ADKT 411

FILED

JUN 30 2008

CLERK OF SUPREME COURT
BY CHIEF DEPUTY CLERK

COMMENTS RE: DISPUTED/UNDISPUTED ISSUES PERFORMANCE STANDARDS

June 30, 2008

Undisputed Amendments to the Performance Standards

Following the May 30, 2008 meeting of the Indigent Defense Commission, a new draft of the Nevada Indigent Defense Standards of Performance was filed with the court containing a substantially amended Preamble and several other changes. The Minority Report and accompanying suggested edits of the Performance Standards suggest a number of changes to the Standards. Since its filing, agreements have been reached by the majority and minority voters on many of the suggested amendments. Those agreements are reflected in the attached exhibits. Following is a summary of the agreed amendments (minor style and language changes are not listed here):

- Salaries of Attorneys, Staff and Experts of Institutional Defenders: Delete-Compensation of the attorneys and staff of institutional Defenders should be left to the budgeting process of the funding entity.
- Addition of language limiting recommended conduct by law, statute or ethical requirements. Agreements were reached that the amendments identified in the attached exhibits could be inserted.
- Appeals: Obligation to file Notice of Appeal-agreement reached that this obligation is triggered when the defendant instructs the attorney to take an appeal, regardless of its merit.
- Obligation to pursue resolution: provision of capital standards setting forth this obligation is duplicated in Felony and Misdemeanor Standards.
- It was agreed that although the duty to investigate exists despite admissions of guilt by the client, the scope of investigations may be limited by admissions.
- Disadvantages of pleading guilty: An agreement was reached that the client should be advised of the matters (further investigation, legal challenges) that will be abandoned if a plea offer is accepted.
- Advice re: Parole Eligibility: It was agreed that, in addition to other sentencing matters, the client should be advised of statutory and regulatory limitations on parole.
- Reciprocal Discovery Obligations: It was agreed that references to reciprocal discovery obligations should be deleted.
- Appeals: Standard 3-2(b) should be modified to reflect that appellate counsel is obligated to investigate unpreserved claims of error.
- Tactical Decisions to not raise Federal Constitutional Claims should not require client assent.

08-33191

Response to Minority Report: Unresolved Issues

Modifying Adjectives: "Quality/High Quality/Competent/Thorough/Appropriate

The Standards employ certain adjectives to describe how certain tasks of the defense function are to be carried out. In the Standards applicable to the defense of capital cases, the Minority Report suggests that the terms "quality" and "high quality" should be replaced by "competent." Similarly, the Minority Report suggests that the term "thorough" when it is used to modify "investigation" should be changed to "appropriate." The proposed changes would seem to have the effect of reducing the performance Standards to the minimum required by the constitutional guarantee of effective assistance of counsel. This is not the goal of the performance Standards.

The performance standards, like other standards relating to the conduct of attorneys, are "rules of reason," Nev. R. Prof. Conduct 1.0A(a). An interpretation of the "quality" and "high quality" terminology that would mandate unnecessary expenditure of time and resources, to provide services that could be obtained by a defendant with unlimited financial resources, would not be a reasonable interpretation of the language of the standards.

The purpose of caseload and performance standards is to improve the general quality of representation, which is not the purpose of the Sixth Amendment guarantee of effective assistance of counsel. The Supreme Court in Strickland, makes this distinction clear:

> "The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial."

Strickland v. Washington, 466 U.S. 668, 689 (1984).

The Nevada Supreme Court is responsible for regulating the practice of attorneys in Nevada. Nev. Sup. Ct. Rule 39 ("the government of the legal profession is a judicial function"). Adoption of rules imposing performance standards for counsel is well within the Court's inherent powers to promulgate rules regulating criminal practice. See id. There is no basis for contending that the Nevada Supreme Court cannot adopt performance standards in capital or other criminal cases that require counsel to perform better than the bare minimum required by the federal constitution. The rules of professional conduct for instance are rife with provisions that are not constitutionally mandated. E.g., Nev. R. Prof. Conduct 1.4(c), 1.14, 1.15, 1.17, 3.6, 4.4, 5.1, 5.4, 6.1, 6.2, 7.2, 8.3. The rules of professional conduct provide that the violation of a rule does not

necessarily give rise to a cause of action nor does it "create any presumption. . . that a legal duty has been breached." Nev. R. Prof. Conduct 1.0A(d). The performance standards similarly provide that a failure to comply with the standards "does not, in and of itself constitute ineffective assistance of counsel," Standard 1(d), and this principle is consistent with current law,[1] by elevating the standard of practice to the point where ineffective assistance will be less likely to occur.[2]

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[1] See, e.g., United States v. Cronic, 466 U.S. 648, 663, 666(1984) (finding of ineffective assistance cannot be inferred from abstract factors such as counsel's inexperience, complexity of case or inadequate time for investigation or preparation, but must focus on "special errors made by trial counsel"); Schriro v. Landrigan, 127 S.Ct. 1933, 1941-1962 (2007) (defense counsel's failure to present mitigating evidence at penalty phase not IAC where defendant instructed counsel not to present mitigation); Bell v. Cone, 535 U.S. 685, 701-702 (2002) (waiver of final argument in penalty phase not ineffective, where waiver prevented more persuasive prosecuting attorney from giving final argument for state); LaGrand v. Stewart, 133 F.3d 1253, 1274 (9th Cir. 1998) (failure of defense counsel to personally interview prospective witnesses, and failure to call them because he believed their testimony would be cumulative, not IAC); cf., e.g., Harris v. Bell, 417 F.3d 631, 638 (6th Cir. 2005) (failure to investigate because counsel does not think it would help found ineffective as "abdication of advocacy"). A successful claim of ineffective assistance of counsel also requires a showing of prejudice, which is not satisfied merely by showing that counsel acted unreasonably. See, e.g., Tanner v. McDaniel, 493 F.3d 1135, 1144 (9th Cir. 2007) (counsel ineffective for failing to discuss filing appeal with defendant, but potential claims frivolous so deficient performance harmless); Evans v. State, 946 S.2d 1, 12 (Fla. 2006) (no evidence failure to appoint second counsel prejudiced defendant); Torres v. State, 120 P.3d 1184, 1189 (Okla. Crim. 2005); Harlow v. State, 105 P.3d at 1070-1071 (no ineffective assistance in failure to raise meritless issues); Mitchell v. State, 971 P.2d 727, 733 (Idaho 1998).

[2] Experience has shown that relying on the litigation of individual cases to enforce constitutional minimum of effective assistance of counsel does not generally result in improving the quality of capital representation overall. The United States Supreme Court has repeatedly had to reverse capital sentences because trial counsel stopped investigating mitigation at issues at a point which they apparently believed was "appropriate," but which resulted in the failure to find readily available mitigation evidence. See Rompilla v. Beard, 545 U.S. 374, 382-385 (2005); Wiggins v. Smith, 539 U.S. 510, 523-524 (2003); Williams v. Taylor, 529 U.S. 362, 396 (2000); Wilson v. State, 105 Nev. 110, 113-115, 771 P.2d 583, 584-585 (1989). In fact, in Taylor the Supreme Court itself emphasized counsel's obligation "to conduct a thorough investigation of the defendant's background." Williams, 529 U.S. at 396 (emphasis supplied), citing 1 ABA Standards for Criminal Justice 4-4.1, Commentary at 4-55 (2d ed. 1980); Strickland v. Washington, 466 U.S. 668, 690-691 (1984) (counsel's strategic choices "virtually unchallengeable" if "made after thorough investigation of facts and law" (emphasis supplied).) Moreover, experience has shown that thorough investigation of guilt issues should not necessarily be bypassed even when the defendant has confessed: the Department of Justice's Report on DNA exonerations includes many cases in which defendant

All of these considerations militate against "watering down" the language of the performance standards, which sends precisely the wrong message to the public and to the Bar.

Support Services in Capital Cases

The Minority Report objects to those Standards which provide that in addition to two qualified counsel, the "defense team" "should consist of an investigator, and a mitigation specialist" and at least one member qualified to screen for mental health issues. The Minority Report suggests that the Standard should be reduced to the minimal constitutional requirement. As discussed above, the Performance Standards are not intended to enforce only minimum constitutional standards but to improve the quality of defense representation. Experience has shown that the ancillary services provided for in Standard 2-1(a),(b)(1)(A) are those normally required in capital cases, in which mitigation investigation, and examination of mental health issues, are practically universal, using the services of such professionals is part of the thorough investigation which is necessary in every capital case to allow counsel to make fully-informed strategic and tactical decisions and to advise the client adequately.

Additionally, the Minority Report suggests eliminating Standard 2-1(b)(2) which provides that similar services should be provided to appointed counsel not a part of an institutional Defender office. Once a defendant has established indigence, whether as an initial matter, or in the course of the proceedings, the state is required to provide ancillary services, Widdis v. District Court, 114 Nev. 1224, 1229, 968 P.2d 1165, 1168 (1998), and providing those services through reappointing authority is consistent with the other provisions relating to the appointment power. The same principle should apply to the provision of training both to institutional defenders and their staffs, and to private counsel and the providers of ancillary services to them. Thus Standard 2-3(a) should also not be altered.

Appointment of Independent Experts

Standard 2-1(b)(1)(B) and (C) contain language insuring that indigent defendants are able to secure the services of expert and other services that are independent and confidential. In other words, an indigent defendant should not be required to employ

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confessed but was latter found not to be the culprit. U.S. Dep't of Justice, Nat'l Institute of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial 15-17 (1996).

experts who are not employed or otherwise beholden to the government. This section should remain. This section is directed toward the services provided to the defense and does not affect properly ordered competency examinations, for instance, which are not services as part of the defense function.

Removal of Appointed Counsel in a Capital Case

The Minority Report argues that the appointing agency should not have the power to remove appointed counsel from a pending case. Minority Report at 5-6; Standard 2-2(c). This standard should not be altered on this point. If the appointing authority receives information, by complaints from the client, co-counsel, or other, or from observation of counsel's performance, that counsel is not performing adequately, the appointing authority should have the power "to take appropriate action," including removing counsel from the case. Notice should be provided before any such action is taken, and Standard 2-2(c)(4) should be modified to provide: "Before taking final action making an attorney or defender office ineligible to receive additional appointments, or removing counsel from a case. . . ."

As noted above, the performance standards are "rules of reason," and nothing in this section is intended to allow the appointing authority to "micro-manage" the litigation of a capital case. Other provisions of ADKT 411 protect the independence of the defense attorney, including creation of Selection Committees in urban court systems through the Model Plan for Assigned Counsel.

Advice of Collateral Consequences

The Minority Report recommends that any language in either the capital case standards or the felony/misdemeanor standards which obligates defense counsel to advise a client on "collateral consequences" of a conviction or plea should be deleted.

In a capital case, counsel should be prepared to advise the client of collateral consequences of potential penalties less than death. Those collateral consequences may include deportation, forfeiture, civil liability and use of a conviction in other proceedings. An indigent client should be informed of all relevant considerations involved in a negotiated disposition, and counsel in a capital case should be expected to have, or develop, the expertise necessary to do so.

In non-capital cases, the primary concern of those seeking to delete any obligation to inform the client of collateral consequences appears to be that the Standard may require counsel to advise the client in an area in which he/she has no expertise. First, a

reasonable reading of the Standard would be that counsel is required to recognize issues which may result in a collateral consequence and insure that the client is fully informed before deciding what course of action to take. An indigent defendant is entitled to be fully informed of all consequences of the course of action he selects.

Duty to Advise of Right to Appeal

Standard 3-1 provides that trial counsel "must[3] advise the client of his or her right to appeal and any limits on that right." The Minority Report recommends that this obligation be limited only to those circumstances in which counsel would be deemed ineffective for failing to advise of the right to appeal. Again, the Performance Standards are designed to improve the quality of performance of indigent defense counsel and to enhance the services provided to indigent defendants. The Preamble advises that the Standards are not intended to create new substantive or procedural rights. In the interests of reducing post-conviction litigation, the language of this Standard should not be changed.[4]

Early Case Resolution

Reference to "early case resolution" programs should not be included in the Performance Standards. The Performance Standards do not preclude "fast track" or "early case resolution" treatment of cases as long as counsel can comply with the Standards in carrying out his/her ethical responsibilities. If, for instance, a program prevents confidential and informed advice to the client, the creation of an attorney-client relationship or such a lack of information about a case that counsel cannot meaningfully consult with a client, then counsel may not ethically stand by while a client enters a plea of guilty. Nevada Rules of Professional Conduct 1.2(a); 1.4. On the other hand, if an expedited resolution program is designed which will permit counsel to abide by the Rules of Professional Conduct and the Performance Standards, then it can be implemented without suggesting that the Standards may be avoided or diluted based upon fiscal considerations.

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[3]These comments do not object to changing "must" to "should" as suggested by the Minority Report.

[4]The Federal courts advise all defendants of the right to appeal at the time of sentencing, even if that right is severely curtailed when the defendant has pleaded guilty. See F.R.Crim.P. 32(j).

MEMORANDUM

Date: June 26, 2008
To: DDA Nancy Becker
From: Franny Forsman
Re: Potential Agreements on Edits to Performance Standards

Following are proposals for an agreement as to the edits to the Performance Standards which you have drafted on behalf of the minority voters:

Numbering:

The Performance Standards which have been filed with the court adopted your suggested system which we agree will be easier to reference.

Standard 2-4: Salaries of Defender staff and experts:

_____While the ABA built in salary parity in the Model, rather than complicating the issue with assessments of workload and comparable pay for County employees, we suggest that the following Standards simply be deleted and that those matters be left to negotiations with appropriate County entities: 2-4(b)(2); 2-4(c)(1) and (2). With those changes and for the same reasons, we do not agree that 2-4(c)(3) should be amended to limit the authority of the Public Defender in retaining experts and should be left to the budgeting process.

Standard 2-7(a)(3) and (4):

_____We agree to your amendment (a)(3) and that in (a)(4)-- it makes the sentences make sense.

Standard 2-11(b)(8)(C):

_____We agree to the amendment; applicable law would, of course, limit any concessions that can be made.

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Standard 2-11(b)(9)(G):

_____We agree to the amendment. See above.

Standard 2-13: "Mandated vs. Discussed"

_____We agree that "mandated" can be deleted, however, we suggest that the phrase "addressed in" be used instead of "discussed in."

Standard 2-15(l):

_____We agree that "While taking into consideration all ethical and legal requirements" can be added to the obligation of counsel to argue against death as a penalty at all opportunities.

Standard 2-18(b):

_____We agree to the amendment. See above.

Standard 3-1: Appeal against advice of counsel and compliance with NRAP

_____We agree to the amendment deleting "chooses" and adding "instructs the attorney" and to the addition at the end of that sentence requiring compliance with NRAP. We do not agree with the remaining suggested amendments.

Standard 4-1: Obligation to pursue resolution

_____The Standards filed with the court include this amendment duplicating the obligation set forth in Standard 2-11(a).

Standard 4-5(a): Information re: Release

_____I think the concern with the original language was that it might suggest an ex parte contact with the court. Rather than requiring counsel to present information to opposing

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counsel (which could mean an obligation for some kind of pre-hearing disclosure), we suggest that the sentence read, "present information about the client's circumstances and the legal criteria supporting release." (Deleting who it is presented to since it is obvious that the information would be presented at a bail hearing).

Standard 4-6(b)(5): Limitations on Discovery at Prelim.

_____We agree with the amendment to this provision.

Standard 4-7(a): Investigation regardless of Admissions

_____We agree with the amendment to this provision.

Standard 4-8(c): Pretrial writs

_____We agree with the amendment to this provision.

Standard 4-9(b)(4): Advice to client re: disadvantages of pleading

_____We agree with the amendment to this provision.

Standard 4-9(c)(2): Negotiation of Place of Confinement

_____We agree with the amendment adding, "if permitted by case law or statute..."

Standard 4-17(a): Advice re: Parole

_____The most recent version of the Standards filed with the court provides, "inform the client of the applicable sentencing requirements, options, and alternatives, including any regulations governing parole eligibility." We agree that the statutory minimum should also be the subject of advice at this stage. We suggest that the sentence read, "inform the client of the applicable sentencing requirements, options, and alternatives, including any applicable regulations and statutory minimum requirements concerning parole eligibility."

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Standard 4-20(b): Appeals-"wishes" to "instructs counsel"

_____We agree that the last sentence of this provision should be amended to read, "If the client instructs counsel to appeal...." rather than "If the client wishes to appeal..." We do not agree with the other suggested changes to this section.

Standard 5-7: Impact of Admissions on Investigation

_____We agree that the introductory paragraph may be amended to allow consideration of admissions by the client in determining the scope of the investigation.

Standard 5-7(l): Reciprocal Discovery Awareness in Juvenile Cases

_____We have not agreed that your proposed new subsection (h) to Standard 4-8 (Pretrial Motions and Writs) should be added. The issue of reciprocal discovery simply is not relevant to Standards focused on improving the quality of representation of indigent defendants, this provision in the Standards governing juvenile cases should be deleted for the same reason.

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MEMORANDUM

Date: June 27, 2008
To: Nancy Becker
From: Franny Forsman
Re: Additional Agreements

Following is my recall of the additional agreements which we reached this morning:

Standard 2-2(a)(1): Qualifications of Capital Defense Counsel

_____We have agreed that the language of this subsection should read: "Consistent with Rules of the Supreme Court of Nevada, the appointing authority..."

Standard 2-4: Salaries of Attorneys, Staff and Experts of Institutional Defenders

_____You agreed that Standards 2-4(b)(2); 2-4(c)(1) and (2) should simply be deleted from the Standards.

Standard 2-13:

_____You agreed to the language change proposed in my June 26. 2008 Memo.

Standard 3-2(b): Unpreserved Claims

_____We have agreed that b) should read in full: "investigate potentially meritorious but unpreserved claims of error."

Standard 3-2(f): federal constitutional claims:

_____I agreed that your edit deleting "and the client assents." should stand. The tactical decision not to bring a claim should rest with the attorneys and does not require client assent especially in light of the standard addressing the obligation to inform the client if counsel decides not to raise an issue.

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Standard 4-5(a): Information re: Release

_____You agreed to the language suggested in my June 26, 2008 Memo.

Standard 4-8(h): Reciprocal Discovery

_____You agreed that your proposed new section (h) regarding awareness of reciprocal discovery obligations should not be added to the Standards. I agreed that a similar provision in the Juvenile standards should be deleted. See below.

Standard 4-14(a): Consultation with client re: defense strategy

_____I agreed that your edit deleting this section should stand. This section is a duplication of the same language which is contained in Standard 4-12.

Standard 4-17(a): Advice re: Parole eligibility

_____You agreed to the proposed language for this section in my June 26, 2008 Memo to you.

Standard 5-7(l): Reciprocal Discovery/Juvenile:

I agreed that this section should be deleted. See 4-8(h) above. We agreed that the issue of reciprocal discovery obligations is not an issue necessary to address in the Performance Standards.

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