Office of the Special Public Defender

330 S. Third Street, 8th Floor, Las Vegas NV 89101

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November 30, 2020

Nevada State Board of Indigent Defense
896 West Nye Lane, Suite 202
Carson City, NV 89703-1578

catanazio@dids.nv.gov

Re: Workshop on Proposed Regulation (LCB File No. R042-20)
December 2, 2020

Dear Board Members:

The following comments are presented by Clark County Public Defender, Clark County Special Public Defender JoNell Thomas, Washoe County Alternate Public Defender Marc Picker, and Washoe County Public Defender John Arrascada. Collectively, we supervise the four institutional offices in the two largest counties in Nevada. In these roles, we collectively manage approximately 180 deputy public defenders and oversee approximately 70,000 cases each year.

We appreciate the great effort that was made with the proposed regulations and look forward to working with Board and Department of Indigent Defense Services in providing the best possible services for indigent persons accused of criminal offenses. We share the goal of providing stellar representation to our clients, as guaranteed by the Sixth Amendment. With this in mind, we have some concerns about the proposed regulations.

Structural Concerns

The regulations are confusing in that it appears some portions apply to only smaller counties (less than 100,000 in population), while other portions appear to apply to all counties. The regulations would be much easier to follow if they were reorganized and labeled so that this distinction was clear. This distinction would also be consistent with the driving force for creation of the Board and Division, which was to improve representation in the rural communities. The Board and

Department lack the resources to oversee the entire state and should be focused on the areas of greatest need.

Unclear Definition of "County"

The proposed regulations use the term "county" throughout, often without specifying whether the provision applies to all counties or only counties with a population under 100,00. Specifically:

Section 18(b) (page 9) defines contributions for counties whose population is more than 100,000. Presumably this does not include Washoe and Clark County, but it is not clear from the text and we do not see any language in earlier portions of the proposed regulations which make this clear.

Section 20 (page 11) speaks generally about "a county" but does not explicitly exclude Washoe and Clark. This same issue exists for:

Section 22 (page 12) – Plan for provision of indigent defense services
Section 26A (page 21) – Plan provisions for indigent defense services
Section 26A (2) and (3) (page 22) – Contents of plans/or contracts, and employment contracts for public defender offices
Section 26(A)(4) (page 22) – Client surveys mandated
Section 40 (page 29) – Department oversight of counties and attorneys, corrective actions, etc.
Section 42A (page 34) – Terms of contracts for providing indigent defense services
Section 43 (page 36) – Appointment of alternate counsel if a public defender is disqualified
Section 48 (page 38) – Workload study
Section 49 (page 39) – Caseload reporting
Section 50 (page 44) – Time reporting

Corrective Action Plans and State Contributions for Large Counties

NRS 180.450 makes a distinction between counties that are required to have an office of public defender pursuant to NRS 260.010, and those which are not required to do so. One reading of the statute, along with Section 20 of the proposed regulations, is that the Board is limited to requiring a corrective plan in small counties, with the enforcement mechanism of transferring representation duties to the State Public Defender if a small county refuses to follow the plan. Another reading is that the Board can enter a corrective action plan for large counties, but there is no enforcement mechanism if a large county refuses to follow the plan. Presumably state funds would not be made available to the larger counties under Section 20, but again, this is not

clear from the proposed regulation. If there is not an enforcement mechanism, and if state funds are not going to be made available to the larger counties, then the correction action plan scheme should not be applied to the larger counties.

The Proposed Regulations Would Encourage Small Counties to Seek The Death Penalty, and There is a Lack of Qualified Counsel at the State Public Defender's Office for Death Penalty Cases

Proposed Regulation Section 18(a)(4) (page 9) provides that:

> "If a county chooses, pursuant to section 21 of the regulation, to transfer to the State Public Defender the responsibility for death penalty cases and/or direct appeals to the appellate court of competent jurisdiction, the costs of providing indigent defense services, including the costs related to expert or investigator fees, in those cases must be a charge against the State and excluded from the required contribution of the county."

Section 21 (page 12) provides that:

> "Upon request of a county whose population is less than 100,000, the State Public Defender may handle for the county all death penalty cases . . ."

This system creates a perverse incentive for small rural counties to seek the death penalty. Under the proposed regulations, if a defendant is charged with murder, the small county is responsible, at least in part, for attorney fees, investigator costs, expert witnesses, and other expenses – but if the small county District Attorney seeks the death penalty, the State will pay all of these expenses. Given the broad scope of Nevada's death penalty scheme, almost every murder case is potentially a death penalty case and it will not be difficult for a small county District Attorney to allege an aggravating circumstance. This presents a number of problems, both under the constitution (Furman v. Georgia, Gregg v. Georgia, and their progeny – which prohibit arbitrary application of the death penalty and which require that the death penalty be narrowed and not applied to all cases) and under the State's budget constraints (these cases are very expensive, and will be even more so in rural counties which require extensive travel for nearly all persons

involved in the case – this expense was not provided for in the budget for the Department).

Next, there are no time restraints for a county to request that the State Public Defender handle a death penalty case. It is important that qualified counsel be appointed under SCR 250 as soon as possible. Under Section 21(2), if a county wishes to have the State Public Defender handle a death penalty case, the board of county commissioners shall notify the State Public Defender and such responsibility must be transferred. The rule does not require that this be done within days of arrest, as might be expected for a capital case.

Next, this process seems unfair to counties with more than 100,000 residents in that they must pay their own capital case expenses.

It is also worth noting that there appear to be no attorneys qualified under Supreme Court Rule 250 to handle capital cases at the State Public Defender's Office. It is doubtful that they employ mitigation specialists or routinely engage expert witnesses who are critically necessary in these cases. Transferring capital cases to an office without qualified personnel, and which lacks experience in handling these cases, presents a host of problems. Section 21 of the proposed regulations does not address this concern.

Finally, there is appears to be nothing in AB81 which authorizes this action. Surely had the Judiciary and Finance Committees been made aware of these issues there would have been great debate about this subject.

Indigent Defense Plan (Section 22, page 12)
Assuming this section applies to larger counties, presumably the existing Clark County and Washoe County plans are sufficient – though it is hard to know without seeing the form to be provided by the Board.

Appointment of Counsel (Section 24, page 15)
This proposed regulation provides that the Department may assign counsel. Presumably this does not apply to the large counties, but this is not clear. It indicates that distribution of cases may be made on a rotational basis, or other method that ensures fair distribution, but does not specifically address the qualification of counsel for a particular case type.

Private Discussion Accommodations (Section 25, page 17)
We agree that accommodations for private discussions between a client and attorney should be provided at courthouses and jails, but the regulations do not provide any enforcement mechanism for the failure of a courthouse or jail to make such accommodations. Presumably this could be made part of a corrective action plan, but again it is unclear as to whether (1) corrective action plans apply to larger counties, and (2) whether the State will pay for these expenses.

Contract Provisions Requiring Compliance With Regulations (Section 26B, Page 22)
Subsection (3) would mandate that "Offices of public defenders . . . must require or include a provision in the employment or other contract requiring compliance with these regulations." This may conflict with NRS Chapter 288 and its provisions regarding Collective Bargaining Agreements. For agreements that do not reopen for several years, it is unclear as to how this would be implemented. While we believe attorneys are subject to compliance with ADKT 411 and SCR 250, this provision presents a potential minefield of problems. For example, what happens when a detention center refuses to provide sufficient contact visiting rooms for every attorney to visit with every client in a confidential setting, at least once a month, as provided for in the regulations? By including this provision in a Collective Bargaining Agreement will employees go the EMRB to force remodeling of the jail?

NRS 288.150(3) provides that "Those matters which are not within the scope of mandatory bargaining and which are reserved to the local government employer without negotiation include: . . . (c) The right to determine (1) Appropriate staffing levels and work performance standards, except for safety considerations; (2) The content of the workday, including without limitation workload factors, except for safety considerations; (3) The quality and quantity of services to be offered to the public; and (4) The means and methods of offering those provisions." This proposed regulation arguably conflicts with this statute.

Client Surveys (Section 26B, Page 22)
This proposed regulation would require that the plans for services ensure that any client surveys authorized by the Board are provided to a client at the conclusion of his or her representation by an attorney. Presuming that this applies to large counties, there is no provision as to what is to be done with these surveys. There is also no provision for payment of associated expenses or the administrative burden imposed by the requirement.

Attorney Requirements (Section 39, page 28)
This is unclear as to whether it applies to all attorneys, or only those seeing appointments under Section 31. This is especially confusing as to the CLE requirements and whether large county public defender employees would be required to individually submit proof to the Department each year. It is likewise unclear as to whether CLE offered by the Department will be available to all public defenders in the state.

Assessment of County Services (Section 40, page 29)
Again, it is unclear as to whether this applies to the large counties. If so, the burden imposed by the review process is unclear. Given the breadth of the potential review, this could create unanticipated obligations by staff. If review is limited to existing reports and data, this burden could be manageable, but if there is an expectation that new information be created, it may be difficult to comply – particularly if only 10 days' notice is required. As noted above, there are additional concerns about application of corrective action plans to large counties. Any additional reporting requirements beyond those currently provided should not be imposed upon our entire offices, but instead should be limited to small sample groups.

Terms of Contract (Section 42A, page 34)
It is unclear as to whether this provision applies to larger counties, but it does not appear to apply to public defender offices.

Workload Study (Section 48, page 38). This provision makes it clear that a workload study would be done for larger counties, but it fails to address details concerning such a study. Presumably software will be used to assist with this study. The proposed regulation does not define who would pay for this software or other expenses incurred by the study. It does not address how long the study would last, the time burden imposed on employees and management in conducting such a study, etc. It does not address whether all employees would participate, or whether a sampling of employees is sufficient. Critically, it does not address the validity of a study conducted during pandemic conditions. The gathering of any information within the foreseeable future would not be an accurate accounting of a typical day or year. It is hard to address the burden to be imposed without these important details. There does not appear to be an appeal process should an agency want to contend that the burden imposed by the study is too great or unnecessary.

Reimbursement of Expenses (Section 48A, page 39)
This proposed regulation provides that if large counties "are seeking reimbursement of indigent defense expenses pursuant to Section 18, the counties must include the data collection and case management system in the plan for the provision of indigent defense services for the next biennium." Yet it appears from Sections 18 and 19 that they do not provide for reimbursement of indigent defense expenses by large counties. The proposed regulation is also confusing in that the term "the data collection and case management system" is not defined. Does that mean the system selected by the Board or the Department, or does it mean a system selected by the public defender agency?

Data Reporting (Section 49, page 39)
This proposed regulation would require reports beyond those currently provided. Specifically, under section (d)(II) a report would be required as to "the outcome of each case." This appears to require a reporting on the contents of each verdict or plea agreement. Under a client-centered representation model, the "outcome of each case" may also involve a host of other factors that are not reflected by a verdict or plea agreement.

The proposed amendments would also require reporting on the total numbers of motions to suppress that were (1) filed and (2) litigated, as well as the number of trials over the reporting requirement. These reporting requirements impose extreme burdens on large offices. Our case management software does not automatically generate reports on this information, so staff would be required to manually enter this information. The burden imposed on the primary PD offices would be enormous and would likely require the employment of additional personnel. Existing reporting requirements are sufficient. At a minimum, the Department and Board should demonstrate that they have a use for this data. Requiring our offices to produce lengthy reports on the outcome of every case is unreasonable if that information is not going to be used for some beneficial purpose. If such a burden is imposed, and funds are granted for employment of extra personnel to meet this obligation, we should also report on the race of the defendant, the alleged victim, and jury members as such information would be useful for future legislative actions.

Thank you for the opportunity to provide these comments on the proposed regulations. If we can be of any additional assistance, please let u know. Each of us plans to be present for the meeting on December 2, 2020, should you have any questions.

Sincerely,

for

JoNell Thomas
Clark County Special Public Defender
JoNell.Thomas@ClarkCountyNV.gov

Darin Imlay
Clark County Public Defende
Imlaydf@ClarkCountyNV.gov

John Arrascada
Washoe County Public Defender
Jarrascada@washoecounty.us

Marc Picker
Washoe County Alternate Public Defender
MPicker@washoecounty.us