

MINUTES
PUBLIC DEFENSE REFORM INTERIM COMMITTEE
October 17, 2013
8:00 a.m. to 4:00 p.m.
Room WW55, Capitol Building
Boise, Idaho

Co-Chair Representative Darrell Bolz called the meeting to order at 8:00 a.m. Silent roll was taken. Members present were: **Co-Chair Senator Dean Mortimer**, Senators Cliff Bayer and Todd Lakey; and Representatives Lynn Luker, Christy Perry, Janet Trujillo and Carolyn Meline. Senators Curt McKenzie 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 and Patti Tobias, Idaho Supreme Court; Hon. Lansing Haynes, First Judicial District; Hon. John Stegner, Second Judicial District; Hon. Thomas Ryan, Third Judicial District; Hon. Timothy Hansen, Fourth Judicial District; Hon. Richard Bevan, Fifth Judicial District; Hon. Stephen Dunn, Sixth Judicial District; Hon. Jon Shindurling, Seventh Judicial District; Holly Koole, Idaho Prosecuting Attorneys Association; Paul Panther, Office of the Attorney General; Richard Eppink, ACLU; David Carroll, Sixth Amendment Center; Sara Thomas, State Appellate Public Defender; Daniel Chadwick, Idaho Association of Counties; Alan Trimming, Ada County Public Defender; Jerry Mason and Justin Ruen, Association of Idaho Cities; Steve Rutherford, City of Boise; Judge John Varin; Dennis Byington, Cassia County Public Defender; Daniel Taylor (telephonically), Bonner County Public Defender; and Margaret Molchan and Mike Paananen, Ada County Clerk's Office.

Note: All copies of presentations, reference materials, and handouts are on file at the Legislative Services Office and are also available online at:
<http://legislature.idaho.gov/sessioninfo/2013/interim/defense.htm>.

Co-chair Senator Mortimer moved to approve the committee's minutes from the September 12, 2013, meeting. The motion was seconded by **Senator Bayer** and passed unanimously.

Ms. Patti Tobias, Administrative Director of the Courts, Idaho Supreme Court, introduced the Administrative District Judges: Hon. Lansing Haynes, First Judicial District; Hon. John Stegner, Second Judicial District; Hon. Thomas Ryan, Third Judicial District; Hon. Timothy Hansen, Fourth Judicial District; Hon. Richard Bevan, Fifth Judicial District; Hon. Stephen Dunn, Sixth Judicial District; and Hon. Jon Shindurling, Seventh Judicial District. She also recognized **Judge Barry Wood, Senior District Judge, Idaho Supreme Court**, and distributed a handout illustrating the Idaho judicial district boundaries.

Each Administrative District Judge detailed his perspective on the state of the public defender system within his respective district.

Judge Haynes, 1st District, stated that Kootenai and Bonner Counties each have county-funded public defender offices, while Boundary, Shoshone and Benewah

Counties engage in contract systems with local attorneys to provide public defender services. He noted that while the public defender system works reasonably well, there are ongoing issues regarding funding, training and support services. He stated that the Kootenai County Board of Commissioners has done a good job retaining public defenders. He described the replacement process of a public defender in Bonner County, where a committee of three lawyers evaluated applications and sent a list of three names to the county commissioners, who in turn chose a qualified person. He commented that an area of concern in his district is handling conflict cases. He noted that the county commissioners use hourly contract services with local attorneys in law firms. He stated that this system has been in place for a year and that it is a work in progress. He noted that the hourly contracts are more costly than the previously used flat fee contracts.

Judge Stegner, 2nd District, noted that Nez Perce County was critically reviewed in the NLADA report. As a result, the county commissioners implemented changes to address some of the criticisms. In contrast, when Latah County Commissioners have been faced with changeovers in public defenders, they have awarded the contract to the lowest bidders and thereby lost experienced public defenders who were requesting more money. He observed that budgets are the driving force in the selection of public defenders in some of the counties. He closed by noting that the 2nd District has undertaken an administrative order to set a floor for conflict counsel at \$85 an hour.

Judge Ryan, 3rd District, stated that the seven counties in his district use the contract public defender system and it works reasonably well, but noted some systemic flaws. Both the size and rural nature of the counties play into the situation. In a large county like Canyon County, there can be room for an abuse of the system, including the awarding of a large contract to one individual who has a business motivation to hire inexpensive lawyers right out of law school. This has an impact on the quality of public defender services. By contrast, in small rural counties, the contract is usually awarded to one attorney who handles all public defender services. If that public defender has a horrendous murder case, it is unfair for the public defender to be paid under a contract negotiated on an average workload. He suggested that the committee should consider district-wide public defender delivery systems.

Judge Hansen, 4th District, stated that Ada County has an in-house public defender office and Valley, Elmore and Boise Counties have contract public defender systems. The Ada County Public Defender's Office has an annual budget of \$7 million and is staffed by career public defenders who are well-trained and experienced attorneys. He stated that, on the whole, he has been very impressed with the three outlying counties in terms of the contract public defender services each provides. He commented that there are training and funding issues for the outlying counties.

Judge Bevan, 5th District, stated that Blaine County is unique in that it operates under monthly public defender contracts. He also stated that Twin Falls County has an in-house public defender office that, over the years, has raised the level of expertise and enhanced retention of public defenders. His biggest concern is the nature of the conflict issue. Twin Falls County pays conflict attorneys \$50 an hour

and they are often attorneys who cannot get other work, are understaffed and nonresponsive to phone calls.

Judge Dunn, 6th District, stated that his district includes Bannock County and five rural counties. Bannock County has an in-house public defender's office. Three of the attorneys in that office are trained in handling capital cases. None of the other counties have attorneys with this type of training. The rural counties expressed a shared concern about the expense of handling a recent murder case. He stated that the hiring process for a public defender includes the appointment of three attorneys to a committee who review applications and submit a name. He stated that in Power County's hiring of a conflict attorney, even though there was not a great disparity in the bids, the county still selected the lowest bid. Some years ago a district-wide administrative order was entered that required all counties to pay conflict public defenders at least \$75 an hour. From his experience, the public defenders do a diligent job. He noted that many of the public defenders are experienced, but some of the conflict attorneys are not at all experienced. In closing, he added that the system struggles to keep up with the demand.

Judge Shindurling, 7th District, stated that his district is physically the largest and includes nearly 25% of the counties in the state. The district has made great strides toward meeting its constitutional requirements of providing good public defense. He is concerned that counties across the state of similar size are paying widely disparate amounts for public defense. He opined that it is better to have a full-time public defender than a system where an attorney supplements his private practice income with public defense work. This latter type of arrangement leads to a lack of consistency with standards and training. There is a wide inconsistency in how these services are delivered. The larger counties with full-time, well-trained professional public defenders working in public defender offices are doing well. He stated that an option to improve this situation is to create a regional system of public defenders that offers a career track.

Senator Lakey asked **Mr. Daniel Chadwick, Executive Director, Idaho Association of Counties**, to discuss the status of the Capital Defense Fund. **Mr. Chadwick** stated that currently there is roughly \$4 million in the fund. There are several active cases. He stated that the fund is active and healthy. They collect approximately \$600,000 each year from all counties except Jefferson County, which does not participate in the fund.

Co-chair Senator Mortimer asked **Mr. Chadwick** if there is a need to expand the fund to include high profile cases other than capital cases. **Mr. Chadwick** responded that if access to the fund is expanded, you risk bleeding the fund very quickly. It's a question they have been considering, but have not come up with an answer just yet.

Representative Meline asked **Mr. Chadwick** if public defenders were trained by Idaho Counties Risk Management Program (ICRMP). **Mr. Chadwick** responded that he did not think that they were and asked **Mr. Jerry Mason, Association of Idaho Cities**, for his input. **Mr. Mason** confirmed that public defenders were not trained by either ICRMP or IHC.

Representative Luker asked **Mr. Chadwick** if there is a formula to apportion moneys in the Capital Defense Fund among the counties. **Mr. Chadwick** replied that it is \$600,000, proportional by population. **Representative Luker** followed up, asking if this would work if the public defense delivery system was set up by districts. **Mr. Chadwick** responded that it would depend on the amount of revenue generated in a district and that he would need to look deeper than just the population basis.

Co-chair Senator Mortimer asked if one of the Administrative District Judges would discuss training on a state-wide basis. **Judge Ryan** agreed that training is sorely needed for both prosecutors and public defenders. From a state-wide perspective, training could be combined for both groups in terms of criminal law and procedure. There is also a need for training in juvenile justice, child protection and in dealing with the mentally ill.

Ms. Tobias asked **Judge Dunn** to discuss in greater detail his initiative of outreach to the counties. **Judge Dunn** briefly explained that he invites county commissioners, sheriffs, probation officers, judges and clerks of a rural county to join him for breakfast or lunch to discuss issues and questions relating to the criminal justice system. This outreach has been well-received.

Co-chair Representative Bolz asked **Judge Shindurling** if a district-wide or multi-county system would be beneficial. **Judge Shindurling** opined that the only way to operate on a consistent basis would be to have a regional system. **Co-chair Senator Mortimer** followed up, asking Judge Shindurling if he would exempt any counties, particularly Ada County. **Judge Shindurling** stated that Ada County is an exception, as it has a well-established career track office.

Senator Lakey discussed the concern addressed in the study about oversight in regards to county commissioners and asked how hiring committees function. **Judge Haynes** responded that in regards to conflict cases, Kootenai County has a system whereby there are three tiers of cases that can be handled by a conflict attorney. The judicial oversight committee has a panel of three lawyers that receives applications from people who wish to contract with the county. The panel sets minimum criteria for assessing applications, including training and experience required for the tiered case at issue.

Judge Dunn stated that his district also appoints three lawyers to review the applications; however, it is clear who the county commissioners wanted, which was the applicant to whom they would have to pay the least amount of money.

Judge Ryan explained that Canyon County is moving toward an in-house public defender system. His responsibility will be to appoint three lawyers who will select three to five names to present to the board of county commissioners. He stated that Canyon County Commissioners have a keen interest in being involved in that selection process and want to set up their own committee for this purpose. Depending on the board of county commissioners, there can be an interest in having strong oversight and involvement in the selection process. It varies throughout the state. **Judge Shindurling** added that many county commissioners do not have the level of experience necessary to conduct oversight.

Representative Luker asked if there are cost control measures in place, such as consolidating motions. **Judge Shindurling** responded that as a resource judge, he has the ability to survey the public defenders regarding their needs, as well as discuss tactics and strategies in a case and thereby develop a perception of what the actual needs are. The sitting judge on the case does not have the ability to make these ex parte contacts, making it more difficult to assess what the real needs are in a particular case.

Representative Luker followed up, asking **Judge Shindurling** to discuss the consolidation of motions. **Judge Shindurling** responded that they tried that, but there are some who do not cooperate. He stated that judges are forced to give more leeway because, if they don't, they are faced with a post-conviction case or an appeal.

Representative Luker asked for more details regarding how resource judges operate. **Ms. Tobias** stated that her office will provide the committee with a briefing paper on this topic.

Judge Stegner closed the remarks for the panel, stating that public defense is a state obligation. It isn't the counties that have the obligation to provide counsel to the indigent. He opined that **Mr. Chadwick** would suggest that this is an unfunded mandate the state has transferred to the counties. **Judge Stegner** emphasized that public defense is first and foremost an issue the state must address. He stated that although county commissioners are well-meaning, they are not sophisticated in choosing legal counsel. Making those decisions more uniform and based on objective criteria is a better approach. Additionally, he observed that training is a paramount issue that needs to be addressed. He suggested the committee pay attention to the difference in relative strength between prosecutors and public defenders. The public defenders are fighting prosecutors who are trained, belong to a strong organization and have the attorney general available to assist them in certain cases, while the public defenders have none of these resources. He opined that the system works best when there are talented, zealous advocates fighting for their clients.

Co-chair Representative Bolz introduced **Mr. Jerry Mason, Association of Idaho Cities**.

Mr. Mason stated that the city attorney is appointed by the mayor and confirmed by the city council. The city attorney serves as civil counsel to the city. **Mr. Mason** briefly reviewed Section 50-208A, Idaho Code, and the duties of the city attorney, which include prosecution of violations of county or city ordinances, state traffic infractions and state misdemeanors committed within municipal limits.

Mr. Mason discussed the relationship the cities have with the public defense system. He commented that in the criminal arena, the legal advisor to the county commissioners is the prosecutor, which is the opponent of the public defender.

Mr. Mason suggested re-evaluating penalties imposed for city ordinance violations.

Representative Luker commented that city-issued misdemeanor citations carry the potential of jail time, requiring a public defender for which there is no city contribution. **Representative Luker** asked **Mr. Mason** why the cities should not contribute something to the public defender system. **Mr. Mason** responded that providing public defense is a state function, although the funding has been left to counties. He stated that county taxpayers who live in cities already pay for the cost of the public defender, and if they're called upon to pay again, that will bring up the issue of equity.

Co-chair Representative Bolz introduced **Mr. Steve Rutherford, Chief Deputy, City of Boise Legal Department**, who outlined his department's 18-member staff that assists in the prosecution of misdemeanors and infractions in Boise and in Meridian by contract. He noted that there are good, experienced public defenders in Ada County. It was his general observation that public defenders should be free to those who are truly indigent, but there are a whole host of people in Ada County who can afford something. He suggested that the discussion should include meaningful consideration of reimbursement.

Mr. Rutherford addressed the misconception that the cities are using their misdemeanor courts as a cash cow, and he emphasized that this is not the case in Boise. Though cities receive 90% of their revenues from certain misdemeanor citation collections, misdemeanor collection is as low as 11%. He stated that the City of Boise receives between \$100,000 and \$200,000 per month from misdemeanor and infraction fines. Pursuant to a contract for court facilities, the city pays the county approximately \$88,000 per month.

Senator Lakey stated he understands the argument that people pay taxes at the county level so they shouldn't be required to pay additional funds at the city level. He asked whether this argument weakens if the revenue sharing formula is changed. **Mr. Rutherford** responded that he does not know the answer to the question.

Representative Luker asked **Mr. Rutherford** where the 11% collection rate came from. **Mr. Rutherford** responded that he participated with the Ada County Prosecutor's Office and the Ada County Clerk's Office and other representatives of county government two to three years ago to institute a civil collections process. When they transitioned to civil collections they were at 9%. The last figure he heard was 11%. He volunteered to report back to the committee with the most current figures.

Co-chair Representative Bolz introduced **Ms. Sara Thomas, SAPD**, who discussed her PowerPoint presentation entitled *Critical Areas for Consideration – As Identified by the Idaho Criminal Justice Commission's Subcommittee on Public Defense*. Her complete presentation is available online at: http://www.legislature.idaho.gov/sessioninfo/2013/interim/defense1017_thomas.pdf.

Representative Luker asked **Ms. Thomas** who pays for the CLE classes for public defenders. **Ms. Thomas** responded that if they are on contract, then they are private attorneys and they pay themselves. She stated that she has not had training funds in her office for five years, so she trains her attorneys herself.

Co-chair Representative Bolz introduced **Mr. Dennis Byington, Public Defender, Cassia County**, who presented a PowerPoint presentation entitled *Mini-Cassia Public Defender Office Perspective*. His complete presentation is available online at: http://legislature.idaho.gov/sessioninfo/2013/interim/defense1017_byington.pdf.

Mr. Byington suggested recommendations for the committee's consideration, including budget equality between prosecutors and public defenders; incentives for more experienced attorneys; conflict attorney cost control; state wide guidelines and supervision for misdemeanor probation offices; streamline rules for filing and service by email; state division for post-conviction relief cases; and state public defender appointment for termination of parental rights appeals.

Representative Luker asked **Mr. Byington** if prosecutors in Cassia County have arrangements in place where they can send conflicts to other counties. **Mr. Byington** responded that his county does not have this arrangement and that they have to find private counsel.

Representative Luker asked if the new qualifications for indigent status have increased caseload. **Mr. Byington** responded that his office is getting significantly more appointments.

Co-chair Representative Bolz asked how the budgets are determined in his counties. **Mr. Byington** responded that the budgets are determined by a formula depending on the number of appointments.

Senator Lakey, following up on **Representative Luker's** question, asked if **Mr. Byington** has seen a significant increase in appointments or if that has been over the course of recent history. **Mr. Byington** replied that the misdemeanor caseloads have increased significantly in the past few months.

Co-chair Representative Bolz introduced **Mr. Alan Trimming, Public Defender, Ada County**, who shared with the committee his perspective on the current status of the public defense system in Ada County. He stated that the driving factors in staffing his office include the number and types of cases and the number of judges. He continued, stating that evaluating caseload is a good starting point, but workload should also be reviewed. He cautioned not to focus solely on the number of lawyers but also review the support and investigative staff and other ancillary resources.

Mr. Trimming stated that his office conflicts 3.5% to 4.5% cases a year. He noted that he has been fortunate in his budget process over the years because of the forward-thinking three people to whom he has had to present his budget. He stated that these people do not always like what he asks them for, but they understand the need for it. He took issue with the suggestion that in practice public defenders are lesser attorneys than prosecutors. He pointed out that public defenders handle the same cases in front of the same judges. To him, that a public defender with five years experience is paid less than a prosecutor with similar experience does not compute. He further stated that any equity assessment should include a total compensation package analysis and not just salary considerations.

Mr. Trimming stated that his operations budget for the next fiscal year is over \$2 million. The operations budget is everything that is not salaries, including computerized research, new computers, office supplies, conflicts cases, professional services, investigation costs, transcripts and continuing legal education. He further stated that conflicts costs last year approached \$1 million. **Mr. Trimming** advised that salary equity needs to be a localized assessment rather than state-wide.

Mr. Trimming noted that in his misdemeanor division, the Ada County Prosecutor's Office generates 25 to 30% of his caseload, while 65 to 70% is generated by other prosecuting agencies.

Representative Luker asked if he was correct in understanding that, in terms of caseload, about 25% comes from Ada County prosecutors and 75% from cities. **Mr. Trimming** clarified that those figures were in reference to his misdemeanor cases, but 100% of his felony caseload comes from the Ada County Prosecutor's Office.

Representative Perry asked, in regards to parity, what resources other than money public defenders need access to. **Mr. Trimming** responded that there are provisions in statute requiring public defenders to have the same access to state resources as the prosecution, but that it does not work because public defenders face resistance that the prosecution does not face, including with state lab resources.

Senator Lakey asked **Mr. Trimming** to share his thoughts about a district-wide public defender system. **Mr. Trimming** stated it can be done, but there are cultural differences between counties that will cause issues.

Representative Luker asked how workloads are divided between felonies and misdemeanors. **Mr. Trimming** responded that he uses the baseline caseload assignment assessment methodology his felony division far exceeds any requirements. In other words, his office is well below the 150 case-per-year threshold; that is without getting into a case weight assessment, such as how murder cases, rape cases, drug conspiracy cases, etc., count.

Representative Luker inquired about the difference between the felony and misdemeanor divisions in terms of attorney hours spent in the office. **Mr. Trimming** responded it varies between individual attorneys because some spend more time at the jail, while others spend more time on the phone with clients in lieu of going to the jail. He concluded it balances out based on the drives and needs of the cases.

Representative Luker asked for a rough delineation of resources that are dedicated to felony versus misdemeanor cases. **Mr. Trimming** responded that the felony division has 21 attorneys and they are assigned roughly 1,800 to 2,000 cases a year, while the misdemeanor division has 17 attorneys and they are assigned approximately 8,500 to 9,000 cases a year.

Co-chair Representative Bolz greeted **Mr. Daniel Taylor, Public Defender, Bonner County**, who shared with the committee his perspective on the public defense system in Bonner County. He presented and responded to questions from the committee members telephonically.

Mr. Taylor discussed a public defender contract he once had in Jerome, which was for a set amount. If he needed anything above the set amount, then he had to go to the district court to ask for funds. He stated that the district judge was really good about granting these requests.

Mr. Taylor commented that Bonner County is a little unusual in the state because although it is one of the smaller counties, it does have an in-house public defender's office. He stated that the problem for in-house public defenders is that the commissioners do what they can in terms of giving funds, but the commissioners have limited funds and a budget within which they have to work.

Mr. Taylor noted that 23% of the Bonner County Public Defender's Office caseload comes from cases that are prosecuted by the cities of Sandpoint, Ponderay and Priest River. The county is paying public defender salaries and office expenses to defend those charges. There is statutory provision allowing cities to prosecute cases, but no statute requiring cities to chip in for the cost of defense. He explained that 23% of his budget represents about \$140,000 that Bonner County is paying every year.

Mr. Taylor discussed salary inequity between certain city attorneys and the attorneys in his office. He suggested that if cities have the option to prosecute misdemeanor cases, then they should have the responsibility to pay for defending them.

Mr. Taylor stated that he would discourage establishing a regional public defender system, explaining that it would create an additional level of bureaucracy. He noted that it might work for smaller counties to pair up into a multi-county public defender's office. He stated that certain larger counties that can afford to do so should be made to go in-house.

Mr. Taylor suggested that counties be smarter about how they allocate resources for conflict public defenders. He also commented that although the new public defender guidelines were designed to lessen the burden on public defenders, the guidelines have had the opposite effect in Bonner County. Closing his remarks, **Mr. Taylor** observed that another issue the public defense system faces is prosecutors overcharging.

Representative Luker asked about the size of the Bonner County Public Defender's Office. **Mr. Taylor** responded that they have four attorneys and five support staff. **Representative Luker** asked about the prosecutorial staff for the county and the three cities. **Mr. Taylor** responded that there are six attorneys in the prosecutor's office, one of whom is solely a civil attorney. He does not know how many assistants that office has. The city of Sand Point has two full-time attorneys and three full-time assistants. The cities of Ponderay and Priest River do not have city attorney's offices, but rather a prosecutor's contract.

Co-chair Senator Mortimer asked what the caseload was for the office for the last 12 months. **Mr. Taylor** responded they averaged 2,000 cases per year, give or take.

Co-chair Senator Mortimer asked **Mr. Taylor** to describe the training and ongoing education of the public defenders in his office. He also asked about collaboration between public defenders, prosecutors and judges. **Mr. Taylor** responded that, in regards to initial training, his office hires attorneys who took advantage of various public defender clinics in law school. With regard to collaboration with prosecutors and the judicial system, **Mr. Taylor** stated that there is no collaboration. Every attorney in his office is a member of the Idaho Association of Criminal Defense Lawyers (IACDL), which holds various seminars, issues publications and makes other resources available to members. The attorneys in his office take CLEs on criminal law. He stated that the junior attorneys in his office sit second chair on felony trials and are not alone during their first misdemeanor jury trials.

Senator Lakey asked what the membership dues are for the IACDL and **Mr. Taylor** responded that the dues are \$35 for an attorney per year and that public defenders get a discounted rate. **Senator Lakey** asked if there is a need for a separate association for public defenders. **Mr. Taylor** stated that an association of public defenders could be beneficial depending upon what the association is designed to do. If such an association simply mirrors what IACDL currently does, then there is not a need for it. If it was designed to address funding issues, issues involving evaluators and the ongoing aspects of running the office, then it may be beneficial.

Co-chair Representative Bolz asked **Mr. Taylor** to describe reimbursement efforts. **Mr. Taylor** responded that he does not know how beneficial reimbursement efforts have been to the counties and suggested it might be helpful if counties were given different tools to collect.

Co-chair Representative Bolz introduced **Mr. David Carroll, Executive Director, Sixth Amendment Center**, who presented his PowerPoint presentation *How States Structure Right to Counsel Services*. His presentation is available online at: http://legislature.idaho.gov/sessioninfo/2013/interim/defense1017_carroll.pdf.

Mr. Carroll advised that when the committee is contemplating structures, independence is the first thing that needs to be considered. For most states, this means having a state commission overseeing right to counsel services.

Mr. Carroll described the 11-member commission in Montana. Montana broke its system down into 11 regions. The first thing Montana did was to make all existing public defenders state employees. The commission then made all the contracts in other areas of the state uniform. This did not mean everyone received the same compensation, but it meant that they had the same terms as to what was expected to be done in each case. Montana's system builds in flexibility for each region of the state. Given the similarities in Idaho's geography, he suggested looking at some aspects of the Montana model.

Mr. Carroll observed that, before undergoing its reform, Montana's system looked very similar to Idaho's system. After the ACLU sued Montana and four of its counties, Montana asked to table the lawsuit while it attempted to fix the public defense system. **Mr. Carroll** stated that he helped design the Montana system, which essentially took the ABA Ten Principles and made them statutory requirements but did not micromanage how this was accomplished. However,

Montana did require the establishment of a state-wide training unit for the purpose of continual education of public defenders.

Mr. Carroll discussed the Montana appellate defender's office, stating that this is a separate office attached to the commission but is still independent enough for proper checks on the trial level. By contrast, in Michigan they felt it necessary to have a separate commission over the state appellate public defender's office. He advised that there is no national standard on this issue.

Mr. Carroll explained that in certain Montana regions, there is more than one public defender office. Within each region, even if there is a public defender office, there are contracts to handle conflict and overflow cases.

Mr. Carroll stated that he does not like flat-fee contracts, but opined that a contract system can work. Oregon provides 100% of public defense representation through contracts. The Oregon public defender offices are not state agencies; they are 501(c)(3) non-profit entities that contract with the state. Each contract has explicit details about performance standards. He noted that Oregon has a sophisticated matrix to determine workload. The Oregon computerized program analyzes the number and severity of cases so that it can be accurately predicted when a given contract attorney will have too many cases. He stated that Oregon has a seven-person public defense commission with a small central office that includes a contracts unit, an appellate defense unit and a training unit, as well as a compliance officer. The contracts are with non-profit entities, law firms and individual attorneys. Less populated areas tend to have several individual attorneys on contract. But the contracts are very specific about caseload, and time records are required to be kept and submitted.

Mr. Carroll reminded the committee that Idaho is one of seven states that put the trial level burden entirely on the counties. Some states fund 100% and the vast majority of states fund at least 50%. While reviewing a national map that reflected the percentage of total funding provided, by state, **Mr. Carroll** cautioned that there will be upfront costs for implementation, but there will be savings realized on the backside. He stated that Montana's system costs \$24.5 million or \$24.37 per person. If the Montana system were established in Idaho, the estimated cost would be \$38 million. **Mr. Carroll** stated that Oregon's system costs \$110 million or \$28 per person. If the Oregon system were established in Idaho, the estimated cost would be \$44.5 million. He estimated that a decent system in Idaho is going to be \$22 to \$23 per person.

Co-chair Representative Bolz asked if the Oregon and Montana commissions were established by statute or by executive order. **Mr. Carroll** replied by statute and further stated that all state commissions are statutorily created. **Co-chair Representative Bolz** then asked if the commissions were funded from general funds. **Mr. Carroll** replied that almost all of them are funded by general funds, but Louisiana uses funds assessed on traffic tickets, and Alabama has a \$45 civil filing fee that goes into an indigent defense fund. He restated the benefits of collecting on the front end during the indigent screening process.

Co-chair Senator Mortimer asked if incarceration rates went down when commissions were put in place. **Mr. Carroll** responded that there is only anecdotal data.

Co-chair Senator Mortimer asked **Mr. Carroll** to address training. **Mr. Carroll** stated that in the states with the best training programs, there are two components: (1) new attorney training; and (2) ongoing training. Newly hired public defenders do not get a case for their first six months of employment. These newly hired lawyers are solely going through training. Montana runs a three- to four-week intensive training program, and after completion the trainees take cases with a senior attorney. Ongoing training is in specialized aspects of criminal law, which varies based upon what the training director deems necessary.

Representative Trujillo asked if, during the indigent screening process, an applicant is deemed truly indigent, the person's upfront fee is refundable. **Mr. Carroll** responded that if a person is deemed truly indigent, the upfront fee is waived.

Representative Luker, observing that prosecutors are not required to be certified, asked why there would be a public defender certification requirement. **Mr. Carroll** responded that there is not a constitutional right to effective prosecution. He suggested that public defender certification be done down the road and that training is the priority.

Co-chair Senator Mortimer asked if **Mr. Carroll** would identify any states with regular and ongoing collaboration between defense counsel, prosecution and judicial officers. **Mr. Carroll** responded that he is impressed with Idaho's criminal justice coordinating committee. He opined that New Hampshire does it best with its 24-member Judicial Council that includes criminal justice stakeholders from all three branches. This council is responsible for setting criminal justice policy and for arguing the budget for the entire criminal justice system, including the indigent defense fund budget.

Co-chair Senator Mortimer asked for details on the current situation in Utah and Wyoming. **Mr. Carroll** stated that Utah and Pennsylvania are the only states that do not contribute to indigent defense. Idaho funds the appellate level; Utah does not. Utah is currently undergoing a study of ten of its counties and is heading toward reform. He advised not looking to Utah. He reported that Wyoming has a statewide system that is 85% funded by the state, and the counties have to provide the physical plant for public defender offices. Wyoming does not operate under a commission.

Co-chair Representative Bolz asked **Mr. Carroll** how long he thought it would take for Idaho to get a system put in place. **Mr. Carroll** estimated a rollout to take anywhere between three to five years.

Senator Lakey asked for more details regarding the contract system in Oregon. **Mr. Carroll** stated that the Oregon system has built-in flexibility, allowing the commission to do what works best in a given area of the state.

Co-chair Senator Mortimer asked **Mr. Carroll** to discuss the difference in cost between a contract system and a state employee system. **Mr. Carroll** replied that studies have found that the most efficient system is the public defender's office where the region supports the amount of cases. The reason for this is that there is more ability to specialize and to take advantage of built-in efficiencies.

Representative Luker asked **Mr. Carroll** to discuss mechanisms to find balance in reaching parity and how other states deal with city contributions to the public defense system. **Mr. Carroll** responded that in regards to both questions, it is difficult to do an apples-to-apples comparison because of the myriad ways in which systems are funded, and some states have a unified court system while others do not. He is not a proponent of looking at parity between prosecutors and defenders on a one-on-one basis because they perform different tasks. There are states that have parity statutes that require public defenders and prosecutors be paid the same.

Representative Luker followed up, stating that prosecutors are in the driver's seat and bring whatever charges they feel are needed. He noted that in the civil system, there are checks and balances that include the loser paying costs and attorney's fees for frivolous suits. There is nothing like this in the prosecution of criminal cases. **Mr. Carroll** stated that there is value of checks and balances in a state-funded defense system.

Co-chair Senator Mortimer asked **Mr. Carroll** to discuss regional systems in more detail. **Mr. Carroll** responded that there are good and bad examples of regionalization. He noted that where states have gone solely to regional public defender's offices, they might not work in some areas because there are not enough cases to support the office. He opined that the key is to build in flexibility.

Co-chair Representative Bolz opened the meeting up for committee discussion. **Representative Luker** suggested that, in moving forward, the committee use **Ms. Thomas'** four areas of consideration as a framework. He observed that the public defenders seem to like the county system. He appreciated the concern about the extra layers of bureaucracy, but sees the need for state-wide consistency in standards and training, which he saw as a potential area for initial state contribution. He reiterated his concern for parity between public defense and prosecution, as well as his concern regarding city participation. In terms of standards, he sees issues with vertical representation, flat-fee contracts, guidelines and separate funding for personnel versus operating expenses.

Co-chair Representative Bolz agreed with **Representative Luker's** remarks and emphasized the need to prioritize the issues.

Senator Lakey agreed the committee needs to figure out where it wants to start; however, he prefers a whole system rollout versus a fragmented rollout. He stated that he supports local control and recognized the state needs to help with funding. In terms of parity, it is difficult to compare public defenders to prosecutors because they have different responsibilities. He prefers to focus on the constitutionality rather than parity.

Co-chair Senator Mortimer agreed that **Ms. Thomas'** four critical areas of consideration should be used as a guide. He emphasized the importance of local control, which he opined creates greater efficiencies and accountability.

Representative Meline commented that the estimated cost of \$38 million for a public defense system is concerning.

Co-chair Representative Bolz asked **Representative Meline** and **Senator Lakey**, both former county commissioners, for their input regarding the idea of capping county funding at the current amount expended and having the state fund above the capped level. **Representative Meline** opined that some groups might take issue with this. She suggested that the state should fund the training. **Senator Lakey** responded that he would like to explore this with the counties and that it would provide stability and certainty in county budgets. He is in favor of setting training standards, providing money for this purpose and allowing local decision making as to how training is accomplished.

Co-chair Representative Bolz expressed the importance of the counties funding some portion of the system because it allows them to have some local control.

Representative Luker stated that eligibility qualifications need review and suggested looking at not just income but also assets. He agreed with **Co-chair Senator Mortimer's** suggestion that the committee focus on what the state can fund, such as standards and training, rather than getting into a CAT Fund situation. **Representative Trujillo** agreed that one of the first issues to be dealt with is eligibility standards and then an analysis of regional contracts, including those with non-profit organizations.

Co-chair Senator Mortimer suggested that the committee first decide what needs to be accomplished and then assign costs. He stated that he does not feel comfortable with capping the counties because of population growth.

Mr. Chadwick stated that we are only three months into the new indigent qualification law and heard only a couple anecdotal statements about it. The new law has a poverty level of 187% and includes the ability to asset test. He cautioned that there is not yet enough information to gage whether the new law is working the way it was intended. He stated that with regard to the \$22 million of county moneys, he advised the counties that this amount will always be a part of their obligation in funding the public defense system.

Representative Luker asked **Mr. Chadwick** to speak in more detail about the asset requirement in the new law. **Mr. Chadwick** stated that by statute, there are rebuttable presumptions of eligibility, including 187% of the poverty level or if you were incarcerated or if your family was receiving public assistance. However, the court has the ability to look behind those presumptions and perform a complete analysis of an individual's financial circumstances.

Representative Perry called attention to the statute's reference to "public assistance" and asked if a subsidy under the state exchange might be considered

public assistance. **Mr. Chadwick** responded that he does not know if it would be considered public assistance.

Senator Bayer stressed the importance of policy driving the budget. He suggested addressing the constitutional provisions on a state level in a complementary way, with local control. Discussing revenue- versus budget-driven systems, he cautioned against getting into a situation where tax dollars are played against one another. **Co-chair Representative Bolz** asked the members what information they need presented at the next meeting.

Representative Luker expressed a desire to get a handle on costs to the system associated with cities.

Co-chair Senator Mortimer asked what a regional commission would look like. **Ms. Thomas** commented that the perspective from the subcommittee was that judges would not be involved with the commission because of ethical obligations and the issue of independence. She advised that a commission should not include law enforcement, prosecutors and judges. She stated that the board members should be knowledgeable about the criminal defense system.

Co-chair Senator Mortimer asked what role counties and cities would want to play in a regional system. **Mr. Chadwick** stated that the key is to determine the extent of independence of a commission. He noted that the regional concept has worked well for the health districts, but the issue is independence for regional public defender commissions and the lack of political influence built in to that system.

Senator Lakey asked about a regional system with built-in autonomy for some counties within the region. **Mr. Carroll** shared examples of this, including in Oklahoma where the two largest cities are not part of the state-wide system because they had pre-existing public defender offices.

Co-chair Representative Bolz reminded the committee members that the next meeting will be held Wednesday, November 20, 2013.

Co-chair Representative Bolz adjourned the meeting at 3:40 p.m.