

Steve Sisolak
Governor



Marcie Ryba
Executive Director

Jarrold Hickman
Deputy Director

**STATE OF NEVADA
DEPARTMENT OF INDIGENT DEFENSE SERVICES**

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PUBLIC MEETING NOTICE AND AGENDA

Date and Time: January 29, 2020, 1:00 PM

Location: Capital Building
101 North Carson Street
Old Assembly Chambers
Carson City, Nevada 89701

Video Conference Location: Grant Sawyer Building
555 E. Washington Avenue, Ste. 4406
Las Vegas, Nevada 89101

MINUTES

Board Members Present:

Mayor Robert Crowell
Professor Anne Traum
Laura Fitzsimmons
Rob Telles
Julie Cavanaugh-Bill
Joni Eastley
Lorinda Wichman
Jeff Wells
Drew Christensen
Kate Thomas

Others Present:

Director Marcie Ryba
Jarrod Hickman
Craig Newby
Dave Mendiola
Sophia Long
Franny Forsman

1. Call to Order / Roll Call

The Chairman called the meeting of the Department of Indigent Services Executive Board to order a little after 1:00 PM on Wednesday, January 30, 2019.

Ms. Atanazio conducted a roll call. **Quorum was established.**

2. Public Comment (The first public comment is limited to comments on items on the agenda. No action may be taken upon a matter raised under public comment period unless the matter itself has been specifically included on an agenda as an action item. The Chair of the Board will impose a time limit of three minutes).

There were no public comments from either North or South.

3. Approval of the December 19, 2019 Minutes (For possible action)

Motion: Approve December 19, 2019 Minutes with no corrections.
By: Lorinda Wichman
Second: Laura Fitzsimmons
Vote: Passed unanimously

4. Attorney-client discussion of potential and/or existing litigation. (pursuant to NRS 241,015(3)(b)(2), DIDS may go into Closed Session to receive information over which the public body has supervision, control, jurisdiction or advisory power.)

a. Conference with Legal Counsel – Pending Litigation. Attorney: Craig Newby, Deputy Solicitor General, Attorney General.

Chairman Crowell took a motion to go into closed session.

Motion: Pursuant to NRS 241.015, Section 3, Sub B2 that the meeting go into closed session to receive information from Deputy Solicitor General Craig Newby
By: Drew Christensen
Second: Jeff Wells
Vote: Passed unanimously

5. Report from the Executive Director of the Department of Indigent Defense Service (For possible action)

- Discussion on Matters to Bring before IFC (for possible action)

- Proposal to give authority to Executive Director to request funds to provide investigators, social workers, a research director, expert fees, a software reporting system etc. for all rural indigent defense attorneys.
 - Contingency Fund update
- Update on Organization Chart; obtained a P card; website: dids.nv.gov; working with UNLV students.
- AB81 codified into NRS 180.300, et seq.
- Proposal of Procedure to Receive Complaints and Recommendations (For Possible Action)
 - Propose the form through the DIDS Website as the procedure to receive complaints and recommendations: https://hal.nv.gov/form/DIDS_Complaint/Complaint_or_Recommendation_Form
 - Discuss Internal Operating Procedure for Complaints and Recommendations
 - Propose the Resolution Form
- Presentation of RFI for weighted caseload study (For Possible Action)
- Approve Travel Policy (For Possible Action)
- Proposal for Standards on: Vertical Representation; Data Collection; Attorney Qualifications; Attorney Training; Prompt Appointment and First Appearance Representation (For Possible Action)
- Recommendation that the State Public Defender's Office should handle death penalty cases and appeals in the rural counties, except that counties may provide counsel on a non-contract fee basis (For Possible Action)
- Update from Attorney General on Work Group Question – Can be 1-2 Board Members (For Possible Action)
- Work Group Update – Establish Formula for maximum amount paid by the Counties. (For Possible Action)
 - Review County Costs.
 - Proposed Standard: The maximum amount that a county will be required to pay for the provision of indigent defense services shall not exceed that county's actual costs to provide indigent defense services for the average of fiscal

year 2018 and fiscal year 2019 minus any expenses related to capital and murder cases for those years plus, for each subsequent year, the percentage equal to the lesser of: a) the cost of inflation (measured by west region consumer price index); and/or b) the union negotiated cost of living increase for employees for that county.

- Proposal for Future Agenda Items (For Possible Action)

Motion: To bring the meeting back into open session
By: Drew Christensen
Second: Jeff Wells
Vote: Passed unanimously

Mr. Jonathon Kirshbaum presented out of order.

Marcie Ryba presented an update on the contingency fund. The contingency fund has \$4.7M in it, and the Tort Claim Fund has \$6.9M in it. Marcie Ryba asked for a motion to be given authority to request funds from the IFC to provide investigators and expert witnesses for the rural counties immediately, or as soon as we can get relief, possibly within the next year, to provide them immediate access to these experts. So I would ask for authority to provide resources to the rurals.

Chairman Crowell noted that this is a touchy subject because normally there would be a board meeting before doing anything in front of the IFC; however, there are time constraints and it's in the interest of the plaintiff folks to keep this moving along.

Professor Anne Traum questioned whether the motion would need more structure. Sophia Long noted that it's whatever the Board feels comfortable with.

Mr. Dave Mendiola added that immediate relief is being sought. What is the definition of immediate? The only relief you can give up immediately here is to set up a system to address the current needs out in the rural communities.

Professor Anne Traum noted the new requirements for trials in Domestic Violence cases in the rurals is hitting them hard.

Motion: To give Marcie Ryba authority to seek funds from the IFC.
By: Lorinda Wichman
Second: Julie Cavanagh-Bill
Vote: Passed unanimously

Marcie Ryba moved on to the update on the Organization Chart and stated, I sent out the organization chart because there were requested changes to be made at the last time which is in the attachment that I provided. AB 81 has been codified into NRS 180, so I

provided everyone with a copy of that. We were advised to let everyone know we obtained P cards. We can start making purchases for the office.

We've created a website which I'm trying to link to here. While I'm doing that, the building right there that you can see if where we're going to be moving into. We have a website of bids.nv.gov so that's been set up. One of the things is that we've been going out trying to let people know that we have a website. Our new address is going to be 896 West Nye, Suite 202.

We've recently hired the Deputy Director, Patrick McGinnis. He starts in February. We've also hired an Administrative Assistant II who starts next week, so by the time that we move into the office we may not have furniture, but we're going to have people that can go there.

One thing to move on to next is we are required under now NRS 180 to propose a procedure to receive complaints and recommendations. We have provided you an example of a form, and I will be updating the bottom, on the bottom there is a please note regarding that we are subject to Freedom of Information Act. I have talked to Sophia Long and I have received updated information as to what she feels is appropriate to place on the bottom of the form.

I will be changing the bottom of this form and adding the appropriate language, but what I'm going to be asking for today is the Board's approval once I make these changes to place this form in a pdf on our website. I also have an online version. I don't know why it doesn't pop up, but the online version is going to be one that you can fill out and fill it out online. And I provided a link to that when I sent everyone the attachments so that you could link through it.

It's going to be basically similar to this where you place your name, you put who you are, your address, your email, your telephone number, and then you state what your recommendation or your complaint is. Once we receive the complaints, we've proposed an internal operating procedure which I would like this Board to approve or discuss.

And that would be that once we do receive these complaints or recommendations that they be forwarded through our office to our department, that the department makes the determination whether or not this is a statewide system issue or whether or not it's kind of an internal issue maybe with one attorney, a complaint about an attorney.

If it turns out that it's a statewide issue that we'd like to provide it to the Board at the next Board meeting to allow the Board to make the determination as to what they believe is the appropriate way to handle that, however, if it's not a statewide issue then the Department would handle it appropriately possibly by contacting the attorney that is possibly a complaint on and sending that information back to the Board on a quarterly basis.

Something similar to this would be our resolution form that we could provide to the Board if it was not a statewide issue of what we did do with the complaint or the recommendation, so when we provide it on a quarterly basis the Board is kept up to date. So, I would like discussion on that issue.

Ms. Joni Eastley asked whether the FOIA information at the bottom of Page 1 would be replaced. Marcie Ryba stated that the language will read, "Please note, DIDS also strives for government transparency by adhering to the requirements of the Nevada Public Records Law, and the information received on this form may be subject to disclosure pursuant to the Nevada Public Records Act. For more information please see NRS Chapter 239." And I'm planning on providing a link through the website to Chapter 239.

Professor Anne Traum asked, when there's a complaint filed against somebody will they have some protection, privacy protection, along the way in terms of whether before it's been processed or resolved or if it's found not to be substantiated? Would the forms be publicly available when there's an unsubstantiated or incomplete investigation of the client? Sophia Long answered, normally with board and commissions, when they receive complaints from the public, that by statute it is considered confidential until they decide to formally proceed with it, so to formally charge the person. That's specific to boards and commissions. Other than that, when I was looking regarding your complaints, if the Board wants to review complaints, and of course, anything that the Board reviews is a public document anyway.

Professor Anne Traum asked, but how do you keep it confidential until you've gotten to that point? Sophia Long answered, your staff can review it. You can make a policy, however right now there's a law that is on the Board Commission side regarding discipline.

Professor Anne Traum stated, I'm just wondering if we should be mindful of that because if someone lodged a complaint against me, it would be public information that they've complained about me, whether it's a good complaint or whether the Board has done anything or whether the office has done anything.

Jeff Wells agreed with the previous statement and added, I know when we have medical boards that the complaints are held confidential and even when its presented to their board it's done in closed session initially until there's a determination whether it's a private censure or public censure or a suspension, et cetera, et cetera. I recognize we don't have that authority, but if these are not going to be confidential, then I have multiple concerns, not only the concern you're referencing, but a complaint could be filed while a case is still pending. Then we would have confidential disclosures in the middle of our complaints to deal with a case that hasn't even finished all of its appellate processes and such. And so, I actually would move that we hold up on this until we have a much more definitive answer on what we can do to hold these records confidential.

Marcie Ryba noted that one complaint has been received thus far and they are unsure of how to proceed.

Rob Telles asked, they have to print it out, fill it out and then submit it. Is that correct? Marcie Ryba replied, they can either print it out to submit it or there's a click box on the website where you can directly have it submitted that way.

Drew Christensen suggested having a form with a number to reach somebody dedicated to receiving complaints.

Marcie Ryba commented that the complaint received was from a mother whose son is in prison for life. She was directed to email the complaint.

Drew Christensen stated, I think that's some of the kind of complaints that you want to find. Won't you want, as Director, to hear from different forces of the legal community, both administratively through the judiciary, the clients, and so to give everybody an opportunity, whether it's on a systematic complaint or an individual case complaint. I think you'd want to have both those avenues to pursue to seek and verify whether there was any accuracy to that. I also think you may want to consider having this in at least Spanish, if not other languages.

Laura Fitzsimmons agreed and added, one thing I'm concerned about is if for now until we go through the reg process and these are all things, that we're going to need to incorporate into this reg, if I'm somebody's mom and I just filed a complaint and nothing happens, do you think on the website we need to say we're formulating a way to process this?

Marcie Ryba answered, the mother that made the complaint, she did follow-up pretty much the next day to see what the resolution was. We did update her to let her know that the appeal had been filed, so there was likely not much we'd be able to do, but she does plan on calling back is my understanding.

Laura Fitzsimmons asked, once in the office, do you feel that at this point the traffic on this is not going to be unduly burdensome and you can handle things as you did with this mother, or is that going to distract you from all the institutional things you need to have in place? Marcie Ryba answered, I think that at this point we could handle it, and that's why we're proposing that if it's not a systemwide issue we would just kind of give a report of we're received this many complaints, not necessarily disclose what the complaints were specifically, but that we're received this many complaints and we disposed of this many. That's why I have the proposal of not necessarily giving you what the complaint was but keeping that within our office because it was in a system wide. My plan was in this case is to let the attorney know that there has been a complaint but that we are aware that an appeal was filed, and we did make the mother aware of that. But we wanted to talk to the board before we proceeded.

Ms. Joni Eastley asked whether the agency will be accepting anonymous complaints through this system? I realize you're not going to be able to get back to someone. I would think that there would be certain circumstances under which people would want their identity protected. Also, your staff is going to respond to complaints or recommendations that don't implicate system-wide issues. Can you give me an example of what a system-wide issue is? Marcie Ryba answered, my understanding of what a system-wide issue is, not a formal complaint, but just in talking with certain attorneys that

they feel that the process for appointment is possibly unfair, that maybe they're receiving more Category A felonies than others in a certain county. I think that could possibly be a system-wide issue regarding appointment of counsel to cases.

And when we did reach out to other states that have this, they said that the majority of complaints they received are really from attorneys discussing how things are happening in their counties and problems that they're having with the cases that they've been appointed to.

Marcie Ryba added. I believe they'd be able to submit it by placing anonymous in there. There's nothing that say that you have to say what your name is, so you could fill it out as anonymous. But if the Board would like, I could change the form to allow anonymous submissions.

Ms. Julie Cavanaugh-Bill asked, on the question that Anne brought up about the personal identification information, NRS 239.014, would that cover these records because it talks about the confidentiality of personal identification information, name, address, email. Marcie Ryba questioned if Ms. Cavanaugh-Bill was asking about the complaint form. Ms. Julie Cavanaugh-Bill stated, it talks about separating certain portions of the form of the report, so I would think that as a Board we could discuss the substance of what the complaint was but not identify the individual who made the complaint or individuals named in it. Sophia Long answered, the Board can do that. Statutorily, there is specific confidential information such as an individual's Social Security number or home address or phone number. Speaking with the medical board, in order to bring complaints before the medical board, the board does have to approve those complaints, and that is how they bring their complaints is they'll say, we have a medical doctor that has a complaint that he fell below the standard of care because of this, you know, can we investigate. So, if the Board is comfortable with just getting general information regarding the complaints, I mean there's nothing wrong with that.

Motion: To accept the recommendation of Marcie Ryba to use the complaint form with modifications to substitute the language that was recommended by the Executive Director at the bottom of Page 1, and also include a mechanism for filing anonymous complaints. Also, until administrative rules on the confidentiality are established, Marcie Ryba will only report general statistics or a fact pattern that doesn't relate to the name of the case or the name of the attorney or the name of the complainant.

By: Laura Fitzsimmons

Second: Lorinda Wichman

Vote: Passed unanimously

Marcie Ryba stated, one thing that I forgot to do in my update is I wanted to let the Board know that Jarrod and I did have the pleasure to go out to Nye County. We had the opportunity to meet with the County Manager, Tim Sutton, and the Assistant County Manager, Lorina Dellinger. And they were a pleasure to meet with. They discussed with us how they chose their council that is in the contracts, and we had a lengthy conversation with them, so we've started reaching out to meet with certain individuals.

So, I did want to let the Board know that we had our first trip out to the rurals, and it was very successful in our minds.

Marcie Ryba moved on to the presentation of RFI for weighted caseload study and stated, we did move forward to release the caseload study, RFI. The RFI was released on January 3rd, 2020. We were trying to get it out as quickly as possible, and it does have a response deadline of March 6th, 2020. We have not received any responses yet, however, there has been some interest in vendors that will be submitting an RFI to us.

Marcie Ryba moved on to the next agenda item, approve travel policy. Marcie Ryba stated, the next thing that I will be requesting is approval of this Board of the Travel Policy. We are required as a Department to create Travel Policies, and basically how this affects the Board is, we are requesting that you fill out certain forms. Cindy from our office is willing to assist anyone with filling out those forms. We have a very tight budget for travel, and we want to know who's planning on traveling, how much it will cost, so we can keep everyone up to date. I did provide this Travel Policy for discussion to see if this Board would approve and accept this Travel Policy.

Another thing that I would like to know to request from the Board is, we've been advised by our Financial Officer that we are going to be going into building our budget in April. It may be helpful if I have good numbers for how much travel would be if many of you were requesting travel. I know many of you have decided that you will not request funds for certain travel because we're very limited or you'll find alternate means to be able to pay for that.

However, if you could, if this Travel Policy is approved, we would request if some of you could reach out to us and let us know how much the travel would have cost so that we could build it into the budget so in the next budget we'll have sufficient funds for our Board to be able to travel and have that covered.

Ms. Joni Eastley asked whether permission was needed before traveling and whether this included scheduled Board meetings. Marcie Ryba answered, the biggest concern is not necessarily permission, but the biggest concern is keeping track of how much money we have in our budget. If we're getting close to the end of the fiscal year and we don't have much money for travel and won't be able to cover it, then that's something I would like to know beforehand so we can talk about possibly moving money from a different account if we have the ability to do that. So, we don't want any of our Board members to travel and then us not be able to reimburse them for the costs that are associated with that. So, that's really what our concern is protecting the Board members so that they know up front how much money is there and that we have sufficient money to cover it.

Mr. Jeff Wells stated, one of the ideas that I had mentioned last time is I still thought we should have a meeting where everybody is together, and perhaps we could go ahead and schedule one of those kinds of meetings. Clark County will pay for you and I to go so we won't touch into your budget, but we can then share with you afterwards our actual expense sheets that we turn in to Clark County, and then you'll have that number and you

can start projecting forward how many meetings we might have in a year and how often we travel. That would give you a basis for doing something like that. Marcie Ryba answered, yes, that's exactly the information we need so that we can make this accurate because before it was just a guess as to how much would be needed.

Joni Eastly stated, on the face-to-face meeting, I'd be happy to make arrangements to host something in Tonopah. It's right in the center of the state. Nobody has to travel farther than four hours, and there will be no airfare involved.

Ms. Julie Cavanaugh-Bill added, I know on the Board of Governors for the State Bar we make sure that we have one rural meeting a year and I think especially with the focus of this Board on the rural counties it's going to be really important. So, maybe if we can alternate even each year in a different rural setting.

Laura Fitzsimmons stated, I do feel from here, and somebody will scream at me if I'm wrong, our general consensus is at least once a year meeting Tonopah, Elko, wherever, Winnemucca, my favorite town in Nevada, and I think that's important. I do think though looking ahead at timelines that have to do with the submission of regs or the submission of budgets, our Executive Director will see one that kind of fits.

There are certain ones that we're going to need Governor staff and AG staff to attend and our counsel. That may not be the best for Tonopah, but we're going to find a meeting that just makes sense for that, and we can all get our travel vouchers in for that before Marcie Ryba has to go to – you're not going to IFC; that's for the budget.

Motion: To accept the policy as presented
By: Lorinda Wichman
Second: Joni Eastley
Vote: Passed unanimously

Mr. Jarrod Hickman moved on to the Proposal for Standards and stated, a couple of preparatory comments before we launch into this because I think it may kind of dictate how we proceed in terms of talking about the standards today.

The first thing is, in our last Board meeting the Board indicated in terms of deliverables it wanted standards to begin taking action on, and we endeavored to do that within the confines of our staff limitations, our office limitations, and I think we've got five out and five that we've worked hard on. And those have been provided to the Board in our attachment package.

Two concerns we had in terms of what to do next and what we're asking the Board to do today as it relates to the standards. One is we have five, but that's not all. We anticipate another five to seven to be prepared and presented at our next Board meeting. Before we take formal action in moving this toward the regulatory process, it might behoove us to get them altogether to see what it looks like in a final picture.

That way what we're finding as we write these things is that a number of them are inter-related. The difficulties I envision is if we start moving forward on the first five and then

we're looking at the next seven and have to change something there, and would it have an impact on the first five. So, that's one of my concerns. The second concern is that obviously given our staff limitations is we've been preparing these in a vacuum without getting out and really soliciting feedback from other interested parties. And I know the regulatory process will do that with the notice and public comment, and I know that the function of our Board here is to get comment.

What I'm envisioning doing today is opening these up for discussion. What we have done is we have taken the ABA 10 Principles of a Public Defender, Public Defense Delivery System and we have essentially taken Nevada precedent, so to speak, and tried to come up with a workable standard based on those 10 principles and what has come before us, because Marcie Ryba and I are both acutely aware and we acknowledge that there's a lot of people, including people on this Board, that have been in this particular trench for longer than we've been practicing, so to speak. We want to pay some deference to that, and as we're moving forward with our standard make sure that we're acknowledging that that work has come before us. But at the same time, we also have a job to do in terms of developing a workable system that meets constitutional minimum standards, and that's what we've endeavored to do.

In terms of discussion, I am happy to proceed through; unfortunately, discussion on proposed standards tends to violate the first rule of a PowerPoint and that's don't make too wordy of a slide, but we do have our standards in slide form and what I envision doing is moving forward and offering some commentary as to how we reached it and what it takes to do and then soliciting feedback from the Board.

Ultimately, what the Board wants to do from there is up to it, but with those comments in mind that's what our thoughts are.

Chairman Crowell asked whether this presentation is for information only and that we'll get another bite at the apple on these when all of the standards are in place when we start talking about adopting a regulation. Mr. Hickman confirmed.

Professor Anne Traum followed up with the question, will we also have an opportunity to distribute this? Because I know just in talking to the Public Defender in Elko there was some concerns about the language, but will we have it in time that we could send it out and especially just the specific individuals who are interested in making comments on these? Mr. Jarrod Hickman responded, that would be two parts. One is that, of course, we will distribute them in the normal course of our agenda, and the attachments, I don't want to promise anything that I can't deliver, so I don't want to tell you that we're going to have them ready in a week in advance of our next meeting not knowing when that's going to be. But we will, of course, provide them in the 72-hour period ahead of our meeting so that there is some time for that. And the other answer that I would provide to that is, I think according to AB 81 or NRS 180, Chapter 300, et cetera, the idea here is that these will all be submitted through a rule making and a regulation type process that will be open and noticed in public comment. So, anyone that would like to weigh in on that will have that opportunity just by virtue of that process.

Chairman Crowell responded, we'll understand that this is just kind of an update on where you are in drafting, you and Marcie Ryba, and the Department is in terms of drafting the standards for us to review and approve or not approve. Mr. Hickman responded, yes, but also to get feedback in terms of direction. Essentially what we've provided in our attachments are not only the proposed standard or regulation but also some commentary as to how we arrived there, and I hope that's been useful to all interested parties.

The first thing we looked at is a standard regarding the prompt appointment of counsel and appearances with an attorney at the initial first appearance or arraignment. Those standards, I cited the support for those standards throughout out commentary on that and obviously they come from a lot of nationally, I guess lauded or compiled studies including the NLAVA, the National Study Commission on Defense Services, the ABA. But anecdotally I think what's been important to us is as we were looking at contracts, we've noticed some contracts including Nye County already have provisions for attorney or representation at that initial appearance.

On top of that, I understand that in Carson City the State Public Defender has been appearing not only at in-custody arraignments but out-of-custody arraignments as well, and we ran into Judge Kristin Luis yesterday on our flight to Las Vegas here for this meeting and she provided very, very positive feedback on the impact that that's had in just a short amount of time as to not only how case is set or tracked but also on the custodial determinations that are made in those settings as well.

The overall language that we've looked at in there is borrowed heavily, heavily, from the ADKT 411 Model Plan. Now we understand that when that was adopted or sent out back in 2010 that was not adopted for the rural counties, and there is a caveat on the model plan that was distributed from the Supreme Court that indicated that due to ongoing discussions and practical realities that it was only being asked for in Clark County and Washoe at the time. But that note also included a statement that the Supreme Court did not desire to have multiple systems of appointment at the time, and I think given with some of the choice provisions that, or option provisions that we have built into that particular standard, it's a standard that is uniform across the state, but it allows the counties some flexibility in terms of deciding who that appointing person or agency or employee is that also provides some autonomy or independence from the judge.

Then it also gives the counties some flexibility in determining how they're going to arrange the initial appearance piece. There's a number of options that that can satisfy that, whether it's building it into a contract service with the appropriate reduction in caseload once the weighted caseload study is done, whether it's hiring a separate attorney to handle just that first appearance as part of its contract, or in the institutional setting with some of the Public Defenders Offices, whether it's assigning misdemeanor attorneys or someone from our rotation to make that appearance as well.

Now obviously the concern in looking at some of the commentary in the original ADKT 411 proceedings was that this is an unfunded mandate. And given the nature of AB 81

and the intent here it's got to be subject to a kind of a compliance plan and reasonable implementation time to ensure that the state funds that as we move forward.

The next section deals with an attorney's qualification. Obviously, ABA standards there on the left and our principle is there on the right, the principle that we are following. The language for the actual proposed regulation or standard follows. This is modeled heavily on the way Michigan has proposed their qualifications, but also on the way that Clark County, through their model plan in ADKT 411, sets up their qualifications.

The starting point obviously is Supreme Court Rule 250. It would be kind of nonsensical to make qualifications for lesser cases higher than what the Supreme Court has decided for death penalty cases. So, we kind of started there and worked backwards.

Obviously, the basic requirements here are going to be that you're admitted to practice law in the state, so you pass the character and fitness portion of the bar, you pass the bar and you're in compliance with your CLE requirements. And that also has a piece on our standards relating to training and education that we'll get to next.

But then we start ramping up from there. For misdemeanor and gross misdemeanor proceedings the proposed standard includes satisfaction of the basic requirements plus sitting a second chair on a prior trial. I know in individual discussions with some of our membership there's some concerns that that may be too much, but the goal here again is to make sure that we have attorneys that have at least seen what a trial looks like before they rush in and do it.

Michigan imposes a like requirement that at least you sit second chair on that type of trial before you run in and do it. Obviously, these are going to be subject to comment and debate, but that's our thought process behind that is that we've had some experience before acting as lead counsel, and it can be on a bench trial or jury trial capacity, whichever comes first. We didn't want to tie it to one situation or another, but you've at least been in the room, you've been a part of the action before you take up the flag on your own.

The second portion of that gets into B, C, D and E. This is kind of where we struggled a little bit because obviously there's some extremely complex Category B felonies that carry significant penalties, but at the same time we've got to work with the Supreme Court's mandate and SRC 250 and also not limit the depth and breadth of our experience pool for counties making hiring determinations with contractors in the rural counties.

The basic requirements are again satisfy the basic requirements, have one year of practice under your belt in the criminal defense realm, prosecutor, public defender or deliverer of indigent defense services or retain a counsel, and that you've had at least two trials under your belt, one of which was actually submitted to the jury to completion.

Again, the thought process is that you've been there before, you've seen it, you've been involved. But at the same time, in following the logic or the requirements of Supreme Court Rule 250 there is a demonstration piece too. If you don't have exactly the same requirements but you're able to demonstrate that you have experience and ability to

handle some of these things, and you can demonstrate that to the Department, perhaps you will be qualified.

And the situation that I envision there is someone who maybe has a bench trial or two and then 10, 15 prelims under their belt but just can't get a case to go to trial. With that amount of litigation they're going to be qualified to handle some of these higher-level cases and be able to demonstrate that and get qualified to move forward in those categories of cases.

The next step we move into, the Category A, the non-capital Category A. Again, we borrowed using the five-trial requirement of Supreme Court Rule 250 and then looking at Clark County's model plan, they've also required five trials in this particular situations. We've taken it down a step again to ensure that we're not limiting the depth and breadth of I guess applicant pool in the rural counties.

But the requirements are again that you're obviously licensed to practice law and in compliance with your CLE requirements, you've been practicing criminal law for three years, and you've got three trials tried to completion as first or second chair. Or you can demonstrate to the Department the high quality of work and ability to take on some of these more complex cases.

Now in prior iterations of ADKT 411 there was ongoing debate as to the terms 'quality' versus 'high quality'. I'm still sifting through those documents to see if that's appropriate terminology or if it should be changed. I want to get a handle on all those arguments, but I think what we're getting at here is that you have the ability to handle a complex case with multiple witnesses, perhaps multiple documents, scientific evidence and you're not just running in there after you get your contract with little to no experience in that particular situation. Capital proceedings, Supreme Court Rule 250 still governs, and that's kind of where we started from. With respect to the appellate counsel in felony proceedings the appellate counsel in capital proceedings and – well I'll stop there and just comment on those. Those were both taken from ABKT 411, the October 2008 performance standards, and then SRC Rule 250 just about verbatim.

The only thing that we have I guess kind of added to is the qualification of counsel for juvenile delinquency cases. I think there's been national recognition that juvenile delinquency is a very specialized area of criminal law, and I think it's very important that anyone who is handling those types of cases specifically transfer certification hearings from the juvenile court to adult court has some of that felony trial work under their belt, and I think that's recognized under the ADKT 411 performance standards as well.

So, those were adopted as part of our standard on training – or qualifications rather. And again, the overall effort with respect to the qualification piece is to kind of elaborate on what's gone on in ADKT 411 already. After the capital litigation really what we saw in that document was that the qualification standard was sufficient training and experience with no real kind of definition as to what that means. So we're trying to make that a little more black and white so, we've got easy qualifications to look at when we're reviewing applications for certain types of cases for an applicant pool.

With that, I'll ask if there's any comment with relation to the qualification standard before moving forward.

Ms. Julie Cavanaugh-Bill stated, this is the one, when I was reading through it, that kind of jumped out at me having litigated criminal defense cases out in the rurals. I talked to a couple other individuals that do criminal defense work out in the rurals, and there's a lot of times where we have trouble finding one attorney that will take the appointment.

And so, when you've got attorneys taking these appointments and I mean you don't get paid much and a lot of times you're traveling three or four hours to go to hearings or meet with your client. I'm just concerned that, I know under the statute we're supposed to create standards that don't create economic disincentives to the rurals, so this is one that I think we have to be really careful about how much burden we're going to impose.

When you're requiring before an attorney can take a criminal defense case with a misdemeanor that they have to have sat a second bench in another criminal jury trial, I don't think its feasible. I'd have trouble seeing how many attorneys that are taking these misdemeanors, if they're first or second-year attorneys, they may not have ever seen a trial. I think we could just structure it in a different way where they can get that experience, or we could address that they have the basic level of training and education to represent their clients without imposing that additional requirement.

Ms. Julie Cavanaugh-Bill, continued, and then under 3 and 4 where we have E, have equivalent experience and ability to demonstrate similar skills as determined by the Department. The concern I have there is I have – I mean I'm no longer taking the appointments cause I'm sitting on this Board, but I can't tell you how many times we would get a call from a court saying can Ms. Cavanaugh-Bill take this case, and can she be here tomorrow. So, if I had to wait to get approval from the Department to determine if my experience and skills were enough sufficient to take a particular case, I mean the defendant might have lost the ability to have that hearing in a timely basis. So, that's my concern as well, any delay that would be caused if we word the standards this way. And then also if an attorney takes the case in the beginning and then say the DA's Office adds additional charges to it, puts on a repetitive offender, I mean if anything like that, then do you change attorneys midway through because they no longer meet the standard.

Mr. Hickman responded, I definitely appreciate that feedback and I've made notations and I'll take a closer look at that. But some of your concerns kind of address why we would like to see the full picture of the standards before we move forward with a formal action because I think there's going to be some overlap with a standardized or model contract in deciding that. Ideally, I think what we're looking at is that the qualification and determination is not going to be made on a case by case basis, but rather as someone is applying for this particular contract or seeking this contract. That's already been determined before the contract's even approved. So, we know moving forward from that moment that the person is qualified.

Drew Christensen, I just noticed under your Category A qualifications that you talk about three years of experience either as a defense attorney or a prosecutor. We've always taken the position regardless of how long someone's been a prosecutor, we don't want

their first defense trial to be a high Category A. There's a different dynamic sitting on one chair versus the other, so while that experience obviously is valuable, we let them walk on some more lower level felonies before we assign a murder, sexual assault. Just keep that in mind. I mean there's obviously experience worthwhile knowing and they very well may be qualified to handle that, but I'd still like to see them handle a few defense cases before their first appointment was a murder case. Mr. Hickman thanked the speaker for the feedback.

Drew Christensen stated, we put a catch-all on our qualifications that individual exceptions can be made by the Board. I'll give you some examples. We've had people apply with a tremendous amount of civil appellate experience and we took the position, they've been to the Supreme Court, they've been to the 9th Circuit.

It's different subject matter, but their ability to research the law, so even though they may not fit the criteria of what we wanted to see in a criminal appellate lawyer, at least they know what they're doing. We'll give them the opportunity to do criminal appellate work. I think if you have a catch-all that says your office will look at individual examples and exceptions, and even though they may not meet the technical qualifications, we're comfortable as a body to say, they're pretty good.

Jeff Wells stated, I'm also concerned you have a clause in here in a couple places that after you like A,B, C felonies, you have what they have to do, a couple of trials, and you say or similar experience as determined by the Department. We have probably what, Drew, 160 lawyers or something under contract. We put them on there not based on us, but we have a committee of I think seven or eight folks from all the different bar associations, the Federal Public Defender and all that.

I'm not sure from a Clark County point of view I want to defer those eight or nine people who are familiar with all lawyers that practice criminal law in our county, defer it up to you guys to make those decisions whether that's a comparative treatment or skillset or not. Mr. Hickman responded, I think there's probably some clarifying language that needs to be in there. While we generally understand that AB 81 has statewide applicability in a lot of aspects, the focus here I think is on the rural counties.

For instance, one of my favorite quotes out of the Legislative history of AB 81 was commentary of the takeover provision in Section 14 and someone compared it to an elephant or an ant swallowing an elephant if the state PD was trying to take over the Clark County Office. And we acknowledge that, and I think there's some clarification that should be made, but a lot of our focus here is on the rurals. I think for the vast majority of these standards Clark County and Washoe County are already doing it.

Laura Fitzsimmons stated, and Carson or something and just up for discussion, but you know, a lot of these standards are for statewide but just the outlet, the equal experience as determined by maybe, I don't know how you'd do it, but that would be another ant/elephant situation if you were screening their people.

Ms. Franny Forsman stated, it seems to me if you're going to each county adopting a local plan, and if as part of that local plan it includes a selection committee, then it would

be uniform across the state, and that was really the intent of the original model plan was that it would apply across the state until there were some objections from the rurals. But once you create that selection committee then that's what it would go through. I think the agency would oversee that, but the selection process and qualifications be done pursuant to the local plan.

Mr. Jarrod Hickman continued and stated, the next standard that we have in the packet deals with the vertical representation. This one was fairly easy because there is very specific language in AB 81 or Chapter 180 about what that vertical representation should look like. And you know, like crafting the jury instruction where there's statutory language, let's use it. So, that's where that language came from.

Jeff Wells stated, Clark pretty much has gone away from the 48-hour probable cause paper review. We now have an initial appearance court which generates the folks getting a release decision within 12 to 24. We do have track attorneys in there. We do have public defenders in there. We have not done a conflict choice yet, but so they simply are working on whatever the risk assessment tool is and grounds for their ties to the community, see if we can get them released earlier. We need an exception here for doing that because that person is not going to be the person who is assigned or even stays in the public defender's office. That judge won't even be the same judge that we have, it all happens in the initial appearance court. Then it will move over to whatever JP will have it for the prelim and all that. I don't want to dwell on it, but we need some exception in here for that because we already know that those two public defenders that are sitting there doing it, that they are not going to take 500 cases.

Mr. Hickman responded, yes, and in the commentary, I address that specifically. That was some of the overlap between two standards that we noted and acknowledged. There's a bunch of different ways that counties smaller than Clark can do that and it includes a different attorney limited to that first appearance track attorney. But you're right. I think maybe having it a little more expressed language in what's going to be set up will be useful.

Mr. Hickman continued with his presentation and stated, the final one for today deals with training for providers of indigent defense services. What we look to do, again following Michigan's lead, is identify the critical areas that we want to encourage training in, and we want to offer training in, and have written those out as specific provisions within that proposed standard or regulation.

With respect to CLE requirements we are only proposing five. The commentary I provided to everyone related to how we arrived at that number is this. I think we're required all to take 13. Three of those are consumed by the Supreme Court's mandatory ethics and substance abuse requirements, so that leaves 10, acknowledging that in rural counties there are providers that are also authorized to have a private practice and will need training presumably in other areas. The minimum requirement I think would be half that, so five related to the provision of indigent and defense services. If this was the only thing

that you were doing, we would strongly encourage that it be more than that. But that's how we arrived at that number.

And then with respect to the duties of the Department, it is in AB 81, NRS Chapter 180, one of the duties of our Department is to provide training, and while we're working on kind of the skeleton budget we're going to be working with Clark County to at least provide streaming CLE's online so those are accessible to anyone who would like to see those and provide those. But ideally, our thought process is to put on more robust training programs, perhaps one in the north, one in the south, and bring in some of the, you know, more I guess nationally recognized experts and things of that nature, and if we can get to it even perhaps trial schools or trial, week-long trial courses, a la, NLADA, NACJ, those types of things. But that's the framework of that. Any questions or comment regarding that, the trainings standard?

Ms. Julie Cavanaugh-Bill suggested that this might be something to put in the proposed budget to do some of the training in the rurals. Mr. Hickman noted that it is already,

Marcie Ryba stated, as an update, we are trying to find a software or possibly create our own software that we could put in the budget to allow easier timekeeping broken up as Jarrod has broken this up, so that's something that hopefully we'll have more information on ion the next meeting as to whether we can have a software or create a software for the timekeeping.

Chairman Crowell moved to the next agenda item, recommendation that the State Public Defender's Office should handle death penalty cases and appeals in the rural counties.

Marcie Ryba stated, there is a recommendation and a prior ADKT 411 order which recommendation three and I provided everyone with a copy of it said, "Pursuant to the Nevada Supreme Court that the State Public Defenders Office should handle all death penalty cases and appeals in the rural counties, and that was adopted, except that the counties may provide counsel on a non-contract fee basis."

Now, my understanding is that this was never implemented, that each county is handling their own appeals and their own death penalty cases. So, I have asked Karen Kreizenbeck, the Nevada State Public Defender, and my understanding is that Chuck Odgers, the Chief Public Defender, is also there as well. I have asked them about the ability for the Nevada State Public Defender to start doing this.

In preparation for that I did advise Ms. Kreizenbeck that we were provided the numbers of the amount of the appeals that were filed by the rurals, or we actually took all appeals that were filed last year and counted how many were filed by the rurals, and there were 68 appeals filed by the rurals last year. So, I did talk to Karen about that as to whether or not her office could handle that.

There is concern about whether there is sufficient staff, but we wanted a recommendation from the Board as to whether this is something we should pursue to possibly start having

the Nevada State Public Defenders Office handle all appeals from the rurals, and the thought for that is that we're creating so much work for these attorneys and increasing their requirements for their caseloads and possibly the appearances.

And we also wanted to create a little bit of relief for them as well. If we could take something off the plate of these rural attorneys like the appeals, I think that would allow them more time to focus on their criminal trial cases. So, that's the feeling behind this is to provide a different place to be able to do the appeals so that we come up with a policy of possibly the trial attorney files a notice of appeal, the request for transcripts and any other paperwork that needs to be filed, and then get the file off to the Nevada State Public Defenders Office to handle the rest of the appeal.

Ms. Joni Eastley stated, I'm familiar with this language in ADKT 411, but I always wondered about this Recommendation 3 and the State Public Defenders Office handling all death penalty cases and appeals. At whose cost? Marcie Ryba answered, the State of Nevada should fully fund indigent defense in the rural counties.

The way that the Nevada State Public Defenders Office is currently set up is that the appeals are charged to the portion that is covered by the state for their budget, so presumably these will be done at state expense because the appellate attorneys charge their time to the state rather than to the county.

Ms. Joni Eastley stated, I would just like to make that perfectly clear and in writing somewhere that the counties would not be on the hook to the state for death penalty cases or appeals, any appeals. Ms. Laura Fitzsimmons stated, if the state assumes 100 percent of the cost for defense investigation, the whole hoo-ha in a death penalty case, then the traditional calculus that hopefully a responsible county prosecutor is entering into which is – I mean there may be some cases that deserve death penalty status, but if they think, wait a minute, by charging it as a death case – so you're ready to discuss this by charging it as a death case, then the county is not going to pay any part of this. It's going to weigh that decision, that charging decision, I'm concerned it could, in certain circumstances, tilt the scales towards charging for death if it's just handled out if somebody else is paying the tab. The issue of appeals I think you separated that when you were discussing it. I think appeals is an easy thing to just resolve. The State Public Defender should take – and Joni, I believe that all of our discussion is informed by the preamble that – to our bill that the state is responsible for any increased costs, so I know you don't – I know you've been around and you've seen this promise before and you've seen unfunded mandates, but I think everything we're discussing fits in the context of the state clearly having taken responsibility.

Chairman Crowell invited State Public Defender, Ms. Kreizenbeck, to talk about this issue.

Ms. Kreizenbeck stated, I have been speaking with Marcie Ryba about broadening the role of State Public Defender, and we are more than willing to assist this Board, Marcie Ryba and the rural counties in any way we can. I think I envision that's the way the State Public Defenders Office should develop, not to walk into counties and take over and supervise from Carson the vast majority of rural Nevada, but certainly I do envision a role

in which we could assist the counties and lightening the burden on the rural attorneys as Marcie Ryba stated. And we would be more than willing to assist in taking appeals from the rural counties and even to consider the death penalty cases, although I do share Ms. Fitzsimmons' concern that it might increase the amount of death penalty cases filed in the rurals. But the state of affairs is that as currently situated the State Public Defenders Office is not funded nor staffed to take over neither the appeals nor the death penalty cases in the rurals, we have one death penalty qualified attorney on staff.

Chairman Crowell stated, but the question I asked her is if you have death penalty qualified lawyers. Ms. Kreizenbeck answered, we have one on staff. He currently has two murders open and several Category A felonies coming up for trial in the next year, so I would not be able to send him out to the rurals and be able to sufficiently cover Carson City's criminal defense demands. I have spoken to Marcie Ryba about this. It would require substantially increasing staff and funding for our office which would mean going to IFC if this was to be done before the next budget building biennium. And again, we're happy to do it, but we can't the way it's currently situated.

Chairman Crowell stated, well, my own sense is it's not a bad idea to follow along with what the Supreme Court has said I mean because it will relieve pressure, financial pressure, on counties and also, comply with what I believe to be a requirement of good indigent defense and that is getting people who are qualified to handle these cases on board.

Ms. Julie Cavanagh-Bill stated, I appreciate your comment about not wanting to walk into the counties and take over because I know that there is criminal defense attorneys out in the rurals that enjoy doing the appellate work and they're good at it, and we do have one attorney in Elko that's death penalty certified. I know the last time we had a death penalty case I believe he co-counseled with someone I believe from your office.

And I know he loved the opportunity to do that, and there's attorneys that enjoy those appellate cases and they've got the expertise, so maybe we look at, and I don't know if the Supreme Court has to revamp a new order or what, but maybe it's an option if the county has insufficient resources or staffing that they can turn to the State Public Defenders Office. But I wouldn't want this Board to become overly paternalistic to the rurals where we're saying oh here, let's take this off of you, you just do this or that, because we're trying to attract more attorneys out into the rurals, and if we take away opportunities for them to really advance in terms of their criminal defense work in the appellate work, I know for many attorneys that is where they want to be. And they enjoy that work. So, I'd just be careful on that. Thank you.

Professor Anne Traum stated, I think if you're transferring responsibilities from the trial attorney to the appellate attorney, I think that normally the counties pay the cost of transcripts, and I just don't want there to be a disincentive in ordering transcripts, so just like one of those little things that I would want to be kept track of so that people are getting – whoever is doing the appeal they're going to get the transcripts that are needed to do the appeal properly and that we're thinking about effective assistance at that level too.

Laura Fitzsimmons noted the importance of this discussion and suggested to table it and put it as a standing item on the agenda for future meetings.

Marcie Ryba suggested that instead of the death penalty attorneys being put in the Nevada State Public Defender's Office, the possibility of adding two attorneys to our office to handle the death penalty cases. When the attorneys were not working on a death penalty case they could travel to the rurals and provide training and resources to attorneys. It was something that she could discuss with Ms. Kreizenbeck on how much funding to build into the budget.

Dave Mendiola asked, if we're talking about a felony A Capital murder case, are we talking about just one attorney or don't you need at least two for a complex case like that? Karin Kreizenbeck answered, the Supreme Court rule requires two attorneys, one of which has to be death penalty qualified and to address the comment earlier, I believe the way we've done it in the past and the way I would intend to do it in the future is to provide a death penalty qualified attorney to a rural county that does not have one, and then associate basically, include local counsel so that that experience level can build so that the county continues to increase its resources but with state support, if wanted. I certainly don't want to inject if we're not wanted.

Julie Cavanagh-Bill stated, that was actually the comment that I received from one of the Public Defenders Offices is that if there was a death penalty case, they'd like the opportunity for one of their attorneys to second chair it. Karin Kreizenbeck answered, we're currently trying to get our attorneys up and it's difficult when there aren't that many death penalty cases to get the experience, so we're sensitive to that issue as well.

Chairman Crowell asked who certifies the death penalty attorneys? Karin Kreizenbeck answered, there's a Supreme Court rule and it enumerates qualifications, and if you meet those qualifications you're certified.

Chairman Crowell asked, there's nobody who says you meet those rules; you just do it? An Karin answered, no, there's Prong 2. And you can get certified through the Supreme Court by meeting the qualifications, but Prong 2 also allows a District Court Judge hearing the case to evaluate your qualifications and experience and deem you death penalty qualified. So, it's two-prong. You can meet the enumerated requirements or in front of the judge that's handling the case be certified.

Chairman Crowell tabled the discussion until the next convenient meeting and moved on to the next agenda item.

Sophia Long stated, reviewing the updates from the Open Meeting Law, so in the past usually what happens is if you have a working group or a subcommittee and the subcommittee is going to come back to the full board and make a recommendation for the board to take action, that was always subject to Open Meeting Law. So, that's currently still the same. However, I believe from the last meeting the discussion we had was that the working groups were going to bring information to put in the Delphi Study.

So, if that's the case, then another event that can subject a working group or subcommittee to the Open Meeting Law is that if you have two or more people on your working group, the majority of them can't be either members of the board or members of the staff. So, again, we put on the agenda it can be one or two board members because I think last time when we were talking about doing working groups we were talking about if needs be we were having groups that were going to be at least, you know, three, four or five members. So, three, four or five members in this working group, so as long as the majority of that working group isn't your members or staff, then it's not subject to Open Meeting Law.

Chairman Crowell stated, right, I think we sort of gave you approval for a work group discussion, Marcie Ryba, but I think what our Deputy AG is saying is that we can indeed do that as long as there are not more than two members of this Board on that. Correct me if I'm wrong. She can so that duty to give her authority. I think we did that already at the last meeting. Sophia Long replied, you do need to give her authority and I don't remember if you did. And just one thing to caution the members to is that even though your working group currently would not be subject to Open Meeting Law, but if you do that walking quorum where you start to talk to other board members, that can subject you to Open Meeting Law and then, of course, in violation of Open Meeting Law.

Chairman Crowell moved on to the next agenda item, the formula for the maximum amount paid to the county, paid by the counties.

Marcie Ryba stated, here is the formula that I've provided to you was submitted by Chris G., Jeff Wells and Dagny Stapleton, that they have a proposed standard that's a maximum amount that a county will be required to pay for indigent defense, shall not exceed that county's actual cost to provide indigent defense services for the average of fiscal year 2018 and fiscal year 2019, minus any expenses related to capital and murder cases for those years, plus for any subsequent year, the percentage equal to the lesser of the cost of inflation and/or the union negotiated cost of living increase for employees in that county.

So, that standard was submitted by our work group for a proposal in this case, and I did provide to this Board – I did reach out as requested to every county to try to determine what their fiscal year costs were for indigent defense. They were very cooperative in working with me and providing these figures to me. There is an issue with possibly the Esmeralda figures. I only have in there what the cost of the contract attorney was. They were not able to update me before this meeting as to how much they spent in total for those fiscal years, but the other numbers we feel are very accurate for how much they spent. They spent a lot of time in determining these numbers.

Mr. Jeff Wells noted that a question was asked by Laura and that he would answer why we took out capital murder cases, and since that was my idea, I'll answer it. In the event we had a smaller county that actually had a murder case one of those two years, they might have had to add an extra \$50,000, \$60,000, \$100,000 to their budget that would not be normal for that county, and it seemed unfair to lock that into the average forever going forward, and so that's why I suggested we do that.

Marcie Ryba stated, I did request from the counties that they could point out if they had any costs that were exceedingly higher than usual. And if you look between fiscal year '18 and '19, most of them are pretty accurate. The only county that was very concerned about the increase in costs was Esmeralda County because they had a sexual assault case that happened in fiscal year 2018, but they were not able to give me the numbers as to how much that increased their costs. So, I don't have accurate numbers as to how much they spent on that case, and that wouldn't have been excluded under the proposal.

Motion: To adopt the recommended language subject to Marcie Ryba going back and verifying all of the 2018 and 2019 number to make sure there should not be an exclusion.

By: Jeff Wells

Second: Anne Traum

Vote: Passed unanimously

6. Presentation on Ineffective Assistance of Counsel Standards by Jonathon Kirshbaum, Chief of Non-Capital Habeas Unit, Federal Public Defender (For Discussion)

Mr. Kirshbaum was taken out of order after the break.

Mr. Kirshbaum started his presentation and noted, I was advised that there's going to be both attorneys and non-attorneys here, and maybe even the attorneys who are here may not know as much about criminal law. For the attorneys who are familiar with this stuff, I apologize, it's going to be relatively basic. But I think the goal of what I'm going to be talking about today is to explain, and it's written out there, so everybody can read along, to explain how difficult it is for a petitioner to win an ineffective assistance of counsel claim in both state and Federal court which shows why the number of successful ineffectiveness claims is a poor representation of the quality of criminal defense in any particular jurisdiction.

In essence, this is in answer to the question, well if there hasn't been a ton of ineffectiveness claims, successful claims, against the attorneys in Nevada, why does it even matter about standards of care? And essentially what I'm going to be trying to show is that standards of care is something completely separate from whether or not there's been successful ineffective assistance of counsel claims against the attorneys here in Nevada.

Everybody is the familiar with the right to counsel. That's why this Department is in existence, but it all, of course, goes back to Gideon versus Wainwright that said that the 6th Amendment requires that any indigent person who's been accused of a crime that could lead to imprisonment is entitled to an attorney. It's inspiring to a lot of people, and I have been a public defender now for 21 years, seven here now in Nevada, 14 years in

New York in the state court system, and I've seen the highs and lows. I've seen cases, some of my cases, where I was able to free an innocent person, and then I've seen those cases where I've been charged with ineffectiveness and it's gone all the way up to the Circuit Court.

I know the highs and lows and I get it, but I'm a true believer in the system, I'm a true believer in what public defense is all about. And so, it matters to me, the level of representation in any particular state that I'm in. But the 6th Amendment also guarantees the right to effective assistance of counsel, and the standards for that were set forth in this case, Strickland versus Washington, which mostly people are even familiar with that case. It was from 1984 and it was the U.S. Supreme Court that just set the standards.

The legal standard has two components. You have to show deficient performance and then you have to show prejudice. I will take each of these components in turn and we'll start with deficient performance. The deficient performance is defined as whether or not counsel's performance fell below an objective standard of reasonableness. Generally speaking, the law is kind of hard to define reasonableness. It's a relatively flexible term. So, it may not sound like it's too high a standard. Some people can look at something and say it's reasonable, not reasonable, but this opinion was written by Justice O'Connor who is not known as a liberal justice, and she's also very much a technocrat. And in the 80's from what I've been told, is that the Supreme Court was very much into protecting the professional class, meaning a lot of deference to the professionals who do their jobs, and one of those obviously are the attorneys. And so, when she broke down what she meant by following below an objective standard of reasonableness, she used a lot of terms that made it very difficult to show, to establish, that counsel's performance has been deficient.

She said that counsel is given wide latitude and decision making when reviewing IEC claims, judges should be highly deferential, and then finally she said courts must indulge a strong presumption that counsel's conduct was reasonable. So, when all of this was put together over the years, the buzz word has been deference. And so, courts give a great deal of deference to attorneys doing their jobs because they basically are saying attorneys are trying their best and they're trying to do their jobs and we're going to defer to their judgment.

So, it's in the first instance very hard to establish that there's been deficient performance, but as it turns out, prejudice is now even harder to establish. So, the test is there's a reasonable probability that but for counsel's errors, the results of the proceeding would have been different. So, you have to show but for causation, and not just that, you have to show a reasonable probability which as it turns out – and this was a prejudiced standard created in Strickland, is actually the highest prejudiced standard that you can – that defendants are forced to meet.

There's essentially three different types of prejudice. There's what's known as a Chapman Standard which is the lowest which actually puts the burden on the prosecution to show that there wasn't prejudice. There's the Kotteakos Standard which is essentially

you have to show that there was any error had a substantial injurious effect, and that's supposed to be a high standard. But as it turns out, and the Supreme Court has said this explicitly, the Strickland prejudice standard is the highest standard out there. It's the hardest one to meet. So, in the end, when you put it all together, a high level of deference plus a high level of prejudice, what that really amounts to is you really have to show some type of catastrophic failure in the system in order to establish ineffective assistance of counsel. And what's even more important about that is it's really just an individual vindication of ineffectiveness in that particular case.

So, we're only talking about what happened to that particular defendant.

It's not an indication of whether or not there's systematic problems or whether or not that attorney is making that same mistake in other cases where there may not be some type of catastrophic failure. So, that's just when you're raising this claim in state court, but when you get to Federal habeas review the standards are even worse.

And the Supreme Court has specifically said that in order to establish sufficient performance we're now doubly deferential to trial counsel's strategic choices and decisions. So, in Federal habeas review, it's even more difficult to establish ineffective assistance of counsel. And so, in order to get there, in order to get to the finish line, there are a whole bunch of hurdles to relieve.

So, ineffective assistance of counsel claims are generally raised on post-convictions, and post-conviction petitions in Nevada as well as just about every other state are filed by pro se petitioners who don't know much about the legal system, who are incarcerated, and that's a big problem, those three things put together, because ineffective assistance of counsel claims generally require some type of investigation, some type of looking into things outside of the record.

But these three things make it very hard for petitioners to actually plead those types of claims, so there's problems in the sufficiency of the allegations when they file a petition. But then a lot of the burdens that I just mentioned, these hurdles, also affect whether a petitioner can get their case into court in a timely fashion, both in state court and in Federal court, and then once you get to Federal court there are other questions about exhaustion and procedural default.

When you add all of that into the succeedingly difficult legal standard, I was trying to come up with a good sort of visual display of that, and I picked this from Star Wars cause it reminded me of Luke Skywalker having to try and shoot those, whatever they were, into the Death Star was like a one in a billion dollar chance, or one in a billion it's shot. That's what it feels like to me. The bread and butter of what I do in the non-capital habeas unit at the Federal Defender's Office, is ineffective assistance of counsel, so I see it all the time, and we get good claims, but to get over all of these hurdles is like trying to blow up the Death Star. So, it's difficult. It's difficult to establish an ineffective assistance of counsel claim, and obviously, that's the point I'm trying to make.

The number of successes is not really an indication of what the level of performance of the attorneys in a particular jurisdiction is. There could be mistakes that rise all the way to the level of ineffectiveness that just can't find their way into court for all of the hurdles

that I just described. But setting all of that aside, in Nevada we do see courts find deficient performance, and these are just eight cases that I was able to come off the top of my head. I didn't even do any research by the. Five of them are cases I worked on – three of them came across my desk very recently, and what we can see from this small sample is that even when the lower courts find ineffectiveness, the Nevada Supreme Court has usually reversed those and oftentimes in a prejudiced prong.

The point of this slide is that mistakes are happening, and whether it's a lack of standard of care, just individual mistakes in cases, it's not quite clear, but it does show that there is reason to be concerned. And this last slide is something that my daughter who is eight years old, is super proud that I get to use cause it's her favorite meme. And I'm not saying that we're necessarily at this point yet, but it's a point that we don't want to be at. We don't want to wait for the catastrophic failures, for all of the ineffectiveness claims to actually be sustained before standards of care are set.

We want to find that aspirational goal where we can set those standards to make sure that we're not just sitting around with the house on fire saying that it's fine because we're not seeing these ineffectiveness claims be successful.

Professor Anne Traum thanked Mr. Kirshbaum for his presentation and asked, from your experience you could talk about some of the kinds of things that went wrong in a case. Some of those things I would imagine are fairly routine and not that exceptional, but they may not merit, as you were talking about, they may not merit success in court. But they still are concerning things on the ground. Mr. Kirshbaum responded, generally what we see a lot and what I think generally forms the basis of many ineffectiveness grounds is lack of investigation and lack of hiring experts, and that really cause in a lot – in some cases we've seen recently which is very disturbing is, attorneys will plead their clients out very early in the case without consulting experts, without doing any investigation whatsoever, without even essentially reviewing the discovery. And so, we do think that – or what my personal opinion is that the lack of investigation and lack of consulting experts is one of the big things that we do see. And I don't know if that's just necessarily in Nevada, but it's definitely something we have seen here.

Professor Anne Traum asked, if you're talking about an attorney who is not taking the time to have assessed the case, what kind of things do you think are probably going into that decision, like that lack of time or lack of care? Mr. Kirshbaum answered, I don't know if I can answer that cause I think it's going to be case specific, at least for the ones that I've seen. Whether it's just maybe a culture of not doing that stuff, maybe it's because they feel like delaying the negotiations is going to make them turn off the prosecution and make them not want to offer the same type of deal.

But we even see cases where the deals that are offered in the beginning are even not that great and they're still pleading them out without doing the extra – without doing what I would think would be basics to look into the case, to be prepared to even negotiate.

Julie Cavanaugh-Bill asked, if you're seeing cases involving a particular attorney, so several cases, and it looks like the same types of issues are coming up, is that something that you turn over to the state bar, Office of Bar Counsel? Mr. Kirshbaum answered,

generally, we don't because we kind of feel that that's not really our responsibility. I mean it's a tricky thing because if we are sort of setting a precedent that if we see something going wrong that we're going to be sending names over to the State Bar, the attorneys won't work with us. And we need to work with prior counsel. We need to get their files. We need to be able to have decent relationships with them. So, it's kind of a tricky position for us to be in. We probably ethically should say something, but from a strategic point of view it's not really in our interest to start making enemies across the state.

7. Discussion and Announcement of Dates for Future Meetings (For possible action)

There was no discussion or announcements.

8. Public Comment (This public comment period is for any matter that is within the jurisdiction of the public body. No action may be taken upon a matter raised under public comment period unless the matter itself has been specifically included on an agenda as an action item. The Chair of the Board will impose a time limit of three minutes.)

Ms. Franny Forsman stated, in consideration of the policy with regard to complaints, I think there should be some discussion and consideration of using any pattern of complaints when contracts are to be renewed. And the second one was is that in Federal Court when we had a requirement for the – it's just with the Federal qualifications of attorneys. We had a requirement that you have Federal experience before doing a Federal criminal case. Well, we knew we were excluding some talented lawyers that didn't and couldn't get Federal experience, so we created a mentorship program that you could end up becoming qualified by going through a mentorship program and giving the attorneys opportunities to be able to shadow a lawyer who is already doing the work.

9. Adjournment (For possible action)

Chairman Crowell noted the next meeting will be at 9:00 a.m. on February 27th and adjourned the meeting.

NOTE: Items may be considered out of order. The public body may combine two or more agenda items for consideration. The public body may remove an item from the agenda or delay discussion relating to an item on the agenda at any time. The public body will limit public comments to three minutes per speaker and may place other reasonable restrictions on the time, place, and manner of public comments but may not restrict comments based upon viewpoint. We are pleased to make reasonable accommodations for members of the public who have disabilities and wish to attend the meeting. If special arrangements for the meeting are necessary, please notify Cynthia Atanzio at (775) 687-0139 as soon as possible and at least two days in advance of the meeting. If you wish, you may e-mail her at catanzio@dids.nv.gov. Supporting materials for this meeting are available at 209 E. Musser Street, Suite 200, Carson City, NV 89701 or by contacting Cynthia Atanzio at (775) 687-0139 or by email at catanzio@dids.nv.gov.

Agenda Posted at the Following Locations:

1. Blasdel Building, 209 E. Musser Street, Carson City, NV 89701
2. Capitol Building, 101 North Carson Street, Carson City, NV 89701
3. Legislative Building, 401 N. Carson Street, Carson City, NV 89701
4. Nevada State Library & Archives, 100 North Stewart Street, Carson City, NV 89701
5. Grant Sawyer Building, Capitol Police, 555 E. Washington, Las Vegas, NV 89101

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