

State of Nevada
Department of Indigent Defense Services
Board Meeting Minutes/Workshop

Wednesday, September 1, 2021

1:00 PM

Meeting Locations:

OFFICE	LOCATION	ROOM
Virtual Only		

Public was able to access the following link: Join Zoom Meeting

<https://us02web.zoom.us/j/84555026078?pwd=ZEIvQTNBZUdsalpEU3lZSoI5TnM5dz09>

Meeting ID: 845 5502 6078

Passcode: 897432

Dial by your location

- +1 346 248 7799 US (Houston)
- +1 669 900 6833 US (San Jose)
- +1 253 215 8782 US (Tacoma)
- +1 312 626 6799 US (Chicago)
- +1 929 205 6099 US (New York)
- +1 301 715 8592 US (Washington DC)

1. Call to Order/Roll Call

Chair Professor Anne Traum called the meeting of the Board on Indigent Defense Services to order a shortly after 1:00 p.m. on Wednesday, September 1, 2021.

A roll call was conducted, and a **quorum was established.**

Board Members Present: Chair Professor Anne Traum, Vice Chair Dave Mendiola, Laura Fitzsimmons, Joni Eastley, Drew Christensen, Chris Giunchigliani, Jeff Wells, Bevan Lister. Kate Thomas, Rob Telles and Justice William Maupin was not present.

Others Present: Executive Director Marcie Ryba, Deputy Director Jarrod Hickman, Deputy Director Thomas Qualls, Cynthia Atanazio, JoNell Thomas, Karin Kreizenbeck and Eve Hanan.

2. Public Comment

There were no public comments from the North or South.

Chair Traum stated that the next item on the agenda was approval of the June 23, 2021, minutes.

3. Approval of June 23, 2021, Minutes (For possible action).

Motion: Approval of Minutes from June 23, 2021.

By: Joni Eastley
Second: Chris Giunchigliani
Vote: Passed unanimously

Chair Traum indicated that the next item that we are going to take is out of order. We are going to number seven on our agenda which is an update from the Department.

7. Update from the Department: (For discussion and possible Action).

a. Update on Training and Resources:

i. Acknowledgement of Summer Volunteers and Extern

Deputy Director Hickman updated the Board on the progress and accomplishments made by the interns during the summer break. He praised each student by name, Nick Wolfram, Harrison Bohn, Christal Folashade and Servando Martinez for their outstanding work and contribution to the department.

Deputy Director Qualls wanted to acknowledge and convey that it was great to work with his extern Emily Driscoll. She assisted in several different ways, which included assisting the data analyst in creating mandatory surveys, research on hourly fees for appointed counsel and develop ideas for educating law students about indigent defense in the rural counties.

Chair Traum commented that she was proud of the students, and they were lucky to work so closely with the department. The work appeared to be as diverse as the department and we are really pleased to see all this work happening and having our students exposed to it.

Deputy Director Hickman wanted to circle back and let the Board know that Harrison Bohn had joined the meeting and to acknowledge his contributions to the department.

Chair Traum stated that we are slated today to hold a public workshop on the proposed regulations, and she would hand it back to Director Ryba to introduce the workshop.

4. Public Workshop: Review Discussion/Consideration/Potential Action for New Regulations (For discussion and possible action).

Director Ryba advised the Board that the proposed regulations are substantially similar to our temporary regulations. There were minimal changes, in sections 11 and 13 the time to respond was changed. Section 22 is now section 20, and the language was modified so counties submit their plans on a yearly basis. In section 23 which was formerly 25 language was added due to the change in the law where initial appearances will take place within 48 hours. We requested that initial screening occur prior to the arraignment or first appearance but not later than 48 hours after arrest pursuant to the *Davis* requirement. Sections 28 through 37 discuss attorney qualifications and because of the change in 32 we had to change section 33 to be comparable. Section 40 we felt it best to cross out a lot of language until the process for oversight is further developed. Sections 39 (previously 41) through 40 talk about contract terms. We wanted to clarify compensation that salary that an attorney received should be in parity with the corresponding prosecutor's office in those criminal proceedings. In Section 40 it was decided that identifying the appointing authority did not seem

necessary for a contract and the language was crossed out. Sections 41 through 45 are on uniform data collection and there were some changes in numbering section 44 is actually 43. Finally, we added clarification on how time should be recorded in tenths or six-minute increments for uniformity and consistency in Section 44.

Jeff Wells voiced concern in the wording in the new section 23 where screening for indigency must occur prior to the initial arraignment/appearance and not later than 48 hours. Perhaps we could change this to say it shall occur prior to or at the initial arraignment/appearance and not later than 48 hours after arrest. Then you would have to delete the words excluding the judiciary because if you are doing it at the initial appearance the judiciary would be participating. The second issue is section 39 the language does not appear to be consistent with NRS 288. Clark County has two separate contracts and two separate bargaining units who may intentionally negotiate the contract for lower wages in exchange for higher benefits. With two separate unions that have rights to bargain under NRS 288 we cannot be compelled to make them exactly the same at all times.

Director Ryba stated that after reaching out to the rural counties it appears counsel are no being appointed until the 72-hour arraignment hearing or until they have seen the judge. The intention is to have the county send someone to talk to them and see if they qualify for the public defender. Some of the smaller counties do not have in custody arraignments every day and the public defender may not live in that county, so we want to make sure the attorneys have notice if they are appointed and prepared to make the detention argument.

Jeff Wells suggested that perhaps the language would be that it must occur prior to, or at the earlier of the initial appearance or initial arraignment proceeding and not later than 48 hours.

Chair Traum questioned whether that wording would work and whether it captures the 48-hour requirement. It would be prior to or at that appearance and would the Director explain judiciary as *Davis* doesn't require that sort of information about the screening.

Director Ryba explained that the screening is only to determine if they qualify for public defender. There is literature that recommends that the judiciary should be excluded from gathering that information. It is better to have an independent individual gather that information and if it is allowed to happen at the initial arraignment or appearance would that still exclude the judiciary, or would we strike that language as well? If we modify that would you like to delete the exclude the judiciary?

Chair Traum stated if we exclude the judiciary, and we need that judicial finding of whether this person can afford an attorney does it create a little bit of confusion? If they are following the statute, I think excluding it is probably better if we are not running afoul of *Davis*.

Jeff Wells offered language for Section 39. He thought the language could get there if you could say approximate parity. I don't want to create a standard that everything must be equal to and while our existing two contracts have the identical pay scales, they are different and have been from the very beginning. The goal is public defenders' salaries be the same as the district attorneys. Clark County has always had that, but we have recent examples where through the collective bargaining process they come out different so maybe it should say approximate parity.

Chris Giunchigliani suggested it say subject to the negotiated agreement and then that way they were equal partners in and may delineate it differently.

Bevan Lister voiced that he had some concern within the regulation as well. The Lincoln County district attorney is paid a salary by the state, and he handles all the criminal, civil and everything else for Lincoln County. He is sole attorney in his office and are we suggesting that we need to pay the public defender who has a practice of his own and can-do other things a comparable salary to what we are paying the district attorney. I am having a real struggle with this concept at the small county level.

Jeff Wells stated that he thought Mr. Lister made an excellent point I hadn't realized that they only had the one district attorney. I think that might help explain why the old language is there.

Chair Traum commented that the old language was also problematic because some of those pay scales at the state level are just so different from the county and county employees don't want the state pay scale kind of setting the template or the comparison.

Jeff Wells stated I can assure you our public defender's office does not want the state public defenders' salaries.

Karin Kreizenbeck, NV State Public Defender stated I can assure you that the state public defenders would like the county attorney salaries.

Chair Traum acknowledge the Mr. Lister's comments is basically saying is equivalent for equivalent duties or equivalent work, but where did parity come from and had it always been in the regulation?

Karin Kreizenbeck stated that she vaguely remembered something about parity amongst state employees like attorney general's office employees make more than the state public defender's office so I think, and I could be wrong but to me it was parity across the board for state employees.

Deputy Director Hickman stated the language is new but during the discussions regarding this regulation the larger county offices suggested we use parity if that is what you are after. In doing a little research we pulled this language from the equal defense act that was proposed but ultimately did not pass for federal public defenders so that is where the language came from.

Laura Fitzsimmons commented that is a good point for instance if you look at Lyon County the district attorney is wearing two hats advising the elected, commissioners and he is engaged in civil litigation. Is there something like comparable computable caseloads? If I am a district attorney and that is all I can be, I can't have a private practice and in addition to the criminal work I am doing a bunch of civil work which happens in those counties somehow, we must adjust for that.

Chair Traum stated that we run into problems when we talk about caseloads as the process for a prosecution case is very different from a defense case so I would be very hesitant to make any effort at quantifying that.

JoNell Thomas stated she was going to make that point that workload is different than caseload and if you use the term workload I would not be offended. I remind prosecutors all the time that

they can negotiate cases without client approval, and I don't have that ability. I too could handle 60 cases if I didn't have to consult with the client, but I am afraid of that caseload word on the parity issue.

Jeff Wells stated that he agreed with JoNell on that issue. I do think Bevan's point is a very valid point and I don't think we should tie it to caseload.

Director Ryba wanted to add in the case of Lincoln County where it is not a full-time prosecutor. Once we find out that a three-quarter contract or whatever it is, you could take that into consideration for what parity is. As we reached out to the public defenders in the rural counties, they across the board make less than the district attorney they are opposing, and they are full-time public defenders.

Chair Traum stated that I believe we should keep the word parity and if we are modifying this, I think the words that we should be adding are subject to negotiation and or for equivalent workload or full-time standard.

Chris Giunchigliani suggested that we delete the word reasonable and put equitable because that makes it clear what the intent is.

Jeff Wells stated I would start with new language subject to negotiated collective bargaining agreements and then go with an attorney who receives a salary for providing indigent defense services is entitled to receive a reasonable salary, benefits and resources that is in parity, based on equivalent workload with the corresponding prosecutor's office. That way we don't modify the word parity, we address Bevan Lister's issue where it is based on equivalent workload.

Chair Traum stated that is intriguing and I worry a little bit about workload. Our workload study might be defining what is a workload in a full-time position and what is a workload going to JoNell Thomas's point.

Director Ryba added we did pass assembly bill 480 and we did modify NRS 260.040 and state that the compensation of the public defender must be fixed by the Board of Commissioners and in counties whose population is less than 100,000 must comply with the regulations. I guess the question would be is this regulation necessarily applying to counties whose population is over 100,000? Do we need to have that language in there that's being proposed there are collective bargaining agreements in Elko, but I think the rest are set?

Jeff Wells commented that you might end up with a collective bargaining agreement someplace else at some point. I know that we would feel better having the subject of collective bargaining in here in the first place.

JoNell Thomas commented I don't know what the solution is, but I do think if people are working roughly the equivalent hours that they should have roughly equivalent pay.

Chair Traum commented that we have a law that says in AB480 except for Clark and Washoe whatever salary must follow the regulation. Does this additional language of subject to negotiated collective bargaining designed to have slight deviations from parity but I am worried that it might

suggest that the regulation doesn't apply to collective bargaining, and we want the collective bargaining to also be based on the parity model even if there is some deviation.

Jeff Wells stated then you could put the phrase as a comma after the word parity instead of at the front if that is a concern. They will have parity, subject to negotiated collective bargaining agreement variations, you could put it there and just modify the word parity.

Chair Traum stated she thought that might be better because I don't want to be accepting someone from a regulation that applies to them under state law.

Drew Christensen stated that in theory most of our discussions about parity revolve around salaried employees. It is difficult to discuss parity when you have these communities and counties that have contracts even within Clark County the contracts, we provide the actual hourly rate we pay the lawyers is higher many times than we what we pay institutional lawyers. The contracts don't provide health insurance and other benefits that are within the salaried approach. The parity discussion seems to be more about the salaried employees. Parity is a difficult equation to come to when you have one salaried employee and one contractual employee. My point is there needs to be a discussion somehow to give some kind of modifier to the term parity.

Jeff Wells stated if I understood your suggestion correctly, we could leave the sentence exactly as it is all the way up to the word parity, then say that is in parity, based on equivalent workloads and subject to negotiated collective bargaining agreement variations, and the rest of the sentence would stay the same.

Chair Traum questioned if that addressed Mr. Lister's concerns.

Bevan Lister stated that he did not have it right in front of him, but I believe it will take care of it.

Chair Traum stated that we could also say taking into account equivalent workloads which is more flexible. She questioned if the Director had the language that would work

Director Ryba advised that she was reaching out to AG Sophia Long to see if it is considered to be substantial change to the language. If these are substantial changes, we will have to send them back to LCB and that may not make our timeline. There may be a problem with adding collective bargaining agreements since it is not referenced according to Sophia Long. She is fine with adding language regarding workload but there may be concerns when talking about collective bargaining.

Chair Traum questioned that number 39 is the only issue we have and that is Elko. The other two counties have collective bargaining agreements and are not subject to this, right?

Jeff Wells answered no, Section 39 is specific to Clark and Washoe counties. It is section 40 subsection J that is the rest of the folks.

Chair Traum stated she was confused about the way the regulations work or whether through 480 already cut out Clark and Washoe counties.

Director Ryba stated that AB480 cuts out the salary of the public defender is supposed to be set pursuant to the regulations only in counties with a population less than 100,000 language and that language was limited to our smaller counties.

Chair Traum suggested that we want to get final clarification from Sophia Long about whether the changes would be considered substantial change or clarifying language.

Jeff Wells stated he could make the argument that is just clarifying because NRS 288 already exists. NRS 288 already establishes the rule of how the county must enter negotiations certain times of the year, etc. I could make the argument that this sentence even if we didn't put the clarifying language was subject to 288.

Director Ryba questioned if we need the workload language since it is already covered in section 40?

Drew Christensen made the point that workload can be taken out of 39. Collective bargaining language is what we need to discuss, and Bevan's concern is covered in section 40.

Chair Traum commented that I believe we just say subject to collective bargaining agreements.

Jeff Wells stated we just insert after parity subject to negotiated collective bargaining agreement with NRS 288 in parentheses.

Deputy Director Hickman stated it would read such a contract must include but it is not limited to the following terms sub-section J provided compensation at a reasonable hourly rate that is comparable to the hourly rate provided to local prosecutors with similar experience and comparable workloads.

Chair Traum requested if the Director could tell us what comes next in the process.

Director Ryba stated the next step is to schedule the public hearing and we are proposing October 6. I will talk with Sophia Long after the meeting and give her the information that we want changed and then provide that information to the chair.

Chair Traum agreed that we will be setting our next meeting on October 6 to coincide so that we can approve the regulations. We will not be having a meeting in Tonopah on September 29 because of the meeting we are scheduling October 6. I would like to thank JoNell Thomas and others that are watching for participating as we appreciate the input.

The Board added the following language to Section 39: subject to negotiated collective bargaining agreements, if applicable.

The Board added the following language to Section 40: comparable work load.

5. Complaint and Recommendation Procedure: (For discussion and possible action).

Director Ryba delivered a brief outline of how the internal policy for processing complaints and recommendations would be handled by the department. The correspondence or form would be forwarded to the specific supervising authority and retained for county oversight. If the form does not contain a complaint or recommendation that is specific to indigent defense, we will respond that it is outside the department's purview and close the complaint. If there are complaints or recommendations that implicate possible system-wide issues that could lead to a corrective plan we will take steps as determined to be appropriate by the department.

Chris Giunchigliani stated it is very thorough and at least responds. Most people just want an acknowledgment and there may be some legitimate issues and I think this accommodate what was previously discussed.

6. Review First Report of the Monitor, Letter from *Davis* Plaintiff's Counsel, and Final Report of Dr. Mitch Herian. (For discussion and possible action).

Director Ryba advised that she had provided everyone with a copy of first report from the *Davis* monitor Professor Hanan. The concerns that were at the summary of the report is inadequacy of funding. Her concern is if 1.2 million dollars that is earmarked for the *Davis* counties is delayed in any way the counties may be hesitant to make the changes. We do have a meeting scheduled with the Governor's Finance Office in mid-September to address this issue. Some counties have greatly increased what they expect to spend, and Nye County may increase with the possibility of a three-defendant death penalty case. The monitor also believes the need to renew the data analyst contract which our budget analyst is looking into. The data analyst would perform a wage salary survey to determine parity and what a reasonable salary for a public defender in Nevada should be and if there is a shortage of attorneys in the rural counties. Other states have incentive programs that are working, and we would like to determine what would work in Nevada and put that in place.

Chair Traum questioned the timing issue with the Governor's Finance Office.

Director Ryba stated that we have reached out and the earlier we can get in front of the Interim Finance Committee the earlier we could request the funds. We are asking that the funds be allowed to be used through fiscal year 23 so the sooner we get this done the more time we will be able to work with the data analyst to complete this.

Joni Eastley commented that you mentioned the potential shortage of attorneys in rural Nevada that you are going to be looking at. Is there a shortage of death penalty certified attorneys in Nye County?

Drew Christensen advised Joni that the department reached out looking for attorneys in Clark County who may take the cases over. There are a number of new contracts where lawyers are willing to start going to the rurals and working more in some of the other areas of the state.

Deputy Director Hickman stated that they had a discussion with Nye County Board of Commissioners and the courts regarding their plan while none of the contract attorneys are 250 qualified several attorneys from Clark County applied to be on the list for Nye County.

Professor Hanan commented that it has been great working with the Director and her team. They have been forthcoming and available so that I have the information that I need to supply to the court regarding compliance with the judgment and they are doing it on a shoestring budget. The Director has correctly stated some of my concerns for compliance are really related to funding issues.

8. Discussion and Announcement of Future Meetings and Items for Future Agenda: (For Possible Action). If Appropriate, Set Public Hearing on Notice of Intent to Adopt Regulations.

Chair Traum I believe we talked about future meetings and we will wait upon word that we are good to go on October 6 which would be the correct timing for our next meeting. Regrettably with the timing of the next meeting we will not be meeting in Tonopah on September 29.

9. Public Comment.

There were no public comments from the North or South.

Chair Traum stated that before we adjourn it is with a heavy heart that I mention that this is Director Hickman's last meeting. He has done an incredible job and touched and brought so many people to together in meaningful ways and elevated their practice and criminal defense in this state. We are so grateful for everything that you have done for the department.

Deputy Director Hickman expressed thanks for the kind words and wanted the Board to know that it was a great experience and very much a team effort. We have done this all together and that is something I am going to miss.

10. Adjournment.

Chair Traum adjourned the meeting at approximately 2:40 p.m.