

**PROPOSED REGULATION OF THE  
BOARD ON INDIGENT DEFENSE SERVICES**

**LCB FILE NO. R033-23I**

**The following document is the initial draft regulation proposed  
by the agency submitted on 08/07/2023**

## Board of Indigent Defense Services Draft Regulations

- 1. Statutory Authority: Pursuant to NRS 180.320, the Board has rule making authority and was previously tasked to adopt regulations to establish a formula for determining the maximum amount that a county may be required to pay for the provision of indigent defense services. See AB81(2019). The Board now moves to repeal the regulatory maximum contribution formula contained within NAC 180, Sections 16-19, as the formula has since been codified by AB518(2023) and AB454(2023)**

### ~~[Sec. 16.~~

~~1. The maximum amount that a county is required to pay for the provision of indigent defense services during a fiscal year must not exceed the sum of:~~

~~(a) In a county whose population is less than 100,000:~~

~~(1) The actual costs to the county for providing indigent defense services, minus any expenses relating to capital offenses and murder cases, calculated as the average of the total of such costs for Fiscal Year 2017-2018 and Fiscal Year 2018-2019; and~~

~~(2) The percentage equal to the lesser of:~~

~~(I) The cost of inflation, as measured by the Consumer Price Index/or All Urban Consumers, West Region (ALI Items), as published by the United States Department of Labor for the immediately preceding calendar year or, if that index ceases to be published by the United States Department of Labor, the published index that most closely resembles that index, as determined by the Department, or~~

~~(II) The lowest union negotiated cost of living increase for employees for that county.~~

~~(b) In a county whose population is 100,000 or more,~~

~~(1) The actual costs to the county for providing indigent defense services, calculated as the average of the total of such costs for Fiscal Year 2017-2018 and Fiscal Year 2018-2019; and~~

~~(2) The percentage equal to the lesser of:~~

~~(I) The cost of inflation, as measured by the Consumer Price Index for All Urban Consumers, West Region (AL/ Items), as published by the United States Department of Labor for the immediately preceding calendar year or, if that index ceases to be published by~~

~~the United States Department of Labor, the published index that most closely resembles that index, as determined by the Department; or~~

~~(II) The lowest union negotiated cost of living increase for employees for that county.~~

~~2. If a county whose population is less than 100,000 chooses, pursuant to section 19 of this regulation, to transfer to the State Public Defender the responsibility of providing representation in:~~

~~(a) Direct appeals to the appellate court of competent jurisdiction, the cost of providing representation in those cases is a charge against the State and is excluded from the required maximum contribution of the county.~~

~~(b) Death penalty cases, [the State Public Defender shall submit to the county an estimate for the representation. The county is responsible for paying 25 percent of the actual costs of any death penalty litigation in that county estimate and shall make such a payment in accordance with NRS 180.110. Such payments count towards the maximum contribution of the county.]~~

~~3. If a county, in its plan for the provision of indigent defense services, follows the recommendations set forth in section 25 of this regulation pertaining to the payment of case related expenses, such expenses may be a charge against the State and reimbursed to the county in accordance with sections 17 and 18 of this regulation.]~~

### ~~**[Sec. 17.**~~

~~1. A county may seek state contributions of the provision of indigent defense services in excess of the maximum county contribution, as calculated pursuant to section 16 of this regulation through:~~

~~(a): The submission of the annual report containing the plan for the provision of indigent defense services for the county for the next fiscal year as required pursuant to subsection 2 of NRS 260.070; or~~

~~(b) Pursuant to NRS 180.450, as amended by section 14 of Assembly Bill No. 480, chapter 380, Statutes of Nevada 2021, at page 2268, a request by by Executive Director to tire Interim Finance Committee/or an allocation from the Contingency Account pursuant to NRS 353.266 to address immediate needs in a corrective action plan.~~

~~In accordance with the duty of the Board to review and approve the budget/or the Department pursuant to paragraph (I) of subsection 1 of NRS 180.320, any state contribution requested by a county is subject to the approval of the Board. Any disagreement with respect to a plan for the provision of indigent defense services or state contributions necessary to comply with sections 2 to 45, inclusive, of this regulation will be resolved by the Board.~~

~~3. A county seeking state contributions pursuant to subsection 1 by submitting to the Department a financial status report, certified by the board of county commissioners or its designee and in a form approved by the Department, not later than 15 days after the end of each calendar quarter.]~~

~~**[Sec. 18.]** 1. If a county reaches its maximum contribution for the provision of indigent defense services as determined in accordance with section 16 of this regulation, state contributions for the provision of indigent defense services will be provided to the county treasury by reimbursement, up to the amount approved by the Board and the Legislature in the county's plan for indigent defense services, upon the quarterly submission of the financial status report of the county in accordance with subsection 3 of section 17 of this regulation~~

~~Any state contributions for the provision of indigent defense services must be provided for:~~

~~(a) One fiscal year; and~~

~~(b) The express purpose of complying with applicable indigent defense standards and regulations and improving the provision of indigent defense services in a county.~~

~~2. If a county reaches its maximum contribution for the provision of indigent defense services as determined in accordance with section 16 of this regulation, state contributions for the provision of indigent defense services will be provided to the county treasury by reimbursement, up to the amount approved by the Board and the Legislature in the county's plan for indigent defense services, upon the quarterly submission of the financial status report of the county in accordance with subsection 3 of section 17 of this regulation.~~

~~3. If a county reaches the maximum state contributions approved by the Board in accordance with section 17 of this regulation, any additional state contributions necessary for the provision of indigent defense services must, in accordance with NRS 180.450, as amended by section 14 of Assembly Bill No. 480, chapter 380, Statutes of Nevada 2021, at page 2268, be sought by a corrective action plan pursuant to a request by the Executive Director to the Interim Finance Committee for an allocation from the Contingency Account pursuant to NRS 353.266.~~

~~4. Any unencumbered or unexpended balance of state contributions remaining at the end of the fiscal year lapses and reverts to the available balance of the fund from which it was appropriated.~~

~~5. As used in this section, "fiscal year" means the period beginning on July 1 of a given year and ending on June 30 of the following year.]~~

~~**Sec. 19:**~~

~~[1. Upon the request of a county whose population is less than 100,000, the State Public Defender may handle for the county all death penalty cases, direct appeals to the~~

~~Supreme Court of Nevada appellate court of competent jurisdiction, or death penalty cases and direct appeals to the appellate court of competent jurisdiction.~~

~~2. If a county wishes to have the State Public Defender handle all death penalty cases, and/or direct appeals to the Supreme Court of Nevada to the appellate court of competent jurisdiction, or death penalty cases and direct appeals to the appellate court of competent jurisdiction, as applicable, the board of county commissioners for the county shall notify the State Public Defender, and such responsibility must be transferred, in accordance with the procedure set forth in subsection 6 of NRS 180.450, as amended by section 14 of Assembly Bill No. 480, chapter 380, Statutes of Nevada 2021, at page 2268.~~

~~3. After the responsibility of handling such cases all death penalty cases, direct appeals to the appellate court of competent jurisdiction, or death penalty cases and direct appeals to the appellate court of competent jurisdiction for a county, as applicable, is transferred to the State Public Defender, such responsibility must not be transferred back to the county unless the county receives the approval of the Executive Director of the Department in accordance with NRS 180.460. ]~~

- 2. Pursuant to NRS 180.320(2)(d)(4) the Board must establish guidelines to be used to determine the maximum caseloads for attorneys who provide indigent defense services. Further, in the *Davis v. State*, case number 170C002271B, the “Stipulated Consent Judgement” requires the Defendants to commission a Delphi study to be used to determine the maximum caseloads for attorneys that provide indigent defense services. See p. 17, l. 4-18. Within twelve months of completion of the study, Defendants shall require compliance with the workload standards established as a result of the Delphi Study. Id.**

**Below the Board has adopted proposed language which would require the rural counties, via their plans for the provision of indigent defense services, to comply with the Delphi Study that Nevada has commissioned.**

**At the time of writing this draft, the study has not been published, but is expected to be published, discussed, and reviewed by the Board for adoption within the next 6 months. The purpose of this regulation is to ensure that the regulatory framework is in place to require county compliance with the workload standard/guidelines, as is required by the judgment within a 12-month period.**

Sec. 42.

1. The workload of an attorney must allow the attorney to give each client the time and effort necessary to ensure effective representation. Any office, organization or attorney who provides indigent defense services shall not accept a workload that, by reason of its excessive size, interferes with the attorney's competence, diligence or representation of clients under the Nevada Rules of Professional Conduct.

~~[2. At the direction of the Board, the Department shall conduct separate, specific workload studies for counties whose population is less than 100,000 and counties whose population is 100,000 or more to determine workload guidelines and requirements for attorneys. Counties shall ensure that all attorneys providing indigent defense services participate in such workload studies. The results of each study must include a recommendation to the Board for the purpose of establishing guidelines to be used to determine maximum workloads for attorneys providing indigent defense services pursuant to subparagraph (4) of paragraph (d) of subsection 2 of NRS 180.320.]~~

2. Each county plan for the provision of indigent defense services shall provide details on how the county will comply with the guidelines adopted by the Board on Indigent Defense Services setting the maximum caseloads for attorneys who provide indigent defense services.

- 3. As required by AB454(2023), Section 2, the legislature has authorized the Board on Indigent Defense Services to adopt regulations to establish hourly rates of compensation for court appearances and other time reasonably spent on indigent defense services or representation for**
- a. In counties whose population is less than 100,000, an attorney, other than a public defender, who is selected pursuant to NRS 7.115 to provide indigent defense services; or**
  - b. In all counties, an attorney who is appointed pursuant to NRS 34.750 to represent a petitioner who files a postconviction petition for habeas corpus.**

Sec. \_\_\_\_\_

The hourly rates of compensation for court appearances and other time reasonably spent on indigent defense services or representation for:

- (a) In a county whose population is less than 100,000, an attorney, other than a public defender, who is selected pursuant to NRS 7.115 to provide indigent defense services; or
- (b) In all counties, an attorney who is appointed pursuant to NRS 34.750 to represent a petitioner who files a postconviction petition for habeas corpus,

is entitled to receive an hourly compensation rate equal to the prevailing CJA Panel Attorney hourly compensation rate at the time of service. This rate may be increased as deemed reasonable and necessary by the Executive Director of the Department of Indigent Defense for good cause, including the complexity of the case and the scarcity of available qualified attorneys.

- 4. The draft regulations below are for the purpose of streamlining, clarifying, or improving regulations to make regulations concise and easily understandable to ensure greater access and transparency in the regulatory process. See Executive Order 2023-008.**

**The rulemaking authority of the Board is contained within NRS 180.320.**

**Sec. 22.**

1. A plan for the provision of indigent defense services must provide the process a county will use to hire attorneys who *serve as the Public Defenders and Chief Public Defenders of a county public defender office*, are independent contractors to provide indigent defense services and panels of appointed attorneys. The process must be designed to provide notice of the opportunity to apply and a reasonable opportunity for interested parties to respond.

2. Consistent with the provisions of section 21 of this regulation, the process *must* ~~[should]~~ exclude prosecuting and law enforcement officials. The creation of a selection committee that utilizes stakeholders concerned with the integrity of indigent defense services, which may include the Department, is recommended. Judicial input in the hiring process may be considered but *must* ~~[should]~~ not be the sole basis for selection.

3. For the purposes of evaluating an application, the process must require, without limitation:

(a) In a county whose population is less than 100,000, verification that the applicant is included on the roster of attorneys who are eligible to provide indigent defense services that the Department compiles pursuant to section 30 of this regulation; and

(b) The consideration of the following factors:

(1) The experience and qualifications of the applicant;

(2) The past performance of the applicant in representing defendants in criminal cases;

(3) The ability of the applicant to comply with sections 2 to 45, inclusive, of this regulation, and the terms of a contract; and

(4) If the applicant is an independent contractor, the cost of the service under the contract.

*4. County Plans must provide a process for selection of additional or alternate counsel when the counsel who would normally be assigned to a case under the Plan does not have sufficient qualifications to match the complexity of the case assignment. If a county has contracted with an attorney that has an insufficient qualification level to*



*handle all cases to which he/she is assigned, the county must set forth how a first chair counsel or alternate counsel, at county expense, will be assigned to the case.*

## **Sec. 23.**

1. A plan for the provision of indigent defense services must set forth the process of screening for indigency that is necessary for the judicial determination of eligibility for appointed counsel. The process of screening for indigency must:

(a) Occur prior to, or at the earlier of, the initial arraignment or appearance and not later than 48 hours after the arrest of the defendant; and

(b) Describe the person or agency responsible for the screening.

2. After such screening and upon a judge, justice of the peace, *municipal judge*, or master finding that a defendant is eligible for appointed counsel in accordance with subsection 3 of NRS 171.188 [~~as amended by section 11 of Assembly Bill No. 480, chapter 380, Statutes of Nevada 2021, at page 2266~~], the plan must provide for the prompt appointment of counsel. If a public defender is disqualified from providing representation, a plan must provide for the selection of another attorney in accordance with NRS 7.115, [~~as amended by section 5 of Assembly Bill No. 480, chapter 380, Statutes of Nevada 2021, at page 2263~~], and NRS 171.188 [~~as amended by section 11 of Assembly Bill No. 480, chapter 380, Statutes of Nevada 2021, at page 2266~~].

3. *Each plan must provide for a first and second tier of indigent defense representation.*

(a). If a county uses *multiple* attorneys who are independent contractors *for first tier representation* in lieu of an office of public defender, *the plan must describe how attorneys are assigned to cases*. The distribution of cases may be made on a rotational basis or in accordance with another method that ensures the fair distribution of cases. *A first tier consisting of multiple independent attorneys or offices may constitute a first and second tier, as determined by the Department.*

(b) *If the first-tier attorney is an office of the public defender and [or if] the public defender is disqualified, a plan must describe the second tier and how attorneys in that tier are assigned cases. The distribution of cases may be made on a rotational basis or in accordance with another method that ensures the fair distribution of cases.*

(c) *Counties may not rely upon the appointed counsel list to provide representation for first and second tier counsel. An exception to this may be requested from the Department.*

4. A plan for indigent defense services must require that an attorney be present at *pretrial release hearings*, initial appearances and arraignments and be prepared to address appropriate release conditions in accordance with all relevant laws, rules of criminal procedure and caselaw. A *plan must provide that a* timely initial appearance or arraignment must not be delayed pending a determination of the indigency of a

defendant. ~~[A plan should ensure the presence of counsel at all other critical stages, whether in court or out of court]~~ *The plan must set forth the process for assigning or determining the attorney to be present.*

5. This section must not be construed to preclude a defendant from waiving the appointment of an attorney in accordance with subsection 1 of NRS 171.188 ~~[, as amended by section 11 of Assembly Bill No. 480, chapter 380, Statutes of Nevada 2021, at page 2266].~~

### **Sec. 27.**

1. A plan for the provision of indigent defense services must require that representation be provided in a professional, skilled manner consistent with all applicable laws, regulations and rules of professional conduct and the Nevada Indigent Defense Standards of Performance set forth in ADKT No. 411 of the Nevada Supreme Court *and ABA Defense Function Standards*. Any plan or contract for the provision of indigent defense services must require the attorney representing the defendant to:

- (a) Advise each client not to waive any substantive rights or plead guilty at the initial appearance unless doing otherwise is in the best interest of the client; and
- (b) Make all reasonable efforts to meet with each client within the first 7 days following the assignment of the case and, unless there are no significant updates in the client's case, every 30 days thereafter.

3. A plan for the provision of indigent defense services in a county whose population is less than 100,000 must ensure that any client surveys authorized by the Board are provided to a client at the conclusion of his or her representation by an attorney.

### **Sec. 30.**

1. To ensure that the ability, training and experience of an attorney in a criminal matter matches the complexity of a case, ~~[the]~~ *all indigent defense attorneys, including those employed by a public defender office*, must demonstrate compliance with the standards and regulations of the Board pertaining to training, education and qualifications by submitting an application to the Department on a form approved by the Department. The application must be submitted:

- (a) By mail; or
- (b) Electronically, as provided on the website of the Department.

2. The Department shall, not later than 30 days after receiving an application:

- (a) Review the application and determine the areas of indigent defense services in which the attorney is qualified; and
- (b) Provide written notice of the determination of the Department to the attorney.

3. After an attorney submits an application pursuant to this section, the attorney may continue practicing in the areas of indigent defense for which the attorney is seeking the determination of the Department until the attorney receives written notice of the determination.

4. If the Department determines that an attorney is qualified to provide indigent defense services, the Department shall place the name of the attorney and his or her areas of qualification on a roster of attorneys who are eligible to provide indigent defense services that will be used by boards of county commissioners to select the attorneys who will provide indigent defense services for a county. An attorney may, at any time, seek qualification for different or other areas of indigent defense by submitting another application pursuant to this section that demonstrates the additional qualifications.

5. If an attorney disagrees with the determination of the Department regarding the areas in which the attorney is qualified to provide indigent defense services, the attorney may submit a request for reconsideration to the Department not later than 30 days after receiving the determination of the Department. The Board will review any request for reconsideration that is submitted to the Department.

6. *Except as provided in subsection (7), the [The] failure of an attorney to submit an application before providing indigent defense services for a county or a municipality or to practice only within the areas in which the attorney is qualified may result in the exclusion or removal of the attorney, as applicable, from the roster of attorneys who are eligible to provide indigent defense services established pursuant to subsection 4.*

7. *If a contract attorney does not have the qualifications necessary to handle the full range of cases required for the contract, the attorney may not be assigned to cases outside their qualification level, unless a qualified first chair attorney is also appointed, at county expense, for every such case. The process for achieving this must be set forth in the county's plan.*

### **Sec. 31.**

1. An attorney who seeks to provide indigent defense services to a person charged with a misdemeanor must:

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

(b) Have sufficient training or experience to provide competent representation. *Proof of completion of 6 hours of CLE related to indigent defense services, or attending a DIDS Annual Conference, within the prior year shall constitute sufficient training or experience.*

2. An attorney who is beginning to provide indigent defense services in misdemeanor matters is encouraged to consider seeking the participation of a supervising or more experienced attorney before undertaking representation in a jury trial involving a misdemeanor offense or a misdemeanor offense for which the penalty can be enhanced and, if applicable, *in the process as set forth in the Plan . [make a motion for the*

~~appointment of such an additional attorney pursuant to NRS 260.060, as amended by section 17 of Assembly Bill No. 480, chapter 380, Statutes of Nevada 2021, at page 2270.]~~

### **Sec. 32.**

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

1. Meet the following requirements:

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

(b) Have been trial counsel, alone or with other trial counsel, in two or more *criminal* bench or jury trials that were tried to completion; or

2. As determined by the Department, demonstrate experience and skills that are equivalent to the requirements set forth in subsection 1.

### **Sec. 36.**

1. An attorney who seeks to represent a juvenile who is alleged to be delinquent or in need of supervision must:

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

(b) Have the knowledge and skills necessary to represent a child diligently and effectively; and

(c) *Must be skilled in juvenile defense. Proof of completion of 2 hours of CLE related to juvenile defense services within the prior year shall constitute sufficient training or experience.*

(d) Be familiar with:

(1) The department of juvenile justice services in the county and other relevant state and local programs;

(2) Issues concerning competency and child development;

(3) Issues concerning the interaction between an attorney and a client; and

(4) Issues concerning school-related conduct and zero-tolerance policies specific to juvenile representation. *And*

(5) *Knowledgeable about adolescent development and the special status of youth in the legal system.*

2. An attorney who seeks to represent a child in a certification proceeding pursuant to NRS 62B.390, as amended by section 4 of Assembly Bill No. 230, chapter 515, Statutes

of Nevada 2021, at page 3421, additionally must have litigated at least two criminal jury trials or be assisted by other counsel with requisite experience. *For assistance of other counsel, the attorney may submit a request pursuant to the Plan for the selection of an additional attorney.* As used in this section, "department of juvenile justice services" has the meaning ascribed to it in NRS 201.555.

## **Sec. 37.**

1. In addition to any other requirements provided by law or this chapter, an attorney must:

(a) Have reasonable knowledge of substantive Nevada and federal law, constitutional law, criminal law and criminal procedure, the rules of evidence, the rules of appellate procedure, ethical rules, local rules and practices and changes and developments in the law. As used in this paragraph, "reasonable knowledge" means knowledge possessed by an attorney who provides competent representation to a client in accordance with Rule 1.1 of the Nevada Rules of Professional Conduct;

(b) Have reasonable knowledge of the forensic and scientific issues that can arise in a criminal case and the legal issues concerning defenses to a crime and be reasonably able to litigate such issues effectively; and

(c) Be reasonably able to use the office technology that is commonly used in the legal community and the technology that is used within the applicable court system and thoroughly review materials that are provided in an electronic format.

2. An attorney shall:

(a) Complete, on an annual basis, a minimum of 5 hours of CLE courses relevant to indigent defense services;

(b) ~~Except as otherwise provided in subsection 3,~~ submit proof of compliance with the CLE requirements in paragraph (a) to the Department before January 1 each year by submitting a copy of the annual transcript for the attorney from the State of Nevada Board of Continuing Legal Education:

(1) By mail; or

(2) Electronically, as provided on the website of the Department ~~;~~ and

~~(e) Follow the minimum standards of the Board in determining which CLE courses are relevant to the provision of indigent defense services.~~ *(c) Within 72 hours, advise the Department, designee and County (1) if the attorney takes employment as a prosecutor or judge and/or (2) if the attorney has been sanctioned by any court or state bar.*

3. Any CLE courses provided by the Department count toward satisfaction of the annual CLE requirement set forth in subsection 2. ~~If an attorney satisfies the annual CLE~~

~~requirement through CLE courses provided by the Department, the annual submission of proof of compliance with the CLE requirements required by paragraph (b) of subsection 2 is waived.]~~

## **Sec. 40.**

The terms of any contract between a county and an attorney who provides indigent defense services as an independent contractor *in any court within a county*, must avoid any actual or apparent financial disincentives to the obligation of the attorney to provide clients with competent legal services. Such a contract must include, without limitation, the following:

1. The identification of the contracting authority and each attorney subject to the contract.
2. The terms of the contract, including, without limitation, the duration of the contract, any provision for renewal and any provision for terminating the contract by a party.
3. The category of cases in which each attorney subject to the contract is to provide services.
4. The minimum qualifications for each attorney subject to the contract, which must be equal to or exceed the qualifications required by sections 2 to 45, inclusive, of this regulation, and a requirement that each attorney maintain the applicable qualifications during the entire term of the contract. *—If a contract covers services provided by more than one attorney, the qualifications may be graduated according to the seriousness of offense, and each attorney must be required to maintain only those qualifications established for the offense levels/or which the attorney is approved to provide indigent defense services.*
5. The identification of each attorney who will provide legal representation in each category of case covered by the contract and a provision that ensures consistency in representation in accordance with, section 26 of this regulation, *including any attorney providing such representation as a subcontractor.*
6. A provision establishing the maximum workload that each attorney may be required to handle pursuant to the contract based upon the applicable guidelines established by the Board pursuant to section 42 of this regulation and a provision requiring the reporting of indigent defense data in accordance with sections 43 and 44 of this regulation.
7. In accordance with section 27 of this regulation, a requirement that each attorney provide legal representation to all clients in a professional, skilled manner consistent with all applicable laws, regulations and rules of professional conduct and the Nevada Indigent Defense Standards of Performance set forth in ADKT No. 411 of the Nevada Supreme Court.

8. The statement of a policy that ensures that an attorney does not provide representation to a defendant when doing so would involve a conflict of interest.
9. A provision regarding how investigative services, expert witnesses and other case related expenses that are reasonably necessary to provide competent representation will be made in accordance with all applicable laws and regulations.
10. A provision requiring compensation to be provided at a reasonable hourly rate that is comparable to the hourly rate provided to local prosecutors with similar experience and that is determined after taking into consideration comparable workload, overhead costs, expenses and costs relating to significant attorney travel.
11. *All contracts for indigent defense services must be approved by the Department prior to execution, including subcontracts.*