

AUG 04 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
CHIEF DEPUTY CLERKMEMORANDUM

Date: August 3, 2009
 To: Indigent Defense Commission, Justices of the Nevada Supreme Court
 From: Franny Forsman
 Re: Implementation of Performance Standards-ADKT 411

Some have contended that the Performance Standards as originally adopted on January 4, 2008 were radically transformed by the language adopted by the Supreme Court on October 16, 2008. The contention is that the Performance Standards were “mandatory” prior to the amendment and are now “discretionary.” The position taken by one District Attorney is that the term “discretionary” means that the Standards can be implemented or ignored by any attorney or indigent defense program based upon need for “timely resolution” or lack of resources. This Memo seeks to demonstrate that the Performance Standards adopted by the Supreme Court of Nevada are intended to apply to all attorneys and programs providing indigent defense services and that individual attorneys or programs must comply with the Standards except to the extent that case-specific circumstances call for tactical adjustments. Those adjustments cannot be made based upon a desire for speedier resolutions or due to a lack of resources. In other words, the Standards are ethical norms, a measurement of reasonableness applicable to all indigent defense counsel, not aspirational goals or “discretionary” considerations.¹

The Preamble to the Performance Standards

The current version of the Preamble was the result of negotiations between the District Attorneys represented by Nancy Becker and the defense bar represented by Franny Forsman. The agreed language was originally presented to the Indigent Defense Commission held on May 30, 2008. The preamble, the negotiations and the resulting language resulted from two expressed concerns: 1) That the Standards not create a presumption of ineffectiveness; and 2) That the

¹The work of the Nevada Supreme Court was recently noted favorably as being unique in having developed “a vigorous process to monitor and strictly enforce compliance with performance standards” in indigent criminal defense. See *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel*, Report of the National Right to Counsel Committee of the Constitution Project, April 2009, p. 35, n. 79. (The Committee is chaired by Walter Mondale and William S. Sessions and members include, *inter alia*, Judges, Professors, Deans, a former Dep. Attorney General, a former police officer, a Probation Officer, a State court representative, and one of Clarence Gideon’s lawyers).

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Standards allow for individual attorney flexibility in representing clients. Language to meet these concerns was drafted with the understanding by all parties that if the Standards were adopted by the Supreme Court, all attorneys providing representation to indigent defendants would be subject to the Standards.

Language from the Preamble

The Preamble in section (d) sets forth language which deals with the first expressed concern by explicitly stating that the Standards were not intended a) as criteria to determine the validity of a conviction; b) establish a *per se* violation of the right to effective representation of counsel; c) to create substantive or procedural rights; d) to expand, overrule or extend decisions of the U.S. Supreme Court regarding the standard for constitutional effective assistance of counsel.

The Preamble in section (c) deals with the concern that individual attorneys have flexibility in representing their clients. It provides:

Every attorney who defends persons accused of crime shall be familiar with these standards. The steps covered in these standards are not to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. The standards recognize that the representation of criminal defendants is a difficult and complex responsibility. Attorneys must have the flexibility to choose a standard and course of action that ethically "fits" the case, the client and the court proceeding.

The remaining language in the Preamble makes it clear that the Standards are intended to apply to all attorneys and all indigent defense programs providing services to indigent defendants:

(a) These performance standards are designed to improve the quality of criminal defense representation in Nevada and provide **objective guidelines** for the allocation of resources for indigent defense.

(b) These standards are intended to serve as a **guide for attorney performance** in criminal cases...

(d) These standards are intended to facilitate the efficient and effective operation of indigent and other criminal defense programs and **are to be used as a guide to professional conduct and performance.**

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Other Indicators of Intent

The Supreme Court, when it adopted the final version of the Performance Standards, recognized that the Standards were far more than aspirational goals or “discretionary” considerations when it allowed an additional 5.5 months for the implementation of the Standards even though the Standards were originally adopted 8 months earlier. The intent of the court is reflected in Justice Maupin’s concurrence addressing the additional time accorded for implementation to allow “providers of indigent defense services ample time to adjust to the impact of today’s order.” Were the Standards merely aspirational goals, the impact would not require additional time for adjustment.

The counties knew that the Standards were mandatory when they sought additional time for their implementation. Although the County Managers of both Washoe and Clark County sought far more time to implement the Standards, the court granted an extension to July 1, 2009 only. Implementation of aspirational goals would not require the time sought by the counties, nor would the court have been inclined to extend the time had it not been clear that the Standards required a change in the way that services were rendered.

The ABA Standards

The ABA has adopted 18 sets of standards over the years since the implementation of the Criminal Justice Standards Project by the ABA in 1964. The standards address all aspects of the criminal justice system from the prosecution function, the defense function to the handling of DNA. The ABA Standards are meant as a model and have been cited in over 700 opinions by federal circuit courts and over 2400 state supreme court opinions. Marcus, Martin, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, Criminal Justice, Vol 23, No. 4, Winter, 2009 (a publication of the American Bar Association).

The ABA specifically encourages courts having rule-making authority to use the Standards in adoption or reform efforts. Arn, Lauren A., *Implementation of the ABA Standards for Criminal Justice: A Progress Report*, 12 Am.Crim.L.Rev. 477, 478 (1974). That is what the Nevada Supreme Court has done in adopting the Performance Standards in ADKT 411.

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The United States Supreme Court has described the ABA Standards as reflecting “prevailing norms of practice” and “guides to determining what is reasonable.” Strickland v. Washington, 466 U.S. 668, 688 (1984).²

Nevada’s Performance Standards

The Nevada Supreme Court has been recognized nationally for its firm and comprehensive response to the crisis in indigent defense. See footnote 1 above. Nevada should be proud of this recognition as other states (including Nevada at the time) have failed at any attempts to tackle the problem. See American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice*, December 2004,.

The Attorney General of the United States recently released remarks addressing crime and the crisis in indigent defense and said, “resources for public defender programs lag far behind other justice system programs...,” “[w]e know that defenders in many jurisdictions carry huge caseloads that make it difficult for them to fulfill their legal and ethical responsibilities to their clients...,” “[w]e hear of lawyers who cannot interview their clients properly, file appropriate motions, conduct fact investigations, or do many other things an attorney should be able to do as a matter of course.” The Attorney General has committed to “hosting a national conference with the goal of developing a set of best practices and practical solutions.”³

The adoption of Nevada’s Performance Standards is likely to be a significant topic in any national conversation about best practices.

²The Supreme Court has not held that the ABA Standards create a constitutional requirement. The Preamble to the Performance Standards in ADKT 411 recognizes the same distinction.

³*Remarks as Prepared for Delivery by Attorney General Eric Holder at the Vera Institute of Justice’s Third Annual Justice Address, July 9, 2009.*

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Castillo, Linda

From: McCormick, John
Sent: Tuesday, August 04, 2009 9:16 AM
To: All Chambers; Lindeman, Tracie; Cummings, Harriet; Castillo, Linda; Sweet, Robin; Heying, Stephanie; Titus, Ron; Gang, Bill
Subject: Memo from Franny Forsman re: Performance Standards
Attachments: 08 03 09 Memo to IDC perf st.pdf

Good Morning,

Attached please find a memo from Franny Forsman regarding the applicability and implementation of the Indigent Defense Performance Standards.

This memo will also be distributed to the members of the IDC for tomorrow's meeting.

Thanks,
John



08 03 09 Memo to
IDC perf st.p...

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