March 25, 2003

Ms. Catherine Cortez-Masto, Assistant Clark County Manager
500 South Grand Central Parkway, 6th Floor
Las Vegas, Nevada
89155

Dear Ms. Cortez-Masto,

On behalf of the National Legal Aid & Defender Association (NLADA), thank you for the opportunity to study and make recommendations for improving the cost-effectiveness and efficiency of the Clark County Public Defender Office. Though we understand that county governments must juggle competing interests for limited resources, we are convinced that the adoption and funding of our recommendations will produce cost-savings throughout the entire criminal justice system over time, while bringing the County into compliance with nationally recognized standards of quality for public defense services.

Your recent inquiry into public defense cost recovery and "indigent-but-able-to-contribute" programs gives me hope that the County is serious about increasing needed revenues for the CCPDO. Though the failure to effectively implement such cost recovery programs can produce a serious chilling effect on the right to counsel and equal access to justice, I believe that Clark County has the committed personnel to avoid such pitfalls in designing a successful cost recovery program of your own. The information provided below is intended as background information only. I welcome the opportunity to discuss how Clark County may use this information to further your aims of indigent defense reform.

Indigent-but-Able-to-Contribute Clients

Across the country, more and more policy-makers are asking whether legal counsel at public expense should be provided for only the completely indigent – those unable to contribute any money towards their own defense – or whether public defense services also should be made available to those accused of crime who might have limited resources and can pay for only a portion of necessary representation expenses. Many jurisdictions have adopted standards allowing appointment of counsel but requiring such partially indigent defendants to make some sort of payment toward the cost of their representation.

One jurisdiction adopting such a policy is the State of Washington. There, a person is classified as "indigent" if he/she: (a) receives public assistance; (b) is involuntarily committed to a public mental health facility; (c) receives an annual income, after taxes, of 125% or less of the federal poverty level; or, (d) is unable to pay the "anticipated cost of counsel" for the matter before the court because his or her available funds are insufficient to pay any amount for the

retention of private counsel. A person is classified as "indigent and able to contribute" if the person, at any stage of a court proceeding, is unable to pay the full anticipated cost of counsel, but has sufficient means to pay a portion of the cost. The Washington statute defines the "anticipated cost of counsel" as the cost of retaining private counsel for representation on the matter before the court.

In Pierce County (Tacoma), Washington, defendants found indigent-and-able-to-contribute are offered the opportunity to retain a public defender or assigned counsel attorney at a reduced rate despite being found to have assets or income above the indigency standard. These defendants are asked to sign a promissory note for a determinate amount of money based upon their monthly available funds. A defendant's contribution to his or her own defense is calculated by taking the monthly income, after taxes, and subtracting his or her necessary monthly expenditures (i.e., food, shelter, etc.). The net result is then rounded to the nearest $25. For example, if a defendant earns $500 a month and necessary expenses are determined to be $280 a month, then the client would be asked to sign a promissory note for a total of $225. The only other factor in this calculation is that the assessment cannot exceed the anticipated cost of counsel for the charge the defendant is facing. In Pierce County, those caps are presumptively set at: $3,000 (Class A Felony); $2,500 (Class B Felony); $1,500 (Class C Felony); $500 (DWI); and, $350 (Misdemeanor).

National Standards

National standards permit cost recovery from indigent-but-able-to-contribute defendants under limited circumstances.

The American Bar Association's *Criminal Justice Standards, Providing Defense Services,* Standard 5-7.1 directs that: "Counsel should not be denied because of a person's ability to pay part of the cost of representation." Cost recovery after the representation has been provided (see below) is unconditionally prohibited (with one exception, where the client committed fraud in obtaining a determination of financial eligibility), under ABA Standard 5-7.2. However, pre-representation "contribution" is permitted if 1) it does not impose a long-term financial debt, 2) there is a reasonable prospect that the defendant can make reasonably prompt payments, and 3) there are "satisfactory procedural safeguards",[1] so as not to chill the exercise of the right to counsel.

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1 Required safeguards include:

- Right to notice of the potential obligation;
- Right to an evidentiary hearing on the imposition of costs of counsel, with an attorney present and with the opportunity to present witnesses and to have a written record of the judicial findings;
- Right to a determination of present ability to pay actual costs of counsel and related fees, such as investigative or clerical costs;
- Right to all civil judgment debtor protection;
- Right to petition for remission of fees, in the event of future inability to pay;
- Notice that failure to pay will not result in imprisonment, unless willful;
- Notice of a limit, statutory or otherwise, on time for the recovery of fees;
- Adequate information as to the actual costs of counsel, with the right not to be assessed a fee in excess of those actual costs; and
- Where any of these rights are relinquished, the execution of a voluntary, knowing and intelligent written waiver, as is required in any instance concerning the constitutional right to counsel.

Cost recovery from partially indigent defendants was first authorized by the *National Advisory Commission on Criminal Justice Standards and Goals,* Defense Standard 13.2 (promulgated in 1973 pursuant to directions of the 1967 President's Crime Commission), with the caveat that the amount should be "no more than an amount that can be paid without causing substantial hardship to the individual or his family."

The concept was subsequently fleshed out in the *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services, 1976), Guideline 1.7:

> If the accused is determined to be eligible for defense services in accordance with approved financial eligibility criteria and procedures, and if, at the time that the determination is made, he is able to provide a limited cash contribution to the cost of his defense without imposing a substantial financial hardship upon himself or his dependents, such contribution should be required as a condition of continued representation at public expense...
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> 1. (b) The amount of contribution to be made under this section should be determined in accordance with predetermined standards and administered in an objective manner; provided, however, that the amount of the contribution should not exceed the lesser of (1) ten (10) percent of the total maximum amount which would be payable for the representation in question under the assigned counsel fee schedule, where such a schedule is used in the particular jurisdiction, or (2) a sum equal to the fee generally paid to an assigned counsel for one trial day in a comparable case.

Public Defense Cost Recovery Programs

Jurisdictions have utilized various methods for trying to collect the determined fees. Public defense cost recovery programs vary greatly from jurisdiction to jurisdiction but generally fall into under two categories: post-disposition cost recovery and up-front contribution plans.

As discussed above, post-disposition cost recovery is prohibited under national standards. Although various states have tried it over the years, including via statute, civil suit, lien, or court-ordered condition of probation, post-disposition recoupment has frequently been struck down by the courts, and has been a practical failure. Courts have struck down recoupment statutes on equal protection, due process and Sixth Amendment grounds.[2] Imposition of recoupment as a condition of probation can additionally lead to the incarceration of indigent people under

2 *James v. Strange*, 407 U.S. 128 (1972) (Kansas recoupment statute; equal protection); *Rinaldi v. Yeager*, 384 U.S. 306 (New Jersey statute requiring repayment of the cost of a transcript on appeal; equal protection); *Giacco v. Pennsylvania*, 382 U.S. 399 (1966) (recoupment statute; due process/vagueness); *Olson v. James*, 603 F.2d 150 (10th Cir. 1979) (Oregon recoupment statute; due process); *Fitch v. Belshaw*, 581 F. Supp. 273 (D. Or. 1984) (recoupment statute; due process and Sixth Amendment).

circumstances that a non-indigent person would not be exposed to, in violation of equal protection. *Bearden v. Georgia*, 461 U.S. 660 (1985) (imprisoning an indigent defendant who tried and failed to pay restitution violates equal protection and the fundamental fairness guaranteed by the Fourteenth Amendment).

The practical difficulties are obvious. Imposition of a debt on a marginally indigent person, already convicted of a criminal offense, with the option of incarceration for failure to pay constitutionally barred, yields a likelihood of recovery so low (less than 10%, according to a U.S. Department of Justice Study[3]) that the revenues produced are less than the administrative costs of processing recoupment orders.

Contribution plans, on the other hand offer some practical as well as legal advantages. Contribution plans may include:

- A promissory note to pay all or part of the representation, signed by a defendant or the parent/guardian of a juvenile defendant before the disposition of the case (as in the Pierce County, Washington example above); and,

- Up-front administrative fees or costs payable during the financial eligibility screening process.

Though payments of promissory notes do not have many of the legal ramifications associated with post-disposition cost-recovery programs, they can be just as costly to administer if collections are not made at the time of financial screening. Every effort should be made to collect the fee from promissory notes in full from indigent-but-able-to-contribute clients within the first seven days of screening.

Under up-front application fees, defendants screened for financial eligibility are asked to contribute a modest fee to help offset the costs of representation, generally between $10 and $50. Fifteen states now have such fees (AR, CT, DE, FL, KY, MA, NJ, NM, ND, OR, SC, TN, VT and WI). Six other states allow counties the discretion to impose such a fee (CA, CO, GA, IN, OH, and OK).

A 2001 report of the American Bar Association, *2001 Public Defender Up-Front Application Fees Update*,[4] draws five basic conclusions about successful up-front contribution programs:

1. Public Defenders should not be responsible for collecting the fee (to avoid ethical interference with the attorney-client relationship, as is pointed out in the commentary to ABA Defense Services Standard 5-7.2).

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3 *Containing the Cost of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* (National Institute of Justice, 1986), at 34-35.

4 Mr. Carroll co-authored the report.

2. Court personnel, or whoever is responsible for the fee's oversight, should receive some percentage of the revenue to offset the cost of collection (generally 5% of the total).

3. All revenues should be dedicated for use for indigent defense purposes only – revenues should not go back to the county general fund.

4. All revenues should supplement, not supplant, general fund appropriations. The existence of such programs does not relieve governments' obligation to fund adequate public defense services.

5. Application fee programs do not generate a large amount of revenue. Only 6-20% of all people requesting appointment of counsel are able to pay and do pay.

Below is a list of the states employing application fee programs, from the ABA report:

State	Current Fee	Revenues
Arkansas	$10-$100	$174,412.00
Connecticut	$25	$83,000.00
Delaware	$50	$210,601.00
Florida	$40	$2,500,000.00
Kentucky	$52.50	$873,526.00
Massachusetts	$100	$2,383,240.00
New Jersey	$50	$226,534.00
New Mexico	$10	$106,960.00
North Dakota	$25	N/A
Oregon	$20	$365,806.00
South Carolina	$25	$188,776.00
Tennessee	$50	$921,770.00
Vermont	$25	$298,417.00
Wisconsin	Varies based on ability to pay	$929,218.00

Again, the information provided in this memorandum is meant as a general overview and should be accompanied by further discussion. I look forward to your call and please feel free to continue to use NLADA as a resource for your criminal justice inquiries.

Sincerely,

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Cc: Marcus Cooper, Clark County Public Defender
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EXECUTIVE SUMMARY

The United States Supreme Court guaranteed counsel to those of insufficient means under the Sixth and Fourteenth amendments of the U.S. Constitution, while reaffirming the states' responsibility to provide representation in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Despite this, Nevada remains among the shrinking minority of states that still rely primarily on county funding to ensure its citizens' constitutional right to assistance of counsel. The extent to which Nevada relies on county funding for indigent defense services and the inadequacies of services it produces was extensively detailed in the joint U.S. Department of Justice and American Bar Association report *Indigent Defense Services in the State of Nevada: Findings and Recommendations* (December 2000). It was the professional opinion of the DOJ/ABA team that the issues raised throughout the state justified further study through county-by-county public defender audits.

In March 2002, Clark County issued a Request for Proposal (RFP) to evaluate current practices and recommend alternatives for improving the efficient use of attorney and staff in the Clark County Public Defender Office (CCPDO). Additionally, the RFP solicited proposals to study and recommend the best management structure to allow CCPDO to monitor its performance. After a competitive bid process, the National Legal Aid & Defender Association (NLADA) was awarded the contract. NLADA is a national, non-profit membership association dedicated to quality legal representation for poor people and has played a leadership role in the development of national standards for indigent defense functions and systems for decades.

During the week of July 8th, 2002, an NLADA assessment team conducted one-on-one interviews with CCPDO management, attorney supervisors, staff attorneys, investigation management and staff, legal support staff, and operations personnel. NLADA also reviewed numerous public defender case files, visited public defender clients in the County Jail and conducted in-court observations. Finally, NLADA reviewed CCPDO assignment and disposition statistics, budget requests, job descriptions, annual reports, and county policy/procedure manuals.

Chapter I (pages 1-7) of this report is an overview of indigent defense funding from a national perspective and serves as an introduction to the current study. Chapter 2 (pages 8-12) explains the county's criminal justice system in which the county's indigent defense system operates and details the organizational structure and current practices of the CCPDO.

Although the report identifies areas within the current management structure that need improvement, the NLADA assessment team determined that the majority of the problems preventing the office from providing adequate representation in an effective and cost-efficient manner were created in years past. The discussion of two of these issues, related to organizational culture and workload, are set apart in Chapter III and IV (pages 13-37) to underscore the seriousness of the issues and to emphasize the immediate need to address these operational deficiencies.

Our finding in Chapter III states that the CCPDO has a longstanding institutional culture that places a priority on attorney autonomy over the collective health of the organization. This has fostered organizational isolationism that limits accountability, support and professional development of staff, and inhibits interactions between attorneys

in the office, between attorneys and support staff, between the organization and its client base, and between the organization and the national indigent defense community -- all of which has hindered the organization's ability to implement effective change.

Chapter IV finds that CCPDO attorney caseloads are in serious breach of national workload standards. The office has been historically understaffed and there is a serious crisis in adult felony and misdemeanor representation. Juvenile representation is beyond the crisis point and requires immediate attention to avert constitutional challenges of ineffective assistance of counsel. Since 1983, the juvenile facility has been staffed with only two attorneys. The current Chief Public Defender added a third in 2002. From 1993 until 2001, the CCPDO juvenile new assignments increased over 397% (from 576 to 2,867) without a single new attorney being added to help with the workload. At the close of 2001, CCPDO's juvenile attorneys were expected to handle more than *seven times* the number of cases recommended by standards promulgated by the American Bar Association (ABA) and NLADA.

The report concludes that Clark County has many assets that can support positive change, including, among other things, dedicated, talented CCPDO staff and leadership, strong County leadership, an engaged community that desires good performance and accountability, and competitive salaries to recruit and retain qualified staff. However, no management team or structure will be able to institute the performance-based accountability system desired by the County without a serious recommitment of resources to CCPDO and some significant changes. Chapter V (pages 38-74) details NLADA recommendations needed to bring Clark County into compliance with national indigent defense standards. They include, among others, the following:

* Clark County must increase the number and type of CCPDO staff positions;
* CCPDO should redefine its management structure;
* CCPDO must develop and implement a performance plan that includes clear performance guidelines and expectations, training and other appropriate means for promoting staff development and consistent processes for assessing development needs as well as performance;
* CCPDO must develop training programs and opportunities for all staff and should consider creating a specialized training unit;
* CCPDO should create a separate appellate unit incorporating NLADA's *Standards and Evaluation Design for Appellate Defender Offices*;
* CCPDO should consider alternative methods of attorney assignment and the composition of teams;
* The Chief Public Defender should immediately design and implement an agency-wide communications plan;
* CCPDO must begin active community outreach to promote positive relations in the community-at-large and its client base; and,
* Clark County and the CCPDO should use national standards and guidelines when considering the most appropriate process for determining financial eligibility.

Though Clark County policymakers must balance other important demands on the County's resources, the Constitution does not allow for justice to be rationed to the poor due to limited funding. The issues raised in this report serve to underscore the failure on the part of the State of Nevada to adhere to the *Gideon* decision. Though *Gideon* vests the responsibility for funding indigent defense services with the state, the County must continue to bear the brunt of providing adequate defender services until such time as the State accepts its constitutional responsibilities.

The report's conclusion (Chapter VI, page 75) recommends that Clark County work in partnership with CCPDO management to address the problems facing the organization that were created over the past decades but which continue to jeopardize the constitutional rights of its people.