

Dear Reader: Please be aware that this document came from an 8-page file which opened with huge gaps between blocks. As a result, you may see footnotes in strange places. Sorry for any inconvenience.

June 28, 2011

Commissioner John Breternitz
Commissioner David Humke
Commissioner Kitty Jung
Commissioner Robert Larkin

Commissioner Bonnie Weber
Washoe County Commission
PO Box 11130
Reno, NV 89520

AMERICAN CIVIL LIBERTIES UNION OF NEVADA
601 SOUTH RANCHO DRIVE,
SUITE B-11
LAS VEGAS, NEVADA 8910
1325 AIRMOTIVE WAY
SUITE 202
RENO, NEVADA 89502
WWW.ACLUNV.ORG

Re: Constitutional Concerns Over Washoe County's Proposed Early Case Resolution Program

Dear Washoe County Commission Members:

The ACLU of Nevada is writing to express our grave concern over the County's consideration of a proposed new Early Case Resolution (ECR) program being championed by the Washoe County District Attorney and Washoe Legal Services. The ACLU of Nevada believes this program could have serious implications for the integrity and constitutionality of the criminal justice system in Washoe County. We urge you to vote against the program as it is currently conceived, and to demand a full explanation of how this plan has been designed to both avoid the constitutional flaws in the prior ECR system and comport with the Nevada Supreme Court's ethical standards for indigent defense.

As you may know, the previous ECR program in Washoe County was terminated after the Washoe County Public Defender, in consultation with the National Legal Aid and Defender Association and the District Attorney, determined that the process did not and could not comply with the Indigent Defense Standards of Performance recently issued by the Nevada Supreme Court (ADKT 411)¹. In an attempt to reconstitute an ECR program, the Washoe County District Attorney approached the Public Defender and Alternate Public Defender, who responded that any ECR system that would meet constitutional and ethical standards, must, at a minimum:

- **Establish a meaningful attorney-client relationship;**

¹ The constitutionality of the previous ECR program was repeatedly questioned by the National Legal Aid and Defender Association years before the enactment of ADKT 411.

- **Enact a conflict check system to avoid unethical representation;**
- **Provide an appropriate amount of factual discovery and investigation.**

Rather than work with the county's indigent defense counsel to create a program that complies with the above minimum standards, the Washoe County District Attorney chose to remove them from the process and work instead with attorneys outside of the criminal defense system. The fact that trained defense counsel balked at this arrangement, and that now the plan substitutes in Washoe Legal Services, a civil legal office with no mandated indigent defense training or responsibility, is to say the least, a massive red flag.

The resulting ECR program is two-tiered system that fails to create any attorney-client relationship, incorporates no meaningful conflict check or discovery, and has no foreign language resources: all leading to a host of constitutional concerns. **The program**

offers even fewer protections than the abandoned system, and substitutes the County's trained indigent defense system with civil attorneys. This ECR program is not a solution; it is a massive constitutional liability for Washoe County.

I. Overview of the ECR Plan

Although the ACLU of Nevada does not have access to the full ECR proposal, elements of the to-be-presented program have been discussed at Indigent Defense Subcommittee meetings. The proposed ECR program, as we understand it, will likely consist of the following elements:

Once the Public Defender is appointed but before a conflict check can occur, a "supplemental" or "plea deal" attorney will contact in-custody defendants selected by the District Attorney to propose a resolution of the case.

The supplemental attorney would ask the defendant to sign a waiver of any conflicts of interest which may exist and would propose a plea agreement.

The supplemental attorney would have "whatever discovery the District Attorney has," although it is unclear what that would entail, and would also question the client about the facts of the case, but would not engage in any independent investigation.

The supplemental attorney would "forward" any plea offer, but would refrain from recommending any plea deal or giving legal advice.

In most cases, a plea would be entered the next day and a sentence imposed. There would be no assurance that all defendants would receive a suspended sentence.

If the client does not want to plead, he/she will be represented by the Public Defender.

The proposed system would not be limited to misdemeanor charges, and may include both felonies and significant jail time.

There are no provisions for interpreters or translators in the program.

The proposed ECR program described above does not conform to the legal and ethical standards that apply to criminal attorneys in Nevada. The proposed ECR would conflict with many of Nevada's Rules of Professional Conduct and the Nevada Indigent Defense Standards of Performance as well as State and Federal Constitutional protections. **Until this program is designed in keeping with Nevada's statutory and constitutional mandates, it cannot be allowed to move forward. We urge you not to approve this program.** Details about our concerns are below.

II. The proposed ECR would violate many of Nevada's Rules of Professional Conduct and the Nevada Indigent Defense Standards of Performance as well as State and Federal Constitutional protections.

The Nevada and Federal Constitutions set the standards that must be followed by those in the legal community. The Nevada Supreme Court has also set standards for ethical and professional responsibilities as embodied by the Nevada Indigent Defense Standards of Performance (NIDSP) and the Nevada Rules of Professional Conduct (NRPC). These ethical and professional standards would be violated under the proposed ECR program outlined above. Of particular concern to the ACLU is the fact that the proposed ECR program would violate our state's standards of legal responsibility by:

Eliminating any semblance of effective attorney-client relationship;

Creating an improper relationship between the District Attorney and his opponents and improperly permitting the District Attorney to select who and what crimes are directed into ECR;

Denying the "supplemental attorneys" any reasonable opportunity for pretrial discovery, and failing to offer any significant time for adequate consultation with their clients;

Denying any opportunity to ensure that no conflicts of interest arise out of any representation; and

Failing to offer this program to non-English speakers.

This list of ethical and legal violations is not exhaustive, and a quick review of the

Nevada Constitution, the Federal Constitution, the NRPC or the NIDSP will each reveal many more such infringements upon the law. The plea itself is extremely vulnerable to post-conviction attack, and the treatment of defendants under this program could result in civil liability under 28 U.S.C. §1983. Not only would ECR be unethical and unconstitutional, it would be unwise. **Improper plea deals could lead to a stunning amount of unnecessary and expensive post-conviction litigation that could be avoided were the program structured, with defense input, in a manner that ensures pleas are fully informed and lawfully accepted.**

A. The proposed ECR program fails to ensure the establishment and maintenance of an effective attorney-client relationship.

Although an expedited resolution program may have the ability to offer defendants an opportunity to quickly settle criminal cases, as well as offering each county potential monetary savings, such a program should never violate a defendant's Sixth Amendment right to competent, effective, and zealous representation. The NRPC and the NIDSP support this notion, and they require defense counsel to establish and maintain a meaningful and effective attorney-client relationship.

NIDSP 4-1 – the paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process.

NRPC 1.1 – A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
NRPC 1.2 – in a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive jury trial and whether the client will testify.

As the ACLU of Nevada understands this plan, defendants would have *two* competing lawyers: one assigned by law from the Public Defender, and one "plea bargaining" or "supplemental" attorney² from Washoe Legal Services. It is of course the responsibility of a defendant's counsel to determine whether a plea deal is appropriate given the facts and evidence, and to advise the defendant accordingly. It is not readily evident whether the "supplemental attorneys" would directly represent the defendant, or whether they would instead serve as an intermediary between the court and the defendant in the pleading process. It is also unclear what sort of legal duty the "supplemental attorneys" have and to whom that duty is owed. The vague standards involved in such "supplemental" representation leads to some very serious concerns as to the efficacy and zealotry with which these "supplemental attorneys" would function. **Perhaps most importantly, it is unclear that the County could in any way require the Public Defender or Alternate Public Defender to consent to another attorney's communication with their clients, which is absolutely prohibited by the ethical rules.**

By providing defendants with counsel from Washoe Legal Services, the ECR program fails to take into account the specific experience and training required to handle the complexity of the criminal justice system. Washoe Legal Services is comprised of civil attorneys that are undoubtedly highly competent in their own fields, but have no formal, institutional training to handle decisions that they will routinely encounter in a court of criminal law. Any plea entered by a defendant will have lasting and dire consequences, consequences which only a criminal attorney can

² To call the Washoe Legal Services counsel a client's attorney is an exaggeration. According to 2010 statements by Washoe Legal Service's Director, Paul Elcano, in order to comply with ADKT 411, his attorneys would not recommend any plea deal or negotiation, but would simply explain and sign off on negotiated offers. This relationship would not qualify as an attorney-client representation guaranteed under the Sixth Amendment.

properly understand and explain to his client. Compounding this concern is the fact

that the “supplemental attorney’s” main task in handling these cases would be to promote expediency, and not to provide “zealous and quality representation.”

Due to the fact that civil attorneys could now have fast-paced criminal responsibility for counseling plea deals in the absence of any meaningful attorney-client relationship, full conflict check, investigation, or evidence, the ACLU of Nevada believes it is critical that this proposed process first be reviewed by the Nevada Supreme Court’s Indigent Defense Commission (ADKT 411) before it is implemented.

B. It is improper for prosecutors to select their own opponents.

This system of indigent defense is being designed and championed by the prosecution without buy-in from the county’s hired indigent defenders. The District Attorney’s office will determine the crimes and individuals eligible for the program. More troublingly, the District Attorney’s office has pre-selected its own opposing counsel, and appears to be lobbying for that office’s compensation. The close relationship between the District Attorney’s office and Washoe Legal Services, combined with the District Attorney’s decision of who and what qualifies for ECR, create very real concerns under the constitution’s equal protection and due process clauses. **This issue also arose during the selection of the current Public Defender, and led to an embarrassing and costly re-do for the County once the clearly inappropriate prosecutorial role was made public.**

One critical requirement of state ethical rules and the Sixth Amendment is that public defenders have meaningful autonomy and complete independence as lawyers, regardless of their funding stream. It is very difficult to imagine true independence and meaningful advising coming from a “supplemental attorney” whose organization has already agreed to be the District Attorney’s opponent, stipulated to advocating for plea deals, and who would turn the case over to another lawyer should a plea not be agreed to. Under this system, legal services attorneys would be under pressure to settle cases, as not doing so would be a “failure” of the ECR system.

Having a District Attorney design an indigent defense system while the county’s funded public defenders have balked at the lack of basic rights it includes is a recipe for constitutional disaster. This is a costly lesson that Washoe County has already learned, and should not forget

C. The proposed ECR program fails to provide any reasonable opportunity for pre-trial investigation, discovery, or adequate consultation with clients.

Nevada Constitution, Article 1, Section 8 provides, “No person shall be tried for a capital or other infamous crime...and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions.” This right to counsel would be meaningless without an adequate opportunity for counsel to understand the nature of the charges against the defendant, the factual and legal circumstances of the case, and the background of the defendant. In the spirit of the constitution, the NIDSP requires defense counsel to carefully review charging instruments, police reports, and relevant background information with their clients:

NIDSP 4-6(c), 4-7(b) - requires defense attorneys to conduct any necessary independent investigation or consultation with expert witnesses in appropriate circumstances before advising their clients concerning participation, and this duty extends even after a defendant’s decision to make a plea.

NIDSP 4-6(a) and (c) - Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted in a timely manner unless there are strategic reasons for not doing so, and the client has the sole right to waive a preliminary hearing.

NIDSP 4-9: Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.

The proposed ECR program seems to completely disregard the Nevada Supreme Court's performance standards. The current ECR plan leaves the defense with no time to appropriately consult with witnesses or make a thorough independent evaluation of a defendant's case. The fact that the "supplemental attorney" may have access to "whatever discovery the District Attorney has" does not satisfy this requirement. Evidence gathered through discovery may be key to a defendant's acquittal, or it could provide for a more suitable plea deal.

For these and many other reasons, it is wholly improper for an attorney to propose a plea deal without an appropriate investigation. Without any time or resources to conduct any sort of meaningful discovery or investigation into the circumstances and evidence of a case, it will be impossible to find that any such program would be acceptable under the laws of the state of Nevada.

D. The proposed ECR program would violate the NRPC by denying any opportunity to conduct a full conflicts check.

The Nevada Supreme Court has made it clear that a defendant must not be represented by an attorney if that representation would present a conflict of interest. These standards have been expressly stated in the NRPC:

• NRPC 1.7: A lawyer, except as provided by NRPC 1.7(b), shall not represent a client if the representation involves a concurrent conflict of interest.

NRPC 1.8(h): A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.

NRPC 1.9: A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially

related matter in which that person's interest are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

The mere existence of a direct relationship between the District Attorney and the "supplemental attorney" is itself a disquieting conflict of interest. However, even assuming that no conflict is inherent to ECR, the program provides no means to check if any other conflicts of interest do exist. Furthermore, the conflict waiver that a defendant will be required to sign is meaningless; without an independent attorney assisting the defendant, a blanket waiver of liability will not be valid under the NRPC. The lack of a conflict check and the relationship between the District Attorney and the "supplemental attorney" all but ensure that the ECR will violate the Nevada Rules of Professional Conduct.³

III. The legitimacy of this program will be in question if allowed to move forward without involvement from the county's indigent defenders and the Supreme Court's Indigent Defense Commission.

The Public Defender's office has refused to participate without assurances that the program would meet the state's performance standards and constitutional minimums. For this reasonable and ethically required position, they were promptly removed from the process. The ACLU of Nevada believes the Commission should share the Public Defender's ethical reservations about the ECR program, and that both County judges and defense counsel – Public Defender, Alternate Public Defender, conflict and private counsel – must be invited to weigh in on any specific policy proposals so that the Commission can fully understand the ethical issues raised by the Public Defender's office in refusing to participate in ECR.--

The proposed ECR program may violate not only the law, but ethical duties to the judicial system, public, and indigent defendants as well. This program must first meet all of the standards set out by the federal or state constitutions, the Nevada Supreme Court, the NRPC, and the NIDSP, prior to its implementation or acceptance by the Commission.

It could lead to failed convictions and lawsuits aimed at the county, and have a devastating effect on the public's confidence towards Washoe County's criminal justice system. The legitimacy of this program is already in question; without any involvement

3 Washoe Legal Services' involvement in the ECR program also throws into question their current family law contract work with the Public Defender, and makes a full conflict check all the more critical.

from the Public Defender's office or judges expected to implement the promised plea deals, how can the public place their trust in this program?

The ACLU of Nevada asks you as a Commissioner charged with upholding the integrity of the county's judiciary, to consider these facts. We trust that, through a proper discussion that includes defense counsel and a thorough consideration of state ethical and performance standards, a better plan can collaboratively be achieved for the administration of justice in Washoe County.

We are more than happy to discuss this letter and our concerns with you.

Sincerely,

Allen Lichtenstein
lichtenstein@aclunv.org,
NV Bar No. 3992
ACLU of Nevada

06/28 ECR/legal redress/apnaacp/opsnxi