

**MINUTES**  
**PUBLIC DEFENSE REFORM INTERIM COMMITTEE**  
**August 15, 2013**  
**8:00 a.m. to 3:10 p.m.**  
**Room EW42, Capitol Building**  
**Boise, Idaho**

**Co-chair Representative Darrell Bolz** called the meeting to order at 8:05 a.m. noting that there was a quorum present, which included: **Co-chair Senator Dean Mortimer**, Senators Curt McKenzie, Cliff Bayer, Todd Lakey and Cherie Buckner-Webb; and Representatives Lynn Luker, Christy Perry, Janet Trujillo and Carolyn Meline. Legislative Services Office staff members present were Brooke Brouman, Richard Burns and Jackie Gunn.

Others in attendance included: Chief Justice Roger S. Burdick, Judge Barry Wood, Patti Tobias and Michael Henderson, Idaho Supreme Court; Holly Koole, Idaho Prosecuting Attorneys Association; Paul Panther, Office of the Attorney General; Craig Hanson, Steven Rule and Kathy Alder, Canyon County; Judge Molly Huskey and Judge Thomas Ryan, Third District Court; Grant Loeb, Twin Falls County Prosecutor; Lyn Darrington, MTC; John Gross, National Association of Criminal Defense Lawyers; Monica Hopkins, ACLU; Matthew Roker, Private Attorney; Judge Dayo Onanubosi, Canyon County Magistrate Court; Benita Miller, Canyon County Assistant Trial Court Administrator; Denise Kennel, Court Operations Canyon County; Scott Booth, Canyon County Sheriff's Office; David Carroll, Sixth Amendment Center; Sara Thomas, State Appellate Public Defender; and Daniel Chadwick, Idaho Association of Counties.

NOTE: Copies of the presentations, reference materials and handouts are on file at the Legislative Services Office. PowerPoint presentations and handouts are posted on the Idaho Legislature website: [www.idaho.legislature.gov](http://www.idaho.legislature.gov).

**Co-chair Rep. Bolz** commented about the function of the interim committee by referencing the directions and issues spelled out in House Concurrent Resolution No. 26, which authorized the interim committee. Some of those issues include flat fee contracts, reporting requirements, public defender caseloads and workloads, training, resources available to public defenders, standards for public defenders and the idea of establishing a state public defense commission.

**Co-chair Rep. Bolz** described the three-year study conducted by the Criminal Justice Commission Subcommittee, which produced a final report that included several recommendations. Among the issues that the subcommittee recommended be studied by this interim committee were: (1) structure and organization of an indigent defense delivery system in Idaho; (2) oversight and accountability of indigent defense delivery; (3) the mechanisms, standards and funding for training and education for defense

attorneys; and (4) long-range plans for stable and ongoing funding of indigent defense delivery.

**Co-chair Rep. Bolz** noted that the subcommittee's recommendations laid the ground work for House Bills 147, 148 and 149, enacted during the 2013 legislative session.

**Co-chair Rep. Bolz** reviewed the public defense requirements and responsibilities set forth in the Sixth Amendment to the U.S. Constitution, as well as the U.S. Supreme Court's decision in *Gideon vs. Wainwright*, Article I, Section 13, of the Idaho Constitution and Section 19-106, Idaho Code.

**Co-chair Rep. Bolz** assured the committee members that each meeting will conclude with a discussion of member questions, comments and requests for information to be presented at future meetings.

**Co-chair Sen. Mortimer** thanked his fellow committee members, LSO staff and presenters for their commitment in this effort and extended a special thanks to his co-chair for his work.

**Patti Tobias, Administrative Director of the Courts**, introduced **Idaho Supreme Court Chief Justice Roger Burdick**.

**Chief Justice Burdick** stated that he fully supports the key areas of study of the Criminal Justice Commission Subcommittee, as summarized by **Co-chair Rep. Bolz** in his introductory remarks. **Chief Justice Burdick's** complete presentation is available online at: [http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815\\_burdick.pdf](http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815_burdick.pdf). **Chief Justice Burdick** concluded his presentation by recognizing that the committee's task is an important duty. He reiterated that the Idaho courts stand ready to help.

**Senator McKenzie** acknowledged that **Chief Justice Burdick** was consistent with the conclusions of the National Legal Aid and Defender Association (NLADA) report and asked **Chief Justice Burdick** whether the problem with the public defense system is a reflection of a bigger issue, which is incarceration rates. The studies that he has seen show that we have the highest incarceration rates of any country in the world. He stated that this drives, in part, the caseloads. He noted that the American Bar Association recommended considering whether crimes can be charged differently. **Sen. McKenzie** asked whether, within the context of keeping our communities safe, we can change the way we incarcerate our citizens.

**Chief Justice Burdick** responded that there are two realities: (1) our country's historic "lock them up" punishment approach, and (2) the present economic climate. He encouraged the committee to:

- Keep attuned to the Criminal Justice Reinvestment Interim Committee efforts;
- Analyze the criminal statutes and ask whether we really need to send people to jail for the activities currently criminalized; and

- Take a nuanced approach to the criminal statutes that exist today because many were enacted by statute in the 1880s.

**Representative Trujillo** mentioned House Bills 148 and 149 and asked how to further tighten that criteria and make it easier to determine who is eligible to receive help.

**Chief Justice Burdick** suggested that there is a lot of work to be done on *who* gets a public defender and stated that there should be a standardized approach in determining indigency.

**Senator Lakey** noted that the Chief Justice discussed tax savings, accountability and cost effectiveness, while at the same time the studies emphasize a need for independence. He asked for the Chief Justice's thoughts on the need for oversight of those tax dollars, while looking at the independence that is needed of public defense attorneys.

**Chief Justice Burdick** noted that "independence" means the independence to represent your client reasonably at state expense. In order to have oversight, every public defender should be legally bound to give certain data as concerns their cases. We are not holding them accountable to get the least money to them to pay for a fair and impartial trial. We are trying to make them accountable for reasonable opportunity. He opined that data is the cornerstone going forward with cost accountability. Other mechanisms to hold public defenders accountable include the judge, who can hold them accountable for conduct outside the bounds of appropriate behavior in a court of law, and the Idaho State Bar, which can monitor acts that violate the Code of Professional Responsibility. He stated ultimately, accountability starts with data.

**Representative Perry** asked the **Chief Justice** to discuss public defender reimbursement and user fee financing. **Chief Justice Burdick** replied that the court is collecting money for other political entities that has little to do with the adjudication of defendants. As a result, there is basically a user fee approach to criminal justice. We are financing the criminal justice system on the backs of undereducated persons raised in chaotic lives, subject to sexual, emotional and physical abuse and usually marginalized to begin with. We do not want people to recidivate, but yet we want them to pay all this money in court costs, fines and restitution, hold down fulltime jobs and find a way to make it to all AA meetings or the like, all within a certain time period. If a person slides back, there are repercussions.

**Representative Meline** noted that there is very little on the court questionnaire designed to determine eligibility for public defense and opined that the form could be improved. She recalled that when she was a commissioner, her county was proactive in following through with billing.

**Chief Justice Burdick** reiterated that a standardized approach for funding the public defender service is essential, which includes the investigative process.

**Co-chair Rep. Bolz** introduced **Mr. David Carroll, Executive Director, Sixth Amendment Center.**

**Mr. Carroll** discussed his presentation entitled “*The Right to Counsel: Constitutional Requirements, Standards & State Trends,*” available online at: [http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815\\_carroll.pdf](http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815_carroll.pdf). The four topics discussed included:

1. What the right to counsel means
  - (a) Amendments I, II, III, IV, V and VI to the U.S. Constitution
  - (b) Warren, Burger, Rehnquist and Roberts Court rulings
  - (c) County funding of indigent defense
  - (d) Need for greater state involvement in at least providing guidelines, if not mandates
2. National standards of justice
  - (a) ABA Ten Principles
  - (b) To ensure independence, many states established nonpartisan public defense commissions
3. Indigent defense trends around the country
  - (a) Lyon County, NV example – little incentive to dedicate flat fee to clients
  - (b) Again, establish either statewide or partial public defense commissions
4. Consequences of not meeting 6<sup>th</sup> Amendment requirements
  - (a) Systemic litigation
  - (b) U.S. Department of Justice has begun to enforce the right to counsel

**Co-chair Rep. Bolz** asked **Mr. Carroll** to share his perspective on what adequate representation costs. **Mr. Carroll** discussed the Eddie Joe Lloyd case in order to illustrate how expensive it is not to provide adequate counsel. He closed his comments by stating that a strong public defense system is critical.

**Co-chair Rep. Bolz** introduced **Sara Thomas, SAPD, Public Defenders in Idaho and U.S.**

**Ms. Thomas** discussed her presentation entitled “*Indigent Defense in Idaho,*” available online at: [http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815\\_thomas.pdf](http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815_thomas.pdf).

**Ms. Thomas** discussed the history of the public defense system in Idaho. She commented that until 2012, there was no answer to the question “who is entitled to counsel” and until this year, there was not a standard eligibility form. She added that the form is nearing completion. She also explained what the Capital Crimes Defense Fund is and how it works.

**Ms. Thomas** reviewed the following topics of indigent defense in Idaho:

(1) Who is entitled to counsel and when

- Rebuttal presumption
- The court may determine that other persons are indigent after considering other factors

(2) How counsel is provided

- Section 19-859, Idaho Code – the methods by which trial-level services may be provided
- Section 19-860, Idaho Code – qualification and compensation for trial-level public defenders and appointed counsel

(3) Idaho's trial-level program in practice

- Services actually provided by trial-level attorneys
- Method of providing services

(4) A comparison of contracting counties by population and defense expenditures

- Contracting for services
- Comparing contracting counties by population and defense expenditures
  - Here, **Ms. Thomas** made particular note that it is not an adversarial system when the local prosecutor decides how much the public defender gets paid. Population does not answer the "why." There could be various definitions of indigence or different services could be provided. For these reasons the statute was amended. As of July 1, they will provide an annual report that breaks down the costs and reflects how they spend the money for the case.

(5) The inconsistencies between the counties

- Here, **Ms. Thomas** noted that the Idaho Supreme Court Technology Committee is preparing a workable and reasonable definition of "case."

(6) Where do we go from here? The four critical areas for the committee's consideration:

- Structure and organization of indigent defense delivery
  - Here, **Ms. Thomas** commented that in appointment of counsel the screening process varies. Also, there are no standards of ethics.
- Oversight and accountability of indigent defense
  - Here, **Ms. Thomas** stated that the level varies based on contract rules - most counties find no way to measure performance. Typically the judge explains to the defendant their rights and in many courts prosecutors can negotiate with defendants without the defendants being told their right to counsel.

- Mechanisms, standards, and funding for training and education for defending attorneys
- Long-range planning for stable and ongoing funding of indigent defense delivery

**Representative Luker** asked how many criminal cases in Idaho are handled by public defenders versus by private counsel. **Ms. Thomas** responded right around 80 percent. **Representative Luker** asked for a rough estimate of the number of public defenders in Idaho. **Ms. Thomas** stated that she had no idea because public defenders do not report to her office and the number changes every year. Also, some county contracts are for a three-year period while others are yearly.

**Co-chair Rep. Bolz** introduced **Daniel Chadwick, Executive Director, Idaho Association of Counties.**

**Mr. Chadwick** discussed his presentation entitled “*Report on the ICJC Subcommittee on the Public Defender/County Costs for Public Defense Services,*” available online at: [http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815\\_chadwick.pdf](http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815_chadwick.pdf). He discussed the three-year long work of the ICJC Subcommittee, as well as the membership of the ICJC Subcommittee.

**Mr. Chadwick** emphasized the important balance between the competing interests – the issue of money versus the issue of responsibility. Resources are limited and there is no open checkbook. He listed the county-level criminal justice system players and their respective responsibilities; including: the sheriffs, prosecutors, clerk of court, coroner and the board of county commissioners. Public defenders are one component of an entire system. **Mr. Chadwick** noted that the common thread to this is that the state requires these services, but the state does not deliver these services. Every one of these services is provided by the counties with or without adequate resources.

**Mr. Chadwick** discussed the ICJC Subcommittee’s key recommendations, which resulted in House Bills 147, 148 and 149, as well as HCR26. He briefly discussed the following four critical areas:

- (1) Structure and organization of indigent defense delivery
  - In-house office and contract court appointment
- (2) The oversight and accountability of indigent defense delivery
  - Statewide commission or some other oversight entity that looks at how indigent defense services are delivered and whether standards are being maintained
- (3) Mechanisms, standards and funding for training and education for defending attorneys
  - Caseloads, experience levels, education requirements and the idea of creating a professional organization of public defenders
- (4) Long-range planning for stable and ongoing funding of indigent defense delivery
  - Biggest area – “What can we afford, what does it cost now and where do we go from here?”

**Mr. Chadwick** reviewed a spreadsheet titled “*Public Defense Expenditures and Related Data by County, 2012*,” available online at: [http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815\\_chadwick2.pdf](http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815_chadwick2.pdf). He noted that counties pay for public defender services out of the current expense fund or the Justice Fund. The numbers show that for FY2012, counties have spent \$21,033,323 on public defender services.

**Mr. Chadwick** stated that he has collected data on contracts, which he can make available to committee members. He noted that there are many disparities among the contracts.

**Mr. Chadwick** stated that the Idaho Association of Counties (IAC) manages the Capital Crimes Defense Fund. Seven county commissioners run the Fund. The fund deals only with death penalty cases. There is roughly \$4.5 million currently in the fund. He explained that there is a money judge who reviews the claims from the public defenders and then rules on the appropriateness of the claims. The claims are submitted to the county commissioners in the form of a court order. The commissioners do not see the actual claims. IAC receives the actual claims and the court order and IAC pays the claims based upon the court order. This process makes charging decisions and the defense in capital cases less subject to money pressures.

**Mr. Chadwick** closed by stating that providing a public defender is a federal and state responsibility. The state of Idaho has chosen to delegate that responsibility to the counties and it is currently funded by counties. He stated that there is no question that public defender services are constitutionally deficient. He stated that there are going to be increased costs for the state and he does not know that the counties can bare those costs. Finally, he stated that it will require new revenue.

**Co-chair Sen. Mortimer** asked if **Mr. Chadwick** has looked at the numbers on his spreadsheet in terms of misdemeanor and felony caseloads. **Mr. Chadwick** stated that given that there has been no single definition for “case” it is difficult to provided caseload statistics.

**Representative Perry** asked **Mr. Chadwick** to specifically identify the areas in which Idaho is constitutionally deficient. **Mr. Chadwick** responded education and training, experience levels, caseloads, resources available for investigations, mitigation experts and the fact that there is no current standard for who can be a public defender.

**Senator Lakey** asked whether counties have expressed a preference in terms of organization or structure for service delivery. **Mr. Chadwick** responded that Canyon County indicated its preference, which will be part of the local judicial system, but there is still the question of resources. He stated that he has no specific preference at this point and asked that as the committee does its work and makes its recommendations that the issue of the ability to pay be considered.

**Representative Meline** requested the same figures for the prosecution in the counties because she would like them kept somewhat equal in their funding. **Mr. Chadwick** stated that the prosecutors may have an opportunity to present that information during the next committee meeting. He will work with the prosecutors to gather data on budgets. He noted that prosecutors play a dual role because they are also civil counsel for counties.

**Co-chair Representative Bolz** invited **Mr. David Carroll, Executive Director, Sixth Amendment Center**, to present his presentation titled "*Public Defense in Idaho: Review of the NLADA Report*," available online at: [http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815\\_carroll2.pdf](http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815_carroll2.pdf).

**Mr. Carroll** began by discussing report methodology as well as the report findings related to how Idaho measured up to the ABA Ten Principles and the appointment of counsel provision. He then continued suggesting priority standards that the interim committee might consider during its deliberations.

**Mr. Carroll** explained that the Idaho Criminal Justice Commission (ICJC) asked him to study seven Idaho counties, chosen by ICJC. The methodology of the study included data collection, which was severely hampered by not having uniform caseload statistics and no definition of "case." He stated that the main crux of the study was two-fold: (1) interviews, including a broad cross-section of stakeholders; and (2) courtroom observations, including first appearance, sentencing and probation violation dockets. He stated that it was a difficult report to write because it is hard to talk about the ABA Ten Principles in the absence of any of the principles in the counties studied. The study showed that there is no independence, there are no workload controls, there is no training, there is no supervision, and there are a lot of flat fee contracts that create financial conflicts between the attorney and the client.

**Mr. Carroll** specifically addressed workload controls and noted that in Ada County there are 900 cases per attorney, in Canyon County 952 cases per attorney and in Kootenai County the workload is 152% above Nation Advisory Commission standards. NAC standards were developed by the U.S. Department of Justice in the early 1970s and provide that attorneys handling felony cases should not be handling more than 150 felonies per year. The biggest problem in Idaho is that nobody is watching the ship. He thinks that Idaho is constitutionally deficient and Idaho's exposure to a lawsuit is great.

**Mr. Carroll** next discussed the early appointment of counsel and referenced the U.S. Supreme Court's decision in *Rothgery v. Gillespie* case, which provides that critical proceedings cannot occur after the attachment of the Sixth Amendment right to counsel unless there is an attorney with the time, training and ability to handle the case. If the first appearance is a "critical" proceeding, counsel must be provided. In Idaho, he found that counties had structured ways to get out from under the early appointment of counsel, one of which was to accept uninformed waivers of counsel. He opined that not providing counsel at early stages is Idaho's biggest exposure.

**Mr. Carroll** discussed cost recovery practices. He agreed that if someone can afford to pay, then they need to pay. He stated that the problem is that Idaho counties are not determining who is and who is not capable of paying. He noted that national standards provide that cost recovery is constitutional and acceptable but there is a need to screen at the front end of a case to determine how much each individual person can and cannot pay and have the person pay at that point in time. It's much more difficult to collect at the back end of a case.

**Mr. Carroll** stated that there are no recommendations in the NLADA report because the system was so deficient. Also, they did not want the debate to be about the recommendations, but rather they wanted the stakeholders in Idaho to struggle with the content of the NLADA report and come up with solutions that best fit the state. He opined that the flat fee contracts in Idaho need to be eradicated but emphasized that this does not mean that Idaho needs to get rid of the contract system entirely. He noted that Oregon has a contract system that works. In Oregon, there is a state commission that issues standardized contracts and the ABA Ten Principles are conditions of that contract. Oregon is able to enforce compliance with the Ten Principles through the terms of the contract itself. Massachusetts is nearly entirely an assigned counsel system where private attorneys do the work, but there are rigorous standards setting forth who can be on panels, yearly training attorneys must undergo and the contracts with private attorneys provide for oversight. He stated that the simplest way to explain the situation in some parts of Idaho is to think in terms of the medical field: you do not go to a dermatologist if you have a brain tumor. Real estate attorneys cannot do a good job handling criminal cases if they do not have the adequate training and supervision.

**Mr. Carroll** stated that the standards are more important than the delivery model. He suggested that the committee not get hung up on which model is the best. He stated that there are good and bad systems applying the various models. The key, regardless of which model is employed, is following the standards. He posed the following questions: *how* are we going to ensure attorney meets the complexity of the case; *how* are we going to issue training, and *how* are we going to make sure there is ongoing supervision. He stated that the policymakers in Idaho are better suited to answer these questions than is the Sixth Amendment Center. He stated that the Center stands ready to inform the committee if its proposal has been tried elsewhere and whether it has or has not worked, as well as offer suggestions for consideration.

**Mr. Carroll** noted that Michigan recently struggled with many of the issues Idaho is currently struggling with. In terms of funding, Michigan capped the county contribution at the current level and the state contributes additional costs. This is good for counties because they know exactly what to budget.

**Mr. Carroll** opined that the issue of independence is the preeminent question that must be dealt with in Idaho. Most states have found that a state commission is the most cost efficient way to address independence. However, **Mr. Carroll** made clear that this is not the only way.

**Mr. Carroll** closed his presentation by stating that in every state reform he has been involved with, the last people fighting change are not the prosecutors or the judges, it is the public defense bar battling cases. They do not want to change. In Idaho, the prosecutors are tired of preserving the record. It makes the prosecutors' jobs harder to go up against *pro se* defendants and public defenders who do not know what they are doing. He noted that judges struggle with independence. An objective independent body is needed that can look from a criminal defense perspective and determine whether something is or is not a good use of money. Other states do not have an open checkbook. They must go before the Legislature and justify their budget on a yearly basis.

**Co-chair Rep. Bolz** asked **Mr. Carroll** to discuss his assessment of what has worked best in other states in terms of assessing fees and recovering costs. **Mr. Carroll** responded that some states assess a screening fee. If the person is eligible for a public defender then the person must contribute some amount of money (\$40 to \$50). Representation is not conditioned upon whether the person can pay. If a person is truly eligible then the fee should be waived. This does not provide a lot of money. But it does address the taxpayer issue to the degree that people are being held accountable to a certain extent, even if it is just \$5 per month that is recovered from a person.

**Co-chair Sen. Mortimer** asked if there is a state that has been effective in recovering costs. **Mr. Carroll** responded that he will provide the interim committee with a list. He also noted that it tends to be the states that follow the ABA standards and try to assess an upfront fee and not finance efforts to collect on the back side. There may be higher revenue streams in states that assess or collect on the back side, but the entire structural cost of trying to collect is not reflected. Appreciating this, **Mr. Carroll** opined that the states that have been most successful are those that collect what they can on the front end.

**Co-chair Rep. Bolz** invited committee member discussion.

**Senator McKenzie** stated that it would be helpful to understand the costs associated with the different models discussed.

**Representative Meline** asked the committee to keep in mind that when it is deliberating on the budget process, that the county commissioners are stuck with a three percent cap and the Justice Fund is right at the top.

**Senator Bayer** requested further discussion regarding policy. He stated that there is a link between budgeting and policy. He noted that there are some limitations and practicalities that get into an area where there seems to be practices that raise questions of ethics and meeting standards. He hopes that he does not hear that it is as simplistic as more money solves all problems. The importance of managing these moneys is critical. He requested more dialogue about the implications of budgets on a local budge-driven formula versus a state revenue-driven formula. He recognized that there is a significant difference in the budgeting processes. The state needs to take into

consideration the variables it will need to deal with, including raising revenues or cutting budgets.

**Representative Luker** recognized that this is a complicated area involving a fundamental constitutional right versus public funding. He suggested that the committee may need to prioritize the concerns and that the ICJC Subcommittee has provided a good framework from which to start. He opined that the state does not necessarily need to address all of the concerns. For example, he stated that the Idaho State Bar can deal with standards by incorporating standards into continuing education. The State Bar has specialty groups that have yearly training requirements for those who specialize. He also expressed concern about funding public defense similar to the CAT fund. He acknowledged the tension between prosecutorial funding and public defender funding. If a county is growing its prosecutorial force, then there likewise should be growth in the public defender force. He stated that the state probably needs to come up with more funding, but the counties need to have continuing skin in the game.

**Representative Perry** opined that the prosecutorial and public defender sides of the adversarial system need to be on par with each other. She requested information regarding pay, caseload, as well as other information so that the committee can do a comparison.

**Co-chair Rep. Bolz** stated that **Holly Koole** will present this type of information at the next committee meeting.

**Senator Lakey** requested information about models in other states. He stated that he struggles with the issue of independence. He agrees there needs to be independence, but there cannot be a blank checkbook.

**Senator Buckner-Webb** emphasized the importance of equity between the two systems. She also encouraged everyone to keep in mind the human element involved in the process.

**Representative Meline** stated that a lot of the money distributed from the courts goes to the city, while the county does most of the work.

**Representative Luker** asked **Mr. Chadwick** who is responsible for providing city public defense work. **Mr. Chadwick** answered that the county provides public defenders whether it is a city or county case.

**Co-chair Sen. Mortimer** suggested that it may be beneficial to hold a roundtable discussion where experts are at the table with committee members so that specific questions can be specifically answered.

**Representative Trujillo** commented that she would like to have more information relating to the different types of structures that are out there. She would like to explore the idea of setting up public defender districts.

**Co-chair Rep. Bolz** commented that it is the case in Idaho that not one structure fits all because of population differences among the counties.

Following lunch, **Patty Tobias** introduced the **Canyon County Public Defender Study Group and Third Judicial District Judge Thomas Ryan and Third Judicial District Judge Molly Huskey**. The complete “*Canyon County Public Defense System Report*” available online at:

[http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815\\_canyonco\\_rpt.pdf](http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815_canyonco_rpt.pdf).

**Judge Thomas Ryan** discussed the formation of the Canyon County Public Defender Study, which was prompted by a letter sent by Canyon County Commissioners to **Judge Ryan** expressing concerns about: (1) the determination of indigent status for purposes of appointment of a public defender; (2) public defender costs imposed upon the county; and (3) whether the public defender delivery system in the county meets the ABA Ten Principles.

**Judge Molly Huskey** introduced the committee members. She stated that the group took the goals from ICJC. She emphasized the importance that each member of the committee have a voice and be candid. The scope of the study was governed by the letter discussed by **Judge Ryan**, which included the cost of the public defense system, who is eligible to receive services and how it should be managed. The job of the committee was to make a recommendation to the commissioners. The committee recommended the system that they thought would best fit Canyon County without regard to cost. **Judge Huskey** stated that when cost drives the method of delivery, corners are cut. They recommended a method, then they looked within that method to determine where there could be some efficiencies that might save money.

**Judge Huskey** stated that they looked at the demographics of Canyon County by using Supreme Court numbers. Looking at the federal poverty guidelines, about 48 percent of Canyon County residents would be eligible for public defender services.

**Judge Huskey** commented that the committee looked at the ABA Ten Principles, which gave them a great starting point. She pointed to the National Center for State Courts as a great resource because it recently came out with a workload study that looked at the amount of time each type of criminal case should take. She noted that caseload does not provide all the information needed. For example, a first degree murder case is not the same as a DUI case even though each is one case. Applying the center’s study, the committee found that they were short only one or two attorneys, but they were significantly short in support staff.

**Judge Huskey** recounted that the committee made recommendations by going through each of the ABA Ten Principles. The committee also provided a sample budget. The committee recommended that Canyon County: (1) go in-house; (2) increase to 19 attorneys, including a chief deputy and a chief public defender; (3) increase support

staff to 12 or 13; (4) require training; (5) implement and maintain electronic data collection system; and (6) explore ways to get the budget covered.

**Representative Perry** asked whether the committee examined models from other states or created their own. **Judge Huskey** responded that there are not many models out there. There is the in-house model, assigned counsel and different types of contracts.

**Co-chair Sen. Mortimer** asked how hard it would be to expand to a regional office covering five to six smaller counties. **Judge Huskey** opined that it would not be difficult. **Co-chair Sen. Mortimer** asked **Judge Huskey** to address standards in terms of the number of cases per attorney and qualifications of attorneys. **Judge Huskey** responded that this is difficult to do. The difficulty is determining how you establish those qualifications and who establishes them. She stated that what we really need is to have the opportunity for people to train. The head public defender should understand the different types of representation public defenders do so that they can hire accordingly and appropriate training is in place.

**Representative Luker** asked for a copy of the Canyon County report. **Co-chair Rep. Bolz** indicated that he will distribute the report. **Representative Luker** asked if the Canyon County public defender office model is similar to the other seven counties that have the in-house public defender offices. **Judge Huskey** stated that it is like the other seven public defender offices. The difference is that Canyon County has a high Hispanic minority population, so the office needs public defender staff who are bilingual and culturally knowledgeable. **Representative Luker** asked what the difference was between the recommended budget and current expenditure. **Judge Huskey** replied that the current budget is a little over \$2 million and the recommendation was \$2.8 million.

**Senator McKenzie** asked whether there was a recommendation about how Canyon County would reach the \$2.8 million and how smaller jurisdictions would share in the costs. **Judge Huskey** replied that the subcommittee did not address how other entities that use the criminal justice system should or could pay in. She acknowledged that many of the small counties in Idaho would have to partner. For example, there is no way that Clark County could sustain an in-house office because they do not have the infrastructure. **Senator McKenzie** requested more information relating to the financing piece and who the contributors would be to that financing.

**Co-chair Rep. Bolz** asked if the budgets submitted included housing for the public defenders. **Judge Huskey** replied that they knew the commissioners were in discussion regarding construction of a new administration building. What they did not know was whether it would be more economical to house the public defenders in the new building versus lease space elsewhere. **Co-chair Rep. Bolz** commented that when the committee starts looking at going from a contract to a public defender office system, housing needs to be factored in.

**Representative Luker** asked if her committee considered the inherent conflict when a public defender has a private practice. **Judge Huskey** replied that they absolutely did. Her understanding is that individuals are permitted to carry private cases. When there is a conflict between a private client hearing and a public client hearing, attorneys go to the private client hearing because they are paying. Another attorney, who may or may not know anything about the public client's case, is sent to the public client hearing. This is an inherent conflict of interest. She opined that if an attorney has a public defender contract, that attorney should not be taking private clients.

**Senator Lakey** asked if the public defenders would be county employees. **Judge Huskey** responded yes, the public defender would be a county employee but one of the primary ABA Ten Principles is independence. As a public defender you must have a working relationship with the commissioners and there must be a significant level of trust between the commissioners and the public defender.

**Co-chair Rep. Bolz** introduced **John Gross, Indigent Defense Counsel, National Association of Criminal Defense Lawyers.**

Commenting on the analysis made earlier in the meeting that "the Idaho defense system is broken," **Mr. Gross** emphasized that this is not uncommon around the country. He stated the *Gideon v. Wainwright* decision was an unfunded mandate. Many states had systems in place but many strictly for criminal cases. As the pressure grew to appoint more and more counsel, the ad hoc arrangements became entrenched. Nobody evaluated the system or asked how it might be managed differently.

**Mr. Gross** observed that the progress made by several states is not all about funding, but also about breaking through the hesitance for change and lack of insight as to how to improve. Additionally, **Mr. Gross** commented that some of the problems derive from the increased demands on the criminal justice system. States have enacted more laws that spur prosecution of more crimes and we expect the criminal justice system to do more than was originally intended. He suggested discussing a broader reform effort including the following: (1) the categorization of offenses; (2) available pretrial services; (3) potential sentencing reforms; and (4) holistic representation.

**Mr. Gross** stated that there are definite financial savings to a well run indigent defense system. He stated that some of the biggest costs are corrections and posed the questions: do we really need to be locking up so many people and are there other ways we can facilitate their release back into society without sacrificing public safety. He stated that getting a sentence right the first time saves money, which requires early attorney involvement. The use of increased diversionary programs can save money. Greater court efficiency can save money.

**Mr. Gross** questioned employing a system that recoups money from defendants who are "marginally" indigent. He posed the question of whether it is wise to make these people spend the small amount of money they have when they are already living

paycheck to paycheck. What happens if their car breaks down? Now, they are out of a job and applying for unemployment. Have you gotten the money out of them to help offset the costs to the criminal justice system, but actually spent more than that because now they are a ward of the state? He suggested that this essentially takes people who are marginally self-sufficient and pushes them below that self-sufficient level.

**Mr. Gross** stated that in terms of accountability, people spend money on indigent defense and they do not know what they are getting for their money. This is especially true for flat fee contracts. There needs to be standards and metrics to measure performance and to determine what you are getting for your money.

**Mr. Gross** remarked that though a discussion about caseloads has some value, it is better to think about workloads. For example, the meaningfulness of having 50 cases depends on the type of cases you have.

**Mr. Gross** suggested discussing the idea of achieving cost savings by reclassifying some offenses. Also, that the committee should think about maintaining statewide consistency and noted that currently, the quality of justice entirely depends upon where you are arrested in the state.

**Mr. Gross** concluded by offering his assistance in any way in the future.

**Representative Luker** asked if **Mr. Gross'** organization has certification programs for defense lawyers and if so, do any states utilize them. **Mr. Gross** responded that the NACDL does not have these programs because his is a national organization with affiliates in all 50 states. He is in favor of the development of standards and workload metrics. In order to do that, the standards must first be determined.

**Representative Luker** commented that when setting standards, on the one hand you are setting a level of aptitude, but on the other hand you risk a civil lawsuit for ineffective counsel if standards are not met. **Mr. Gross** responded that lawyers have long been in the position of self-regulating. Courts often use those self-regulations to determine whether counsel has been effective. The standards need to be realistic.

**Senator McKenzie** asked if **Mr. Gross'** organization has done any studies regarding the specific issue of indigent defense system and funding. **Mr. Gross** replied that he authored an article regarding the cost of representation versus the cost of incarceration. He stated that early representation saves money both at pre-trial and post-trial incarceration. He stated that he does not have solid economic data because it is not being kept and emphasized the importance of requiring reporting.

**Co-chair Rep. Bolz** asked the members whether more discussion would be helpful.

**Representative Luker** asked if ISTARs keeps information relating to public defenders and whether that system can be enhanced to collect relevant data. **Ms. Tobias** offered to put together information relating to caseloads by county and by major case types.

She cautioned that the limitation in the data is that it does not always distinguish between whether the attorney has taken a case on a contract basis or as a private attorney. She also noted that they are moving to a new case management system that will provide a good opportunity to identify the additional metrics. The system will be available to public defender and prosecuting attorney offices.

**Senator Bayer** stated that, in terms of “smart on crime,” he would like more appreciation for comparisons between the states in terms of what crimes are on the books. He would also like to know examples of ordinance violation implications in Idaho. **Ms. Tobias** explained that the Justice Reinvestment Interim Committee is discussing this issue and suggested that it may be helpful for members to read the report that will be presented at that committee’s next meeting.

**Co-chair Rep. Bolz** noted that the next meeting is scheduled for September 12 and that one committee member indicated she cannot make that day. **Senator Bayer** inquired about the length of future meetings. **Co-chair Rep. Bolz** responded that it depends upon the agenda. He requested that LSO staff send an email inquiring about members’ September availability.

The meeting was adjourned at 3:10 p.m.