

Revised Proposed Regulation of the Board on Indigent Defense Services.
Changes from the Temporary Regulations highlighted in **RED**

Revised Proposed Regulation of Board on Indigent Defense
Highlight of Changes

Table of Contents

Sections 1 – 8: Definitions

Sections 10 – 15: Declaratory Rulings and Petitions for Decision Making

Sections 16 – 19: Maximum Contribution Formula and Financial Reporting

Sections 20 – 27: Plans for the Provision of Indigent Defense Services

Sections 28 – 37: Attorney Qualifications, Training, and Education

Section 38: Audit, Investigation, or Review

Sections 39 – 40: Economic Disincentives and Contract Terms

Sections 41 – 45: Uniform Data Collection

Sec. 8. (Previously Section 10)

“Plan for the provision of indigent defense services” or “plan” means the processes established by a county for the provision of indigent defense services and the estimated cost to carry out the plan in accordance with these regulations and applicable laws.

Sec. 11 (Previously Sec. 13)

1. The Board may refuse to review a petition which requests the adoption, filing, amendment or repeal of a regulation if the requirements set forth in Section 12 of this regulation are not met.
2. The Board may require the Department to review a petition filed pursuant to Section 12 of this regulation.
3. The Department shall notify the petitioner in writing of the decision of the Board or Department, as applicable, not later than ~~30~~ 90 days after a petition is filed.

Sec. 13(Previously Sec. 15.)

1. The Executive Director may refuse to review a petition filed pursuant to Section 12 of this regulation that requests the issuance of a declaratory order or advisory opinion if the requirements set forth in that section are not met.
2. The Executive Director may, or may designate a deputy director to:
 - (a) Conduct an informal hearing to determine issues of fact or hear arguments relating to a petition and enter reasonable orders that govern the conduct of such a hearing;
 - (b) Request a petitioner to provide additional information or arguments relating to a petition;
 - (c) Issue a declaratory order or an advisory opinion based upon the contents of a petition and any materials submitted with the petition;
 - (d) Consider relevant decisions that have been issued by the Department that apply or interpret the statute, regulation or decision in question; and
 - (e) Enter any reasonable order to assist his or her review of a petition.
3. The Executive Director or deputy director shall:
 - (a) Mail a copy of any declaratory order or advisory opinion that is issued to a petitioner not later than ~~60~~ 90 days after whichever of the following events is the last to occur:
 - (1) The petition is filed;
 - (2) The petition is referred to the Executive Director for a decision;
 - (3) An informal hearing is conducted; or
 - (4) The Executive Director or deputy director receives any additional information or written arguments; and
 - (b) Maintain a record of each declaratory order and advisory opinion that is issued and index such records by subject matter.

Sec. 20 (Previously Sec. 22)

1. A plan for the provision of indigent defense services must include, without limitation, the processes for providing indigent defense services consistent with these regulations and applicable law.

2. **A Each** county shall provide its initial plan for the provision of indigent defense services to the Department not later than 180 days after the date on which this section becomes effective or on the next occurring May 1, as determined by the Department.

(a) If a county elects to receive assistance from the Department in creation of its plan pursuant to NRS 180.430(4), the county must notify the Department at least 90 days before the plan is due.

(b) To assess local needs, counties should consult with local providers of indigent defense services in formulating its plan.

(c) If a county joins with one or more other counties to establish an office of the public defender to serve those counties in accordance with NRS 260.020, the joining counties may submit a single, joint plan for the provision of indigent defense services.

3. **After the initial plan is provided, each county must submit plans in accordance with NRS 260.070.**

4. Plans for the provision of indigent defense services approved pursuant to the Nevada Supreme Court Administrative Docket 411 will satisfy the requirements of this section.

Sec. 23 (Previously Sec. 25.)

1. A plan for the provision of indigent defense services must provide the indigency screening process necessary for the judicial determination of eligibility for an appointed counsel. The process of screening for indigency must occur **prior to the initial arraignment/appearance and** not later than 48 hours after arrest, exclude the judiciary, and describe the person(s) or agency responsible.

2. After such screening and upon a judge, justice or master finding that a defendant is eligible for appointed counsel in accordance with subsection 3 of NRS 171.188, the plan must provide for prompt appointment of counsel. If a public defender is disqualified from providing representation, a plan must provide for the appointment of another attorney in accordance with NRS 7.115 and 171.188.

3. If a county uses independent contractor attorneys in lieu of an office of the public defender or where the public defender is disqualified, the plan must describe how attorneys are assigned cases. Distribution of cases may be on a rotational basis or other method that ensures fair distribution of cases.

4. Plans for indigent defense services must require that an attorney be present at initial appearances and arraignments and be prepared to address appropriate release conditions in accordance with relevant statute, rule of criminal procedure, and caselaw. A timely initial appearance or arraignment must not be delayed pending a determination of the indigency of a defendant. Plans should ensure the presence of counsel at all other critical stages, whether in or out of court.

5. This section must not be construed to preclude a defendant from waiving the appointment of an attorney in accordance with subsection 1 of NRS 171.188.

Sec. 32 (Previously Sec. 34.)

An attorney who seeks to provide indigent defense services to a person charged with a category B, felony for which the maximum penalty is **less than** 10 years **or less**, a category C, D or E felony or a gross misdemeanor must:

1. Meet the following requirements:

(a) Be licensed to practice law in the State of Nevada; and

- (b) Have been trial counsel, alone or with other trial counsel, in two or more bench or jury trials that were tried to completion; or
2. As determined by the Department, demonstrate experience and skills that are equivalent to the requirements set forth in subsection 1.

Sec. 33 (Previously Sec. 35).

An attorney who seeks to provide indigent defense services to a person charged with a non-capital category A felony or a category B felony for which the maximum penalty is **more than 10 years or more** must:

1. Meet the following requirements:
- (a) Be licensed to practice law in the State of Nevada;
 - (b) Have practiced criminal law for three full years, either as a prosecutor, provider of indigent defense services or retained counsel; and
 - (c) Have been trial counsel, alone or with other trial counsel, and handled a significant portion of three felony jury trials that were tried to completion; or
2. As determined by the Department, demonstrate experience and skills that are equivalent to the requirements set forth in subsection 1, have a significant record of quality representation in criminal trials and have the ability to handle complex felony matters.

Section 38 (Sec. 40.)

1. The Department shall monitor and regularly assess whether counties and attorneys meet these regulations and whether indigent defense services are being provided in a constitutional manner. In conducting an assessment, the Department may obtain information from a variety of sources, including, without limitation:

- (a) Client feedback;
- (b) Client surveys;
- (c) Other providers of indigent defense services;
- (d) Office staff;
- (e) Judicial personnel;
- (f) Observations of a deputy director of the Department;
- (g) Data provided to the Department pertaining to attorney workload;
- (h) Attorney contracts;
- (i) Financial information pertaining to the provision of indigent defense services;

and

- (j) Information obtained through the Complaint and Recommendation process.

~~2. Pursuant to NRS 180.440, the Department must review the manner in which indigent defense services is provided throughout the State.~~

~~—(a) Prior to an on-site review, the Department will contact the county, court, and/or attorney(s) to identify a convenient time and/or location for which the review will take place and identify any information necessary to the review.~~

~~—(b) Once a convenient time and/or location is selected, or in the event that no agreement can be reached, the Department will notify the subject of the review at least 10 days before the review.~~

~~—(c) The Department will issue a report within 30 days of the review detailing its findings.~~

~~(1) If a county is not in compliance with these regulations or deficient in the provision of indigent defense services in any other manner, the report will recommend a corrective action plan for the county.~~

~~(i) No later than 30 days after recommending a corrective action plan, the Department will seek to identify a convenient time for which to collaborate on the manner in which the county will meet these regulations and the time by which the corrective action plan must be executed.~~

~~(ii) Upon agreement as to the contents of a corrective action plan and time in which it must be executed, the corrective action plan will be submitted to the Board for approval at the next scheduled Board meeting. Disputes as to the contents of the plan or the time in which it must be executed will be submitted to the Board for resolution at the next scheduled Board meeting.~~

~~(2) In counties less than 100,000, if the Department determines that any person is providing indigent defense services in an ineffective or otherwise inappropriate manner, the report will be issued to the person; entity that employs or contracts with the person; and the other deputy director of the Department pursuant to NRS 180.430.~~

~~(i) The other deputy director of the Department will collaborate with the person to provide training and/or educational opportunities consistent with Section 39 and best practices for delivering effective indigent defense services.~~

~~(ii) Upon completion of, or refusal to participate in, training and/or educational opportunities, the deputy director will provide notice to the entity that employs or otherwise contracts with the person. Refusal to participate in training or educational opportunities may result in the recommendation of a corrective action plan to a county.~~

~~3. Pursuant to NRS 180.320(1)(c), the Board may direct the Executive Director to perform any additional audit, investigation, or review the Board deems necessary to determine whether its regulations are being followed and indigent defense services are being provided in a constitutional manner.~~

~~— (a) Upon such direction, the Executive Director will work with the subject of the audit, investigation, or review to identify a convenient period for which to conduct the audit, investigation, or review.~~

~~— (b) Once a convenient time is selected, or in the event that no agreement can be reached, the Executive Director will notify the subject of the audit, investigation, or review at least 10 days before the audit, investigation, or review is to take place.~~

~~— (c) The Executive Director will issue a report to the subject of the audit, investigation, or review no later than 30 days upon completion of the audit, investigation, or review.~~

~~— (d) If the Executive Director finds that the subject of the audit, investigation, or review is not in compliance with the regulations for the provision of indigent defense or that indigent defense services are not being provided in a constitutional manner, the subject will have 60 days from the date of the report to respond in writing to each finding of non-compliance and steps taken to remedy such findings. The subject of the audit, investigation, or review may request additional time to respond to the inquiry, if necessary. Such request must be directed to the Executive Director.~~

~~—— (e) The Executive Director's report and response from the subject of the audit, investigation, or review, if any, shall be provided to the Board at the next scheduled meeting. Failure to respond or to take remedial action may result in a corrective action plan in accordance with NRS 180.450 or removal from the list of eligible indigent defense provider maintained in accordance with NRS 180.430.~~

Section 39 (Previously Sec. 41.)

1. 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 with the corresponding prosecutor's office that appears adverse to the public defender's office in criminal proceedings. The rates of compensation paid by county district attorneys, the Nevada Attorney General and other county or state offices must serve as guidance for reasonable compensation.~~

Section 40 (Previously Sec. 42.)

1. The terms of any contract between a county and independent contract attorney must avoid any actual or apparent financial disincentives to the obligation of an attorney to provide clients with competent legal services. Such a contract must include, but is not limited to, the following terms:

- (a) Identify the ~~appointing authority~~, contracting authority, and contractor;
- (b) Specify the terms of the contract, including duration, any provision for renewal, and a provision for terminating the contract by either party;
- (c) Specify the category of cases in which the contractor is to provide services;
- (d) Specify the minimum qualifications for attorneys covered by the contract and require such attorneys to maintain the qualifications during the term of the contract. The qualifications shall equal or exceed the qualifications provided in these regulations. If a contract covers services provided by more than one attorney, qualifications may be graduated according to the seriousness of offense and each attorney shall be required to maintain only those qualifications established for the offense level(s) for which the attorney is approved to provide indigent defense services;
- (e) Identify the attorney(s) who will perform legal representation in each category of case covered by the contract and include a provision that ensures consistency in representation in accordance with Section 28 of these regulations;
- (f) Set the maximum workload each attorney may be required to handle pursuant to the contract based upon the applicable workload guidelines determined by the Board in accordance with Section 44 and require the reporting of indigent defense data in accordance with Sections 46 and 47;
- (g) In accordance with Section 29, require that the contractor provide zealous legal representation to all clients in a professional, skilled manner consistent with all applicable regulations, laws, Rules of Professional Conduct, and the Nevada Indigent Defense Standards of Performance adopted by the October 16, 2008 Nevada Supreme Court Order in Administrative Docket 411;
- (h) State a policy to assure that the contractor and its attorneys do not provide representation to defendants when doing so would involve a conflict of interest;
- (i) Specify how investigative services, expert witnesses, and other case-related expenses that are reasonably necessary to provide competent representation will be made in accordance with applicable regulations and laws; and

(j) Provide compensation at a reasonable hourly rate that is comparable to the hourly rate provided to local prosecutors with similar experience and considers overhead, expenses, and costs relating to significant attorney travel.

Sec. 44 (Previously Sec. 46.)

1. In counties whose population is less than 100,000, each plan shall require caseload reporting by the county's indigent defense providers. The plan shall specify whether the reporting will be done by attorney or collectively by office of a public defender. The plan shall require such reporting on an annual basis that details, without limitation, the total number of:

- (a) Beginning pending cases;
- (b) New appointments;
- (c) Cases returned from warrant or re-activated;
- (d) Cases adjudicated, disposed or closed and:
 - (i) The manner in which each case was adjudicated, disposed or closed, including, pursuant to a plea, dismissal or verdict at trial;
- (e) Warrant or placed on inactive status cases;
- (f) Cases set for review;
- (g) End pending cases.
- (h) Total number of motions to suppress (i) filed and (ii) litigated; and
- ~~(e)~~ (i) Number of trials over the reporting period.

2. The cases included in a report required pursuant to subsection 1 must be further arranged by the following case type:

- (a) Death penalty cases;
- (b) Non-capital category A felonies and category B felonies for which the maximum penalty is **more than 10 years or more**;
- (c) Category B felonies for which the maximum penalty is **less than 10 years or less** and category C, D, E felonies and gross misdemeanors;
- (d) Misdemeanor driving under the influence and domestic violence cases;
- (e) Other misdemeanors, including misdemeanor direct appeals;
- (f) Probation and parole violations;
- (g) Direct appeals of capital convictions;
- (h) Direct appeals of non-capital felony and gross misdemeanor convictions;
- (i) Juvenile cases including delinquency, child in need of supervision, and appeals;
- (j) Juvenile probation and parole violations, and
- (k) Specialty court cases.

3. If the independent contractor attorney or office of a public defender provides representation beyond those services provided in NRS 180.004, reports should also include case totals for:

- (a) NRS Chapter 128 cases;
- (b) NRS Chapter 432B cases;
- (c) NRS Chapter 433A cases; and/or
- (d) NRS Chapter 159 cases.

4. As used in this section:

(a) "Adjudicated, disposed or closed" means a case in which an original entry of final adjudication has been entered.

(b) “Beginning pending” means a case which, at the start of the reporting period, is awaiting disposition.

(c) “End pending” means a case which, at the end of the reporting period, is awaiting disposition.

(d) “Final adjudication” means an entry of judgment or adjudication, an order of dismissal or the end of the appointment of an attorney regardless of adjudicatory status.

(e) “Juvenile case” means a matter involving an allegation of a juvenile in need of supervision or an act committed by a juvenile which, if committed by an adult, would result in criminal prosecution and over which a juvenile court has statutory original or concurrent jurisdiction.

(f) “New appointment” means a case in which a defendant has been assigned counsel for the first time.

(g) “Returned from warrant or re-activated” means a case re-opened because a defendant has been arrested on a warrant for failure to appear and has appeared before the court or has returned from a diversion program or another similar event has occurred that reactivates a case.

(h) “Set for review” means a case that, after an initial entry of judgment during the reporting period, is awaiting regularly scheduled reviews involving a hearing before a judicial officer.

(i) “Warrant or placed on inactive status” means a case closed because a warrant for failure to appear has been issued, the defendant has been ordered to participate in a diversion program or another similar incident has occurred to make the case not active.

Section 45 (Previously Sec. 47.)

1. Each county whose population is less than 100,000 shall require time reporting by indigent defense attorneys in their plan. The plan shall require reporting on an annual basis that details:

(a) attorney hours per case;

(b) investigator hours per case;

(c) staff hours per case;

(d) expert hours per case; and

(e) private workload, if any, measured in attorney hours.

2. Time entries should be kept as close to contemporaneous as reasonably practicable to ensure accuracy of time reporting and the ability of the Department to generate quarterly reports. **Time entries should be recorded in tenths of an hour (i.e., 6-minute increments).**

3. As used in this section, “staff” means a paralegal, or similar employee, as defined by the Bylaws of the Paralegal Division of the State Bar of Nevada, adopted on November 11, 1994 or the same as they may be amended.

4. In each county whose population is over 100,000, time records must be kept only during periods in which weighted caseload studies, pursuant to Section 44, are conducted.