

**CORRECTED MINUTES**  
**Approved by the Committee**  
**Public Defense Reform Interim Committee**  
**Friday, September 18, 2015**  
**9:00 AM to 4:00 PM**  
**WW53, State Capitol**  
**Boise, Idaho**

**Co-chair Representative Christy Perry** called the meeting to order at 9:00 a.m. and requested a silent roll call. Members present were: **Co-chairs Senator Lakey** and **Co-chair Representative Perry**; Senator Jim Guthrie; Representatives Lynn Luker, Patrick McDonald, and John Gannon. Senators Curt McKenzie, Dean Mortimer, and Cherie Buckner-Webb and Representative Janet Trujillo were excused.

Others in attendance: Mike Gilmore, Attorney General's Office; Judge Molly Huskey and Bill Wellman, Public Defense Commission; Dan Chadwick and Dan Blocksam, Idaho Association of Counties; Kathy Griesmeyer and Leo Morales, ACLU; Sara Thomas and Eric Fredericksen, SAPD; Judge Barry Wood, Michael Henderson, and Janica Bisharat, Idaho Supreme Court; Nichole Devaney, PDC; Lorna Jorgensen, Ada County; and Seth Grigg, Idaho Association of Cities.

NOTE: Copies of most presentations, handouts, reference materials, and public testimony can be found at: <http://legislature.idaho.gov/sessioninfo/2015/interim/defense.htm> and are also on file at the Legislative Services Office.

**Co-chair Representative Perry** welcomed the committee's two new members, **Representatives McDonald and Gannon**. She stated that the vote for approval of the November 24, 2004, minutes will be postponed to later in the meeting. She then introduced **Mr. Michael Gilmore**, Deputy Attorney General, Civil Litigation Bureau, who provided an update on the status of the Tucker class action complaint. **Mr. Gilmore's** presentation materials are available at: [http://legislature.idaho.gov/sessioninfo/2015/interim/PDEF\\_TuckerClassActionComplaint.pdf](http://legislature.idaho.gov/sessioninfo/2015/interim/PDEF_TuckerClassActionComplaint.pdf). He stated that the lawsuit's premise is that the public defender system in the state of Idaho is unconstitutional statewide. The Attorney General is disputing that premise, asserting that this is not the case. He outlined the lawsuit's timeline, where the motion to dismiss was filed in July. The motion states that even if everything in the lawsuit is true, because of the rules of civil procedure, plaintiffs have no claim upon which relief may be granted.

The case was assigned to **Judge Hoagland** in August. **Mr. Gilmore** noted that almost simultaneous with the filing of the complaint there were extensive discovery and interrogatories requested by the plaintiffs. The Attorney General's office filed a motion for a protective order in August, stating that until their order to dismiss is ruled upon, it is burdensome for them to collect the interrogatory information. He noted that **Judge Hoagland** temporarily put a halt to all discovery. The motion for protective order will be argued October 2nd. He continued, explaining that their reply brief will be filed later today. The motion to dismiss will be considered December 16th. **Judge Hoagland** indicated that he will not take up the issue of class certification until he has ruled on the motion to dismiss.

**Mr. Gilmore** opined that the case is at the crossroads of the judicial and the political, where the remedies they seek would require action at the political level. He identified who is being sued: the state of Idaho, the Governor of Idaho, and, the members of the Public Defense Commission. He pointed to the laundry list of complaints, including:

- Widespread use of fixed-fee contracts;
- High attorney caseloads;
- Lack of structural safeguards to protect the independence of defenders;
- Lack of ongoing training and professional development; and
- Lack of meaningful funding from the state.

He informed the committee that constitutional violations are brought under two provisions: 1) the U.S. Constitutional right to counsel; and 2) the Idaho Constitution. He outlined the five elements under the federal right to counsel, Section 1983, and stated that in their motion to dismiss, his office argues that the state of Idaho is not a person, it is a sovereign. **Mr. Gilmore** opined that the heart of the plaintiff's complaint is in paragraph 9, "the current, patchwork public-defense arrangement in Idaho remains riddled with constitutional deficiencies and fails, at all stages of the prosecution and adjudication processes, to ensure adequate representation for indigent defendants . . ." He then pointed to the plaintiff's claim in paragraph 11, "indigent defendants in most Idaho counties, including the named Plaintiffs, are not represented by counsel at their initial appearances . . ." He stated that this issue is an intractable one and he questioned whether a judicial solution is possible. The Attorney General's office contends it is not.

**Mr. Gilmore** went on to review the plaintiff's list of relief requested and identified many to be fuzzy standards. He closed, emphasizing that the underlying theme of their motion to dismiss is that the state cannot be sued as a defendant for this type of thing, the Governor is not responsible for the actions of each and every person in the state or local government, and the Public Defense Commission has no statutory authority to tell the counties how implement the plaintiff's requests. **Representative Gannon** asked if any of these issues have been raised at the county district court level and if any judges have issued opinions. **Mr. Gilmore** stated he is not aware that the statewide issue has been raised nor is he aware of any rulings, though he has heard of judges who have expressed concern and they have stepped in to secure specific public defense services in some circumstances.

**Representative McDonald** asked if the plaintiffs are requiring the state to take up responsibilities to do certain things that are presently handled at the county level. **Mr. Gilmore** responded that if the lawsuit is successful, the state will have to take an active role, either on its own or in concert with the supervising counties. Following up, **Representative McDonald** asked if, based on Section 1983, the plaintiffs are claiming that federal rights are denied and, because of that, we are entering into a civil rights issue. **Mr. Gilmore** stated that the plaintiff contends inadequate representation is a statewide failure, based upon the experiences of the four named class members.

**Senator Guthrie** asked if there are lawsuits like ours that have been successfully defended, where the premise of the defense was similar, and he wondered if the interim committee's efforts might have an impact on the suit's outcome. **Mr. Gilmore** detailed the successes in New York and Michigan: 1) in New York, the suits were brought against individual counties; and 2) in the Michigan case, it is opaque and difficult to understand what is going on, as they have had two flip-flops with their Michigan Supreme Court rulings. With regard to the interim committee's work, **Mr. Gilmore** advised the committee to concentrate on making good policy, regardless of how the case proceeds. Turning to the plaintiff's relief request barring the use of fixed-fee contracts, **Representative Luker** noted that they passed legislation prohibiting flat-fee contracts, so asked if there was more to the issue and **Mr. Gilmore** responded that the statute required that when the existing contract expires the next contract may not be a flat-fee contract. So, he explained, the plaintiff's statement is true at the moment. **Representative Luker** asked that the committee receive a copy of the full complaint and **Mr. Gilmore** agreed to provide that to **Mr. Hoskins**, who in turn will email it to the members.

**Co-chair Representative Perry** introduced **Judge Molly Huskey**, Chair of the Public Defense Commission, who provided a progress report on the work

of the commission. **Judge Huskey** presentation materials are available at: [http://legislature.idaho.gov/sessioninfo/2015/interim/Public\\_Defense\\_Judge\\_Huskey\\_Handout.pdf](http://legislature.idaho.gov/sessioninfo/2015/interim/Public_Defense_Judge_Huskey_Handout.pdf).

**Judge Huskey** provided a summary of the work the commission completed over the past year, including: hiring an executive director who just stepped down to accept a position in Ada County in trial work; drafting model contract terms for the counties to use; and submitting those terms to all of the counties for their review, as well as presenting those terms to the Idaho Association of Counties in June. She stated that contracting terms include things like qualifications and annual training requirements. The commission created a template for the annual report that **Mr. Henderson** will review during his presentation. The annual report is statutorily required to be submitted by the counties. The commission drafted temporary rules that would allow them to continue with the training seminars program. During the course of the past year, the commission organized three different training seminars for public defenders throughout the state. She commented that almost all of the counties had individuals participating. She added that the Idaho Association of Criminal Defenders (IACD) presents one big annual seminar in March and the commission plans to partner with the IACD at the March event and host their own annual event in August.

**Judge Huskey** reported the commission spent close to their total \$100,000 budget, meeting their goal of providing free training to the public defenders, who are required to complete 12 CLEs a year and 36 units over three years. She agreed with **Mr. Gilmore's** observation that law school does not prepare its graduates for practical courtroom duties. With this in mind, when the commission crafted the contract terms, they reviewed each type of case, from serious felonies and misdemeanors to child protection, and articulated the training that should be there. She affirmed that the commission will be prepared to make those recommendations of contract terms to the Legislature in January.

**Judge Huskey** outlined the obstacles to maintaining the ongoing viability and usefulness of the commission. She began by noting the challenges the commission faces in adopting workload or caseload standards. For example, she explained how Idaho's geographic diversity creates a disparity between county public defenders in the travel time required to simply represent their clients. She stated that workload and caseload analyses completed by the National Center for State Courts, as well as their workload recommendations, are available for committee review. She also noted that the trend is to move away from caseload, as it is not considered an accurate reflection of work. She observed that, because the commission's work is advisory, counties can simply decline to adopt any of the contract terms proposed. She stated the commission has no authority to require any county to participate in any particular program.

**Judge Huskey** opined that it is up to the Legislature to decide the role of the commission moving forward. Without an executive director and with all of its present members holding full-time positions, she stated they don't have the ability to continue to piecemeal this work. With no real prospect to hire a qualified executive director in the near future, unfair pressure is put on the commission's part-time staff person. Given the staffing constraints, she explained that the commission will have a difficult time over the next six months fulfilling its basic responsibilities. She asked the committee members for direction; should the commission continue rendering advisory opinions or should it take on some additional tasks? She indicated that if the committee wishes for the commission to take on a broader scope, she asked the members to consider three fixes: 1) change the statute that gives the commission authority, and by so doing, give the commission the authority to spend the trust money to assure continued sponsoring of training sessions; 2) give the commission enforcement authority for training, qualifications, and the caseload and workload standards; and 3) provide oversight over the entire public defender system. She stated that the commission believes there must be some kind of state oversight, and that it can no longer be run through the counties. She observed that if the commission is going to have enforcement authority, then it has to have that authority over every county public defender - there can be no "opting out." She also stated that the input she has received from the county commissioner is that they don't

care who provides the oversight. Continuing, she opined that it is not an issue of local control, the counties just want the public defenders adequately trained.

**Judge Huskey** emphasized there are only three viable funding mechanisms that are possible: 1) increase the levies; 2) have the state fund all of it; or 3) have some combination thereof, where it is a joint effort between the counties and the state. The commission proposes that the counties either be capped at what they are currently putting in and the state make up the difference or that the Legislature come up with some formula where the amount that counties put in is a pro rata share. She noted the Capital Crimes Defense Fund used this latter funding mechanism. She explained that other states use this funding mechanism, and the pool of money goes to the Public Defense Commission and they allocate it based on the state's needs. She stated the commission does not wish to take on additional responsibilities without additional ability to enact those responsibilities. And, she noted that it might be problematic for the commission to serve the counties as both a resource and as the enforcing authority.

**Judge Huskey** stated that in terms of oversight, the commission proposes a statewide system. She contends that, without this, there will never be successful enforcement. And, in turn, there would be no reason to broaden the scope of the commission's responsibilities. The commission suggests state oversight be administered on a regional basis, organized to coincide with the judicial districts.

**Judge Huskey** cautioned that with this regional strategy, there might be unintended consequences and perhaps some tensions; such as, having to address the issue of shared employees. She advised the members of the interim committee that they might get feedback of these concerns from the counties and she suggested these concerns might be alleviated by funding coming in from the state.

**Representative McDonald** asked if **Judge Huskey** thought it would be possible to create an oversight system that combines state and county efforts, where the counties are subservient to the state, or where the public defenders are subservient to two kings, the state and the county. **Judge Huskey** responded she believes it can be done, because the public defenders wouldn't see themselves as serving two kings, and she explained how there are lots of areas where the state has requirements that are carried out at a local level. **Representative McDonald** asked if increased monies to the counties alleviate a lot of this problem and **Judge Huskey** replied no, observing that we can give as much money to the county as they wish, but so long as they can choose how they are providing those services, with no standards, no minimum qualifications, and no oversight, it doesn't solve the problem of whether or not someone receives effective services or not. Recognizing the current staffing and resources the commission has, **Representative McDonald** asked if the commission has the ability to establish the standards right now. **Judge Huskey** replied that they have already established recommendations for qualifications and training and were promulgated in the context of contract terms. The only thing remaining to establish are the standards for appellate work.

**Representative Luker** asked **Judge Huskey** to elaborate on what kind of funding her office might need to continue with the training portion, recognizing her present staffing situation and **Judge Huskey** responded they have the money in trust benefits, approximately \$100,000, and the executive director can continue to organize that, but perhaps other tasks cannot get done. She estimated to do just the seminars and the training requires probably a third or a half of a person. Following up, **Representative Luker** asked if she had the spending authority freed up to do the scholarships, what additional staff might she need and **Judge Huskey** replied beyond the part-time staff person, they would need to hire someone who would understand the issues that public defenders face and have the requisite skills to find the speakers. She suggested that if they had a paralegal on staff, someone in tune with those issues, she believed the work could be done by those two people. She is not certain that giving the present staff member an additional half time would solve the problem. **Representative Luker** asked if the issue could be addressed by funding an

executive director, and up to a full-time person, that could be parsed out any way they wanted. **Judge Huskey** agreed this would work.

**Co-chair Senator Lakey** asked if **Judge Huskey** can put the hybrid regional approach in writing. **Judge Huskey** responded that the commission can provide that, though their resources are limited at present. She explained that the essence of the model is that it is a statewide system administered by the seven regional public defenders who would have the ability to hire, fire, and staff within their regions. These seven would answer to either the executive director, the public defender commission, or somebody in a state agency. They would be required to follow the standards adopted by either the Legislature or the Public Defender Commission. Following up, **Co-chair Senator Lakey** asked if the standards of the National Center for State Courts are different than some of the standards we see coming out of the more advocacy-oriented organizations. **Judge Huskey** stated she will work on providing the members with the center's study. The center's staff went to Virginia and they had the local attorneys track their time, they collected the data and then they corrected for what they thought would be effective assistance. She observed that it was strictly a workload analysis. She stated that the federal system has promulgated some standards that are not available, but she will try to get a copy of those for the committee. She opined that Idaho has three options; 1) wait until the Odyssey system is up and running statewide and gather our data that way; 2) try to run some pilot programs in a few rural and urban districts and generate that information ourselves (this would require statistical analysis); or 3) adopt the standards promulgated by the National Center for State Courts, and then over time tweak those standards for what is unique to Idaho.

**Co-chair Senator Lakey** commented that Idaho data is an essential element in crafting a solution and asked if the commission's preference is to look at some national standard and tweak it. **Judge Huskey** responded that the commission has not discussed this issue. She stated that her preference is to first take the data from the federal court system or the National Center for State Courts' study, so we have something to work with much sooner. Then, as data is gathered in Idaho, the commission would adjust those workloads up or down; otherwise, we must wait for Odyssey to go statewide, gather enough data to measure, and then contract with somebody to review that data. This process would take three to five years to complete. Regarding enforcement options, **Co-chair Senator Lakey** asked for more clarity in practical terms. **Judge Huskey** stated that while the commission hasn't talked about the specific enforcement mechanisms, she believes they will include both the carrot and the stick and she provided a few examples.

**Senator Guthrie** asked if the commission would rely on a licensure board and this board would serve as the enforcement arm or would the commission rely on the seven regional directors. **Judge Huskey** responded that the bar's job is licensure and to make sure the people pass minimum qualifications and they are not in the position to ensure the quality of representation, except where professional ethics have been violated. She stated that the commission wants to enforce the standards of the particular area of employment.

**Co-chair Representative Perry** introduced **Mr. Dan Chadwick**, Executive Director of the Idaho Association of Counties, who presented details on county budgets and levies and possible funding options. **Mr. Chadwick's** presentation "County Budgets and Possible Funding Options" is available at: [http://legislature.idaho.gov/sessioninfo/2015/interim/Public\\_Defense\\_and\\_County\\_Budgets.pdf](http://legislature.idaho.gov/sessioninfo/2015/interim/Public_Defense_and_County_Budgets.pdf). In advance of his prepared presentation, **Mr. Chadwick** addressed **Mr. Gilmore's** comments regarding litigation. He stated that when talking with county commissioners around the state regarding the lawsuit, they would ask why his association isn't joining with the ACLU as parties' plaintiff. He responded that to create an appropriate system in this state the decision should come through the legislative process. He observed that the interim committee is in a great position to do just that. Regarding flat-fee contracts, he stated that the counties are phasing out these types of contracts; though some of the contracts might look like a flat-fee contracts at first glance. He explained that,

after September 30, the association will be collecting data from the counties to determine how much these increased costs add up to. He mentioned he is hearing 20 to 30 percent cost increases for contract public defenders in the state, but emphasized that this is anecdotal. **Mr. Chadwick** also provided details regarding the Montana lawsuit filed in state court by the ACLU. The Montana Legislature took a year to resolve the issue and then the lawsuit went away and they ended up creating a regional system. **Mr. Chadwick** commented that he dislikes the term "local control." He prefers the term "local execution"; because, when the state sets requirements, there isn't any real local control, but there is local execution based upon local conditions. **Mr. Chadwick** opined that as the standards are increased and accountability is imposed, the key will be to provide the resources to the counties in need, in order to execute those laws and to make sure they are providing a constitutional public defense system.

**Mr. Chadwick** stated that counties have two ways of funding justice-related responsibilities through the property tax system: 1) through the Current Expense Fund; and 2) through counties drawing from other sources of revenue like revenue sharing, in order to augment their levies. He illustrated the services that are funded out of the Justice Fund. He highlighted the two separate levies: 1) a .20% levy for justice; and 2) a .20% levy for current expense, for all other services. **Mr. Chadwick's** PowerPoint presentation includes charts detailing the Justice Fund and the levy rates.

He identified the problems with the current statutory maximum:

- Current statutory maximum does not cover justice-related expenses for counties; and
- As a result, counties pull from current expense and district court levies to support justice-related expenses.

He then offered estimates of what the levy rate might be if the counties actually funded all justice-related expenses from the Justice Fund. For FY 2014 the required justice levy rate would be, on average .31%; and for FY 2015 the required justice levy would be .32%. He asked and answered the question of how counties without justice funds manage, stating that:

- For counties with ample property values, their Current Expense Fund is sufficient; and
- For already cash-strapped counties, the 3% budget cap on the growth of county budgets renders a Justice Fund, or a mere increase in levy authority, meaningless.

He noted that in FY 2015, 28 counties are in distress; with using over 90% of their Justice Fund levy limit, they can't go anywhere to raise additional revenue. Regarding the levy limit, **Representative Luker** asked if the current expense is .026%, but if you have a Justice Fund, then they are both .02%. **Mr. Chadwick** stated this is correct, the trade-off is the increased authority, if the county agreed to go with the Justice Fund. Addressing the funding scenarios for all of the justice expenses, **Representative Luker** noted that while some of the categories listed are being funded by the Justice Fund, others come from the Current Expense Fund. He asked if the scenarios apply only when you put all those categories in. **Mr. Chadwick** agreed, stating that is where you see that increased levy. Right now the current levy is insufficient to cover all of those costs, so you have to pull from those other sources; such as, from the current expense and from the revenue sharing, in order to complete your budget for those. **Representative Luker** asked, if all of those were transferred to the Justice Fund, would that reduce the draw on the Current Expense Fund. **Mr. Chadwick** answered that it could, though it depends on where the increased pressures of increased costs are coming for counties. He stated that it is not a static or stagnant process in the counties.

**Mr. Chadwick** presented the members four funding options to consider:

1. Increase Justice Fund levy limit;
2. Create a levy specific to public defense;
3. Create a statewide or regional public defender office that is funded by the state; or
4. Provide state funding directly to the counties.

He also discussed the association's responses to each option. He commented that **Judge Huskey's** suggestion has real potential because it gives the committee a road map on maybe how to solve this problem, how to deal with the funding component and how to get put standards into place. He stated that the association is also concerned about national standards. He stated that they want a statewide standard developed and the Public Defense Commission might be the right entity to help develop that, if given the authority. And he agreed that along with the standards, the money has to follow. **Representative Luker** asked if he had thoughts about **Judge Huskey's** concern about being both the deliverer of resource services and the enforcer. **Mr. Chadwick** stated that he doesn't see her concern to be an issue, because the commission set the standards only after having a lengthy dialog with the counties. The real enforcement is in who gets to be a public defender.

**Senator Guthrie** asked who would bring about the punitive component, will it be the regional directors or a board comprised of public defenders who have the expertise to recognize competence. **Judge Huskey** responded that the committee members need to determine the role of the commission. She noted that the commission has not specifically discussed this because they don't have any enforcement authority now. She stated that she believes it depends on how the oversight is built. If the decision is to go with the regional system with seven public defenders that were potentially state employees, then they would have the obligation to enforce the standards and to administer the discipline to those who did not meet the standards. If not that seven, then it would fall back to the commission or another entity. Regarding the funding options, **Senator Guthrie** asked if option #3 reflects total state funding and option #4 reflects a combination of county and state funding and **Mr. Chadwick** stated he is correct.

**Representative Gannon** asked why Clearwater County's "percentage used of District Court levy" is so high. **Mr. Chadwick** explained that it is a function of budget and budget needs. He referred to the actual dollar amounts for the county in Table 4, and noted that their budget has to cover existing costs without drawing on any other resources. Clearwater County relies heavily on other resources to cover more than half of their justice-related expenses. **Representative Gannon** asked why the county is only collecting \$1.1 million from the Justice Fund and **Mr. Chadwick** confirmed that they are at their maximum tax levy cap. **Representative Luker** asked if **Mr. Chadwick** had a sense of which counties are struggling and if he has a ranking sheet that illustrates which rural counties are struggling versus those that have their dedicated public defender offices. **Mr. Chadwick** stated that he has no way of knowing how the smaller counties are doing, but he will discuss this with **Mr. Dan Blocksom**. **Representative Luker** commented that it would help to know if there is any pattern that can be addressed in terms of location or resources, and attack the issue that way. He opined that when we have standards, it seems the urban areas are more easily capable to meet them because they have the resources, but we still have the issue of how well the individual counties can reach them.

Speaking to the 20 to 30 percent estimated increase in county expenditures, **Co-chair Senator Lakey** asked how the services are being provided in relation to the cost increase. **Mr. Chadwick** responded that his association has asked for their contracts to survey the counties on exactly what they are getting for them. Regarding the flat-fee contract issue, **Co-chair Senator Lakey** commented on the misconception that if a contract has a flat amount that it is automatically unconstitutional. He stated that this is not the case - his perception is that you can have an amount, as long as you provide a constitutional level of service and if there is an increase in need or other services beyond that, then it is provided for in the contract. He asked if the model contract deals with this. **Mr. Chadwick** stated that his perception is correct. He opined that in a contract, one has to identify whether there an economic incentive or disincentive to provide adequate defense. **Co-chair Senator Lakey** asked if there is a need to tweak the definition in the Idaho Code and **Mr. Chadwick** suggested that the Legislature wait a year or two and review it then. Regarding the funding formula, **Co-chair Senator Lakey** presumed with a shared approach, as costs increase, that both the state and the counties



will have to be able to respond to that, in order to cover the costs of the system. So, he asked **Mr. Chadwick** if he thought there will be a need to change the levy caps. **Mr. Chadwick** stated the question is, "what is the pressure going to be and what flexibility will they have to cover those costs?" He stated that if the Legislature wants the counties to participate, then we are going to need some relief from the caps or some other funding mechanism.

Looking at Table 4, **Senator Guthrie** noted that 12 counties do not have a Justice Fund and 29 counties augment their Justice Fund with other monies, he asked, are there situations where the counties are in danger of leaving levy funds to a level that is inappropriate. **Mr. Chadwick** referenced the percentages in "Table 1, Percentage Used of Various County Levies FY15," and explained that they'll use it if they need to. He observed that the pressures are climbing now on both the Current Expense Fund and the Justice Fund and there isn't a lot of flexibility out there. **Senator Guthrie** asked if they are using monies that should be appropriated for something else and **Mr. Chadwick** responded that he doesn't know. He stated that Current Expenses General Fund monies can be allocated anywhere within the county, so there isn't any danger of money being moved inappropriately. **Representative Gannon** asked if he had suggestions on how we can help the small tax base counties. **Mr. Chadwick** stated he would look into it, noting that it depends on standards and enforceability. **Co-chair Representative Perry** asked if the Justice Fund includes prosecutorial services, as well as public defense services. And if it does, she asked if the counties have discussed applying prosecutorial discretion. **Mr. Chadwick** stated that the issue of prosecutorial discretion is up to individual prosecutors, though the counties have discussed removing some crimes from being misdemeanors and moving them to infractions.

**Co-chair Representative Perry** introduced **Mr. Michael Henderson**, Legal Counsel at the Idaho Supreme Court, who presented an update on the Odyssey reporting system and details regarding reporting requirements in the Idaho Code. **Mr. Henderson's** presentation "Public Defense Reporting" is available at: [http://legislature.idaho.gov/sessioninfo/2015/interim/Public\\_Defense\\_Reporting.pdf](http://legislature.idaho.gov/sessioninfo/2015/interim/Public_Defense_Reporting.pdf). Before beginning his presentation, he highlighted a few caveats. He explained there is a requirement that an annual report be made by every defending attorney and submitted to the county commissioners and to the administrative judge in that district. **Judge Barry Wood** sent out an email to the administrative district judges in each of the seven districts and asked them what reports they had received. **Mr. Henderson** explained that what they got back was information concerning what the administrative judges had received. Consequently, he noted that the survey may not be comprehensive because some number of reports may have been given to county commissioners. Additionally, he explained that there is some uncertainty about which year we are referencing when we discuss annual reports. The assumption is that it should be the county fiscal year, but he stated there are reports we expect to still receive after this fiscal year has ended.

**Mr. Henderson** reviewed Section 19-864, Idaho Code, and provided details of what data is included in the annual report, such as:

- The number of persons represented under this act. This includes criminal proceedings, probably juvenile cases, and commitment proceedings. But public defenders appear in other cases, including CPA and parental termination cases.
- The crimes involved.
- And the expenditures, totaled by kind.

He gave an update on report submissions for each of the counties within the seven judicial districts. He also suggested that the members consider what specific data they expect to gather from the report, including:

- For which year should the reporting take place? Calendar, state fiscal, county fiscal?
- What number should be reported? Cases, defendants (clients), and/or charges?
- "Crimes involved" – Does this mean the charge in each case? What do we need?
- What "expenditures" should be reported?



- Not just crimes. Public defenders also represent defendants in juvenile cases, mental commitments, CPA cases, parental terminations, contempt proceedings.

He reviewed the Idaho Uniform Public Defense Report template, which is available at: [http://legislature.idaho.gov/sessioninfo/2015/interim/PDEF\\_IdahoUniformReport.pdf](http://legislature.idaho.gov/sessioninfo/2015/interim/PDEF_IdahoUniformReport.pdf).

**Mr. Henderson** explained that the Public Defense Commission created the reporting form and it is not quite the finished product. It is an annual report, designed to match the county fiscal year timeline. He stated that it will provide more data than is called for by statute and it comes close to providing a concise form to discern the employee profile, the caseload in the various areas, and case expenditures by type (excluding personnel costs) in various areas of the case. The report requires input on education and training. He opined that it is a good form, but if put into the hands of the individual attorneys, it will encourage reporting across the board. Though he recognized that the workload data will not come from this report, he stated it will be something accessible with the Odyssey system.

**Mr. Henderson** introduced **Ms. Janica Bisharat**, Director of the Court Management Division, Idaho Supreme Court, who gave an update on their efforts to transition from ISTARs to the Odyssey system. She stated that the pilot county in Twin Falls is up and running today. She explained that Odyssey has a full suite of products, one of which is the Enterprise Custom Reporting (ECR) program. This tool allows for data extraction; as long as the clerks are entering that data into the system, the tool allows her team to design reports to pull the data out of the system. At present, her team has created a list of custom reports that they wish to design, in order to report on certain things. She has also met with the Public Defense Commission earlier this year, assessing what they want to see and what Odyssey can provide to meet the requirements of the statute. She noted that earlier in the meeting, certain data elements of interest were discussed; such as, the number of cases by county and the number of felony cases assigned to the public defenders and explained that these data elements are already planned and will enable her team to report in the future. However, she continued, they will be straddled between ISTARs and Odyssey for the next two years. During this period it will be difficult to pull in the data. She observed that there are certain areas where business processes need to be redesigned. Her team is presently looking across all case types and analyzing the business process; for example, the appointment of public defenders. They will evaluate if it is possible to capture all the data elements the committee has requested and then they will design the reports. In Twin Falls, she stated they have developed operational reports and can now move on to respond to the statewide report needs. She restated that Ada County will go live next year, and that it will be a couple of years before all counties are on board. She opined that the reporting requirement will invariably change the business process for county clerks and for public defenders.

**Representative Luker** asked if there is a specific public defense module created at this point and is it being matched up with the data we are not getting from the counties. **Ms. Bisharat** responded no, but she knows Ada County is moving to a case management product, though she explained that not all counties are slated to turn to this system. It will be possible in Ada County, because they are moving to the attorney case management program to collect the data, and soon other counties will have the opportunity to come on board. It is a stand-alone, separate program that integrates into Odyssey. It is optional, though the program user would have to pay for conversion expenses. **Representative Luker** recalled that Odyssey had been explained to be a basic data tracking program with the capacity to add modules for future needs, like public defense. He asked, given what she said about the attorney case management program, if it can really incorporate the public defender data that will be collected from the report. **Ms. Bisharat** stated yes, though she doesn't know to what extent case management products are used in all of the public defender offices.

**Representative Luker** voiced his concern that even when Odyssey is online statewide, the public defender information collected will not be complete coverage from all of the different district courts.

**Ms. Bisharat** answered that quite a bit of data can be gathered and reported on. She stated they will not be able to collect all of it, like expenditures, but as each county comes onto the system,

quite a lot of data will be captured. **Representative Luker** asked her to provide examples of the type of data they will be able to collect. **Ms. Bisharat** agreed to pull a list together for the members.

**Co-chair Representative Perry** introduced **Mr. Jared Hoskins**, LSO, Principal Budget and Policy Analyst. His presentation materials are available at:

[http://legislature.idaho.gov/sessioninfo/2015/interim/Public\\_Defense\\_Structure\\_and\\_Funding.pdf](http://legislature.idaho.gov/sessioninfo/2015/interim/Public_Defense_Structure_and_Funding.pdf).

**Mr. Hoskins** stated he would review public defense delivery models and the various approaches that are in evidence across the country. He focussed on three primary components: 1) administration of these systems, and whether the state provides public defense systems or whether that function is delegated to some local unit of government; 2) funding; and 3) whether the state has a separate commission, board, or council and what role they play. He emphasized that what information he gathered is collected from a high level - providing the members with a broad, conceptual idea of what the various states are doing in the realm of public defense; and specifically, how they are balancing the interaction between the three components: administration, funding, and oversight. Referencing PowerPoint slide #3, **Mr. Hoskins** stated that he looked at 13 models from 13 states. He proceeded to review each one in turn, across the spectrum from Arizona, Pennsylvania, and Utah (Decentralized/Unfunded/Unsupervised) to Oklahoma and Montana (Centralized/Significantly Funded/Supervised). He emphasized that regardless of where each state falls in the spectrum, each state has a unique characteristic in its system that might prove useful when considering how the three components can work in Idaho. He suggested that perhaps by narrowing down some of the components, the committee can move in from the broad perspective to a more in-depth look. He provided detailed slides regarding the approaches used for each state and discussed them in succession. After his review of the approaches of the 13 states, he identified components evident in their systems. He observed they are not necessarily compatible, one with another, nor are they mutually exclusive:

- Bifurcation
- "Pressure Release"
- Dual/Parallel Offices
- Compliance Monitoring or Auditing
- Regionalization
- Local Reimbursement for Local Ordinance Defense
- Financial Incentives for Compliance with Standards
- Different Requirements Based On Size or Population
- Independent Oversight
- Offsetting Costs Through Adjustments in Revenue Sharing

**Representative McDonald** asked if Idaho did not already have a state public defender. **Mr. Hoskins** stated Idaho does have a state appellate public defender who handles appeals cases. **Ms. Sara Thomas**, State Appellate Public Defender, came forward and explained that her office handles felony appeals in the state and provides all of the post-conviction actions in capital cases, and that takes place in the district courts. In addition to that, they handle the consolidated appeals. **Co-chair Senator Lakey** asked if the unsupervised states, such as Arizona, Utah, Pennsylvania, and Florida, the ones with no state commission, if they have adopted standards. **Mr. Hoskins** replied the Florida has some standards built into their statutes. **Co-chair Senator Lakey** asked if any of these decentralized states have been subject to legal action and **Mr. Hoskins** opined that Montana is now a centralized state due to the litigation. He added that New York and Michigan were mentioned earlier in the meeting and he believes there are a couple more. **Ms. Thomas** stepped forward and stated there has been extensive litigation. She discussed the situation in Louisiana, where the state was forced into an agreement because they weren't providing representation for juveniles. She stated the Department of Justice now has an agreement and they are following and supervising what is going on with juveniles in that state. In the Pennsylvania Supreme Court there is a case where a

county is suing, essentially saying the county is not providing adequate services. It was filed as a constructive denial claim. She recounted that after extensive litigation, Dade County, Florida, was allowed to withdraw from cases whenever their caseloads were too high. Utah is currently having a study done, just like Idaho did, and working on their system. She stated that the 6th Amendment Center's website has an updated list of lawsuits.

**Representative Guthrie** asked **Mr. Hoskins** to identify where Idaho falls on his spectrum graph. **Mr. Hoskins** responded that he believes Idaho falls somewhere between Arizona, Pennsylvania, and Utah on one side and Indiana and Texas on the other side. **Representative Guthrie** commented that it appears that, as you move right on the chart, the costs per case go up. **Mr. Hoskins** can't say how much they are spending per case. **Representative Guthrie** asked who makes up the board of five in Oklahoma. **Mr. Hoskins** stated he will provide that information to the members. **Representative Luker** suggested the middle ground states might have addressed the state's role in playing catchup in trying to fund public defense based on what the county is doing, and asked if **Mr. Hoskins** came across that in his research. **Mr. Hoskins** responded that he did note reference to parity and pay with prosecutors and again offered to dig deeper to find an example of how states deal with the notion that prosecutors drive the caseloads of public defenders.

Regarding the Florida case, **Representative Luker** asked **Ms. Thomas** if she knows what happens to the rest of the public defender cases when an office says they have reached their limit. **Ms. Thomas** answered that the state still has the responsibility to provide counsel, part of which has been addressed through more adequate funding for the Dade County office. She pointed out that their state public defender is elected, so there is an interesting financial dynamic going on there. In some instances, emergency funding is involved to hire more attorneys. **Representative Luker** asked if she knew what pocket of money that extra support comes out of and she answered that she did not know how that was worked out. **Representative Guthrie** asked **Judge Huskey** if her option mirrors Louisiana's. **Judge Huskey** explained that she doesn't see her option fitting on **Mr. Hoskins'** spectrum because it would be a hybrid of a couple of different things. She opined that if she had to put it on the spectrum, it would be more toward the right. She emphasized, regardless of whether you have a model at the county level or state level, or some hybrid thereof, there must be adequate funding. She cautioned the committee against fitting Idaho into the spectrum. **Mr. Hoskins** agreed with **Judge Huskey**.

**Co-chair Representative Perry** introduced **Mr. Chadwick**, who returned to the podium to discuss the final slide of his PowerPoint presentation relating to the salary for law clerks. He observed that this is one of those truly shared employee issues that counties and the courts get to confront. He recounted that a number of years ago the courts and the counties agreed that law clerks really didn't fit well in the county government and should be employees governed by the courts. He pointed out that right now the law clerks are hired by the judges, serving at their pleasure for usually one to two years. Also, some have become permanent, staff employees. He stated that the clerk positions are paid for by the counties and are supposed to follow their procedures but sometimes this is difficult to do, as the judges might have differing expectations for them. He explained that if the clerks were moved from the county to the state, the state would assume the 44 full-time positions; furthermore, this action would necessitate a statutory change and a Joint Finance-Appropriations Committee allocation of \$3,985,235, which includes salaries and benefits. The county and the courts have been discussing when to bring this proposal to the Legislature. He added that, if the proposal passes into law, there would be a county savings of close to \$4 million, funds that could go toward the issue of public defense. **Representative Luker** asked if at present the law clerks are paid differently, depending on what county they are in. **Mr. Chadwick** responded that the clerks are not paid in a consistent manner statewide. Referring to the PowerPoint slide, **Representative Luker** commented that the estimated FTE total "44" on his slide represents the number of counties

but that doesn't mean they would all benefit equally. **Mr. Chadwick** stated that he is correct, the number has no relationship to the counties, it simply relates to the judges.

**Co-chair Representative Perry** invited **Ms. Thomas** to return to the podium. **Ms. Thomas** mentioned discussions she recently had with **Co-chair Representative Perry**, where she presented options to try to give some relief to the county public defenders and to try to help control their workload. Currently the State Appellate Public Defender office only handles appeals in the felony cases. She noted that the question has been raised on numerous occasions, "can the state appellate public defender take on all the other public defense appeals that go from district court into the Idaho Supreme Court?" To determine how this would impact her office, she opined that it appears that the number of cases that go from the district court to the Idaho Supreme Court are exceptionally small when not a felony case. She discussed various other types of cases that could be moved into her office. She then discussed Section 19-870, Idaho Code, the statute that gives her office its authority. She stated that the language used in the statute is creating problems and should be updated in order to clarify their role and their jurisdiction. And, she added that her office caseload would not increase with this clarification.

**Senator Guthrie** asked, in order to solve some of the funding or workload issues, would she rather have her office do more of the cases or would she rather give the cases to the local jurisdiction to do the work. **Ms. Sara Thomas** answered that it depends upon how you are talking about taking on the additional workload; with the number of appeals her office has now, and with a little more money to cover the extra staff, her office could handle the additional workload. She did emphasize that it is not feasible for her office to cover anything beyond appeals. **Co-chair Senator Lakey** asked if she is saying that her office handles interlocutory and post-conviction appeals now but she is asking the Legislature to clarify their ability to keep doing this. **Ms. Thomas** answered yes, that is what she means. **Co-chair Senator Lakey** asked her to explain how she gets a case. **Ms. Thomas** responded that the U.S. Supreme Court has ruled that an appeal must be filed when asked. When the District Court grants the appeal, state appellate public defense attorneys review the transcript and raise the best case they can. In Idaho, even if the attorneys are unable to find a meritable point, they must proceed anyway. However, in post-conviction cases, when a state appellate public defense attorney reviews the appeal and finds no viable issue for appeal, with three attorneys attesting support for that assertion, the attorney may file a motion to withdraw.

**Representative Gannon** asked if **Mr. Chadwick** knows of a funding formula that would help the counties, other than funding through the property tax base. **Mr. Chadwick** stated that it depends on what the interim committee is going to recommend to the Legislature first. Part of the problem is that some counties fund public defense services on a proportional basis, and he stated that approach will not cover the costs in the smaller counties. He suggested that perhaps the committee might consider directing the funding to the actual resources needed within the counties. **Representative Gannon** asked **Mr. Chadwick** if there were any state programs now in operation that might be a model for needs-based funding. **Mr. Chadwick** identified the Catastrophic Health Care Cost (CAT) program, but he explained that the state is paying for it, not the county. With regard to initial representation, **Representative Luker** asked **Judge Huskey** what role she sees the court playing as a part of the enforcement where counsel is not provided at initial processing. **Judge Huskey** agreed the courts have a role to play but warned that tasking them to step in assumes that the court knows who is and who isn't receiving counsel. To make this so, she stated some systemic changes would be needed. She added that in the felony courts they are very careful that counsel is provided from the very beginning but she wasn't certain about at the magistrate level. She added that the state Supreme Court is willing to be partners in this discussion. She restated that the courts can have a role to play, as long as the courts operate within the ethical constraints of what individual judges can do in individual cases.

**Representative Luker** asked at what point does the right to have counsel attach. **Judge Huskey** responded it is at the beginning of the adversarial proceedings, usually at the initial appearance. She noted that sometimes there is a misunderstanding about when the initial appearance is in different types of cases. **Representative Luker** asked her to clarify the concern regarding having the court act as enforcer at this point, is it concern for a speedy trial. **Judge Huskey** stated no, it is not the speedy trial so much. She explained what happens on criminal motion day in Canyon County, where 40 to 50 arraignments are scheduled in the morning, so adding just one additional question to each case would take hours of court time. **Representative Luker** emphasized the priority moving forward is to know what the standards are. He asked what the status is of the standards and what her perspective is for the logical progression from standards to the filling in of the rest of the equation. **Judge Huskey** stated that the standards are done, with the exception of appellate representation. When the contract terms were reviewed at the county level, the anecdotal evidence is that we are seeing a 20 to 30 percent increase, and that doesn't include implementing all the recommendations the commission has made. She suggested the only way they can determine exactly how much this is going to cost is: 1) do the workload studies over a couple of years and then extrapolate the cost; or 2) adopt an amount as a starting point, and have a willingness to evaluate that amount over time. She stated that the commission does not have a recommendation on this issue at present. She asked the interim committee to give the commission an implementation timeline. She also warned that if you don't have a stick, you won't get the carrot, so counties can't have the ability to opt out. **Representative Luker** asked for the opportunity to review the standards and **Judge Huskey** agreed to provide them to the members.

Recognizing that the commission has yet to address the caseload/workload issue, **Co-chair Senator Lakey** asked if the study completed by the National Center for State Courts touched on that. **Judge Huskey** stated yes, the study did and she agreed to forward the executive summary of the report to the members. **Representative Luker** asked if the commission is asking for the authority to promulgate rules or the Legislature needs to adopt those rules and somehow set up an enforcement mechanism. **Judge Huskey** responded that the committee would have to act in two ways: 1) decide whether you want the standards to apply to every public defender, regardless of the way the service is provided: would the terms for model contract apply to stand-alone offices or whether these would be used exclusively in cases where contractors are providing the services; and 2) does this committee wish to make the standards mandatory, statutory, by rule, and then again, you must define the consequences, if any, for failing to comply. **Representative Gannon** asked how the federal public defender program compares to what this committee is considering. **Ms. Thomas** stated that they do have public defender offices that are supervised by the court administration office in Washington, D.C., and they also have panel attorneys. In the federal program, certain qualifications must be met and pay rates are set by Congress. **Ms. Thomas** stated that the court administration office has completed a useful study and she agreed to make this study available to the committee when it is released.

**Senator Guthrie** suggested that the committee formulate an approach based upon the actions **Judge Huskey's** outlined moving forward with the commission: 1) what will the statute changes look like that will give them authority to continue the training; 2) does the committee want the commission to have enforcement authority and what will the model look like; 3) with funding, do we support a combination approach of state and county; and 4) do we want a statewide system or move to a regional system. **Co-chair Senator Lakey** advised taking it one bite at a time, beginning with defining the role of the commission. He suggested that the commission keep the training and give them some responsibility with enforcement authority. He recommended that the standards are ultimately approved by the Legislature, by rule or by statute, because there needs to be legislative buy off. **Representative Luker** agreed with the **Co-chair Senator Lakey's** statement, suggesting they address some of the low hanging fruit pieces, to include the reporting clarification. To that end, he stated his support for: 1) Legislative Services to create a draft regarding the changes to the state appellate

public defender statute language and regarding the training aspect, freeing up the commission to access the trust fund moneys on scholarships, as well as adding half a staff member; and 2) add state funding for filing the reports; perhaps including funding for the hardware/software, to ensure that everyone is on the same page with data entry/retrieval. He stated he envisions a hybrid, where the state supplements to pay for the increasing standards, and use a formula that considers the rural nature of some of these counties, and the extra costs entailed. He mentioned that we should incentivize cooperative approaches.

Regarding funding and model delivery, **Co-chair Senator Lakey** opined that the state has to step up and provide additional funding related to the increases in cost for workload. He noted that with the counties involved there is an ability to oversee the level of services and the funding provided, so there is scrutiny at a closer level. He stated that his preference is for assistance to counties to provide the services. He added that he is open to a regional model but observed that it probably demands a "shared employee" system that doesn't always work, so perhaps it is better to avoid that conflict. **Representative McDonald** asked to review the commission's standards and stated his wish is to involve the counties as much as possible in this process. He noted how expensive this will be and cautioned that the committee may have to face unintended consequences. He agrees that there is a need to clarify the role of the State Appellate Public Defender office and added that he thinks that much of this should be done at the local level. **Representative Gannon** voiced his agreement with **Representative Luker's** identification of the low hanging fruit. He also asked to have the opportunity to review the federal panel standards, and he stated there should be some CLE requirement or some kind of basic qualifications for public defenders. He emphasized his interest in pursuing the option of needs-based funding in order to have statewide compliance with the 6th Amendment of the Constitution. Specifically, funding and public defender expertise; and judges' role in the area of right to counsel.

**Representative Luker** suggested that the next discussion should be on the specific standards we expect to be implemented. With that, he stated, the committee can tie the standards to a cost. From this we can develop a game plan that addresses: how much money is necessary, where is it going to go, and who is going to enforce it. He stated his interest in being involved in standards but sees the commission taking on the enforcement. He added that the committee has to figure out how to administer it. **Co-chair Senator Lakey** observed that until Odyssey is up across the state and we are collecting the good data, we won't have an Idaho-specific vision. He suggested the committee investigate some sort of interim funding model. Ideally, he suggested they pursue standards created by more neutral folks and adjust them as we receive the Idaho data. He emphasized the need to move forward with a funding model now. **Representative Luker** asked if issues, such as how much time should be allotted to counsel, are addressed in the commission's standards. **Judge Huskey** explained that the commission has determined how many hours of experience people should have. The commission created the template form. Some data, like travel time, is regionally determined. She agreed to provide the data that the commission used. She stated that a workload standard was validated. She added that if the committee want the commission to compile workload models, they will do that. She emphasized that the commission can not take on the enforcement armed with carrots and no sticks.

**Representative Luker** asked **Judge Huskey** to state the enforcement mechanisms she needs. **Judge Huskey** responded that she needs the stick; such as, she needs the authority to remove public defenders from their role, if they are unwilling to perform as indicated. **Representative Luker** asked how this would work in a multi-attorney office. **Judge Huskey** answered public defender by public defender. She added that at present contract public defenders are excepted and are handled at the local level. **Representative Luker** commented that it might be possible to insert that requirement into the contract. **Representative McDonald** asked for more specifics regarding the logistics of enforcement. **Judge Huskey** replied that the members should tell them how to proceed in the area

of enforcement. **Representative McDonald** asked her to discuss the due process element, as it relates to enforcement. **Judge Huskey** stated that this might not be required; for instance, if the Legislature promulgates standards, an appeal can be made to challenge the standard. **Representative Gannon** asked if the requirements are met by independent offices. **Judge Huskey** indicated that the effort would be to empower and train the head public defenders, in an effort to meet those standards. **Judge Huskey** stated the commission has incorporated the National Legal Aid & Defender Association (NLADA) standards and they are referenced in the contracts. **Senator Guthrie** asked if the seven district public defenders, in addition to their supervisory role, would have a caseload. And if so, would this necessitate moving some work to the State Appellate Public Defender office. **Judge Huskey** stated that the commission has not discussed this, but she believes the answer is that the seven would not carry a caseload. **Co-chair Senator Lakey** asked **Mr. Hoskins** to provide a list of those states that have the oversight but not a state system, where standards are administered at the local level, in order to consider the mechanisms (the carrot and the stick) already in use.

**Co-chair Representative Perry** asked the members to review the information they have received and think in terms of oversight and the role of commission. She asked the members what sort of other information would they like: 1) she mentioned how the committee wants a copy of the standards (**Judge Huskey** and **Ms. Thomas** will provide); 2) **Representative Gannon** mentioned the public defender panel information; 3) information about how to aid those counties that will probably have more struggles (**Mr. Chadwick** will provide); 4) more on the funding model recommendation (the Public Defense Commission will discuss at their next meeting); 5) **Representative Gannon** asked for information on funding models similar to the Capital Crimes Fund (**Mr. Chadwick** will look into that); 7) **Representative Luker** asked to hear from the courts in terms of their enforcement position at critical points in the process and what they bring to the table to try to help with the enforcement side of things. Also, he'd like to find out where the 20 to 30 percent comes from; and 8) **Co-chair Senator Lakey** asked **Mr. Hoskins** and **Mr. Bush** to put together some proposed draft language on reporting clarification, state appellate public defender clarification, and the authority for training (**Mr. Hoskins** and **Mr. Bush** agreed to provide a draft at the next meeting).

**Representative Luker** moved to approve the meeting minutes of November 24, 2014, and **Co-chair Senator Lakey** seconded, and they were approved unanimously. The next meeting will be Friday, October 16, 2015.

Meeting adjourned at 3:35 p.m.