

MINUTES
PUBLIC DEFENSE REFORM INTERIM COMMITTEE
September 12, 2013
1:00 p.m. to 4:30 p.m.
Room WW17, Capitol Building
Boise, Idaho

Co-chair Senator Dean Mortimer called the meeting to order at 1:00 p.m. and requested a silent roll call. Members present were: **Co-chair Representative Darrell Bolz**, and Representatives Lynn Luker, Christy Perry, Janet Trujillo and Carolyn Meline. Senators Curt McKenzie, Cliff Bayer, Todd Lakey and Cherie Buckner-Webb were absent and excused. Legislative Services Office staff members present were Brooke Brouman, Richard Burns and Jackie Gunn.

Others in attendance included: Judge Barry Wood, Patti Tobias and Michael Henderson, Idaho Supreme Court; Michael Bartlett, Idaho Association of Criminal Defense Lawyers; Greg Bower, Ada County Prosecutor; Holly Koole, Idaho Prosecuting Attorneys Association; Grant Loeb, Twin Falls County Prosecutor; Paul Panther, Office of the Attorney General; Monica Hopkins and Tanya Greene, ACLU; David Carroll (telephonically), Sixth Amendment Center; Sara Thomas, State Appellate Public Defender; Daniel Chadwick, Idaho Association of Counties; Alan Trimming, Ada County Public Defender; Judge John Varin; and Lauren Kraemer, Boise State University student.

NOTE: All copies of presentations, reference materials, and handouts are on file at the Legislative Services Office and are also available online at:
<http://www.legislature.idaho.gov>.

Representative Janet Trujillo moved to approve the committee's minutes from the August 15, 2013, meeting. The motion was seconded by **Co-chair Representative Bolz** and passed unanimously.

Mr. Greg Bower, Ada County Prosecutor's Office, presented on the perspective of Idaho prosecuting attorneys related to the public defense system. He opined that a good public defender in a professional office makes all of the difference in a system that works. He chronicled the evolution in Ada County from a contract public defender system to the current governmental public defender system. He stated that there is a need to rationally balance the support of all pieces of the criminal justice system.

Mr. Bower discussed the differences between the duties of public defenders and the duties of prosecutors. With the aid of a chart titled "Life of a Criminal Case," he traced the prosecutorial and the public defense functions through a criminal case. "Life of a Criminal Case" can be found online at:
http://legislature.idaho.gov/sessioninfo/2013/interim/defense0912_bower.pdf.

Mr. Bower noted that in this fiscal year, he will spend approximately \$10.5 million on salaries. \$2 million of that goes to a civil division that represents county government. The civil division includes more than 15 lawyers.

Mr. Bower noted that one of the differences between prosecutors and public defenders is that the burden of proof is always on the prosecuting attorney. He compared the relationship between the prosecuting attorney and the public defender to the relationship between a home builder and a building/code inspector.

Mr. Bower explained that unique to his office is the considerable amount of time spent on the investigation of unsolved homicides. He stated that in more complex cases, it can be years before a case gets filed. These cases require hundreds of hours of prosecutor and police time before the first pleading gets filed. He stated that prosecutors also perform additional functions, including night and weekend duty, provide advice and education to law enforcement on a regular basis and perform grand jury functions.

Mr. Bower stated that a unifying state public defenders association would be helpful. He noted that about 60 percent of the funding for the state prosecuting association comes from county dues and the remainder comes from POST funds. He recognized that a public defenders association would benefit the counties differently.

Mr. Bower closed by stating that the best way to ensure a just and defensible system is to have “governmentized” public defender offices throughout the state. He opined that a beginning step toward this is the creation of an association to support and develop the tools that public defenders need. He recognized that the only way many counties will be able to have government public defenders is through joint powers agreements or MOUs with adjacent counties or a large county in their district.

Representative Lynn Luker asked **Mr. Bower** whether the 1,800 mental health petitions go through the criminal division. **Mr. Bower** answered that the petitions go through the juvenile division. **Representative Luker** followed up, asking **Mr. Bower** how many of the petitions involve the public defender. **Mr. Bower** explained that virtually all of those cases involve the public defender.

Co-chair Representative Bolz asked about the effect of recent legislation that set parameters for indigency qualification. **Mr. Bower** replied that the rules in Ada County are such that the new law will not have much impact in terms of the number of people who qualify; however, there is some concern in the juvenile arena because many of those cases are handled outside of the judicial arena.

Ms. Monica Hopkins, Executive Director of the ACLU of Idaho, presented an overview of the ACLU’s role in the Legislature’s efforts to respond to the constitutional deficiencies in the state’s indigent defense system. She briefly reviewed a handbook titled “Criminal Justice Reform: Addressing Deficiencies in Idaho’s Public Defense System” that can be found online at:

http://legislature.idaho.gov/sessioninfo/2013/interim/defense0912_gideon.pdf. She noted that the committee's roadmap is the ABA's Ten Principles.

Ms. Hopkins stated that at the current level of prosecution and excessive number of misdemeanor caseloads, the Legislature needs to realize there is going to be a price tag.

Ms. Hopkins stated that every charge that carries the threat of jail time triggers the requirement to provide constitutionally adequate representation. She observed that the more charges that are brought, the more lawyers must be provided. By reducing offenses from misdemeanors to criminal or civil violations, the number of criminal charges that trigger the duty to provide a lawyer will be reduced.

In regards to the reclassification of some misdemeanors, **Ms. Hopkins** encouraged the members to answer three questions:

1. What is the problem we are trying to solve?
2. What is the evidence that a criminal sanction will actually solve the problem?
3. Will applying a criminal sanction cause more problems than it solves?

Ms. Hopkins advised abolishing flat fee contracts, establishing reasonable workload controls and securing independence and accountability.

Ms. Tanya Greene, National ACLU, observed that Idaho has an opportunity to create a statewide infrastructure that can meet the ABA's Ten Principles.

Ms. Greene discussed her observations of the chart "Life of a Criminal Case" presented by **Mr. Bower**. She commented that although the chart may accurately portray what happens in criminal cases in Ada County, it is also an illustration of Idaho's unconstitutional system. She stated that the defense counsel functions should extend across the chart matching the prosecutorial functions.

Ms. Greene suggested that the committee consider regional offices, a contract system like that implemented in Oregon and statewide oversight to ensure that protections are afforded consistently throughout the state.

Ms. Greene stated that in order to determine cost, the state first needs to define "case." Caseloads and workloads then need to be assessed in conjunction with that definition. She also emphasized the need to collect and maintain data.

Ms. Greene concluded her remarks by stating that Idaho's remedy should contain:

1. Legislation that will codify a statewide independent oversight system that incorporates the Ten Principles as the minimum guideline, with appropriate enforcement mechanisms; and
2. An overall funding structure.

Co-chair Representative Bolz noted that Idaho might need a mixed system and asked **Ms. Greene** to identify states that have regional and county offices. **Ms. Greene** stated that there are other states that have mixed delivery systems. She suggested that this is where the statewide oversight comes into play. There can be an intermediate level between the individual county or regional office and the oversight board that brings them all together or they can have a relationship directly with the board, depending on what is most efficient and cost effective.

Co-chair Representative Bolz followed up, asking **Ms. Greene** to address whether workload is more important than caseload. **Ms. Greene** responded that workload incorporates caseload, so caseload is one of the building blocks that make up workload.

Representative Carolyn Meline asked whether the public defenders are elected in other states. **Ms. Greene** responded that there are elected public defenders in some states and there are also appointed public defenders. She suggested that a compromise might be that the oversight board participates in the public defender selection process.

Representative Christy Perry requested access to pertinent information from other states. **Ms. Greene** replied that there are no national resources, but there are books and manuals that list state statutes.

Representative Meline noted that the Justice Fund is capped at 3 percent growth in the counties. **Ms. Greene** confirmed that the 3 percent cap is a county cap, not a state cap.

Mr. Michael Bartlett, IACDL President, began his remarks by emphasizing that his association appreciates the serious nature of providing defense services for Idaho citizens. He stated that he speaks for the IACDL, which is made up of both public and private defenders. He encouraged the members to invite various public defenders to explain what they do on a daily basis.

Mr. Bartlett discussed the history of IACDL. He stated that currently there are 300 active members, 47 percent of which are public defenders. The association has a president and 13 board members, six of whom are full-time public defenders and three who perform federal criminal defense work. IACDL is a volunteer organization funded entirely by fees paid by the individual members. The IACDL serves as a clearing house for public defense discussions regarding legal issues. The association holds three CLEs a year, including an annual two-day seminar held in Sun Valley. Information regarding the Sun Valley seminar can be found online at: http://legislature.idaho.gov/sessioninfo/2013/interim/defense0912_iacdl.pdf. The association also maintains a website to assist in creating efficiencies and to improve the quality of services provided. He described other services available to members and he detailed professional support mechanisms of the association, including a strike team.

Mr. Bartlett stated that we do not currently have a constitutional system throughout all of Idaho. He opined that Idaho's base level for meeting its constitutional requirement is to comply with the ABA's Ten Principles. He highlighted the following issues related to the Ten Principles:

- **Independence** – A statewide system may answer this problem.
- **Private bar involvement** – In addition to the reasons stated by the ABA, this will provide a pollination of ideas and a cross-reference of work that benefits both the public defense bar and private bar.
- **Public defender training** – Training and experience must match the complexity of the cases. It should be a requirement that public defenders receive public defense training.
- **Continuous representation by the same attorney** – There are inefficiencies and frustrations with a team defense system.
- **Parity in budgets and resources** – Resources buy justice, not money. He noted that the resources work for the state. Turning to the chart "Life of a Criminal Case," **Mr. Bartlett** stated that it doesn't accurately reflect what is happening. He encouraged the members to invite public defenders to specifically address their thoughts regarding the chart. He also suggested that when reviewing resources, the members should look closely at both the county and municipal prosecutor offices. Public defenders defend city prosecutions too.

Mr. Bartlett concluded his remarks by stating that, in the short term, the IACDL stands ready to help in any way they can. In the long term, he suggested that the state needs to create a statutory system that complies with the ABA's Ten Principles.

Representative Perry asked if the IACDL has a relationship with the prosecuting attorneys association. **Mr. Bartlett** responded that defenders and prosecutors are cordial, but there is little to no coordination between the two associations.

Representative Luker asked **Mr. Bartlett** whether training, independence and parity of resources would be the priorities. **Mr. Bartlett** stated that while they are all important, parity of resources probably rises to the top.

Representative Luker pointed to Oregon's weighted system and asked **Mr. Bartlett** for suggestions on how to allocate available resources depending on the nature and complexity of given cases. He asked whether this would be an internal management issue or if there is something that can be accomplished legislatively. **Mr. Bartlett** responded that different cases fall into different categories in terms of what resources are necessary and emphasized that cases need to be weighted based on complexity. He suggested that this could be addressed legislatively but primarily should be left to practitioners with the adequate expertise and experience level necessary to effectively allocate resources.

Referencing a state lab example, **Representative Perry** asked **Mr. Bartlett** if Idaho can establish a process that would resolve resource concerns by performing lab work for both the prosecutor and the defender. **Mr. Bartlett** responded that sometimes a second

test performed by a different lab is needed to either confirm or reject the results. He noted that as private defense counsel, he often has to ship samples to out-of-state labs with varying fees. He stated that it makes sense to have a state lab designed to just get results.

Co-chair Senator Mortimer invited the roundtable participants to identify points that will assist in thoroughly assessing Idaho's public defense system as well as to identify tenable options for meeting constitutional requirements.

Mr. Daniel Chadwick, Executive Director, Idaho Association of Counties, noted that the following two documents have been provided to the committee:

1. General statement of the cost of prosecution without regard to civil or criminal titled "2012 Prosecuting Attorney Budgets by County"; and
2. Sample Public Defense Contracts – three basic and three conflict contracts.

Both documents are available online at:

<http://legislature.idaho.gov/sessioninfo/2013/interim/defense.htm>.

Mr. Bartlett asked **Mr. Chadwick** if the \$33 million statewide total, listed on the "2012 Prosecuting Attorney Budgets by County" report, includes city prosecuting budgets.

Mr. Chadwick replied that it includes only the county funds that are being expended; it does not include city costs.

Representative Janet Trujillo suggested that the committee look more closely at the qualifications for indigent status. She also suggested that the committee review successful regional-based public defense systems.

Representative Perry asked to hear **Mr. Trimming's** comments. She also suggested that the committee hear from other public defenders from both urban and rural areas of the state in order to gain a full perspective.

Co-Chair Senator Mortimer invited **Mr. Alan Trimming, Ada County Public Defender**, to comment. **Mr. Trimming** encouraged the committee to focus on the commonalities expressed by the presenters. He agreed with **Representative Perry's** suggestion that the committee invite representatives from other staffed public defense offices in Kootenai, Bonneville or Pocatello. **Mr. Trimming** also emphasized the importance of independence – the freedom from judicial influence as well as undue influence – because public defenders often take controversial positions and advocate unpopular positions.

Co-chair Representative Bolz commented about the relationship between the budgets in the prosecutor's office and public defender's office. He has budget data from Canyon County and will make it available to committee members. He also stated that he is interested in obtaining more information about regional and multi-county public defense offices.

Representative Luker suggested the committee come to a conclusion about its broad goals and a specific action plan. He identified particular issues, including **Ms. Hopkins'** suggestion that certain crimes could be reclassified; the regional office system; and cost-effectively using state resources. He requested more detailed financial information from counties regarding the public defender offices statewide, including the smaller counties. He also requested to hear from the Association of Cities.

Representative Meline noted that Bannock County went in-house because they were getting fewer people willing to contract with the county. She stated that the in-house system has worked better; however, the public defenders are overloaded. She also mentioned that the court-managed reimbursement program is working well. She asked **Mr. Trimming** if in Ada County the budgets of the public defender's office and the office of the prosecutor are comparable. **Mr. Trimming** replied that they are not.

Co-chair Representative Bolz asked the committee members to address the issue of timing. Recognizing that finances are, and will continue to be, an issue, he asked the members to consider whether they want to try to accomplish everything in one year or take progressive steps over several years.

Co-chair Senator Mortimer asked the roundtable attendees to assist the interim committee by sharing their thoughts regarding what the committee still needs to learn.

Judge Barry Wood, Senior District Judge, Idaho Supreme Court, suggested that the committee organize and prioritize its efforts based on the four goals identified by the CJC subcommittee. He commented that there needs to be a regional office of some type. He also opined that a statutory platform would be more beneficial than MOUs because of differences in county bargaining powers.

Mr. Michael Henderson, Idaho Supreme Court, agreed with **Judge Wood** that attention should be given to the four goals identified by the CJC subcommittee, which includes a discussion about the usefulness of regional public defender offices.

Mr. David Carroll, Executive Director, Sixth Amendment Center, agreed that regionalization is the right direction. He suggested looking at Montana and Oregon's systems that have regional offices in some areas and employ contracts in remote rural areas. He also echoed **Mr. Trimming's** comments about the importance of independence and added that if independence is not maintained, the other ABA Ten Principles will not be achieved.

Mr. Grant Loeb, Twin Falls County Prosecutor, stated that he supports a strong public defender system and reflected that he has worked on this issue for three years. He recognized that there are problems with the public defense system in Idaho, but he advised the committee not to presume that means it is unconstitutional. He suggested that the committee:

1. Learn more about regional systems, determine what the regions would be and the cost, which will depend on how the regions are organized; and

2. Review the costs of applying the ABA Ten Principles and other organization-supported standards. He cautioned that in Twin Falls County, the imposition of the standards would increase the annual budget from \$880,000 to \$1.8 million.

Mr. Paul Panther, Office of the Attorney General, suggested a survey of how other states have approached public defense reform and, in particular, states that have smaller and more rural counties similar to those in Idaho. Additionally, he suggested the committee learn more about how the defense system interfaces with the prosecutorial system in other states.

Honorable John Varin, Senior Judge, Retired, suggested that members keep in mind the other county defender services beyond criminal defense. Because public defenders are working within these other arenas, each offering unique complexities, he asked the members to not allow juvenile justice to become an afterthought.

Ms. Patti Tobias, Administrative Director of the Courts, Idaho Supreme Court, suggested the committee invite a panel of administrative district judges to speak at the October meeting. She noted that the ADJs have experience in all of Idaho's counties.

Ms. Tobias distributed the following:

- FY2013 Case Filings by County and District, found online at: http://legislature.idaho.gov/sessioninfo/2013/interim/defense0912_filings.pdf;
- Memo: Reimbursement Provisions for Public Defender Services, found online at: http://legislature.idaho.gov/sessioninfo/2013/interim/defense0912_henderson.pdf and
- FY2013 Public Defender Cost Reimbursements, found online at: http://legislature.idaho.gov/sessioninfo/2013/interim/defense0912_reimburse.pdf.

Ms. Tobias also offered to speak at future meetings about technology and noted that the Idaho courts are moving into a new case management system. She thought it would be helpful to discuss the type of computer system regional offices would use to interface.

In response to **Representative Luker's** comments, **Mr. Chadwick** noted that he shared information regarding FY2012 public defense expenditures by county, which can be found online at: http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815_chadwick2.pdf. He asked the committee how much deeper it would like to dig into those budgets and offered his assistance in that regard.

Ms. Sara Thomas, SAPD, asked **Mr. Carroll** to provide the members with a map depicting public defense reforms around the country and specifically identify those systems in place that are working. She noted that states that have been through this process will have insight for the committee. She suggested contacting someone in Montana, which went through a reform effort as recently as five years ago. She agreed with **Mr. Loeb's** comment that the cost of implementing standards needs to be reviewed

but cautioned that the other side of this needs to be reviewed as well, which is the cost of not properly funding public defense. She also suggested that the committee review the reasons why some states have lost litigation related to their public defense systems. She noted that this may be a good tool for prioritizing in Idaho. **Mr. Trimming** agreed with this approach.

Mr. Bartlett stated that he is interested in the role cities play in burdening the public defense system and identifying the prosecutorial cost associated with enforcing state and city codes, as well as the related cost to the public defense system.

Ms. Hopkins stated that the use of flat fee contracts in and of itself exposes Idaho to litigation. She noted that in addition to the ACLU, the Department of Justice is taking a keen interest in states like Washington, Idaho and Louisiana that have unconstitutional systems. She agreed that a regional approach is best for Idaho, but that there also needs to be state oversight.

Representative Luker asked whether the U.S. Supreme Court has defined the point at which initial representation is constitutionally required. **Ms. Thomas** replied that it is discussed in the *Rothgery* case – when the defendant goes in for an initial appearance, when the charge is presented to the judge, the defendant is entitled to counsel at that point.

Representative Trujillo discussed the need for independence and noted that in Bonneville County the public defender's office relies on the prosecuting attorney's office for resources.

Co-chair Senator Mortimer confirmed that the next meeting of the interim committee is tentatively scheduled for October 17 and asked **Brooke Brouman, Principal Legislative Research Analyst**, to contact the committee members to confirm a November meeting date of Tuesday, November 19 or Wednesday, November 20.

Representative Perry referenced the Criminal Justice Reinvestment Interim Committee's work on a draft and asked if that draft is ready for review. **Co-chair Representative Bolz** answered that there is no draft yet. **Ms. Thomas** commented that she asked CSG to what extent they intend to look at how public defense interacts with other issues and the response was they did not intend to address it at all.

Representative Perry asked if they planned to consider reclassifying some crimes, which would affect public defender caseload. **Ms. Thomas** stated that she was told they do not intend to change our criminal code; however, researching this issue, along with city and county ordinances, is a goal of the Criminal Justice Commission in the next calendar year.

Co-chair Senator Mortimer adjourned the meeting at 4:30 p.m.