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October 14, 2015

Via Email: dblocksom@idcounties.org

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Dear Dan:

Thank you for the opportunity to provide comments on the rough draft of the Idaho State Public Defense Commission Proposed Core Contract Terms. It is the Board of Ada County Commissioners' (hereinafter "Ada County") understanding that Madison County Commissioner Kimber Ricks, who has been serving on the Public Defense Commission, has reached out to counties for comments. It is also Ada County's understanding that at the last Public Defense Interim Committee Meeting, Judge Molly Huskey indicated that the standards incorporated in the proposed contract will be used as standards for all public defenders in Idaho. Therefore, Ada County's response is provided from the understanding that the proposed standards in the contract are being proposed as the standards for all public defenders in Idaho, including public defenders that work in a public defender's office.

1. ABA's Ten Principles of a Public Defense Delivery System

The proposed contract states that indigent defense system "should be designed to meet the goals articulated in each and all of the Ten Principles." *See* Rough Draft at 3. First, Ada County points out that the Ten Principles are goals and not statutory requirements. While these advisory and idealistic goals have some merit; it is also important to focus on other aspects as well. Everyone knows there are limited financial resources in the state of Idaho so the money should be applied where it will do the most good. Because lawyers are assumed to be professionals, who have been licensed as such, overlap with state bar licensure, and the ethical responsibilities of a lawyer do not seem like a good use of limited resources. The last thing that needs to occur in Idaho is the micro-management of legal professionals.

The first ABA principle discusses independent funding. Adherence to this first principle would require funding from an entity other than the counties because a core concept in county government is that property taxpayers should have a say in how their property tax dollars are expended. Counties are responsible for providing a multitude of services, and public defense is just one of the services that is competing for property tax dollars. This is not to say that public defense should not receive adequate funding but receiving county funding requires decision

makers to weigh all needs of the county. This would be the same issue with funding from the state of Idaho. The state must also assess all needs and priorities in any given budget cycle.

ABA Principle 2 requires active participation from the private bar. Neither the counties nor the state of Idaho has control over the private bar and there is no requirement that the private bar engage in public defense work.

ABA Principle 3 requires screening for eligibility. Currently the determination of indigency resides with the courts and should remain there. As counties have learned with the funding of the indigent medical services program, obtaining information regarding resources is a long, laborious process that is often met with resistance. Additional funding would be needed to hire clerks to investigate financial matters. The expenditure of funds on this principle does not seem well advised.

ABA Principle 4 states that defense counsel is provided sufficient time and a confidential space to meet with the client. Ada County, in both the courthouse and the Ada County Jail has made significant efforts to comport with this requirement. However, it is important to point out that defense counsel is licensed to practice law and has some control over the system. Defense counsel can ask the judge for more time and state on the record that he or she has not had time to consult in private with the client. In addition, defense counsel can refuse to speak with a client unless in a controlled, confidential environment. It is also unclear who would monitor compliance with this principle other than the assigned attorney. Expending resources on hiring someone to monitor compliance appears to be micro management.

The same can be said regarding ABA Principle 5. Defense counsel is licensed to practice law and has a duty to control the quality of his or her representation. It is also difficult to determine the nexus between quality representation and workload. Some individuals are quite good at juggling multiple tasks and providing quality representation while others get bogged down in minute detail and still cannot provide quality representation. This appears to be a management issue that Ada County's public defender is capable of overseeing without outside oversight.

ABA Principle 6 states that defense counsel's ability, training and experience match the complexity of a case. There is no requirement for private defense counsel to have the ability, training and experience to match the complexity of a case and the Rules of Professional Conduct require only that a lawyer be competent. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.1. The commentary states that "[a] newly admitted lawyer can be as competent as a practitioner with long experience." Again, this is a management issue. Ada County's public defender is capable of assessing the capabilities of staff and assigning work appropriately without outside oversight.

ABA Principle 7 requires the same attorney to continuously represent the client until completion of the case. Although this is a desirable goal, it cannot be made mandatory without a dramatic

increase in staffing. It would also require the courts to do its business in a different way. Again, the concern is whether this is the right expenditure of funds when there are limited resources.

ABA Principle 8 requires parity between defense counsel and prosecution with respect to resources and that defense counsel be an equal partner in the justice system. It is unclear what constitutes being an equal partner in the justice system. It is also unclear what constitutes parity. Is it testing the same drug twice, is it a dollar for dollar expenditure? Is it having similar number of lawyers, support staff, investigators, and access to ancillary resources. Is it compensation? Concrete definitions would be a place to start.

ABA Principle 9 states that defense counsel is provided with and required to attend continuing education. In order to maintain licensure in the state of Idaho, all attorneys must complete continuing education. Public defenders should be encouraged to attend training that are directed at public defense. It is unclear why additional resources are necessary when continuing education is already required. Perhaps, the issue is that more training specifically directed at public defense needs to be available.

ABA Principle 10 states that defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. Ada County agrees that public defenders should be reviewed for quality and effectiveness just like any other employee. Again, attorneys in Idaho must comply with the Idaho Rules of Professional Conduct which require competence, the maintenance of confidentiality, etc. Having national standards for public defenders and expending resources on a manager to ensure compliance with national standards does not appear to be a wise use of resources, especially when national standards are currently only advisory. Adding national standards to the mix, beyond carefully crafted and meaningful local standards, is simply redundant and unnecessary.

2. Performance Guidelines of the NLADA (National Legal Aid and Defender Association)

Ada County questions using the performance guidelines of the NLADA for Idaho, when the same organization made errors when assessing Idaho's system. For example, the 2010 NLADA Report stated that the Ada County public defender's office handled 2,856 felony cases in 2007. Ada County questions how they came to this conclusion when the Prosecutor's Office only filed 2,468 felony cases. Since some individuals are represented by private counsel and it is assumed that the Public Defender's Office handled 70% of the cases, that is 1,727 cases. A defendant is entitled to a new trial if their public defense was ineffective. 1,486 cases were appealed across the state but zero new trials were granted. In addition, it is a huge leap to state that all counties are providing inadequate representation on the basis of the NLADA report.

The language in the proposed contract and that is proposed to be the standard for public defenders in Idaho is taken directly from the National Legal Aid & Defender Association website. http://www.nlada.net/library/article/na_performanceguidelines. In order to get the actual performance guidelines requires a person to register and provide an e-mail address. Ada

County questions requiring public defenders in Idaho to be a part of this national organization. Lawyers have the option of being a member of the American Bar Association but it is not a requirement. It would seem more appropriate to start a local public defender organization rather than rely on an organization based in Washington, DC

That being said, although the Performance Guidelines of the NLADA are labelled guidelines, the actual language in the contract indicates that they are mandatory. In essence then, the Commission wants to make these NLADA performance guidelines mandatory for all public defenders. The contract states that if a public defender deviates from a NLADA performance guideline, the attorney must provide a legitimate and articulated reason. Again this appears to be micro-management of a professional. And someone must be hired to hear the articulation of the legitimate and articulated reason. Attorneys are governed by the Idaho Rules of Professional Conduct, yet the proposed standards seem to ignore that fact. No one disagrees that when a public defender is part of a public defender office, the public defender has authority to manage his employees so that adequate public defense is provided. And no one disagrees that an attorney who contracts with a county to provide public defense should adhere to contract requirements. The question is whether the NLADA performance requirements in the contract will discourage most competent attorneys from taking on a contract position. Public defenders in public defender offices may choose not to be public defenders when they are not treated like professional attorneys and must clear every legal decision with someone who is monitoring compliance with the NLADA standards. In addition, the proposed standards in the contract will ultimately require each county using a contract to hire an attorney to ensure that the attorney under the contract is adhering to the record requirements, the ten principles, the performance guidelines and performance requirements. Again, the question is whether this is a wise use of limited funding. It seems that the monetary focus should be on enhanced lawyering skills rather micro management of a licensed professional.

3. Performance Requirements

The performance requirements state that the person under contract will make reasonable effort to comply including making legitimate and articulated reasons for deviation from the NLADA Performance Guidelines. This provision should be stricken. Performance Requirements, A-C, and E-K appear reasonable. D requires compliance with ABA Opinion 06-441. The ABA opinion addresses generally the ethical constraints on individual attorneys regarding caseload/workload. It is couched in terms of all attorneys but is clearly more directed at public defenders. It is related to the general Rules of Professional Conduct that exist in Idaho but it is Ada County's understanding that it has not been formally adopted by the Idaho Bar. It provides generally that an attorney cannot accept case assignments beyond the ethical ability to provide ethical representation. The opinion is lengthy. It is controversial even within the public defender community. The implications are subject to interpretation. It can be argued that it empowers individual attorneys within an office to define caseload/workload based upon individual perception of ethical duty. One attorney may view a given caseload/workload to violate this ethical duty while another may feel the same workload/caseload is ethically

manageable. The dilemma is obvious. Such a standard is redundant and unnecessary and should not be included.

4. Training Requirements

In order to maintain a license in the state of Idaho, all attorneys must complete continuing education, including ethics, and report the completion of training every three years to the Idaho State Bar. Public defense attorneys should strive to attend training related to their public defense practice. Sometimes the training is not available so mandating hours is not reasonable. Rather than creating a system of micro-management and spending dollars unnecessarily to create this system of micro-management, these dollars could be spent on providing the right kind of training for public defenders.

5. Experience Requirements

Section A is reasonable. It requires familiarity but does not mandate. Attorneys are trained to find information because it is impossible to remember everything. Being familiar indicates you know how to find the information if needed. Sections B through J could be goals but mandating the years of experience is problematic on a variety of fronts. First no other attorney who is licensed to practice law in the state of Idaho is required to have a certain number of years of experience in a particular area. As previously noted, the commentary to the Idaho Rules of Professional Conduct state that a newly admitted lawyer can be as competent as an attorney with long experience. If a defendant were to hire private counsel, that private counsel would not be required to have a certain number of years of experience. In addition, what happens if a county or the state cannot find attorneys who want to be public defenders with the requisite years of experience. Who then will be legal counsel for indigent defendants? Again, it goes to management. Some attorneys learn the skills of effective practice quickly while others take more time. Number of years does not equate to effective public defense, or to the effective practice of law in any other area.

6. Reporting Requirements

The statute currently delineates the reporting requirements for public defenders. The Ada County Public Defender indicated that it was a huge task to meet the statutory requirements for reporting. If he is required to address all of the questions on the proposed reporting form, he will have to hire support staff to fulfill that function. Again, Ada County questions focusing scarce resources on functions that do not address the allegation that public defense representation is ineffective. In fact, every decision should start with the premise that, will this decision and the expenditure of funds make public defense in Idaho more effective.

7. Other Observations

It is intriguing that the requirements for public defenders do not apply to private practitioners, prosecutors, or judges. The effort to improve the defender system addresses only one component of the criminal justice puzzle. So why are public defenders being singled out?

The draft mentions “problem solving courts”. These courts, together with a wide variety of specialized dockets, create staffing issues for counties. Officially designated problem solving courts do require local agencies and counties to agree to participate. Specialized “dockets” do not. It is argued that judges may unilaterally create such dockets as they see fit. All serve to stretch resources and undermine the ability to address core responsibilities for a fraction of the overall clientele. It may come to pass, regardless of the real or perceived good problem solving courts and specialized dockets may do, that an assessment of priorities and core responsibilities will need to take place. At the least, court imposed duties that transcend traditional and clearly defined constitutional mandate should be funded by the state.

In the event the Public Defense Commission (“PDC”) is given enforcement authority over counties and public defenders are directly accountable to the PDC, the PDC should be truly a public defender commission. The NLADA, which is so prominently referenced in the proposed contract, has established guidelines for such commissions. There are several provisions. Included are the following: no single branch of government should have a majority of votes; a majority of the commission should consist of practicing attorneys; the commission should not include judges, prosecutors, or law enforcement officials. The current PDC does not comport with these provisions. If the PDC intends to give the ABA and the NLADA the force of law, it should be a commission that applies the same ideals to itself.

And finally, the PDC envisions becoming the enforcement agency over all public defenders, including public defender offices that are funded by counties. Ada County is not in favor of more shared employees between the state and the county because such a structure creates its own set of problems. The system of shared employees works as long as there are no personnel issues but personnel issues frequently occur and consequently the system breaks down. For example, one could envision a scenario where the state public defender believes a county public defender is doing a great job but judges, clients and others point out problems with the public defender’s performance in the courtroom. In such a situation, the county would need to take action but would be prohibited from doing so by the state. Such a system is unworkable. There needs to be clear lines of who ultimately has authority so that personnel issues can be addressed. This requires that a public defender either have a contract/be employed by the state or a public defender have a contract/be an employee of a county.

Again, Ada County thanks you for the opportunity to comment on the proposed standards for public defenders. Ada County is committed to ensuring that funds allocated to public defense are utilized in a manner that results in indigent defendants receiving adequate public defense. We ask that the Interim Committee adopt standards that focus on the professionalism of

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attorneys and to expend the limited resources in ways that assist attorneys in becoming more effective public defenders.

Sincerely,

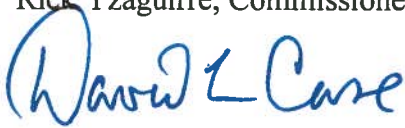
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