that counsel cannot advise the client on such issues.

IX. Agreements Regarding Custodial Status

The Minority Report proposes adding language that notes that agreements or recommendations by a defendant, prosecutor or judge on confinement conditions and correctional facilities are subject to applicable law. Where not expressly permitted by law, they should not be part of negotiations because a defendant will always argue that he or she thought the suggestion would have meaning when, in reality, these are only suggestions and have no force and effect. Thus they should only come into play where they have actual meaning.

X. Standard 2-19(d) – Post-Conviction Duties

Add "where appropriate" to the provision discussing post-conviction counsel's duties regarding filing petitions for writs of certiorari in the United States Supreme Court. The preamble may eliminate the need for this language since it clarifies that whether to take an action is to be decided on a case-by-case basis.

XI. Standard 3-1 – Appellate Counsel

The current language requires trial counsel to advise a client of a right to appeal in all cases. The proposed change indicates that such advise is to be given only when required by Roe v. Flores-Ortega, 528 U.S. 470 (2000) and Thomas v. State, 115 Nev. 148 (1999). Those cases hold that counsel has a duty to advise the

client of appeal rights whenever a case has gone to trial but in a guilty plea situation, the duty to advise is very limited. On guilty pleas, the duty exists only if the attorney knows of issues that could be raised and would therefore have reason to believe the client would want to raise them or if the attorney learns of information that calls into question the validity of the plea. The language should reflect the actual state of the law.

XII. Standard 3-3(a) and (f) – Issues on Appeal

Subsection (a) talks about investigating claims of error not reflected in the trial record. If they are not a part of the record (either by transcript or an NRAP 9 statement), then they can't be raised on appeal. The Minority Report brings this to the Court's attention because drafters were unable to locate the rationale or comment that might apply to this provision and the Report suggests the provision be deleted as this is not an appropriate duty of appellate counsel.

Subsection (f) indicates that a client must consent to a lawyer's tactical decision not to raise a federal constitutional claim. The Minority Report suggests deleting the client consent provision as it is contrary to law. Appellate counsel are free to make a tactical decision not to raise every conceivable claim so as to focus the appellate courts attention on the claims the lawyer believes have the best chance of success.

XIII. Standard 4-1 – Role of Defense Counsel

Add new subsection that indicates counsel has obligation to pursue agreed-upon disposition. This section is included in the capital case provisions, but not the non-capital felony or misdemeanor cases or juvenile. It should be in all three and it is the understanding of the Minority members that the Majority does not object to this being done.

XIV. Standard 4-4(b) – Initial Client Interview

The Minority Report questions whether the 48 hour time frame is reasonable in all areas of the State and suggests 72 hours. Also, given that this standard applies to all three categories of non-capital cases: felony, gross-misdemeanor and misdemeanor proceedings, the language about confidential setting needs the qualifier "whenever possible" to incorporate the ability to talk to a client without going to a separate room but in a setting that protects client confidentiality – hallways, in the courtroom away from other prisoners, etc.

The Minority Report also proposes adding a new section dealing with early resolution programs and offers. An attorney should convey any offers or explain the program, its limitations – i.e. lack of investigation, discovery, and benefits – i.e. as the State investigates it may learn information that would cause the offer to be withdrawn or it may lapse with the passage of time.

XV. Standard 4-5(c) – Pretrial Release

The standard talks about explaining to third parties the options, procedures and risks in posting security. The proposed change deletes the reference to third parties. The duty is to the client and the attorney cannot advise third parties. The potential for conflicts to develop in violation of the Nevada rules of professional conduct is very real. An attorney is trying to arrange bail for a client the attorney has reason to believe is not reliable. If the attorney is talking to a third party who wishes to post that bail, it is not in the client's best interest to tell the person about the risks.

XVI. Non-capital Investigation

In the non-capital areas, the standards contain language indicating that counsel has a duty to investigate regardless of client admissions or statements, etc. This language appears in various places. The suggested changes add language indicating that the client's admissions, desires and statements may be taken into consideration by counsel when determining the scope of the investigation. Also,

for the same reasons cited above in Section VII of this report, the word "thorough" has been replace with "appropriate" when referring to investigations.

XVII. Standard 4-9(b) – Plea Negotiations

The proposed language addresses the role of early case resolution programs in negotiations. It indicates counsel should explore resolutions under such programs and when conveying any offer, explain the investigations or legal challenges that would be abandoned upon accepting an offer. It is the Minority members' understanding that the Majority does not oppose this change.

XVIII. Standard 4-14(a)

Subsection (a) is duplicative of Standard 4-12. Suggest deleting duplicate language.

CONCLUSION

The suggested changes incorporate the input and discussions of various Commission members from various backgrounds. Because the proposals were worthy of additional discussion or work within a subcommittee, a number of those members voted "no" on the motion to approve no additional changes to the Standards. Thus the Minority Report serves to bring these issues and concerns to the Court's attention and is not an expression of a view on each of the issue by every member who voted against the motion. We hope the Court finds it helpful in your deliberations.

Respectfully submitted

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