



Nevada Board of Indigent Defense Services

Proposed Minimum Standards and Regulations for Indigent Defense Services

Prepared by the Department of Indigent Defense Services
896 West Nye Street, Suite 202, Carson City, Nevada 89703

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PURPOSE

Nevada Revised Statute 180.320 requires the Board of Indigent Defense Services to “establish minimum standards for the delivery of indigent defense services to ensure that such services meet [. . .] constitutional requirements and do not create any type of economic disincentive or impair the ability of the defense attorney to provide effective representation.”

The Sixth Amendment to the United States Constitution, made applicable to the state via the Fourteenth Amendment, guarantees that “the accused shall enjoy the right [. . .] to have the Assistance of Counsel for his defense.” In *Gideon v. Wainwright*,¹ the United States Supreme Court held that the states have a constitutional obligation under the Fourteenth Amendment to provide Sixth Amendment lawyers to the indigent accused. That guarantee is more than just the presence of a lawyer at a trial – both the lawyer and the state have an obligation to ensure each can provide effective representation and are in fact doing so. *Strickland v. Washington*;² *United States v. Cronin*.³

Under *Cronin*, the hallmarks of a structurally sound indigent defense system include the early appointment of qualified and trained attorneys with sufficient time and resources to provide competent representation under independent supervision.⁴

These standards strive to ensure that indigent defense delivery systems in Nevada (in particular, rural Nevada) meet the constitutional requirements of the Sixth Amendment. They are designed to improve the quality of criminal defense representation in Nevada and provide objective guidelines for the allocation of resources for indigent defense. Further, they are intended to serve as guides for local jurisdictions to assemble delivery systems consistent with the hallmarks of sound indigent defense systems. These standards may or may not be relevant in the judicial evaluation of effective representation, depending upon the circumstances.

PROPOSED MINIMUM STANDARDS

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Standard 1 - Education and Training of Defense Counsel

A. Knowledge of the law. Counsel shall have reasonable knowledge of substantive Nevada and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, civil procedure applicable to abuse and neglect and termination of parental rights, ethical rules and local practices. Counsel has a continuing obligation to have reasonable knowledge of changes and developments in the law. “Reasonable knowledge” as used in this standard means knowledge of which a lawyer competent under NRPC 1.1 would be aware.

B. Knowledge of scientific evidence and applicable defenses. Counsel shall have reasonable knowledge of the forensic and scientific issues that can arise in a criminal case, the legal issues concerning defenses to a crime, and be reasonably able to effectively litigate those issues.

C. Knowledge of technology. Counsel shall be reasonably able to use office technology commonly used in the legal community and technology used within the applicable court system. Counsel shall be reasonably able to thoroughly review materials that are provided in an electronic format.

D. Department will provide training opportunities. Consistent with its statutory obligation, the Department will develop and provide CLE programs for attorneys who provide indigent defense services. This may include, but is not limited to, regular CLE courses and/or annual training programs that include topics tailored to the needs of indigent defense services.

Standard 2 - Qualification and Review

A. Attorney experience. Prior to handling a criminal matter, defense counsel's ability, training and experience shall match the complexity of the case.

B. Review. The quality of the representation provided by indigent defense providers must be monitored and regularly assessed. In conducting the review, the Department may obtain information from a variety of sources including client feedback, other providers of indigent defense services, office staff, judicial personnel, observation of a deputy director of the Department, and statistical data provided to the Department pertaining to attorney workload.

DRAFT

Standard 3 - Counsel at First Appearances and Critical Stages

A. Prompt eligibility determination. Counsel should be assigned as soon as the defendant is determined to be eligible for indigent defense services. The indigency determination should be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge, but not later than 48 hours after arrest. To ensure prompt indigency determinations, delivery systems shall make reasonable efforts to ensure notices for indigent defense services and applications for eligibility are promptly provided to those seeking such services through cooperation of arresting agencies, county jails and local courts.

B. Counsel at first appearances. Counsel shall be present at initial appearances/arraignments. Counsel should be prepared to address appropriate bail and release conditions where release on a person's own recognizance is denied. A timely initial appearance/arraignment should not be delayed pending a determination of indigency.

C. Counsel at critical stages. All persons determined to be eligible for indigent defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations, and at other critical stages, whether in court or out of court.

Standard 4 - Initial Interview

A. Timing and Purpose of the Interview: Counsel shall conduct a client interview as soon as practicable after appointment to obtain information necessary to provide quality representation. The purpose of the initial interview includes, but is not limited, to:

- (1) establish the best possible relationship with the indigent client;
- (2) review charges;
- (3) determine whether a motion for pretrial release is appropriate;
- (4) determine the need to start any immediate investigations;
- (5) determine any immediate mental or physical health needs or need for foreign language interpreter assistance; and
- (6) advise that clients should not discuss the circumstances of arrest or allegations with cellmates, law enforcement, family or anybody else without counsel present.

Counsel shall conduct subsequent client interviews as needed. Following appointment, counsel shall conduct the initial interview with the client sufficiently before any subsequent court proceeding so as to be prepared for that proceeding. When a client is in local custody, counsel shall conduct an initial client intake interview within three business days after appointment. When a client is not in custody, counsel shall promptly deliver an introductory communication so that the client may follow up and schedule a meeting. If confidential videoconference facilities are made available for trial attorneys, visits should be scheduled within three business days. If an indigent defendant is in the custody of the Nevada Department of Corrections (NDOC) or detained in a different county from where the defendant is charged, counsel should arrange for a confidential client visit in advance of the first pretrial hearing.

B. Setting of the interview: All client interviews shall be conducted in a private and confidential setting to the extent reasonably possible. The delivery system should, through cooperation with local agencies, ensure the necessary accommodations for private discussions between counsel and clients in courthouses, jails, prisons, detention centers, and other places where clients must confer with counsel.

C. Preparation: Counsel shall obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports concerning pretrial release, and discoverable material.

D. Client status:

1. Counsel shall evaluate whether the client is capable of participation in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate and, where appropriate, raise as an issue for the court the client's capacity to stand trial or to enter a plea pursuant to NRS 178.405. Counsel shall take appropriate action where there are any questions about a client's competency.

2. Where counsel is unable to communicate with the client because of language or communication differences, counsel shall take whatever steps are necessary to fully explain the proceedings in a language or form of communication the client can understand. Steps include seeking the provision of an interpreter to assist with pretrial preparation, interviews, investigation, and in-court proceedings or other accommodations pursuant to NRS 1.510.

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Standard 5 - Investigation and Experts

A. Reasonable investigation. Counsel shall conduct an independent investigation of the charges and offense as promptly as practicable. When appropriate, counsel shall request funds to retain an investigator to assist with the client's defense. Reasonable requests shall be funded by the delivery system. Decisions to limit investigation must take into consideration the client's wishes and the client's version of the facts.

B. Experts. Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and/or rebut the prosecution's case. Reasonable requests shall be funded by the delivery system.

C. Continuing duty. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance.

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Standard 6 - Independence from the Judiciary

A. Selection and payment of attorneys and trial expenses. The indigent defense delivery system shall be designed to guarantee the integrity of the relationship between lawyer and client. The system and lawyers serving under it should be free from political and undue budgetary influence. Both should be subject to judicial supervision only in the same manner and to the same extent as retained counsel or the prosecution. The selection of lawyers and the payment for their services shall not be made by the judiciary. Similarly, the selection, approval and payment for investigative, expert and other trial-related expenses necessary for providing effective assistance of defense counsel shall not be made by the judiciary.

B. Role of the judiciary. The court's role should be limited to: informing defendants of the right to counsel; making a determination of entitlement to appointment; and, if deemed eligible for counsel and absent a valid waiver, referring the defendant to the appropriate agency/administrator/program. Judges are encouraged to contribute information and advice concerning the delivery of indigent defense services, including their opinions regarding the competence and performance of attorneys providing such services to the Board and Department.

Standard 7 - Indigent Defense Workloads

The workload of indigent defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation. Workloads will be determined through Nevada specific weighted caseload studies.

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Standard 8 - Attorney Compensation (Economic Disincentives or Incentives)

A. Rates of Payment for Salaried Public Defenders. Reasonable salaries, benefits, and resources should be provided to indigent defense counsel. The rates paid by the county district attorneys, the Nevada Attorney General, and/or other state offices serve as guidance for reasonable compensation.

B. Compensation and Expenses for Assigned Counsel.

1. Assigned counsel should receive prompt compensation at a reasonable rate and should be reimbursed for their reasonable out-of-pocket, case-related expenses. Activities outside of court appearances, such as directing an investigation, negotiating, or tactical planning, etc., require no less legal skill and expertise than in-court appearances and are equally important to quality representation. Assigned counsel should be compensated for all work necessary to provide quality legal representation.

2. Capped hourly rates and flat fee payment schemes are discouraged unless carefully designed to minimize disincentives and provide compensation reasonably expected to yield an hourly rate of compensation equivalent to the required minimum rate.

C. Contracting for Indigent Defense Services. The terms of any indigent defense contract should avoid any actual or apparent financial disincentives to the attorney's obligation to provide clients with competent legal services. Contracts-for-service should implement statutory hourly rates or demonstrate that that compensation is at least equivalent to those rates, and provide a mechanism to seek reimbursement for case-related expenses.

**PROPOSED MINIMUM STANDARDS WITH
COMMENTARY AND SUPPORTING
AUTHORITY**

Standard 1 - Education and Training of Defense Counsel⁵

A. Knowledge of the law. Counsel shall have reasonable knowledge of substantive Nevada and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, civil procedure applicable to abuse and neglect and termination of parental rights, ethical rules and local practices. Counsel has a continuing obligation to have reasonable knowledge of changes and developments in the law.⁶ “Reasonable knowledge” as used in this standard means knowledge of which a lawyer competent under NRPC 1.1⁷ would be aware.

B. Knowledge of scientific evidence and applicable defenses.⁸ Counsel shall have reasonable knowledge of the forensic and scientific issues that can arise in a criminal case, the legal issues concerning defenses to a crime, and be reasonably able to effectively litigate those issues.

C. Knowledge of technology. Counsel shall be reasonably able to use office technology commonly used in the legal community and technology used within the applicable court system.⁹ Counsel shall be reasonably able to thoroughly review materials that are provided in an electronic format.

D. Department will provide training opportunities.¹⁰ Consistent with its statutory obligation, the Department will develop and provide CLE programs for attorneys who provide indigent defense services.¹¹ This may include, but is not limited to, regular CLE courses and/or annual training programs that include topics tailored to the needs of indigent defense services.

Commentary

1. The Department will recommend a regulation requiring five (5) annual hours¹² of CLE relevant to the area of indigent defense service in which a lawyer practices. The requirement of five (5) hours of CLE relevant to the area of indigent defense services in which a lawyer practices was derived from an examination of total CLE hours required by Nevada Supreme Court Rule compared with the Supreme Court’s performance recommendations in ADKT 0411, *Order in the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases* (“ADKT 0411”) (Oct. 2008). See SCR 210(2)(a) (each lawyer must complete a total 13 hours of CLE annually; of the 13, two (2) must be in ethics and professional conduct and one (1) must be in substance abuse and/or mental health issues that impair attorney competence); ADKT 0411 Standards 2-3 (recommending CLE and comprehensive training programs in death penalty litigation), 4-2 (“counsel has continuing obligation to stay abreast of changes and developments within the law”), 5-2 (“At a minimum, counsel should attend 4 hours of CLE relevant to juvenile defense annually.”).

2. Nothing prohibits an attorney from devoting more CLE hours to relevant areas of indigent defense if they do not practice in other areas of law.

3. Lawyers can discharge this obligation by attending individual CLEs, attending local trainings, or attending statewide conferences or training courses. The Department, consistent with its statutory requirements will organize and offer statewide training programs in which a lawyer can satisfy this requirement annually.

DRAFT

Standard 2 - Qualification and Review

A. Attorney experience. Prior to handling a criminal matter, defense counsel's ability, training and experience shall match the complexity of the case. ¹³

B. Review. The quality of the representation provided by indigent defense providers must be monitored and regularly assessed. In conducting the review, the Department may obtain information from a variety of sources including client feedback, other providers of indigent defense services, office staff, judicial personnel, observation of a deputy director of the Department, and statistical data provided to the Department pertaining to attorney workload.¹⁴

Commentary

1. The starting point for the trial and experience requirements within the proposed regulation are those imposed by Supreme Court Rule in death penalty litigation. SCR 250(2)(b) (requiring, at a minimum, that counsel in capital proceedings have (1) acted as lead counsel in five felony trials, including one murder trial, tried through completion; (2) acted as co-counsel in one capital trial tried to completion; and been licensed to practice law at least three years). ADKT 0411's recommendation that attorneys have "sufficient experience or training to provide competent representation" before undertaking felony and misdemeanor representation was also considered. Working backward from capital litigation, the proposed qualification requirements seeks to balance the need for experience before handling more severe cases with the small number of attorneys in rural counties.

2. The experience and trial qualifications recommended for category A offenses is similar to the requirements imposed upon counsel for capital representation under SCR 250 because the penalty for a category A offense is either "death or imprisonment in the state prison for life with or without the possibility for parole . . . as provided by the specific statute." NRS 193.130(2)(a). This requirement is also consistent with recommendations of the National Legal Aid and Defender Association's ("NLADA") qualification and experience requirements within the Model Contract for Public Defense Services, Section VI (2000) and the Michigan Indigent Defense Commission, Standard 7 for Indigent Criminal Defense Services.

3. The proposed regulation for qualification of appellate counsel in noncapital cases is based upon two considerations. First, NRPC 1.1's requirement that counsel be able to provide competent representation before undertaking a legal matter. Second, SRC 250's requirement that appellate counsel in capital cases must have previously acted as lead counsel in at least two (2) prior felony appeals.

4. The proposed regulation for juvenile delinquency qualifications seeks to incorporate ADKT 0411, Standard 5-2 and 5-7, and recognize that juvenile delinquency practice is a specialized area of criminal law that should not be undertaken without a mentor, supervisor or prior experience.

5. Likewise, the proposed regulation for dependency and neglect and termination of parental rights matters incorporates the recommendations of ABA, *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases* (2006), Commentary and Action to Standard 1.

6. Similar to SCR 250(2)(e), the proposed regulation includes exceptions, at the discretion of the Department, understanding that some applicants, while not possessing the requisite amount of trial experience, may develop experience through internships, externships, clerkships, litigation short of trial, training programs or supervised assignments.

7. Nevada statute requires the Department to ensure that attorneys providing indigent defense services in counties whose population is less than 100,000 meet the requirements established by the Board. *See* NRS 180.430(1)(b) (one deputy director of the Department is responsible for determining whether attorneys meet requirements established by the Board). NRS 180.430(1)(b) further requires the Department to maintain a list of qualified attorneys for local government use in establishing plans that comply with the Board's standards and regulations. *See also* NRS 180.430(4) (one deputy director must provide assistance to counties that must revise the manner in which indigent defense services are provided). The processes by which an attorney may seek approval from the Department to provide indigent defense services and by which a local government may submit compliance plans will be described by regulation of the Board.

8. Review of attorneys providing indigent defense services in counties whose population is less than 100,000 is a statutory function of the Department. *See* NRS 180.430(1) (one deputy director must be responsible for overseeing the provision of indigent defense services in counties whose population is less than 100,000); NRS 180.440 (one deputy director must be responsible for reviewing the manner in which indigent defense services are provided throughout the State; such review includes on-site visits of court proceedings). The review process will be described by regulation of the Board.

Standard 3 - Counsel at First Appearances and Critical Stages

A. Prompt eligibility determination.¹⁵ Counsel should be assigned as soon as the defendant is determined to be eligible for indigent defense services. The indigency determination should be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge, but not later than 48 hours after arrest. To ensure prompt indigency determinations, delivery systems shall make reasonable efforts to ensure notices for indigent defense services and applications for eligibility are promptly provided to those seeking such services through cooperation of arresting agencies, county jails and local courts.

B. Counsel at first appearances.¹⁶ Counsel shall be present at initial appearances/arraignments. Counsel should be prepared to address appropriate bail and release conditions where release on a person's own recognizance is denied. A timely initial appearance/arraignment should not be delayed pending a determination of indigency.

C. Counsel at critical stages.¹⁷ All persons determined to be eligible for indigent defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court.

Commentary

1. Uniform indigency determination. Nevada law requires that a judge appoint an attorney to represent a defendant if the judge “[f]inds that the defendant is without means of employing an attorney; and [o]therwise determines that representation is required.” NRS 171.188. The Department will recommend that the Board adopt the definition of “indigency” and the Indigence Screening Affidavit provided in ADKT 0411 (Jan. 2008) to ensure uniform eligibility determinations. *See* 6AC, *The Right to Counsel in Rural Nevada – Evaluation of Indigent Defense Services* p.156 (2019) (“In many counties, the common refrain is that judges appoint indigent defense attorneys to represent defendants who are not indigent.”).

2. Timing of indigency determination. Although NRS 171.188 allows a defendant to make an oral application for appointed counsel at the 72-hour initial appearance/arraignment, nothing in the statute precludes a sooner determination. The intent of this standard, combined with Standard 6 – Independence from the Judiciary, is for the delivery system's compliance plan to include a methodology whereby eligibility for appointed counsel is determined before the 72-hour initial appearance/arraignment by an independent party for formal appointment at the initial appearance. For potential methods of accomplishing a prompt determination, see NSC, *Guidelines for Legal Defense Systems in the United States*, Standard 1.6 Method of Determining Financial Eligibility (1976); ABA Standards for Criminal Justice, *Providing Defense Services* (“ABA”) (3rd ed. 1992), Standard 5-7.3; ADKT 0411, *Model Plan for the Provision of Appointed Counsel for Urban Courts in Nevada* (May 2008).

3. Counsel at the initial appearance. One of several potential compliance plans for this standard may use an on-duty arraignment attorney to represent defendants at the initial appearance/first appearance. This appointment may be a limited appearance for arraignment only with appointment of different counsel for future proceedings. In this manner, appointment consistent with NRS 171.188 may be made at the 72-hour initial appearance/arraignment. This use of an on-duty arraignment attorney may be accomplished in any delivery model; institutional defender office, appointed counsel program, or contract-for-fee program. The Board and Department anticipates creative and cost-effective compliance plans such as representation and advocacy through videoconferencing or consolidated arraignment schedules between multiple courts.

4. Waiver of counsel. Nothing in this standard shall prevent the defendant from making an informed waiver of counsel, so long as the record reflects that the waiver was made knowingly and voluntarily and with an understanding of the consequences in accordance with NRS 171.188(1).

5. Potential conflicts of interest at the initial appearance. Counsel at initial appearance/arraignments should take care to only address preliminary matters and/or applications for bail necessary for the first appearance and counsel should advise that the appearance is limited to those issues. “Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another.” ABA, *The Defense Function* (3rd ed.) Standard 4-3.5, conflict of interest.

6. Feedback. All involved parties are encouraged to provide feedback as to the efficacy of prompt indigency determinations and counsel at first appearances via the Department’s complaint and recommendation form found at www.dids.nv.gov/Complaints/Complaints_or_Recommendations/.

Standard 4 - Initial Interview¹⁸

A. Timing and Purpose of the Interview: Counsel shall conduct a client interview as soon as practicable¹⁹ after appointment to obtain information necessary to provide quality representation. The purpose of the initial interview includes, but is not limited, to:

- (1) establish the best possible relationship with the indigent client;
- (2) review charges;
- (3) determine whether a motion for pretrial release is appropriate;
- (4) determine the need to start any immediate investigations;
- (5) determine any immediate mental or physical health needs or need for foreign language interpreter assistance; and
- (6) advise that clients should not discuss the circumstances of arrest or allegations with cellmates, law enforcement, family or anybody else without counsel present.

Counsel shall conduct subsequent client interviews as needed. Following appointment, counsel shall conduct the initial interview with the client sufficiently before any subsequent court proceeding so as to be prepared for that proceeding. When a client is in local custody, counsel shall conduct an initial client intake interview within three business days after appointment.²⁰ When a client is not in custody, counsel shall promptly deliver an introductory communication so that the client may follow up and schedule a meeting. If confidential videoconference facilities are made available for trial attorneys, visits should be scheduled within three business days. If an indigent defendant is in the custody of the Nevada Department of Corrections (NDOC) or detained in a different county from where the defendant is charged, counsel should arrange for a confidential client visit in advance of the first pretrial hearing.²¹

B. Setting of the interview: All client interviews shall be conducted in a private and confidential setting to the extent reasonably possible. The delivery system should, through cooperation with local agencies, ensure the necessary accommodations for private discussions between counsel and clients in courthouses, jails, prisons, detention centers, and other places where clients must confer with counsel.²²

C. Preparation: Counsel shall obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports concerning pretrial release, and discoverable material.

D. Client status:

1. Counsel shall evaluate whether the client is capable of participation in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate and, where appropriate, raise as an issue for the court the client's capacity to stand trial or to enter a plea pursuant to NRS 178.405. Counsel shall take appropriate action where there are any questions about a client's competency.

2. Where counsel is unable to communicate with the client because of language or communication differences, counsel shall take whatever steps are necessary to fully explain the proceedings in a language or form of communication the client can understand. Steps include seeking the provision of an interpreter to assist with pretrial preparation, interviews, investigation, and in-court proceedings or other accommodations pursuant to NRS 1.510.

Commentary

1. The Board recognizes that counsel cannot ensure communication prior to court with an out-of-custody indigent client. For out-of-custody clients, the standard instead requires the attorney to notify clients of the need for a prompt interview.

2. To assist in prompt communication with clients that are incarcerated within the NDOC, another county jail, or reside out of state, the delivery system should ensure the defender officer or individual attorney is able to accept collect telephone calls or maintain a toll-free number.

3. Some jurisdictions do not have discovery prepared for trial counsel within three business days. The Board believes that this minimum standard can be used to push for local reforms to immediately provide electronic discovery upon appointment.

4. Systems without adequate settings for confidential visits for either in-custody or out-of-custody clients will need corrective action plans to create this space. Proper compliance will require cooperation with every stakeholder in the criminal justice system. Any person is encouraged to provide feedback as to the availability of confidential meeting space via the Department's complaint and recommendation form found at www.dids.nv.gov/Complaints/Complaints_or_Recommendations/. See NRS 180.430(4) (one deputy director must provide assistance to counties that must revise the manner in which indigent defense services are provided).

5. Although in-person meeting with clients are encouraged, corrective action plans addressing this minimum standard may be accomplished through use of videoconference systems. See ABA, *Criminal Justice Standards for the Defense Function*, Standard 4-3.3 (4th Ed. 2017) ("Defense counsel should make every reasonable effort to meet in person with the client.").

6. This standard only involves the initial client interview. Other confidential client interviews are expected, as necessary. See ABA, *Criminal Justice Standards for the Defense Function*, Standard 4-3.3 (4th Ed. 2017) ("Counsel should interview the client as many times as necessary for effective representation. . . .").

Standard 5 - Investigation and Experts

A. Reasonable investigation.²³ Counsel shall conduct reasonable, independent investigation of the charges and offense as promptly as practicable.²⁴ When appropriate, counsel shall request funds to retain an investigator to assist with the client's defense. Reasonable requests shall be funded by the delivery system. Decisions to limit investigation must take into consideration the client's wishes and the client's version of the facts.

B. Experts.²⁵ Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and/or rebut the prosecution's case. Reasonable requests shall be funded by the delivery system.²⁶

C. Continuing duty. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance.

Commentary

1. The Board recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client. *See Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066 (1984) ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.") Decisions to limit investigation should not be made merely on the basis of discovery or representations made by the government.

2. A client's professed desire to plead guilty does not automatically alleviate the need to investigate.

3. Counsel should inform clients of the progress of investigations pertaining to their case.

4. Expected increased costs from an increase in investigations and expert use will be addressed in corrective action plans.

Standard 6 - Independence from the Judiciary²⁷

A. Selection and payment of attorneys and trial expenses. The indigent defense delivery system shall be designed to guarantee the integrity of the relationship between lawyer and client. The system and lawyers serving under it should be free from political and undue budgetary influence.²⁸ Both should be subject to judicial supervision only in the same manner and to the same extent as retained counsel or the prosecution.²⁹ The selection of lawyers and the payment for their services shall not be made by the judiciary. Similarly, the selection, approval and payment for investigative, expert and other trial-related expenses necessary for providing effective assistance of defense counsel shall not be made by the judiciary.

B. Role of the judiciary. The court's role should be limited to: informing defendants of the right to counsel; making a determination of entitlement to appointment; and, if deemed eligible for counsel and absent a valid waiver, referring the defendant to the appropriate agency/administrator/program. Judges are encouraged to contribute information and advice concerning the delivery of indigent defense services, including their opinions regarding the competence and performance of attorneys providing such services to the Board and Department.

Commentary

1. The Board recognizes that existing statutes provide for appointment of counsel and reimbursement of expenses for investigative, expert and other trial-related services by the judiciary. See NRS 7.115 – 7.135, 171.188. Consistent with its statutory obligations, the Board will recommend legislative changes consistent with this standard. NRS 180.320(2)(g).

2. To accomplish compliance with this standard, delivery systems may develop systems like those created by Clark and Washoe Counties from the direction of ADKT 0411. See ADKT 0411, Model Plan for the Provision of Appointed Counsel for Urban Areas (May 22, 2008). Indeed, the Committee Note indicates that the Committee did not recommend dual systems of representation in urban and rural areas. *Id.* Contract-for-fee systems may designate a contract attorney to fulfill the administrator role, provided that the additional duties are considered in establishing their workload. The use of an independent administrator to accomplish independent selection and payment of expenses may be another avenue of compliance.

3. Only in rare cases may a judge encourage a specific attorney be assigned to represent a specific defendant because of unique skills and abilities that the attorney possesses. In these cases, the judge's input may be received, and the system may take this input into account when making an appointment, however the system may not make the appointment solely because of a recommendation from the judge.

Standard 7 - Indigent Defense Workloads³⁰

The workload of indigent defense attorneys shall allow each lawyer to give each client the time and effort³¹ necessary to ensure effective representation.³² Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation.³³ Workloads will be determined through Nevada specific weighted caseload studies.

Commentary

1. The Board recognizes and anticipates that a Nevada specific workload study is required to consider the unique nature of representation in rural Nevada. Facing a similar situation, the Michigan Indigent Defense Commission (“MDIC”) used the recommendations of the American Council of Chief Defenders, *Statement on Caseloads and Workloads* (2007) as an interim cap pending completion of their study. MDIC, *Minimum Standards for Indigent Criminal Defense Services*, Standard 6. However, the American Council of Chief Defenders does not include gross misdemeanors, probation and parole violations, and abuse and neglect/termination of parental rights matters. One potential interim solution is the adoption of the American Council of Chief Defender limits modified by limits from other studies to fill in gaps:

150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 specialty court cases, 25 noncapital appeals per attorney per year.³⁴

For gross misdemeanor and domestic battery misdemeanors eligible for jury trial matters, caseloads should not exceed 230 cases³⁵ per attorney per year.

For probation and/or parole violation matters, caseloads should not exceed 530 cases³⁶ per attorney per year.

For abuse and neglect and termination of parental rights matters, caseloads should not exceed 80 active cases³⁷ per attorney per year.

2. Other states have conducted workload studies specific to their jurisdiction: Colorado, Idaho, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Mexico, New York (for five counties), North Carolina, Rhode Island, Texas, Virginia, and Washington. The results of Michigan, Louisiana and Idaho are listed below for the Board’s consideration as potential interim alternatives:

The caseload levels recommended by the Caseload Standards for Indigent Defenders in Michigan Report – 15 murder or manslaughter cases; 23 category A sexual offense cases; 37 other category A offenses; 46 category B offenses; 74 C, D, and E offenses; 232 gross misdemeanor offenses; 265

misdeemeanor offenses; 530 probation/parole violations per attorney per year.

-or-

The caseload levels recommended by The Louisiana Project Report – 9 category A offenses; 27 category B offenses for with a maximum penalty greater than 10 years may be imposed; 45 category B and C offenses; 85 category D, E, and gross misdemeanor offenses; 154 enhanceable misdemeanor offenses; 234 misdemeanor offense; and 219 [or 8.47 hours per] probation/parole revocation per attorney per year.

-or-

The caseload levels recommended by the Idaho Public Defense Commission’s Standards for Defending Attorneys – Edition 2018 – 2 capital cases; 210 non capital felony cases; 520 misdemeanor cases; 232 juvenile cases; 105 child protection/parent representation cases; 608 civil contempt cases; or 35 non capital direct appeal cases per attorney per year. Mental health commitment cases shall be included in the civil contempt cases standard.

However, using another system’s workload analysis for interim guides should be approached with caution. *See Rand Corp., Caseload Standards for Indigent Defenders in Michigan (2018)*, at 75 (“Before we turn to such a [jurisdictional] comparison, it is important to note that cross-jurisdictional comparisons of average attorney hours (either actual or recommended), caseload maximums, times to disposition, outcomes, or anything else related to criminal prosecutions or other client matters need to be viewed with caution. [. . .]. [M]yriad other factors at the state and local levels (e.g. prosecutorial policies regarding discovery, travel times to courthouses and jails, support staff levels) can arguably move such a comparison uncomfortably into the world of apples and oranges.”).

3. In assigned counsel or contract-for-service systems in which the lawyers also maintain private, retained practices, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

Standard 8 - Attorney Compensation (Economic Disincentives or Incentives)³⁸

A. Rates of Payment for Salaried Public Defenders.³⁹ Reasonable salaries, benefits, and resources should be provided to indigent defense counsel. The rates paid by the county district attorneys, the Nevada Attorney General, and/or other state offices serve as guidance for reasonable compensation.

B. Compensation and Expenses for Assigned Counsel.⁴⁰

1. Assigned counsel should receive prompt compensation at the statutory rate and should be reimbursed for their reasonable out-of-pocket, case-related expenses. Activities outside of court appearances, such as directing an investigation, negotiating, or tactical planning, etc., require no less legal skill and expertise than in-court appearances, and are equally important to quality representation. Assigned counsel should be compensated for all work necessary to provide quality legal representation.

2. Capped hourly rates and flat fee payment schemes are discouraged unless carefully designed to minimize disincentives and provide compensation reasonably expected to yield an hourly rate of compensation equivalent to the required minimum rate.

C. Contracting for Indigent Defense Services.⁴¹ The terms of any indigent defense contract should avoid any actual or apparent financial disincentives to the attorney's obligation to provide clients with competent legal services.⁴² Contracts-for-service should implement statutory hourly rates, or demonstrate that compensation is at least equivalent to those rates, and provide a mechanism to seek reimbursement for case-related expenses.

Commentary

1. Current Nevada statute provides for \$125.00 per hour in death penalty cases and \$100.00 in all other cases in which an attorney other than the public defender is appointed. NRS 7.125(1). Although the same statute provides maximum limits depending on the category of offense, the statute allows for fees in excess of the maximum where the matter is complex, severe, requires increased time necessary to provide an adequate defense or other special circumstances. NRS 7.125(4).

2. Likewise, NRS 7.135 allows for reimbursement for investigative, expert or other litigation services upon approval. The statute sets a maximum limit of \$500.00 for such services but allows for payment in excess of the limit, provided that the request is for services rendered in connection with a case and is necessary to provide fair compensation for services. NRS 7.135(1).

3. Although NRS 7.125 – 7.175 contemplate submission of invoices and approval of payment by a magistrate or judge, compliance plans for payment of counsel

and reimbursement of trial-related expenses should include adherence to Standard 6 and involve authorization through a public defender office, assigned counsel administrator, or contract-for-fee administrator.

4. The Board is mindful that the statutory hourly rates have not been updated since 2003 and the maximum limits per case type have not been updated since 1985. The Board also maintains a duty to “[r]eview laws and recommend legislation to ensure indigent defendants are represented in a constitutional manner.” NRS 180.320(3). Recommendations for increased maximum limits should be reviewed after completion of a Nevada specific workload study.

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**PROPOSED REGULATIONS OF THE
DEPARTMENT**

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Statutory Authority of Proposed Regulations

Nevada Revised Statute 180.320 requires that the Board to adopt regulations for counties and attorneys providing indigent defense service that include, but are not limited to, the following:

- (1) establishing specific continuing education requirements, NRS 180.320(2)(d)(1);
- (2) establishing experience requirements, NRS 180.320(2)(d)(1);
- (3) requiring time tracking and submission of related reports, NRS 180.320(2)(d)(2);
- (4) requiring uniform data collection and reporting, NRS 180.320(2)(d)(3);
- (5) establishing maximum caseload guidelines, NRS 180.320(2)(d)(4);
- (6) requiring the Department to ensure vertical representation to the greatest extent possible, NRS 180.320(2)(d)(5);
- (7) requiring that the State Public Defender and other attorneys providing indigent defense services include provisions for compliance with the Board's minimum standards and regulations in employment agreements or contracts, NRS 180.320(2)(d)(2) and (5);
- (8) establishing recommendations for the way appointed attorneys request and receive reimbursement for trial-related expenses, NRS 180.320(2)(e); and
- (9) establishing a formula for determining the maximum amount a county may pay for indigent defense services, NRS 180.320(3).

However, the Department's ability to oversee compliance with the requirements established by the Board is limited to the State Public Defender and counties whose population is less than 100,000. NRS 180.430(1).

Upon approval of minimum standards and adoption of the regulations, the process for initial corrective action plans, and securing any additional money necessary, for counties and/or delivery systems not in compliance is outlined in NRS 180.450.

Chapter _____ of NAC is hereby amended by adding thereto the provisions set forth as sections _____ to _____, inclusive of this regulation.

Department of Indigent Defense Services

General Provisions

NAC _____ Definitions. As used in this chapter, unless the context otherwise requires, the words and terms defined in NAC _____ to NAC _____, inclusive, have the meanings ascribed to them in those sections.

NAC _____. “Appointed attorney” defined. “Appointed attorney” includes private attorneys, both contracted and hourly.

NAC _____. “Ancillary services” defined. “Ancillary services” are defense services paid for in addition to attorney’s fees including investigator services, expert services, and mitigation specialist fees, where necessary and appropriate.

NAC _____. “CLE” defined. “CLE” means continuing legal education as discussed in Supreme Court Rules of Nevada 205-215.

NAC _____. “Delivery system” defined. “Delivery system” means, and includes all persons involved, in providing indigent defense services and representation. It may include county defender offices, appointed counsel programs, contract-for-service programs and the lawyers and support staff therein.

NAC _____. “Expert witness” defined. “Expert witness” is a person qualified by knowledge, skill, experience, training, or education to render an opinion on scientific, technical, or other specialized matters.

NAC _____. “Indigent Defense Services” defined.

1. “Indigent defense services” has the meaning ascribed to it in NRS 180.004.
2. “Indigent defense services” also includes an indigent person:
 - a. alleged to have violated probation or other supervision and incarceration may be imposed;
 - b. subject to commitment pursuant to NRS 433A.310;
 - c. seeking relief from a sentence of death pursuant to NRS 34.724;
 - d. who is in-custody as a material witness;
 - e. who has received notice that a grand jury is considering charges against him/her and request for counsel has been made, and approved, by the Court;
 - f. charged with criminal contempt and faces loss of liberty;
 - g. who faces loss of liberty in a case and Nevada law requires the appointment of counsel; or
 - h. is entitled to appointment of counsel under the Sixth Amendment to the United States Constitution or any provision of the Nevada Constitution, or when due process requires the appointment, or the judge is likely to impose incarceration

3. “Indigent defense services” may also include an indigent person:
- a. charged with a misdemeanor, infraction or code violation for which a sentence of confinement is authorized;
 - b. seeking post-conviction relief, other than from a death sentence, pursuant to NRS 34.724(1);
 - c. charged with civil contempt who faces loss of liberty;
 - d. who is a party to a dependency case in which termination of parental rights is a possibility;
 - e. called as a witness before a grand jury, a court, or any agency which has the power to compel testimony, and there is reason to believe, either prior to or during testimony, that the witness could be subject to criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty; or
 - f. any other case in which the interest of justice requires appointment of counsel.

NAC _____. “Investigator” defined. “Investigator” is a person licensed by the State of Nevada who is qualified to secure evidence and/or subpoena witnesses to be used in the preparation and trial of criminal cases.

NAC _____. “Mitigation specialist” defined. “Mitigation specialist” is a person qualified by knowledge, skill, experience, or other training as a mental health or sociology professional to investigate, evaluate and present psychosocial and other mitigation evidence in cases where the state is seeking the death penalty.

NAC _____. Scope of rules of practice. The provisions of this chapter govern practice and procedure before the Board of Indigent Defense Services.

Petitions for Regulation, Advisory Opinions and Declaratory Orders

NAC _____. Petition for action on regulation: Filing; contents.

1. An interested person who wishes to petition the Director for the adoption, filing, amendment or repeal of a regulation of the Department or a division of the Department must file with the Director and the Deputy Director who is authorized to adopt, file, amend or repeal the regulation, the original and one copy of the petition.
2. The petition must include:
 - a. the name and address of the petitioner;
 - b. a clear and concise statement of the regulation to be adopted, filed, amended or repealed;
 - c. the reason for the adoption, filing, amendment or repeal of the regulation;
 - d. the statutory authority for the adoption, filing, amendment or repeal of the regulation; and
 - e. the name of the public officer, Department or division of the Department authorized to adopt, file, amend or repeal the regulation.

NAC _____. Petition for action on regulation: Review; notice of decision.

1. The Director may refuse to review a petition which requests the adoption, filing, amendment or repeal of a regulation if:
 - a. the original petition is not accompanied by one copy of the petition; or
 - b. the petition does not contain the information required by NAC _____.
2. The Director may require the Deputy Director who is authorized to adopt the regulation to review the petition and issue a decision.
3. The Director or the Deputy Director designated by the Director pursuant to subsection 2 will notify the petitioner in writing of his or her decision within 30 days after the petition is filed.

NAC _____. Petition for declaratory order or advisory opinion: Authorization; filing; contents.

1. Except as otherwise provided in subsection 4, an interested person may petition the Director to issue a declaratory order or advisory opinion concerning the applicability of a statute, regulation or decision of the Department or any of its divisions.
2. The original and one copy of the petition must be filed with:
 - a. the Deputy Director who is authorized to administer or enforce the statute or regulation or to issue the decision; or
 - b. the Director, if the statute, regulation or decision is administered or enforced by the Director.
3. The petition must include:
 - a. the name and address of the petitioner;
 - b. the reason for requesting the order or opinion;
 - c. a statement of facts that support the petition; and

d. a clear and concise statement of the question to be decided by the Director or Deputy Director and the relief sought by the petitioner.

4. An interested person may not file a petition for a declaratory order or an advisory opinion concerning a question or matter that is an issue in an administrative, civil or criminal proceeding in which the interested person is a party.

NAC _____. Petition for declaratory order or advisory opinion: Referral by Deputy Director to Director.

1. Upon receipt of a petition for a declaratory order or an advisory opinion, a Deputy Director:

a. Shall send the petition to the Director for his or her decision if it contains an issue:

1. concerning significant public policy, including, but not limited to:
a. a question concerning more than one division in the Department;
b. a question of first impression;
c. a constitutional question; or
d. an issue that has an effect on the budget of the Department.
2. that is specified by the Director and concerns the administration of the Department pursuant to NRS .

b. May, with the consent of the Director, send to the Director for his or her decision the petition:

1. if the petitioner agrees; or
2. for good cause shown.

2. The Director will specify the issues that concern the administration of the Department pursuant to NRS ____ which must be referred to the Director by a chief in accordance with paragraph (b) of subsection 1.

NAC _____. Petition for declaratory order or advisory opinion: Action by Department; record and notice of order or opinion.

1. The Director or a Deputy Director may refuse to review a petition which requests him or her to issue a declaratory order or advisory opinion if:

a. The original petition is not accompanied by one copy of the petition; or
b. The petition does not contain the information required by NRS ____.

2. The Director or Deputy Director with whom the petition is filed may:

a. Conduct an informal hearing to determine issues of fact or to hear argument related to the petition and may enter reasonable orders that govern the conduct of such a hearing.

b. Request the petitioner to provide additional information or arguments relating to the petition.

c. Issue a declaratory order or an advisory opinion based upon the contents of the petition and any material submitted with the petition.

d. Consider relevant decisions that have been issued by the Department or division which apply or interpret the statute, regulation or decision in question.

- e. Enter any reasonable order to assist his or her review of the petition.
3. The Director or Deputy Director with whom the petition is filed will maintain a record of the order or opinion that is indexed by subject matter and mail a copy of the order or opinion to the petitioner within 60 days after:
 - a. the petition is filed;
 - b. the petition is referred to the Director for decision;
 - c. an informal hearing is conducted; or
 - d. any additional information or written argument is received by the Director or the Deputy Director, whichever occurs later.

NAC _____. Petition for declaratory order or advisory opinion: Request for Director to review decision of Deputy Director.

1. After receipt of a decision from a Deputy Director concerning the applicability or interpretation of a statute, regulation or decision of the division, a petitioner may request the Director to review the decision.
2. A request made pursuant to subsection 1 must:
 - a. be in writing;
 - b. contain the information required pursuant to NAC _____.; and
 - c. be filed with the Director within 30 days after the date of the decision.
3. The Director will review the request in accordance with the provisions of subsections 2 and 3 of NAC _____.

NAC _____ Advisory opinion: Oral response prohibited. The Director or a Deputy Director will not render an oral advisory opinion or respond over the telephone to a request for an advisory opinion. An oral response or a response given over the telephone by a member of the staff of the Department is not a decision or an advisory opinion of the Department.

County Contribution for Indigent Defense Services

NAC _____ Maximum amount of county contribution for indigent defense services

1. 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 of 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 the West Region Consumer Price Index, and/or
- b. The union negotiated cost of living increase for employees for that county.

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Training, education and qualification of attorneys providing indigent defense services.

NAC _____ Definitions. As used in this section, unless the context otherwise requires, the words and terms defined in NAC _____ to NAC _____, inclusive, have the meanings ascribed to them in those sections.

NAC _____. “Basic requirements” defined. “Basic requirements” means being admitted to practice law with the State of Nevada and satisfaction of annual CLE requirements set forth in NAC _____.

NAC _____. General requirements; waivers.

1. Attorneys who provide indigent defense services in counties whose population is less than 100,000 shall:
 - a. demonstrate compliance with the minimum standards and regulations of the Board pursuant to NAC _____ to NAC _____.
 - b. provide proof of compliance with annual CLE requirements pursuant to NAC _____ by January 1st of each year;
 - c. practice the indigent defense service for which he or she is qualified through the Department;
 - d. track their time and workload, and provide monthly reports as required by NAC _____;
 - e. comply with the Board’s minimum standards.
2. The provisions of this section may be temporarily waived by the Department for good cause.
3. Failure to comply may result in a corrective action plan pursuant to NRS 180.540 and/or removal from the list of lawyers eligible to provide indigent defense services.

NAC _____. Initial application with the Department.

1. Pursuant to NRS 180.430(1)(b), attorneys seeking to provide indigent defense services in counties whose population is less than 100,000 must demonstrate compliance with the Board’s minimum standards and regulations on the approved form.
2. The form shall be submitted to the Department for review by mail or electronic submission to [contact@dids.nv.gov]. Upon receipt of the form, the Department will review and determine the area of indigent defense services for which the attorney is qualified within 30 days. The Department will provide written notice to the attorney of the Department’s determination.
3. Once an application has been submitted, an attorney may continue practicing in the area of indigent defense for which the Department’s determination is sought until receiving written notice of the determination.

NAC _____. Challenge of Department Determination. If a lawyer disagrees with the Department’s determination of the areas on indigent defense services for which

an attorney is qualified, the Request for Reconsideration must be provided to the Department of Indigent Defense within 30 days of receiving the Department's determination. The Request for Reconsideration will be reviewed by the Board of Indigent Defense Services.

NAC _____. Qualifications for misdemeanor proceedings.

1. Prior to undertaking representation in a misdemeanor matter, lawyers shall satisfy basic requirements and have sufficient training or experience to provide competent representation.

2. For attorneys beginning to represent clients in misdemeanor matters, the Board strongly encourages that attorneys should seek the participation of a supervising or more experienced attorney prior to undertaking representation in an enhanceable misdemeanor or misdemeanor jury trial, pursuant to NRS 260.060 if applicable.

NAC _____. Qualifications for category B offenses for which the maximum penalty is less than 10 years, C, D, E felony or Gross Misdemeanor proceedings.

1. Attorneys seeking to represent individuals charged with category B offenses for which the maximum penalty is less than 10 years, C, D, E felony or Gross Misdemeanor proceedings, must:

- a. satisfy basic requirements; and
- b. have been trial counsel, alone or with other counsel, in two bench or jury trials tried to completion; or
- c. demonstrate equivalent experience and skills as determined by the Department.

NAC _____. Qualifications for non-capital category A offenses or category B offenses for which the maximum penalty is 10 years or more.

1. Attorneys seeking to represent individuals charged with non-capital category A offenses or category B offenses for which the maximum penalty is 10 years or more, must:

- a. satisfy the basic requirements;
- 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 the trial in three criminal jury trials tried to completion; or
- d. demonstrate equivalent experience, have a significant record of quality criminal trial court representation, and the ability to handle complex felony matters as determined by the Department.

NAC _____. Qualifications for death penalty cases. Attorneys seeking to represent individuals charged with category A offenses in which the state seeks death must meet the criteria established pursuant to SCR 250.

NAC _____. Qualifications for direct or post-conviction appeals of felonies other than capital proceedings. Attorneys seeking to represent individuals in direct

or post-conviction appeals of felonies other than capital proceedings shall satisfy basic requirements and have sufficient experience or training to undertake the representation.

NAC _____. Qualifications for appellate counsel in capital proceedings.

Attorneys seeking to represent individuals convicted of category A offenses in which the state sought death must meet the established criteria pursuant to SCR 250.

NAC _____. Qualifications for juvenile delinquency proceedings.

1. Attorneys seeking to represent individuals in juvenile delinquency proceedings shall:

- a. satisfy basic requirements and
- b. have the knowledge and skill necessary to represent a child diligently and effectively.

2. Attorneys seeking to represent individuals in juvenile delinquency proceedings should be familiar with

- a. the Department of Juvenile Justice Services and other state and local programs;
- b. competency and developmental issues;
- c. attorney/client interaction issues;
- d. school-related conduct and zero tolerance policy issues specific to juvenile representation.

3. The Board strongly encourages that attorneys beginning to represent clients in delinquency proceedings should consider working with an experienced juvenile delinquency practitioner as a mentor, pursuant to NRS 260.060 where applicable.

4. Attorneys representing children in certification proceedings in accordance with NRS Chapter 62B shall have litigated at least two criminal jury trials or be assisted by co-counsel with the requisite experience, pursuant to NRS 260.060 where applicable.

NAC _____. Qualifications for dependency and neglect and termination of parental rights cases.

1. Attorneys seeking to represent individuals in dependency and neglect and termination of parental rights cases, must:

- a. satisfy basic requirements,
- b. have a minimum of 20 hours training or equivalent experience in dependency and neglect and/or termination of parental rights proceedings, and
- c. must be familiar with the relevant areas of law, policy, research and practice, including:

1. NRS Chapter 128, NRS 432B, Nevada Rules of Civil Procedure, Nevada Rules of Evidence, Nevada Rules of Criminal Procedure, Nevada Rules of Professional Responsibility, and relevant local court rules;
2. permanency timelines;
3. federal statutes, regulation, policies, and rules including the Indian Child Welfare Act, the Adoption and Safe Families Act, and the Family First Prevention Services Act;

4. federal and state child welfare caselaw;
5. child development principles and research, particularly the importance of attachment and bonding and the harms of parental separation;
6. child welfare and family preservation services available in the community;
7. the role and authority of the Department of Child and Family Services (“DCFS”) and any administrative regulations, policies or laws that govern DCFS practices; and
8. a working knowledge of the types of experts who can consult with attorneys and/or testify on parenting, remedial services and other child welfare issues.

NAC _____. Continuing Legal Education and Training.

1. Attorneys providing indigent defense services shall annually complete a minimum of five (5) hours of CLE courses relevant to the areas of indigent defense services in which they practice.
 - a. Proof of compliance with annual CLE requirements shall be submitted to the Department by the first day of January, as required by NAC ____, by submitting a copy of the Nevada Board of Continuing Legal Education’s annual transcript by mail or electronic submission to [contact@dids.nv.gov].
2. Attorneys providing indigent defense services shall be guided by the Board’s minimum standard in determining CLE courses relevant to the areas of indigent defense services.
3. The Department will develop and provide CLE programs for attorneys who provide indigent defense services. These may include, but is not limited to, regular CLE courses and/or annual training programs that include topics relevant to indigent defense services.

Continuity of Representation

NAC _____. Continuity of Representation

1. Each county that employs or contracts for the provision of indigent defense services shall ensure, to the greatest extent possible, consistency in the representation of indigent defendants so that the same attorney represents a defendant through every stage of the case without delegating the representation to others, except that administrative or other tasks which do not affect the rights of the defendant may be delegated.
2. Nothing in this section shall preclude a county from utilizing a single attorney or rotation of attorneys to provide representation at initial appearance/arraignments.

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Attorney Compensation and Expenses

NAC _____ Attorney Compensation.

1. Rates of Payment for Salaried Public Defenders. Reasonable salaries, benefits, and resources should be provided to indigent defense counsel. The rates paid by the county district attorneys, the Nevada Attorney General, and/or other state offices shall serve as guidance for reasonable compensation.

2. Compensation and Expenses for Assigned Counsel.
 - a. Assigned counsel should receive prompt compensation pursuant to the statutory hourly rate pursuant to NRS 7.125(1). Activities outside of court appearances including, but not limited to, directing investigation, negotiating, or tactical planning are equally important to quality representation and shall be included in assigned counsel's compensation.

 - b. Assigned counsel should be promptly reimbursed for their reasonable out-of-pocket, case-related expenses such as the use of investigators and expert witness fees.

 - c. Capped hourly rates and flat fee payment schemes are prohibited unless carefully designed to minimize disincentives and provide compensation reasonably expected to yield an hourly rate of compensation equivalent to the required minimum rate.

3. Contracting for Indigent Defense Services.
 - a. The terms of any indigent defense contract-for-service shall avoid any actual or apparent financial disincentives to the attorney's obligation to provide clients with competent legal services.

 - b. Contracts-for-service may only be utilized if they are awarded on a competitive basis, implement statutory hourly rates, and provide a mechanism to seek reimbursement for reasonable case-related expenses.

 - c. Contracts-for-service must include a provision that requires the contracting attorney's compliance with the Board's minimum standards and regulations.

 - d. Any contracts-for-service must utilize the model contract approved by the Board.

4. Conflict Counsel. When any conflict of interest is identified by a public defender office or by assigned counsel, that case should be returned for reassignment to the designating authority. Payments to conflict counsel, including fees or other expenses incurred during the representation, shall not be deducted from the line item or contract negotiated with the primary providers (public defender office, assigned counsel, or contract-for-service).

5. Reimbursements. Attorneys must be reimbursed for any reasonable out-of-pocket expenses they incur as a result of representation. Mileage should be reimbursed based on

prevailing local norms and should not be less than the United States General Services Administration published rates.

6. Payments.

a. Invoices submitted by assigned counsel and contract defenders should be reviewed by an administrator, who should be empowered to approve or disapprove fees or expenses, in the manner prescribed in NRS 7.145.

b. Invoices should be approved in a timely manner unless there is cause to believe the amount claimed is unwarranted.

c. In lengthy cases, periodic billing and payment during the course of representation should be allowed.

d. Expenditure of public dollars should be subject to control mechanisms and audits that verify expenditure accuracy. This should be accomplished by following generally accepted procedures that separate staff duties; establish billing policies; and ensure thorough review of invoices, including benchmark setting and investigation where necessary. The approval process should be supported by an efficient dispute resolution procedure.

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Uniform Reporting of Data

NAC _____ Definitions. As used in this section, unless the context otherwise requires, the words and terms defined in NAC _____ to NAC _____, inclusive, have the meanings ascribed to them in those sections.

NAC _____. **“Adjudicated/Disposed/Closed” defined.**

1. “Adjudicated/Disposed/Closed” means a count of cases by defendant for which an original entry of final adjudication has been entered or for which an appointment has ended.
2. Cases adjudicated/disposed/closed should be counted in the same category of offense as it was counted in.

NAC _____. **“Appointment” defined.** “Appointment” means any time a lawyer is asked or assigned to act on behalf of a person in a criminal or juvenile matter by a judicial officer. An “appointment” ends when a lawyer is no longer involved in a case for whatever reason. There can be multiple “appointments” for a single case during the duration of a case.

NAC _____. **“Beginning pending” defined.** “Beginning pending” means a count of cases by defendant that, at the start of the reporting period, are awaiting disposition.

NAC _____. **“Case” defined.**

1. A “case” means a single defendant on a single charging document, regardless of the number of counts alleged, for felony, gross misdemeanor, and misdemeanor matters.
2. A “case” means a single juvenile defendant on a single petition, regardless of the number of counts alleged, in juvenile delinquency matters.
3. For cases in which multiple charges are involved, the case will be classified by the highest offense charged.
4. Felony, gross misdemeanor, and misdemeanor cases are counted at time of appointment.

NAC _____. **“End pending” defined.** “End pending” means a count of cases by defendant that, at the end of the reporting period, are awaiting disposition.

NAC _____. **“Felony” defined.** “Felony” has the meaning ascribed to it by NRS 193.130.

NAC _____. **“Final adjudication” defined.** “Final adjudication” means an entry of judgment or adjudication, an order of dismissal, or when an appointment ends regardless of adjudicatory status.

NAC _____. **“Gross misdemeanor” defined.** “Gross misdemeanor” has the meaning ascribed to it by NRS 193.140.

NAC _____. **“Inactive status” defined.** “Inactive status” means a count of cases in which a warrant for failure to appear has been issued, a diversion program has been ordered, or other similar incident that made a case inactive.

NAC _____. **“Juvenile case” defined.** “juvenile case” means cases involving 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.

NAC _____. **“Misdemeanor” defined.** “Misdemeanor” has the meaning ascribed to it by NRS 193.150.

NAC _____. **“New appointment” defined.** “New appointment” means a count of cases by defendant that have been assigned counsel for the first time.

NAC _____. **“Returned from warrant” defined.** “Returned from warrant” means a count of cases in which a defendant has been arrested on a failure to appear warrant and has appeared before the court, returned from a diversion program, or other similar occurrence that re-activates a case.

NAC _____. **“Set for review” defined.** “Set for review” means a count of cases that, following an initial entry of judgment during the reporting period, are awaiting regularly scheduled reviews involving a hearing before a judicial officer.

NAC _____. **Workloads of attorneys providing indigent defense services.**

1. The workloads of attorneys providing indigent defense services shall allow each attorney to give each client the time and effort necessary to ensure effective representation.
2. Workload requirements will be determined through Nevada specific weighed caseload studies conducted by the Department and implemented by regulation upon completion.
3. Prior to completion of a workload study and regulation, providers of indigent defense services shall reasonably comply with workload recommendations as set forth by the Board’s minimum standards.
4. Workloads will be reviewed by Nevada specific study at least once every five years.

NAC _____. **Reporting of workload data.**

1. On a monthly basis, attorneys providing indigent defense services in counties whose population is less than 100,000 shall provide to the Department a report detailing his or her current appointments.

2. The report shall include totals for:
 - a. beginning pending cases;
 - b. new appointments;
 - c. cases returned from warrant;
 - d. cases adjudicated, disposed, or closed;
 - e. inactive cases;
 - f. cases set for review; and
 - g. end pending cases.

3. Cases will be arranged by the following offense categories:
 - a. Death penalty;
 - b. Murder (non-capital);
 - c. Category A – sexual offenses;
 - d. Category A – other;
 - e. Category B offense for which a maximum penalty of 10 years or more may be imposed;
 - f. Category B offenses for which a maximum penalty less than 10 years may be imposed;
 - g. Category C, D, E;
 - h. Gross misdemeanor;
 - i. appeals to the Appellate Courts of Nevada;
 - j. capital appeals;
 - k. Misdemeanor appeal;
 - l. Misdemeanor DUI;
 - m. Misdemeanor cases involving allegation of domestic violence;
 - n. Misdemeanor;
 - o. Probation/Parole violation;
 - p. Juvenile felony;
 - q. Juvenile misdemeanor;
 - r. Juvenile sexual offense;
 - s. Juvenile violent offense;
 - t. Juvenile certification proceedings;
 - u. Juvenile appeal;
 - v. Juvenile probation/parole revocation;
 - w. Specialty Court;
 - x. Abuse and neglect proceedings;
 - y. Termination of parental rights; and
 - z. Involuntary commitments.

4. The report shall be provided to the Department in the method approved by the Board and shall be due within seven (7) calendar days from the end of the reporting month.

NAC _____ . Time keeping.

1. On a monthly basis, lawyers providing indigent defense services in counties whose population is less than 100,000 shall provide to the Department a report detailing time spent delivering those services.

2. The report shall include time spent in the following categories:

a. In-court activities:

1. arraignment/bail;
2. preliminary hearing;
3. status or review;
4. motion or writ hearings;
5. trial;
6. sentencing;
7. post-trial/plea proceedings;
8. dispositional or plea hearings;
9. *Anaya* hearing;
10. competency proceedings;
11. *Sell* hearings;
12. contempt proceedings;
13. detention hearings;
14. Diversion/Specialty Court;
15. evidentiary hearings;
16. extradition hearing;
17. transfer/certification hearing; and
18. oral argument.

b. Out-of-court activities:

1. case preparation;
2. document review;
3. legal research;
4. legal document preparation;
5. case administration;
6. direct client contact;
7. client-related contact;
8. communication with investigator;
9. communication with social worker;
10. communication with witness;
11. communication with district attorney/court personnel;
12. communication with supervisor/team/colleague;
13. appellate document collection;
14. appellate filing;
15. social services by attorney;
16. investigation by attorney;
18. clerical;
19. travel; and
20. waiting.

- c. Expert, investigation, and private workload time:
 1. investigator hours per case;
 2. expert witness hours per case; and
 3. if applicable, total hours spent in such private practice.
3. The report shall be provided to the Department in the method approved by the Board and shall be due within seven (7) calendar days from the end of the reporting month.

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Confidentiality of Records

NAC _____ Certain records relating to recommendations and complaints to the Board of Indigent Defense Services and application of attorneys deemed confidential; certain records relating to disciplinary action deemed public records; exceptions.

1. Except as otherwise provided in this section and NRS 239.0115, any complaints, recommendations, records or information obtained by the Board through the complaints and recommendations procedure of NRS 180.320(2)(b) or the application of attorneys pursuant to NAC _____ and any record of any investigation are confidential.

2. The Board shall, to the extent feasible, communicate or cooperate with or provide any documents or other information to another licensing board or any agency that is investigating a person, including a law enforcement agency.

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ENDNOTES

¹ 372 U.S. 335, 83 S.Ct. 792 (1963).

² 466 U.S. 668, 104 S.Ct. 2052 (1984).

³ 466 U.S. 648, 104 S.Ct. 2039 (1984).

⁴ Sixth Amendment Center, *Effective Assistance at Critical Stages* as viewed February 14, 2020 at <http://www.sixthamendment.org/the-right-to-counsel/effective-assistance-at-critical-stages/>.

⁵ The right to counsel includes more than a warm body with a bar card – the right to counsel guaranteed by the Sixth Amendment includes the right to *effective* assistance of counsel capable of providing meaningful guidance to an indigent defendant. See *Strickland v. United States*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063 (1984); see also *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64 (1932) (finding that the “right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has . . . no skill in the science of the law. [. . .]. He requires the guiding hand of counsel at every step in the proceedings.”) To that end, the Ninth Principle of the American Bar Association’s *Ten Principles of a Public Defense Delivery System* (“Ten Principles”) recommends that “[d]efense counsel is provided with and required to attend continuing legal education.”

⁶ ADKT 0411, *Order in the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases* (“ADKT 0411”) (Oct. 2008) Standard 4-2 (“Counsel has a continuing obligation to stay abreast of changes and developments in the law.”); *National Legal Aid and Defender Association* (“NLADA”), *Performance Guidelines for Criminal Defense Representation*, Guideline 1.2 (2006).

⁷ The Nevada Rule of Professional Conduct 1.1 provides that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

⁸ ADKT 0411 (Oct. 2008) Standard 2-3 (training programs should include “the presentation and rebuttal of scientific evidence and development in mental health fields and other relevant areas of forensic and biological science.”).

⁹ See Paul Matteoni, *Message from the President: 2020 – Our Duty of Technology Competence*, NEVADA LAWYER, February 2020, 4; Bob Ambrogi, *A 37th State Adopts the Ethical Duty of Technology Competence*, LawSites (Sept. 2019), as viewed February 12, 2020 at <https://lawsitesblog.com/2019/09/a-37th-state-adopts-the-ethical-duty-of-technology-competence/html>. Courtroom technology includes use of simultaneous audiovisual technology, use of courtroom technology such as PowerPoint, presentation of audio/video evidence, annotation monitors, witness monitors, evidence cameras, and/or integrated controllers/media carts. See Herbert Dixon Jr., *The Basics of a Technology*

Enhanced Courtroom, The Judges' Journal (Nov. 2017), as viewed January 23, 2019 at https://www.americanbar.org/groups/judicial/publications/judges_journal/2017/fall/basics-technologyenhanced-courtroom/.

¹⁰ *American Bar Association*, Providing Defense Services, Commentary to Standard 5-5.1 (3rd Ed. 1992) (“Adequate and frequent training programs are a key component in the provision of quality representation by defense attorneys. Criminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or loss of liberty. . . .”); NAC, *The Defense*, Standard 13.16 (1973) (“In-service training and continuing legal education program should be established on a systematic basis at the State and local levels for public defenders, their staff attorneys, and lawyers on assigned counsel panels”); *National Study Commission on Defense Services*, Guidelines for Legal Defense Systems in the United States, Guidelines 5.7 – 5.8 (1976) (institutional defender offices and assigned counsel programs should be responsible for systematic training of lawyers).

¹¹ *National Advisory Commission on Criminal Justice Standards and Goals* (“NAC”), *The Defense*, Standard 13.16 Training and Education of Defenders (1973) (“Each state should establish its own training program to instruct new defenders and assigned panel members in substantive law and procedure.”)

¹² Under the Regulation of the Nevada Board of Continuing Legal Education 3(1), the primary purpose of any accredited educational program must be (1) improving professional skills or competence, (2) furthering education in professional or ethical obligations, and/or (3) improving efficiency in delivery of services. Additionally, accredited education activities in areas other than criminal law may be approved for providers of indigent defense services “if the program has significant intellectual and practical content and improves professional competence or skills or delivery of legal services.” *Regulations of the Board of Continuing Legal Education* 3(5) and (6).

¹³ The United States Supreme Court has held that the constitutional right to counsel guaranteed by the Sixth Amendment includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063 (1984). The right to effective assistance of counsel applies equally whether counsel was appointed or retained. *Cuyler v. Sullivan*, 446 U.S. 335, 344-45, 100 S.Ct. 1708, 1716 (1980). Furthermore, an attorney’s experience is relevant to an evaluation of his effectiveness. *United States v. Cronin*, 466 U.S. 648, 665, 104 S.Ct. 2039, 2050 (1984). Further, the ABA’s Sixth Principle provides that “[d]efense counsel’s ability, training, and experience match the complexity of the case. ABA, *Ten Principles*, Principle Six (2002). The commentary further explains “[c]ounsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation. *Id.*, Commentary to Principle Six (2002); see also NLADA, *Performance Guidelines for Criminal Defense Representation*, Guideline 1.2(b), 1.3(a) (2006).

¹⁴ The ABA’s Tenth Principle provides that “[d]efense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.” ABA, *Ten Principles*, Principle Ten (2002). Relevant here, the commentary to Principle 10 provides that institutional defenders, assigned counsel and contract defenders “should be supervised and periodically evaluated for competence and efficiency.” *Id.*

¹⁵ In its *Ten Principles of a Public Defense Delivery System*, the ABA’s Third Principle provides that “[c]lients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel.” The commentary of the *Ten Principles* elaborates that “[c]ounsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.” *Id.*

¹⁶ The Sixth Amendment of the United States Constitution’s right to counsel attaches at a criminal defendant’s first appearance before a judicial officer. *Rothgery v. United States*, 554 U.S. 191, 211-12, 128 S.Ct. 2578, 2591-92 (2011); *see also* NRS 178.397 (in criminal cases, the right to counsel extends to “every stage of the proceedings from the defendant’s initial appearance before a magistrate or the court through appeal, unless the defendant waives such appointment.”); 6th Amendment Center, *The Right to Counsel in Rural Nevada – Evaluation of Indigent Defense Services* p.154 (2019). Although *Rothgery* explains that the Constitution does not necessarily guarantee the presence of counsel at the moment of attachment, Nevada law allows public defenders to interview an indigent person before being formally appointed as counsel. NRS 180.060; 260.050. Professional associations authoring guides on the provision of indigent defense uniformly recommend the presence of counsel at the initial appearance/arraignment of the defendant. *See* ABA, *Standards for Criminal Justice – Providing Defense Services*, Standard 5-6.1 Initial provision of counsel, Standard 5-8.1 Providing counsel to persons in custody (3rd Ed.); NSC, *Guidelines for Legal Defense Systems in the United States*, Standard 1.2 Time of Entry (1976); National Legal Aid and Defender Association (“NLADA”), *Performance Guidelines for Criminal Defense Representation*, Guideline 3.1 (2006).

¹⁷ *Bell v. Cone*, 535 U.S. 685, 695, 122 S.Ct. 1843, 1851 (2002) (defining “critical stage” as “a step of a criminal proceeding, such as an arraignment, that held significant consequences for the accused.”); *see also Mitchell v. Mason*, 325 F.3d 732, 742-43 (6th Cir. 2003) (pre-trial period is a critical stage of criminal proceedings).

¹⁸ Federal precedent interpreting the Sixth Amendment guarantee of effective assistance of counsel recognizes that systems precluding a thorough discussion with the client at the outset of representation due to lack of time and confidentiality create a constructive denial of the right to counsel. *See United States v. Morris*, 470 F.3d 596, 602 (6th Cir. 2006) (system of case assignment in which counsel was assigned shortly before preliminary examination amounted to state impediment to effective assistance of counsel) *citing United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984).

¹⁹ The commentary to the ABA’s Fourth Principle provides similar guidance: “Counsel should interview the client as soon as practicable before the preliminary examination or trial date.” ABA, *Ten Principles* (2002), Commentary on the Fourth Principle.

²⁰ The three-business-day requirement is specific to clients in local custody because indigent defendants within the custody of the NDOC and some other defendants may be incarcerated in a county different from the charging offense. The requirement of an initial meeting within three business days is consistent with ADKT 0411's Order creating performance standards and is typical of national requirements. ADKT 0411, *Order*, Standard 4-4(b) (Oct. 2008); ABA, *Criminal Justice Standards for the Defense Function*, Standard 4-3.1 (4th Ed.) ("Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client.")

²¹ This standard follows the Nevada Supreme Court's recommended performance guidelines in ADKT 0411, *Order*, Standards 2-7, 3-5, 4-4, 5-4 (Oct. 2008); *see also* National Legal Aid and Defender Association ("NLADA"), *Performance Guidelines for Criminal Defense Representation*, Standard 2-2 (2006).

²² In its *Ten Principles of a Public Defense Delivery System*, the ABA's Fourth Principle provides that "[d]efense counsel is provided sufficient time and a confidential space within which to meet with the client." The commentary further provides that "[c]ounsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel." *Id.*, Commentary on the Fourth Principle (2002); ABA, *Criminal Justice Standards for the Defense Function*, Standard 4-2.2 (4th Ed.) (all detention or imprisonment institutions should provide access to confidential and unmonitored facilities and telephonic communications).

²³ The United State Supreme Court has held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. United States*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066 (1984); *see also Vanisi v. Baker*, ___ Nev. ___, 405 P.3d 97 (2017) (*unpublished*) (finding that *Strickland's* "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" applies to post-conviction counsel) *citing State v. Love*, 109 Nev. 1136, 1141, 865 P.2d 322, 325 (1993) (Rose and Steffen, JJ., concurring) ("Legal and factual judgments erroneously made because of inadequate investigation may be deemed ineffective assistance of counsel."); *Krehnovi, v. State*, No. 67856 Order of Reversal and Remand (Nev. App. 2015) ("If counsel failed to make a reasonable investigation or a reasonable decision not to investigate, then counsel was ineffective . . .").

²⁴ The Nevada Supreme Court's ADKT 0411 performance standards also recognize the duty to conduct a reasonable investigation in capital proceedings, felony and misdemeanor proceedings, and juvenile delinquency matters. ADKT 0411, *Order* (Oct. 2008), Standard 2-9(a) ("Counsel at every stage (of capital litigation) has an obligation to conduct an appropriate and independent investigation relating to issues of both guilt and penalty."); Standard 4-7 ("Counsel should conduct, or secure resources to conduct, a prompt investigation . . . relevant to the merits of the case and penalty The duty to investigate exists regardless of the client's admissions . . . , however counsel may consider such admissions . . . in determining the scope of investigation."); and Standard 5-7 ("An

investigation by defense counsel is essential for competent representation of youth in delinquency proceedings. The duty to investigate exists regardless of the youth's admissions . . . , however counsel may consider such admissions . . . in determining the scope of investigation.”).

²⁵ With respect to the use of expert witnesses, the United States Supreme Court has found that “[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial or both.” *Harrington v. Richter*, 562 U.S. 86, 106, 131 S.Ct. 770, 788 (2011); *see also Hinton v. Alabama*, 571 U.S. 263, 274, 134 S.Ct. 1081, 1088 (2014) (finding that an attorneys failure to request additional funding to hire a competent expert witness was ineffective assistance of counsel); *Lobato v. State*, ___ Nev. ___, 385 P.3d 618 (2016) (reversing and remanding for evidentiary hearing on issue of whether failure to investigate and retain defense expert based on budget constraints was unreasonable decision by counsel); *Williams v. Martin*, 618 F.2d 1021, 1025 (1980) (“There can be no doubt that an effective defense sometimes requires the assistance of an expert witness.”).

²⁶ The ADKT 0411 performance standards promulgated by the Nevada Supreme Court also recognize counsel's duty to investigate and retain expert witnesses where reasonable and appropriate. ADKT 0411, Order (Oct. 2008) Standard 2-1(b) (Counsel should secure the assistance of all expert . . . services reasonably necessary or appropriate to provide competent legal representation at every stage of the [capital] proceedings); Standard 4-7 (counsel should “obtain the assistance of such experts as are appropriate to the facts of the case and reasonably necessary under applicable case law” in felony and misdemeanor cases); and Standard 5-7 (counsel should “obtain the assistance of such experts as are appropriate to the facts of the case” in juvenile proceedings).

²⁷ The United States Supreme Court addressed the issue of independence in *Polk v. Dodson*, 454 U.S. 312, 321-322, 102 S.Ct. 445, 451 (1981):

First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. [. . .]. Second, and equally as important, it is the constitutional obligation of the State to respect professional independence of the public defenders whom it engages. [. . .]. There can be no fair trial unless the accused receives the services of an effective and independent advocate.

²⁸ Recognizing the need for independence of defense counsel, ADKT 0411 's initial order mandated the independence of court-appointed public defense systems from the judiciary:

WHEREAS, participation by the trial judge in the appointment of counsel, other than public defenders and special public defenders, and in the approval of expert witness fees and attorney fees creates an appearance of impropriety; and

WHEREAS, the appointment of counsel, approval of fees, and determination of indigency should be performed by an independent board, agency, or committee, or by judges not directly involved in the case;

WHEREAS, the selection of lawyers, other than public defenders and special public defenders, to represent indigent defendants should be made by the administrators of an indigent defense program; and

WHEREAS, the unique circumstances and case management systems existent in the various judicial districts require particularized administrative plans to carry out the recommendations of the Commission [. . .];

IT IS HEREBY ORDERED that each judicial district shall formulate and submit to the Nevada Supreme Court for approval [. . .] an administrative plan that excludes the trial judge or justice of the peace hearing the case and provides for: (1) the appointment of trial counsel, appellate counsel in appeals not subject to the provisions of Nevada Rule of Appellate procedure 3C, and counsel in post-conviction matters; (2) the approval of expert witness fees, investigative fees, and attorney fees; and (3) the determination of a defendant's indigency in the courts within the district; and

IT IS FURTHER ORDERED that each municipal court shall submit [. . .] an administrative plan that excludes the trial judge or justice of the peace hearing the case and provides for: (1) the appointment of trial counsel and appellate counsel; (2) the approval of expert witness fees, investigative fees, and attorney fees; and (3) the determination of a defendant's indigency in each of their courts.

ADKT 0411, *Order* (Jan. 2008). The Order was stayed as to rural counties and further input sought from the Rural Issues Subcommittee due to financial obstacles to implementation at the time. *Id.* *Order* (March 2008); *Report and Recommendations of the Indigent Defense Commission Rural Subcommittee* (Dec. 2008) at 44-46.

²⁹ The first principle of the ABA's *Ten Principles of a Public Defense Delivery System* (2002) provides that "[t]he public defense function, including selection, funding, and payment of defense counsel, is independent." Relevant here, its commentary offers the following guidance:

The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of service, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public

defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

Id., First Principle (2002), Commentary.

³⁰ The mere presence of a lawyer at a trial “is not enough to satisfy the constitutional command.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063 (1984). Where delivery systems place counsel in circumstances in which even competent counsel cannot render effective assistance, prejudice under *Strickland* is presumed. See *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984); see also *United States v. Morris*, 470 F.3d 596, 602 (6th Cir. 2006) (system of case assignment in which counsel was assigned shortly before preliminary examination amounted to state impediment to effective assistance of counsel). And in *Powell v. Alabama*, the Court held that “a defendant . . . must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.” *Powell*, 287 U.S. 45, 59, 53 S.Ct. 55, 60 (1932). In total, these holdings provide that where caseloads prohibit counsel from providing competent representation, ineffective assistance of counsel is presumed under *Strickland*.

³¹ Nevada Rule of Professional Conduct 1.1 requires an attorney to provide competent representation. “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” *Id.* Further, the Rules of Professional Conduct require that an attorney act with reasonable diligence and promptness in the representation. NRPC 1.3.

³² ADKT 0411 recommends that attorneys and appointing authorities ensure workloads are such that attorneys can render competent legal representation. Standard 2-2(b) (“The appointing authority should implement effectual mechanisms to ensure that the workload of attorneys representing clients in death penalty cases is maintained at a level that enables counsel to provide each client with competent legal representation”); Standard 2-5 (“Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with competent legal representation. . . .”); Standard 4-3 (counsel providing felony and misdemeanor representation have an obligation to make sufficient time to afford competent legal representation); and Standard 5-3 (in juvenile representation, “counsel should not carry a workload that by reason of its excessive size or representation requirements interferes with the rendering of competent legal service, endangers the juvenile’s interest in speedy disposition of charges, or risks breach of professional obligations.”)

³³ The Fifth Principle of the ABA’s *Ten Principles of a Public Defense Delivery System* provides that “[d]efense counsel’s workload is controlled to permit the rendering of quality representation.” Relevant here, its commentary offers the follow guidance:

Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards in no event should be exceeded, but the concept of workload (i.e., caseload adjusted by

factors such as case complexity, support services, and attorney's nonrepresentational duties) is a more accurate measurement.

Id. Fifth Principle, Commentary (2002).

³⁴ American Council of Chief Defenders, *Statement on Caseloads and Workloads* (2007).

³⁵ Rand Corp., *Caseload Standards for Indigent Defenders in Michigan*, 70 (2018).

³⁶ *Id.*

³⁷ Washington State Office of Public Defense, *Parents Representation Program Standards for Attorneys*, Standard 1.4 (2018); ABA, *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*, Obligation of Attorney Managers, Standard 2 – Determine and set reasonable caseloads for attorneys (2006) (recommending a caseload of 50-100 cases, depending on what the attorney can competently handle).

³⁸ In *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 797 (1963), The United States Supreme Court found that defense “lawyers in criminal courts are necessities, not luxuries.” In support, the Court found that “[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime.” *Id.* “[S]ociety’s goal should be that the system for providing counsel and facilities for the defense should be as good as the system that society provides for the prosecution.” *Argersinger v. Hamlin*, 407 U.S. 25, 43, 92 S.Ct. 2006, 2015 (1972) (Burger, C.J. concurring).

³⁹ The Eighth Principle of the ABA’s *Ten Principles of a Public Defense Delivery System* (2002) provides that “[t]here is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.” With respect to institutional defenders, the commentary provides “There should be parity of . . . salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.” *Id.* Eighth Principle, Commentary.

⁴⁰ With respect to assigned counsel programs, the commentary to the Eighth Principle provides “[a]ssigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.” *Id.*

⁴¹ For contract-for-services systems, the commentary to the Eighth Principle provides “[c]ontracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services. [. . .].” *Id.*

⁴² Through its Administrative Docket, the Nevada Supreme Court prohibited the “use of a totally flat fee contract” and required the use of “contracts that allow for a modification of fees for extraordinary cases and allow for investigative fees and expert witness fees.” ADKT 0411, *Order in the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases* (July 2015). In the context of capital litigation, ADKT 0411 recommended that “counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of competent legal representation” and noted that “flat fees, caps on compensation, and lump-sum contracts” are improper. *Id.*, *Order*, Standard 2-4 (Oct. 2008).

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