

MINUTES
Approved by the Committee
Public Defense Reform Interim Committee
Wednesday, January 08, 2014
4:30 P.M.
Room WW17
Boise, Idaho

Co-chair Representative Darrell Bolz called the meeting to order at 4:33 p.m. and requested a silent roll call. Members present were: Co-chair Senator Dean Mortimer; Senators Curt McKenzie, Cliff Bayer and Todd Lakey; Representatives Lynn Luker, Christy Perry, Janet Trujillo and Carolyn Meline. Senator Cherie Buckner-Webb was absent and excused. Legislative Services Office staff members present were Brooke Brouman and Charmi Arregui.

Others in attendance included: Holly Koole, IPAA; Seth Grigg, IAC; Richard Eppink, ACLU; Judge Barry Wood and Patti Tobias, Idaho Supreme Court; Jared Hoskins, LSO Budget and Policy; and Ian Service, Bannock County Prosecutors Office.

NOTE: Copies of the two drafts on the agenda, reference materials and handouts are on file at the Legislative Services Office.

Representative Meline moved to approve the committee's minutes from November 20, 2013, seconded by Representative Luker, and the motion was approved unanimously by voice vote.

Co-chair Bolz asked the members if they had received a copy of the Washington state court case of Wilbur v. City of Mount Vernon, and those who did not have a copy were given a copy for reference purposes. **Co-chair Bolz** said that he had talked with Dan Chadwick who was in Washington, D.C. and had a meeting with Deborah Leff, Department of Justice. One thing tied to this case and others as well, is the impression Ms. Leff gave to Mr. Chadwick that as long as Idaho is making progress, the Department of Justice probably would not take issue with Idaho, at least at this time, but they would like to see progress in terms of what Idaho is doing. Ms. Leff was one person who dealt with this Wilbur v. City of Mount Vernon case. He asked the members to keep that in mind as considerations were made on the drafts to be presented at this meeting today.

Co-chair Bolz invited **Representative Luker** to talk about Draft SBB054 and this draft has to do with making modifications on the front-end trying to transition misdemeanors into infractions. The Justice Revision Committee is focusing more on the back-end and they didn't have anything addressing this currently. What this draft does is to try to set a foundation to get us to a point to transition some misdemeanors to infractions by raising the minimum infraction from \$100 to \$300. Currently, the law allows the Supreme Court to set the fixed penalty, and **Representative Luker** said this should be a legislative duty. Draft SBB054 prioritizes infractions, and some misdemeanor statutes say that a penalty of not more than "x dollars" will be imposed and doesn't set a specific amount. He didn't want to upset what is out there already, to keep it revenue neutral, so Draft SBB054 gives priority to statutory fines as they are set specifically. Secondly, it gives deference to what is currently in Rule 9 of the infraction rule, which is where most infractions have a fixed penalty, except for subsection 38 which is a catch-all, which he put in subsection 4 which gives the legislature the ability to change that number, but it is set at the current amount of \$15.50. Thirdly, it addresses statutes where there is an upper amount but not a fixed penalty and that is left to the discretion of the court. This draft is an attempt to get an infraction law in place to make those transitions from misdemeanors to infractions. He said that he intended to RS this draft, but he invited comments from this committee as he moves forward.

Senator Lakey asked about 18-113A (1) on page 1, saying that most infractions for traffic offenses are set for a specific number and some local government infractions being discussed are misdemeanors that they would like to get down to infractions potentially. Those typically are up to the maximum

amount, but cities and counties have some discretion under that maximum amount to set penalties for their infractions. He asked if that first clause meant that they had to set what the amount is for those local governments. **Representative Luker** said "no, if it's set by statute, then that controls" and is all that means in (1). It does not preclude city ordinance. **Senator Lakey** said that the initial language before that states: "The penalty for an infraction shall be: (1) The amount set by statute" and he wondered about the flexibility there. **Representative Luker** wondered if it should read "by statute or ordinance" and he agreed that something should be added there.

Senator McKenzie agreed that the wording might be changed to read "by statute or ordinance" to clarify, and he said this was a very worthwhile goal. He thinks that many misdemeanors should be infractions, and he commended Representative Luker for this draft legislation.

Co-chair Bolz asked the members if they were basically supportive of this concept for Draft SBB054 to move forward and the members gave their unanimous consent.

Co-chair Bolz invited Patti Tobias, Idaho Supreme Court Administrator, to address the committee and **Ms. Tobias** thanked the committee for the opportunity to address them. She said she had provided to the committee a handout entitled "Court Technology Option: Case Management for Public Defenders" at the request of **Representative Luker**. The Idaho Courts are proposing this year a five-year business plan to upgrade technology systems and the question has been posed by this committee if any of that upgrade would be available to counties for public defender systems in respective counties. She outlined what the module could look like as part of their software license with the basic court system and the counties would have access to an attorney manager system that could serve as a case management system for the public defender system, if they cared to do that. This simply outlines what is possible and if any counties are interested, **Ms. Tobias** said they will work with counties going forward. She wondered if this committee wanted to include any funds in legislation that provided some start-up money for counties for technology. If this committee recommends a council or a commission to be started, one of the things they could examine is what sort of technology and data system should be available statewide so that the commission can determine workloads, standards and other information that would need to be examined.

Representative Luker asked if there was time sensitivity with regard to the option she presented, asking if a module could be added at any time, or would it be more cost effective to add it up front. **Ms. Tobias** replied that they will be proceeding with software licenses at this time, so there would be no cost at this time to add that module for the public defender offices, so there is no time sensitivity.

Co-chair Bolz pointed out an email from Jared Hoskins dated January 8, 2014. He said that Mr. Hoskins works for LSO's Budget and Policy Office, but he was the contract attorney for the Criminal Justice Commission Subcommittee for three years and did much research for that subcommittee in terms of recommendations they came up with. **Co-chair Bolz** had given Mr. Hoskins a copy of Draft SBB049 and also a copy of an email from David Carroll and he had asked for comments from Mr. Hoskins about both the draft and Mr. Carroll's email. He asked the members to review these comments from Mr. Hoskins and there were no objections.

The committee members went over Draft SBB049 section by section and started out discussing the creation of a State Public Defense Commission, having reduced the number of commission members. **Co-chair Mortimer** had two thoughts, one being the length of term being two years, and he said he would rather see three years since it takes time. Under 19-849(c) he suggested "Four representatives appointed by the governor" be "approved by the Senate" which is typically something the Senate does, and he asked for this to be discussed. **Co-chair Bolz** said that terms in the legislature run two years, so he thought that two years would be better. On page 2, 19-849(3)(b) the representative appointed by the chief justice of the Idaho supreme court shall serve a term of one year, and **Co-chair Mortimer** said he didn't have a preference with regard to that. **Representative Meline** said she preferred more than one year. **Representative Luker** said that staggered terms might be considered, perhaps the one appointed by the Governor to serve three years and others two years.

Representative Luker brought up the comment by Mr. Hoskins who recommended a requirement for regular meetings, and suggested meetings at least quarterly. He believes that there is going to be a need for a paid staff to keep things moving and some kind of budget to hire staff. **Co-chair Bolz** said that collecting data and assimilating data may require more than volunteers. He agreed that meeting quarterly would be good after the first year or two, but may need to meet more often in the beginning, so "at least quarterly" was suggested wording.

Senator McKenzie said that he thought authority needed to be given to hire staff, which would have to come through JFAC for implementation. He preferred to assign the Commission to another agency for administrative/budgeting purposes. **Co-chair Mortimer** said that there is always concern about expanding government, wondering about alternatives. Is there somewhere that a staff person would fit in our current structure, either in the judiciary branch or the legislative branch. **Co-chair Bolz** pointed out comments by Mr. Hoskins on this topic in his email. He commented that before this decision is made, it be important to talk to that entity first. **Representative Luker** said that since this is a constitutional issue, he hesitated to "short-shrift this" and he preferred to give this commission their own staff since this is necessary due to constitutional requirements. **Co-chair Bolz** does not want Idaho to get into a legal situation where a judge might come in to tell Idaho how this is going to be done, and hopefully requirements can be met. **Senator Lakey** agreed with **Representative Luker** saying that the commission should have their own staff and independence, but caution needs to be the growth of another state agency, but with proper sideboards the staff can be controlled. **Co-chair Mortimer** said that this draft would authorize promulgation of a section of legislation to actually set up duties and responsibility of staff and budgeting, asking if that is what is being looked at. **Co-chair Bolz** said that some of this would fall under powers and duties of the Defense Commission to hire staff and the legislature would set the size of that staff. This committee could make a recommendation to the legislature to do that. With regard to page 2, 19-850 (2) "make recommendation to the Idaho legislature on (a) Core requirements for contracts between counties and private attorneys . . ." and he wondered if the legislature should actually approve those standards once the commission gives those to the legislature, asking for thoughts about that. **Co-chair Mortimer** said the wording could be "to make recommendations for approval to the Idaho legislature" or "subject to approval." **Senator McKenzie** asked what the effect of that would be or what would that mean, unless it's going to be in legislation. **Senator Lakey** envisioned that the commission would make recommendations but that it is up to the legislature to approve those.

Representative Perry asked about page 2, 19-850 (2) (b) that talked about qualifications and experience standards for the public defender, mentioning that on page 4, line 20, which refers to the board of county commissioners, they shall prescribe the qualifications of such public defender. She asked if some wording needed to be struck or if two entities have the same power. **Co-chair Bolz** said that 19-850 says that the state is being given oversight since the commission is making recommendations to the legislature for approval of standards. In looking at other states, he thinks there needs to be oversight as well as standards and training. **Representative Luker** said that he doesn't see oversight in this draft, and he suggested that a third paragraph under 19-850 should be added. **Co-chair Bolz** wondered who would do the training, and **Representative Luker** said he didn't think the commission needed to provide the training, but they could. **Co-chair Bolz** added that the commission could set up requirements for training. **Senator Lakey** said the commission could set requirements for training, but he didn't think the commission should provide the training.

Representative Trujillo wondered if this draft needed to include the words "within the guidelines of the American Bar Association (ABA) principles." **Co-chair Bolz** responded that the principles are what the commission will have to be guided by, and if they set standards and training, the guiding principles of the ABA would be one thing they would look at. **Representative Trujillo** wondered if, from a legislative viewpoint, those words should be added to the draft. **Senator Lakey** agreed that the ABA principles should be a guide, but he said he was cautious about putting them in

statute because the ABA may call them something else and they do remain a guide, so he wasn't sure about putting that into code.

Representative Luker said that somewhere in the draft it needed to include oversight and how that is enforced. **Senator McKenzie** said that the commission is tasked with making recommendations to the legislature as to what should be in contracts, and the legislature would have to review those by passing legislation to amend 19-859 and 19-860 where it says that counties can contract with public defenders since that is the enforcement mechanism. **Co-chair Bolz** agreed about 19-859 and asked if oversight by the commission needed to be added to Section 3 on page 2 and everyone agreed. **Senator McKenzie** asked for clarification on oversight, the commission being tasked with making recommendations and rules about training and continuing legal education requirements, asking if the commission was going to monitor the county contracts to verify if that is happening or the public defenders' offices to make sure they are doing the training. What is the oversight being given them? **Senator McKenzie** thought that first it needs to say "make recommendations by a certain deadline" and either have this committee continue or standing committees review those and implement some or all of them, depending on what they come back with. **Representative Luker** said this was nebulous and that enforcement goes anywhere from policing to saying that data shows that you're out of compliance, so he thought that this could be tied together with data notification or concern about compliance if the data is out of whack, once standards are in place.

Co-chair Bolz asked Ms. Brooke Brouman if she knew of other commissions that have oversight that could give this committee an idea of what could be put into this draft. **Ms. Brouman** agreed to research this.

Representative Perry said she thought that many things can't be done until recommendations come in from the commission; then adjustments will have to be made to legislation. This needs to be rolled out in sections, and until the foundation is built, she doesn't see exactly how oversight would be implemented. **Representative Meline** asked if the commission would decide where funding would come from for the education of the public defenders. **Co-chair Bolz** said this would be discussed later.

Co-chair Mortimer said that this committee agrees there should be oversight, and he thought that some degree of emphasis needed to be added behind what is being done. As a state, counties are going to be held responsible, so he welcomed taking up this much in this draft, at least attempting to include oversight and then allowing the commission to come back with additional recommendations. He thinks this gives substance and credence to what they are trying to accomplish. **Representative Trujillo** asked if the committee then needed to look at some sort of enforcement and **Co-chair Bolz** said that Ms. Brouman can research this oversight issue and then the committee will determine what to do.

Representative Luker reminded the committee that Mr. Hoskins had suggested that post-conviction law should be a practice area that should be covered by training requirements in addition to the others listed in 19-850 (1)(a) on page 2, line 19 of the draft. **Representative Luker** thought that this should also be where staff goes, rather than in the first section.

Senator Lakey and **Senator McKenzie** did not see anything wrong with 19-853.

Co-chair Bolz said with regard to 19-859, that last sentence in that paragraph needs to read: "The board of county commissioners of each county shall provide this representation by one of the following: . . ." **Representative Perry** said this would be easier to understand by the public. **Co-chair Bolz** also suggested that under 19-859(d) that the words be added "no flat fee contracts" since this is very high on the list to get rid of. **Senator Lakey** said a slight caveat to that is that even though flat fee contracts are the focus of the problem, there are models out there with the right standards that still may work that way. He said it depends on standards if that is an absolute "no" or not. **Co-chair Bolz** pointed out Mr. Hoskins' suggestion to add a provision to the proposed amendments to Section 19-859(d) on page 3, line 40 of the draft, requiring any contract allowing for a defending attorney to engage in civil practice to specifically provide for separate and additional

payment of extraordinary expenses (e.g., experts, investigators, witness expenses, etc.) above and beyond the day-to-day activities. **Co-chair Bolz** asked if that would be enough to take care of the flat-fee contracts to get us out of trouble?

Representative Trujillo said she liked Mr. Hoskins' recommendation. **Co-chair Mortimer** said he believed that the draft must protect against the flat-fee contracts. **Representative Luker** said he thought that 19-859(d) was trying to handle too much, so he thinks that this paragraph needs to be separated out since he has concern about having a dual practice, although he sympathizes with rural counties in that respect. Counties need to reach out further and contract with neighbors, in his opinion. This is exactly why there is a bigger issue in rural counties, because of the conflict between public defender contracts and other work. **Co-chair Bolz** wondered how to separate this and **Representative Luker** said that if an exception was going to be made for little counties, he would put that in a separate section and then (d) and (e) would have exception for little counties. **Senator Lakey** thought that 19-850 about recommendations is something to wait for rather than putting core requirements in at this point. With regard to 19-859(d) he did have a concern about drawing a line on a population, but this is a tough thing to do. His concerns include population, geography and travel time, so this may require them to have some kind of civil practice, but options are usually limited in small counties. **Senator McKenzie** said if a private practice attorney is limited to indigent defense work, that attorney could not stay in practice long. He suggested that we don't differentiate between county sizes, but if the draft says one can contract with a defending attorney, that it not be limited to indigent defense work. Some requirements might have to be put into statute to exclude the flat-fee contracts and the suggestion in Mr. Hoskins' email is an hour and expense-type contract. In small counties, there will be a huge amount of travel time or you won't find an attorney dedicated to indigent defense work.

Senator Bayer said that another variable that comes into play is property values in rural areas, so it is difficult to draw definitive lines. **Representative Trujillo** said there may be some way to include technology in this to play a part. **Representative Luker** said that contract provisions need to be discussed. **Senator McKenzie** said that when there are conflicts in federal court, they have a panel of private attorneys and can have a varied practice, but do it on an hourly basis plus expenses, but if an investigator is hired, that must be approved in advance. That could be pulled from the federal website. **Co-chair Bolz** asked if types of contracts needed to be stipulated or does the commission come up with ideas on contracts, so the only stipulation we might have would be flat-fee contracts. **Representative Luker** said that his concern was the tension between the budget and what is allowed within the contract versus the other work an attorney will be doing. It doesn't give us a good handle on that. **Senator Lakey** said that maybe there should be a flat-fee prohibition at this point and it could be added to. If an hourly contract is being negotiated with an attorney that meets the other qualifications, if government work is done, it is done at a lower rate and governments pay less, but they do pay, and that is the balance that can be found in a practice. **Co-chair Bolz** said he was not opposed to contracts, and Oregon has a system that works there, so the flat-fee contract might be one we want to take out, but not other types of contracts. **Representative Perry** said she thought the draft should state that you can't do a flat-fee contract and allow other details to roll out, and everyone agreed to that. With regard to conflict cases, does that need to be in this draft, or will the commission look at that.

Representative Luker replied that he thinks this committee ought to recommend continuance of this work for another year because the work is not done and city funding and conflict representation are other issues that need to be dealt with. **Co-chair Bolz** asked if this was the consensus of the committee and that was agreed upon.

Senator Lakey clarified that if going to a contract, there is still the ability for counties to cooperate with the same contracting attorney.

Senator Mortimer asked for legal advice on page 4, 19-859(2) and the words "the participating counties shall be treated for the purposes of this act as if they were one (1) county." If two counties are contracting, is that a contradiction of terms? **Representative Luker** replied that was existing language, and it hadn't been a problem so far. **Senator Lakey** asked why that was even in there. **Co-chair Bolz** said that the counties should be asked this question. **Seth Grigg** did not know why that was there, but said he would research that. Representative Luker said that since nobody knew why that was there, that it probably should remain. **Co-chair Bolz** reminded the members that this draft would go before the committees and the counties will have an opportunity to address any issues and that changes can be made as the draft proceeds, and Mr. Chadwick will also be consulted.

Representative Trujillo said she didn't think that qualifications really fit in 19-860 on page 4 of the draft if the commission was going to set those qualifications. **Co-chair Bolz** suggested that the standards or qualifications must meet the minimum standards as set by the commission. **Representative Perry** added that standards could be extended, but she would not want to see them lowered. **Senator McKenzie** said that at this point, the commission will be making recommendations to the legislature and then legislation will have to be passed to implement, so a section will eventually have to be amended. **Senator Lakey** agreed that counties will put out a request for a proposal and they may have minimum standards, but there may be additional standards in a proposal. **Co-chair Bolz** asked if the term should be no less than two years and **Senator Lakey** shared a concern about recent case law on ordinary/necessary expenses and whether that is binding on a future board, adding this could be an issue. **Co-chair Bolz** wondered if the term of office needed to be there. **Representative Luker** said this applies to the office of the public defender and not a contract. **Senator Lakey** said that if the person is an employee, if in-house, he did question the need to have a term there.

With regard to 19-861 on page 5 of the draft, there were no comments or suggestions.

Representative Perry said that on page 5, 19-862, she said she found it odd that the county may accept private contributions toward the support of the office (lines 30-31). She wondered why this would happen, since she saw a conflict in that. If a family member of hers ended up with a public defender and she suddenly decided to give a contribution to that public defender, she found it odd to accept private money into that office. **Co-chair Bolz** asked Mr. Hoskins why that was put in the original legislation and he said that was in the original statute. **Representative Luker** suspected back when this was initiated, they were looking for any money they could come up with, including contributions, treating it like legal aid. He didn't see much of a risk of conflict. **Representative Meline** said there is an issue if the money is given and where it is put, so it could be an auditing issue, since it must be accounted for in code, and it could go into the general fund. **Representative Luker** asked **Representative Meline**, as a commissioner, how she felt about this and she responded that it was wonderful since they got back \$220,000 from people. **Senator Lakey** said he didn't think this happened often, but it might be good to get input from counties on this issue, since it is unusual, but wasn't sure it was a conflict. **Co-chair Bolz** agreed to talk to Mr. Chadwick about this.

The committee next looked at 67-2601 on page 5 having to do with adding this department to the Bureau of Occupational Licenses, and there were no comments or suggestions.

Co-chair Bolz then called attention to the big issue of why this issue was brought to an interim committee for study. **Representative Luker** said that this committee had dealt with funding for the commission in this SBB049 draft, and he thought that a bucket section needed to be added and that a recommendation should be made to JFAC for initial funding for the commission for staff and processing data. **Co-chair Bolz** said that as the bill goes through the process, JFAC would appropriate what that allocation would be. The question remains about how much this will cost and what will the fiscal impact be. **Co-chair Mortimer** asked if this would be a direct appropriation or would this be funded by a fee. Representative Luker said that since this is a constitutional issue, he thinks this should be an appropriation from the general fund. **Co-chair Bolz** said that for at least the first year

there needed to be a direct appropriation, since relying on fees would take time, and the commission needs to be established now. With regard to how much, he wondered if \$200,000 would be enough to handle staffing needs, and asked if restrictions would be put on the commission regarding staff size. **Representative Perry** said she thinks that the budget restricts the amount, but she thought that \$200,000 seemed to be enough to cover travel and at least one person to get the commission up and running. She wasn't sure about putting restrictions on the commission about staff size, since the budget may dictate that. **Senator McKenzie** said that the commission should be trusted and when they come back for a budget request through JFAC, staff size will then be determined. Senator Bayer thought that this is a starting point and that flexibility will allow things to become established, and if the staff member is a state employee, all parameters will apply, and he thinks that things will naturally fall into place after the initial appropriation is made. **Representative Meline** wondered how long it will take to start training for public defenders. **Representative Luker** said that part of what can and perhaps should be a part of this process is to provide at least financially the basis for public defender training. He wasn't sure how many there are in the state, but he thinks there should be a scholarship, a set training stipend for each one to help with consistency. If left to counties, this will be inconsistent. He didn't know if this could be included in the first year of establishing this commission. He sees this as a next step, after the commission is established. **Co-chair Bolz** said that if an emergency clause was not put on this bill, nothing could be established this year. He asked Patti Tobias or Judge Wood if \$200,000 would be enough as a start-up amount. **Ms. Tobias** replied that she would research numbers and mileage calculations in the next few days and get that information to Ms. Brouman as to what one executive director or staff person might cost. **Co-chair Bolz** said he would be much more comfortable with an accurate cost estimate, realizing that for the first year it might not be a perfect estimate. **Ms. Tobias** said that with regard to training, she said she would work with Ms. Brouman on whether a stipend approach might be the way to go this first year, just to get started. The state of Idaho does fund through some dedicated fees dollars for county-paid prosecuting attorneys to have training, so there is an equity issue there, which can be considered in some small amount, just to get started. She said that the POST Academy fee excludes public defenders, this being a matter of parity. The state has assumed some responsibility for training county prosecuting attorneys, so there could be consideration as to how to get started with public defenders. **Co-chair Bolz** thanked Ms. Tobias and said that her information would be helpful to the committee. **Representative Luker** said that perhaps the stipend might be added into this draft under the duties of the commission, administering training stipends for public defenders.

Co-chair Bolz asked if the other members thought that everything had been covered with regard to what the charge of this committee was. **Co-chair Mortimer** complimented **Co-chair Bolz**, the other members, LSO staff and everyone else for their hard work, believing that significant progress had been made.

Representative Perry wondered if a revised draft could be done based on today's comments and suggestions. She thought it would be helpful for the committee to meet once again to repeat the process of today's meeting. **Co-chair Bolz** said it was his intention to get a revised draft to the members. He said he was happy to have another meeting, and that was agreed upon, since emailing a revised draft wouldn't include conversation, as it had at this meeting. **Senator Mortimer** urged the committee to set a date for the next meeting. **Co-chair Bolz** asked **Ms. Brouman** when a revised draft might be available and she said she could have a revised draft ready by Friday, January 10, 2014. The members agreed to meet again on Tuesday, January 14, 2014 at 4:00 p.m.

Co-chair Bolz commended the members and LSO staff for their time and good work, and he expressed his sincere appreciation to David Carroll who has done a fantastic job helping this committee.

Co-chair Bolz adjourned the meeting at 6:03 p.m.