

MINUTES
Approved by the Committee
Public Defense Reform Interim Committee
Friday, October 16, 2015
9:00 AM to 4:00 PM
WW53, State Capitol
Boise, Idaho

Co-chair Senator Todd Lakey called the meeting to order at 9:05 a.m. and requested a silent roll call. Members present were: Co-chair Lakey, Co-chair Representative Christy Perry, Senators Dean Mortimer, Jim Guthrie, and Cherie Buckner-Webb and Representatives Lynn Luker, Janet Trujillo, Patrick McDonald, and John Gannon. Senator Curt McKenzie was absent and excused. Legislative Services Offices (LSO) staff members present were Ryan Bush, Jared Hoskins, Lara Margelofsky, and Cydney Gaudet.

Others in attendance: Judge Molly Huskey, Public Defense Commission; Sara Thomas and Eric Fredericksen, SAPD; Lorna Jorgensen, Ada County; Daniel Chadwick, Idaho Association of Counties; Alan Trimming, Ada County Public Defender; Judge Barry Wood, Idaho Supreme Court; Kathy Griesmeyer, ACLU Idaho; and Nichole Devaney, PDC.

NOTE: Copies of presentations, handouts, and reference materials can be found at: www.legislature.idaho.gov and are also on file at the Legislative Services Office.

Minutes from the previous meeting were approved with the following corrections, as previously suggested by **Representative Luker**: Page 5, line 4, "there" should be "their".

The first presenter was **Judge Molly Huskey** of the Court of Appeals and the Public Defense Commission (PDC). She was present to give an update on the PDC and to review the model contract terms.

Judge Huskey stated that the PDC had been looking for a director, but has put that search on hold. The search received four applicants the first time it was opened, and one additional applicant the second time it was opened. The PDC wasn't sure what this committee would be doing with the PDC, and has decided to wait on that information in case they need to look for a different skill set.

Judge Huskey stated that there was a hearing in Ada County this morning on the lawsuit. The PDC intends to continue its regular meetings and seeks to finalize the contract terms and make those recommendations available for the legislative session. The PDC has decided not to seek temporary rule-making authority for spending for scholarship review, but to go through the regular rule-making process. There has been some language added to statute that may give the PDC some time to get that done.

Judge Huskey gave an overview of how the PDC came to the terms of the model contract. She stated that the PDC sought feedback from Daniel Chadwick of the Idaho Association of Counties to try to determine what the counties were looking for. The PDC then decided it wanted to offer the counties a menu, so they could pick individual provisions as needed, without having to use all of them, and would be free to add information that is county-specific or region-specific.

The PDC talked about the type of cases that a public defender would be required to represent or appear in court for. In addition to criminal cases, public defenders are frequently being appointed in cases of child termination or where there is a contempt because an individual has not paid child support, or in mental health commitment, or an extradition case. There may need to be some separate negotiations under the contract to address these differences.

Judge Huskey stated that the statute that requires mandatory reporting is very broad and also very vague. It doesn't really define what kind of information needs to be gathered. **Judge Huskey** pointed

out that a [letter from a public defender](#) specifically mentions the reporting requirement for CLEs. The PDC hopes to explain the kind of information needed for this requirement.

Judge Huskey addressed a letter received from Ada County, and acknowledged that the recommendations for reporting requirements are much more detailed than are required now and will require a defending attorney to keep records. **Judge Huskey** stated that she believes taxpayers have a right to know how their money is being spent.

Judge Huskey said the PDC believes that commissions and boards should have the right to look at public defense records, including operational expenses and additional funding for extraordinary costs. These records would not include attorney-client privileged information. Letters from a public defender and Ada County express concern that this requirement may be so onerous and burdensome that they would need additional staff to perform the obligation. **Judge Huskey** said she believes there are some factual misrepresentations in the Ada County letter, but was not prepared to address them at this meeting. She said that if they were adequately reporting under the existing statute now, they wouldn't need additional staffing. **Judge Huskey** said the recommendation on reporting requirements doesn't really change the existing statutes; it clarifies them and may require more information, but it's information that should already be kept. **Judge Huskey** noted that State Bar rules require that records should be kept for five years.

Judge Huskey said that, in regards to performance expectations, the Ten Principles are the foundation and minimum level that public defenders should be expected to comply with. Presently, the Ten Principles are non-mandatory guidelines. The PDC is asking this committee to make them mandatory, because as long as they are guidelines, they can be freely disregarded.

Judge Huskey said that the PDC broke down the different types of cases and looked at what the expectations are for someone to defend in those various cases. Serious felonies are difficult cases that require many hours of work, and you do not want someone right out of law school handling those cases. The PDC recommends some minimum standards for such cases. There might be reasons for public defenders to deviate from the terms, but the PDC recommendation asks for an explanation to be given. Based on recommendations from the Idaho Supreme Court, the PDC recommends that if a first-degree murder charge is filed, that it be treated as a capital case, for purposes of their standards.

Judge Huskey said that there may be differences in defining a "significant and material increase." The PDC doesn't feel it's in a position to uniformly define it, because it may widely vary by case.

Judge Huskey said that the training requirement section of the PDC's recommendation is where some amount of angst is. The PDC wants public defenders to have certain skill sets, and recommends the regional model, to make it more likely that qualified counsel will be available. The PDC broke down the different kinds of felonies, and recommends that for a crime that could result in incarceration of greater than 15 years, there are certain higher qualifications a public defender needs to have. The great majority of crimes in Idaho are below this threshold. Public defenders in areas such as juvenile court, child protection, problem-solving courts, and appellate proceedings also need specialized training or consideration.

For case reporting purposes, the PDC recommends using the same case definitions as the Supreme Court to create uniformity.

Judge Huskey noted that if these standards are adopted, it's true that there will be increased costs. It's up to this committee if they are standards that they wish to adopt. She gave an example of the unwillingness to comply with guidelines when they are only recommendations. She commented that there will be resistance either way the committee goes.

Representative McDonald asked where the courts are in this process. He observed that that's why there are judges – to make sure the defendant's rights are supported. In his experience, the courts have been there to ensure that a quality defense is provided. He ask if this is not

happening. **Judge Huskey** replied that the courts have an obligation to ensure that due process is provided, but cannot advocate for the defendant. The judge has to be neutral and detached. The judge also doesn't know everything about the case and the defense's strategy choices. The courts have no business inserting themselves into proceedings except to make sure that there is procedural and substantive due process.

Representative McDonald asked then who is responsible for making sure the rights of the defendant are upheld. **Judge Huskey** replied that she thinks that that is exactly what this committee is here to decide. In the best case scenario, there would be qualified and competent public defenders who would zealously advocate for their clients and protect their clients' interests.

Representative Luker asked if Judge Huskey sees advantages in putting the PDC's recommendations into a contract, versus making them statutory requirements. **Judge Huskey** replied that the reporting requirements could easily be added into statute, in terms of what is required to go in annual reports. If the training or experience requirements were statutory, and those standards were not met, then the question comes back to liability. The counties would have a hard time enforcing them as statutes without some compensatory funds. It could have some unintended consequences, like people suing for not doing what it required in statute. Others recommendations could also be incorporated into rules.

Representative Luker asked if Judge Huskey sees any difference from a liability standpoint if the requirements are in a contract or in statute. **Judge Huskey** replied that in the case of contract, it would be a breach of contract issue, and since that person wouldn't be a party to the contract, the matter would be between the county and the contracting attorney. It's possible there could still be involved in lawsuits, especially in post-conviction.

Representative Luker said that counties are anticipating a 20-30 percent increase in costs, and asked if that encompasses what the PDC is recommending as well. **Judge Huskey** replied that she thinks that amount would encompass some of these things, but not all. The contract terms would be additional costs, but in the regional system there could be economies of scale.

Senator Guthrie asked to what extent the PDC yielded to feedback received from public defenders, and whether the recommendations reflect that feedback. **Judge Huskey** replied that it does reflect both positive and negative feedback. Feedback was solicited, but not much was given. The primary message in the feedback was that things are fine the way they are and help isn't needed. An example of feedback that was included in the recommendations: clarification is needed on whether reporting information is completed on the final day of the county fiscal year or the state fiscal year.

Senator Guthrie commented that people living in rural areas won't have access to the same level of representation (protections, services, etc.) as people living within city limits, so he disagrees with Judge Huskey's earlier comments on this. **Senator Guthrie** asked if there was any consideration given to a model where those who are engaged now could be grandfathered in and new contracts would move forward as a mandate. **Judge Huskey** responded to Senator Guthrie's comment regarding remotely located citizens by noting that firefighters, servicemen, doctors, etc., all receive the same training, so there are minimum standards and oversights that apply to these positions regardless of location. This is something that we can rely on when it comes to public defenders. **Judge Huskey** concluded by saying she does not think that individuals should be grandfathered in because it acknowledges a deficiency that the state is unwilling to resolve at this time, putting the state in an untenable position.

Senator Mortimer asked if the PDC's suggested model would change in regards to what was received from Ada County or the letter; specifically, how would Judge Huskey respond to Ada County. **Judge Huskey** replied that the recommendations would not change as it relates to the letter from the individual defender and noted that the individual defender may simply need further education on the expectations. In terms of the Ada County letter, it would not change Judge Huskey's

recommendation personally, but the Public Defense Commission has not yet had the opportunity to review the letter in its entirety.

Senator Mortimer asked for Judge Huskey to address the caution that the committee should take concerning a standard requirement versus a statutory requirement and a goal versus a statutory requirement. **Judge Huskey** responded that the Ten Principles are guidelines, not mandatory requirements. However, the request is that those guidelines – to the extent that they can be made mandatory by this committee – be made mandatory.

Representative Gannon asked if it is a judicial branch function to address CLEs and implement recommendations rather than having the Legislature enact a statute. Judge Huskey replied that giving this responsibility to the judicial branch is one option and has been done in Nevada. **Judge Huskey** noted that this issue cannot be resolved solely by one branch or group, as it is a systemic issue that will require support and cooperation from all branches of government. She added that it's not entirely clear that the court can provide substantive legislative action and call it a court rule when it was something that could have been done by the Legislature.

Representative Trujillo asked Judge Huskey what she thinks some good recommendations to the committee would be as far as enforcement. **Judge Huskey** replied that she was unsure whether she could answer that, but thought it's possible that the committee would like the Public Defense Commission only to enforce the reporting requirements. She said that the only way to enforce them would be to have any contract by public defender services be approved by the Public Defense Commission, essentially giving them party status so that they could enforce that. Additional staff may be needed to do so.

Senator Buckner-Webb asked if cultural competence is part of the training and development of CLEs. **Judge Huskey** replied that there are problems with cultural competence and that it's an important issue. Recommendations have been made to have a social worker or a paralegal who can reach out to the Hispanic-Latino community and understand the cultural complexities.

Co-chair Lakey asked Judge Huskey to address concerns about vertical representation. **Judge Huskey** replied that in certain cases it would be reasonable and legitimate for a public defender to deviate from the standard and explained that they cannot be in six courtrooms at the same time.

Co-chair Lakey asked if any members of the audience wanted to comment.

Ada County Public Defender **Alan Trimming** commented that he is in philosophical accord with much of what Judge Huskey said, but as an administrator he looks at the practical aspect. In that case, he thinks the financial implications are being grossly understated. He noted that vertical representation would not simply require staffing, but also cooperation and restructuring from the courts. When all the court-initiated programming and guidelines are evaluated, there is a good deal of wear-and-tear, time, and personnel required to resolve these issues. From a practical standpoint, he suggested that one must insist on basic, constitutionally-mandated, adequate representation. With the proposition of administering an office, there is the risk of allowing every single attorney to dictate their caseload responsibilities. **Mr. Trimming** stated that the recommendations have some notable exclusions: police, prosecutors, and judges. He reiterated that the financial implications must be considered. He disagreed with Judge Huskey to a significant degree regarding the reporting recommendations because he believes they are somewhat onerous.

Representative Luker commented that he is most concerned about ensuring that innocent people aren't imprisoned. He asked Mr. Trimming what would help public defenders ensure that. **Mr. Trimming** replied that the primary essentials are adequate investigative ancillary resources, adequate support staff, and competent, capable attorneys. Next, a prosecutorial philosophy of honest and open disclosure of evidence, shared goals on results, and judges that will implement. He sees a change in paradigm and philosophy in the criminal justice system, and urges the committee to ensure that we also change the response to those that are found guilty (i.e., rehabilitation opportunities).

Representative Gannon asked if any of the provisions in the contract are more restrictive on public defenders than they are on prosecutors. **Mr. Trimming** answered that to his knowledge, there aren't any. In general, he does think that more guidelines for public defenders exist, for good reasons.

Senator Guthrie asked if the document is workable and flexible to more feedback. **Mr. Trimming** replied that he will participate in soliciting more feedback in the future as he is able to. **Senator Guthrie** responded that the document is definitive and called for specific rebuttal from those who will be subject to the provisions on what would work. He asked if Mr. Trimming sees that action as more forthcoming than it has been, and what that would look like. **Mr. Trimming** said that he is not imminently familiar with the operations of all other offices, so he is hesitant to speak on their behalf. **Mr. Trimming** said that he would be willing to make some suggestions directly to the Public Defense Commission as to what he perceives as appropriate caseload guidelines within his own shop.

Co-chair Perry asked if Mr. Trimming and his office aspire to the Ten Principles generally. **Mr. Trimming** responded that he does. **Co-chair Perry** commented that if you compare the document to the Ten Principles, it doesn't seem like there is a lot of change, and then gave some examples. She asked if there is fear of bigger change on the county level. **Mr. Trimming** replied that he believes that the Ten Principles have merit and are aspirational, but as an administrator he has to look at how they function on a practical level, and he thinks that making them mandatory is a slippery slope. **Mr. Trimming** added that it will be a challenge to comply with the new recommendations in a fiscally responsible way.

Co-chair Lakey asked Mr. Chadwick of the Idaho Association of Counties to what degree he has seen implementation of the model contract in the counties. **Mr. Chadwick** said that they will have numbers that will help clarify this by the end of this month. He noted that if you increase accessibility to ancillary services, you deal with overhead. The conversion from the flat fee to the hourly rate is where he has seen additional costs.

Co-chair Lakey asked if Mr. Chadwick sees any input or opportunity to respond from the boards of county commissioners on these model terms. **Mr. Chadwick** stated that the Ada County response was the only one that they or the Public Defense Commission received. He thinks that if these recommendations become mandatory, he expects to see more conversation from the counties. **Co-chair Lakey** asked what Mr. Chadwick speculates is the reason for lack of response from the counties. **Mr. Chadwick** stated that he does not think it has been thought through by the counties as thoroughly as they had hoped. **Co-chair Lakey** suggested that it could be a question of counties not understanding that these models would become policy. **Mr. Chadwick** said he thinks that's a correct assumption.

Representative Luker asked Mr. Chadwick if he would consider some kind of financial incentive to encourage reporting. **Mr. Chadwick** replied that he doesn't think they are quite there yet. He would consider it, but he doesn't think that's the biggest issue. The education and training for ancillary services and implementing guidelines is going to require the money. **Representative Luker** agreed that the cost is in those issues, but stated that having the data up front to understand where the problems are is key. **Mr. Chadwick** said he agreed, but doesn't know where the incentive would be best placed to ensure reporting is completed.

Mr. Chadwick said that in regards to what the consequence is for failure to adhere to mandatory contract terms, his answer would be that there is still a 6th Amendment problem if you fail to carry out those terms.

Senator Guthrie asked Mr. Chadwick if there is a point person that could summarize concerns and represent the group in terms of feedback. **Mr. Chadwick** replied that his team is the point of contact, but they would have to be more intentional about asking specific questions, as the previous outreach was very general. He added that he'd be happy to do that if that's what the committee recommends.

Representative Gannon asked Mr. Chadwick if the contract was mandatory and was breached, would those represented by that particular attorney have a right to assert ineffective representation by counsel and have decisions reversed for that reason. **Mr. Chadwick** said he would be happy to yield the question to someone better prepared to answer, but added that if there is a breach of contract, it would be grounds for a board of county commissioners to terminate that contract without regard to the claims.

Jared Hoskins, LSO Senior Budget & Policy Analyst, was next to testify before the Committee. **Mr. Hoskins** advised that he would be presenting information regarding the various revenue sources that are behind the partial funding that is provided to counties in the states that have decentralized public defense systems. He indicated that he had also researched the statutory schemes that effectuate that interplay between the state and local governments in terms of funding.

Mr. Hoskins reminded the committee that Indiana has a completely decentralized public defense system, and that services are provided at the county level. However there is a state-wide commission that creates standards regarding work load, qualifications, parity, etc. This commission has money that it can use to reimburse counties up to 40 percent on non-capital felonies and juvenile cases; and up to 50 percent on capital cases. The money used to reimburse the counties comes from the Public Defense Fund that was created in statute. This fund has two revenue sources; dedicated funds and general funds. The general funds, which constitute approximately two-thirds of the fund, consist primarily of sales tax, personal income tax, and corporate income tax, and the dedicated funds come from court fees. **Mr. Hoskins** explained that in Indiana there are a myriad of court fees, and that depending on the fee there is an allocation to the cities, the counties, and to the state. Out of the dedicated funds allocated to the state there is a statutory transfer of \$7.4 Million each year to the Public Defense Fund.

Mr. Hoskins then went over the portions of the statutory structure in Indiana that he thought the Committee would be most interested in.

IC 33-40-5-4 contains the operative language that gives the commission the authority to condition funding on compliance with the standards.

IC 33-40-6 created the Public Defense Fund, and indicates that the fund was established to receive court costs or other revenues. This has been interpreted to be comprised of the \$7.4 million from court costs as well as the general fund appropriation.

IC 33-40-6-2 gives authorization to invest funds.

IC 33-40-6-3 contains the information regarding reversion of money to the state General Fund, which is essentially carry-over authority. This means that if an appropriation is not spent during the fiscal year, the amount not spent rolls over to the next fiscal year and is then removed.

IC 33-40-6-4 provides the process in which county auditors may request the funding.

IC 33-40-6-5 sets up the process for reimbursement from the commission. This requires a certification by the county auditor and a determination from the commission that the standards have been complied with; followed by an issuance of a warrant from the state auditor.

IC 33-40-6-6 gives certain claims priority over other claims, and provides that the capital representation costs are given priority.

Co-chair Perry asked who in Indiana determines if the counties have met their standards so that they can collect their reimbursement on a quarterly basis. **Mr. Hoskins** indicated that was covered in Indiana Code **33-40-6-5**. He stated that it was basically on the honor system in that the county auditor certifies that the requirements have been met; however, the commission does have the right to determine if the requirements have been satisfied. He indicated that he did not find anything in their code that requires the commission to investigate or audit the counties.

Senator Mortimer asked if there were any provisions in Indiana law that would allow a judge to determine that a person who had received services was able to pay reimbursement for those services. **Mr. Hoskins** indicated that there were several provisions that provided for reimbursement of public defense costs. Although he did not recall specifically if Indiana had that provision there would be plenty of other examples.

Mr. Hoskins continued his presentation by stating that Nebraska was very similar to Indiana in that it has a decentralized system wherein counties provide the public defense services. They have a state commission, which in addition to creating standards, provides direct representation in some cases, such as appeals, capital cases, and some serious felonies. They also incentivize compliance by reimbursing counties 25 percent of their actual expenditures in felony representation. The source of these revenues is 100 percent dedicated funds, which come from the Indigent Defense Fee, which is a \$3 for each case filed in any court, including appeals.

Mr. Hoskins advised that in following up on this information in Nebraska he found that this practice was not currently being followed, and that there are some efforts in the works to repeal some of their statutes. Currently the commission is only providing the representation on some of the cases he had previously mentioned, so the statute is being ignored, and the state is engaged in some reform efforts.

Co-chair Lakey asked which aspect of the statute was being ignored. **Mr. Hoskins** indicated that the fees that were going into the fund were not being reimbursed back to the counties, and the funds are being used to provide direct representation by the commission. He added that he had been advised that many of the counties were not even aware of the services.

Co-chair Perry stated that Idaho had created a separate Public Defense Commission, and also had the State Appellate Public Defender's office. She asked if Nebraska had essentially combined these two offices. **Mr. Hoskins** indicated that would be a good characterization of what Nebraska had done. He did note that they still had counties that were providing appellate representation, but the commission would provide the representation if requested. He also noted that in Indiana they have some other agencies that also provide some services.

Mr. Hoskins then walked the committee through the Nebraska statutes.

29-3927 lays out the commission duties and gives them authority to adopt guidelines and standards that include reimbursement to counties, qualifications, compensation rates, and maximum case loads. He also pointed out the disclaimer that says if the standards are not followed it does not constitute ineffective assistance of counsel, or some other grounds for post-conviction or habeas relief.

29-3921 relates to creation of a fund that is the revenue behind the carrot that Nebraska gives to the counties. This fund consists of the one fee in **33-156**, the indigent defense fee.

29-3933 outlines the process for requesting reimbursement and states that what counties are supposed to do was to submit a plan, issue a statement of intent to comply with the standards, and then issue a certified request for reimbursement. Then the commission is authorized to do some sort of investigation to determine that the counties are meeting the requirements. **Mr. Hoskins** reminded the committee that this was not now happening in Nebraska.

Representative Gannon asked if the \$3 that goes into the Indigent Defense Fee was paid by counties and cities when they filed criminal complaints. **Mr. Hoskins** indicated that according to Nebraska Code **33-156** the fee would be taxed as costs for each case filed in each county court and district court, including appeals, so he thought that would include civil and criminal cases and would probably include complaints filed by a municipal organization or a county.

Representative Gannon said the way that he understood it, counties were not reimbursed for public defender costs for city prosecutions, and asked if this would be a way to get monies from cities to pay for the cost of public defenders. **Mr. Hoskins** indicated that he was correct that cities did not

reimburse counties for these costs, and that attaching a fee for the filing of a complaint may be a way to raise some revenue. **Co-chair Lakey** indicated that if the committee decided to go down the fee route, they would need to explore it further as now cities and counties are not usually assessed a fee when they file a criminal complaint, but there may be court costs awarded in a criminal case or a filing fee for civil cases. **Mr. Hoskins** added that fees were a big issue, and that getting into it may be like opening a can of worms.

Mr. Hoskins indicated that they had not previously talked much about Michigan; however he thought it was an important model for Idaho to look at for a couple of reasons: 1) They had recently concluded some litigation, and that the structure that it has, and the legislation that had passed, were a direct result of that litigation. In fact the litigation was dismissed, as moot, as soon as the legislation passed. 2) They also have a decentralized system where counties provide public defense services and the state provides some funding to fund the cost of compliance. In Michigan the commission proposes standards for approval by the Supreme Court. At first there is a public hearing on the standard they do follow a form of a negotiated rule-making process. Once the Supreme Court has approved the standard it becomes final. At that point counties are required to submit a plan and a cost analysis indicating how they are going to comply with that standard and how much it is going to cost them to comply. The commission then reviews and approves these plans, and there is a dispute process in the case that the plans are not approved. Once approved the commission allocates grants to the counties. The commission is also given the authority to investigate, audit, and review the local public defense operations for compliance with the standards. In talking with members of the commission **Mr. Hoskins** was told that as this process is so new they are in the process of hiring staff. They have just completed their public hearing on the first four standards, which they are proposing to the Supreme Court in early 2016. **Mr. Hoskins** indicated that he did not find any statutes in Michigan that created a fund, however in talking to members of the commission he was advised that the grants are to be funded entirely with state general funds.

Of the three states that **Mr. Hoskins** had discussed, he pointed out that there was a state that used general and dedicated funds, a state that used purely dedicated funds, and finally a state that used purely general funds to fund the partial reimbursement to counties. He then walked the committee through the Michigan statutes.

780.985 is the enabling statute of the commission that is also granted reappropriation authority. The general duties of the commission are to propose minimum standards to the Supreme Court. This section also covers the process of the public hearings and the final approval by the Supreme Court.

780.989 contains more information regarding the duties of the commission, including the duty to oversee the implementation, enforcement, and modification of minimum standards and rules. It also gives the authority for oversight because it can investigate, audit and review the operation of indigent criminal defense services. This section also goes through the ability to hire staff along with other administrative type tasks.

780.991 provides more detail into what the standards should be. He pointed out that in this section the wording looks very similar to the ABA Ten Principles as nine out of ten of the principles were incorporated nearly verbatim into the statute. He quoted a portion that read "In establishing minimum standards, rules, and procedures, the MIDC shall adhere to the following principles," and indicated that this was essentially a guide in that they are supposed to take in the principles as they start drafting the standards, which are then ultimately submitted to the Supreme Court. He explained that this was done in a piecemeal process, and that the standards are submitted one or two at a time for approval, and then adopted by the counties so that they can estimate the cost of compliance. In this way the counties are not given all of the new standards to comply with all at one time. **Mr. Hoskins** pointed out that the only standard that appears to be missing is standard #8 regarding parity of pay with prosecutors. This section also goes into the eligibility requirements for the right to counsel at public expense and provides, the same as Idaho does, for the rebuttable

presumption of indigency and provides for other mechanisms in case someone doesn't make the rebuttable threshold that they can otherwise establish their indigency.

780.993 covers the interplay between the state and the counties. It requires cooperation, and provides that after the Supreme Court approves the recommended standards, the counties must submit their plans and their expected costs to comply with that plan. This section also describes the plan approval stage and explains what happens if the commission disagrees with a plan. This includes a series of meetings to confer, followed by a dispute process if they are not able to agree. If the plan is approved by the commission, this section covers the funding provision through grants. **Mr. Hoskins** pointed out that the counties were not obligated to pay the cost of complying with the standards, as the state is required to pick up that cost.

780.995 outlines the dispute process. He noted that in Idaho the DEQ has an administrative enforcement proceeding which it can initiate for hazardous waste violations that is very similar to this section. So there is some precedent for a similar process in Idaho. In Michigan, if a county disputes the commission's finding, the first requirement is mediation wherein the mediator submits their recommendation to the commission. The commission then approves that recommendation. If the county still disagrees, they have another avenue to dispute that by filing an action for equitable relief in court. To address the problem of counties trying to intentionally opt out of their local systems and allow the state to take over their system, the code allows the state to take over a county's system. But to disincentivize that from being the goal of the counties, a county must not only maintain their local share of funding the program but they are also required to pay a graduated portion of the state's cost in bringing the system into compliance with the standards. This portion of the code outlines this graduated portion, and allows the county to opt back in.

780.997 says that even though the Supreme Court may have approved a minimum standard as final, and there is a county plan that addresses that standard, the counties requirement to abide by that standard is contingent upon appropriation of money from the state. **Mr. Hoskins** explained if there were funding issues, and the state did not have the money to appropriate the additional cost of compliance, the counties were essentially relieved of that duty.

Mr. Hoskins pointed out that Utah is currently going through some reform efforts, and from what he has heard, they are looking directly at Michigan as a model to structure their system.

In discussing the Michigan funding system **Mr. Hoskins** explained that it starts with the county's local share, and then the county has to identify the cost of compliance, and any funding gap the state is required to pick up.

Mr. Hoskins then stated that with help from the Association of Counties he has put together some information regarding what this type of structure might financially look like in Idaho. He began with the FY 14 county expenditures which he estimated at \$24.1 million, and the county FY 15 budgets which he estimated at \$27.5 million. The difference between the 2014 expenditures and the 2015 budget showed an increase of 14.1 percent. He indicated that there had been discussions regarding a recent increase of 20-30 percent, and explained that maybe the discrepancy was that his numbers were going from actual expenditures to budget as opposed to what they may see in November of actual expenditures to actual expenditures in one year. He then estimated what the cost of compliance may be at different percentages of increase. He then explained, in looking at the counties baseline funding and assuming that there would be a 20 percent additional increase to that, there would be a \$5.5 million funding gap.

Co-chair Perry asked where the county baseline funding came from in Michigan. **Mr. Hoskins** indicated that he did not look at the actual county funding sources, but he did recall reading something about relief to county property tax payers, so he assumed that most of the public defense costs at the county level came from property taxes and other levies at the local level.

Co-chair Perry asked if **Mr. Hoskins** could look into that and send the committee the information. **Mr. Hoskins** agreed to obtain that information.

The committee recessed for ten minutes and was called back to order by **Co-chair Lakey** who indicated that the next item on the agenda was a discussion of the draft legislation. In beginning with Draft #12 dealing with the State Appellate Public Defender's office, he invited **Sara Thomas** to the podium. **Ms. Thomas** indicated that when the State Appellate Public Defender (SAPD) was originally created there was some question about the scope of their jurisdiction. This originally arose in a case in which there was a withheld judgement. They had moved to withdraw from the case and explained that because there was no conviction, and the statute was limited to convictions, they were not the appropriate representation in that appeal. The Idaho Supreme Court denied their request to withdraw and it became clear to the office that they were expected to step up in felony appeals, not just the felony appeals that were specifically articulated in the statute. Since that time their office has handled a number of cases that are not specifically articulated in the statute; however, they arise in the course of a case that is covered. She explained that the statute as currently written states that they take appeals in cases where there is a conviction after September 1, 1998. She advised that they also take interlocutory appeals, which are appeals in which the case is not yet final, so there is no actual conviction, but it is a felony case. As an example of this she indicated that if a District Court were to grant a motion to suppress, and the State wanted to appeal that before the case was dismissed, then that would be an interlocutory appeal and they have traditionally taken those cases.

Additionally the statute states that they only take post-conviction cases in which relief is denied. She explained that recently they had a very large post-conviction case that was appealed and the attorney that was handling it at the trial level had been appointed by the court and was being paid by the hour. The attorney wanted to keep the case and bill the county for that representation, however this was representation that the SAPD was willing to provide at no cost to the county. The court appointed attorney pointed out that the statute said that they could only represent someone if relief was denied, and in this case relief had been granted, and the state was appealing. The Idaho Supreme Court ultimately issued a writ of prohibition which prohibited the lower court from allowing the attorney to continue, and the SAPD was appointed in that case so the county is getting representation free of cost. **Ms. Thomas** explained that the proposed changes would identify, in statute, the cases that the SAPD is already handling and would allow them to point out that they did have jurisdiction in handling those cases, thereby taking that burden off of the counties.

Co-chair Lakey asked **Ms. Thomas** to confirm that there would not be any additional fiscal impact with this legislation. **Ms. Thomas** agreed. **Senator Mortimer** asked if the fiscal note would show a zero, and **Ms. Thomas** indicated that was correct.

Co-chair Perry asked if the draft legislation was acceptable to **Ms. Thomas** or if there were any changes to be made. **Ms. Thomas** indicated that as it is currently drafted it is fine.

Co-chair Lakey then moved on to Draft #13 related to the powers and duties of the State Public Defense Commission. He indicated that there had been some question on the ability to use funds to provide training. **Mr. Bush** explained that on the first page, in lines 12 through 16, described the training that the commission is currently providing, and that on the second page, in lines 11 through 13, was the new wording that gives the commission the power to use monies received from a grant or trust to provide the training that is already in statute.

Senator Mortimer indicated that the state is already providing funds, from general funds, to provide this training, and asked if these grants and trusts were in addition to those funds. **Mr. Bush** indicated that he had drafted this as grants and trusts in addition to the general funds. However, as it did not explicitly say that it may need to be revised.

Representative Luker indicated that they may need to add something such as "or otherwise appropriated," and he asked **Mr. Bush** where the terms grants and trusts came from in the context of what they currently are doing. **Mr. Bush** advised that grant monies had been mentioned at the previous meeting so he had added that to the draft, and he intended this to be a general catch-all for monies that they may receive from outside sources.

Co-chair Lakey asked **Judge Huskey** if she was comfortable with the wording. **Judge Huskey** indicated that their concern was in being able to spend the general fund money which they received, and at this time they did not have any grants or trusts. She added that they could keep the words grants and trusts in there in case they received any in the future, however she suggested they add "or otherwise appropriated" so it reflected their ability to spend their appropriation.

Senator Mortimer indicated that he felt by being specific in saying grants and trusts they were limiting the sources, and that they wanted to be able to accommodate all funding sources. **Co-chair Lakey** said that he agreed; however, he thought it would be good to leave those words in just in case they received a grant or some other additional funding. He then indicated that **Mr. Bush** now had some direction in revising the draft.

Co-chair Lakey then moved to Draft #14, which went over the reporting requirements. He indicated that they had added some additional language including a date as to when the report was to be filed. He reminded the committee that they had some discussion earlier regarding what potentially could be added to the reporting requirements, and he invited any additional thoughts or discussion.

Representative Luker said that he was sympathetic to not making the requirements too onerous, and was just looking for the information they would need to evaluate the workload. He indicated that he was more concerned about the workload as opposed to what the counties were paying because they would work that through on their budget, and the state would just need to know what to chip in, in broader terms. He did have a question about the wording "crimes and charges" as the charges were really what drove the complaint, so he was not sure why they needed both terms. **Mr. Bush** indicated that he had included the wording in this first draft based on discussions from the previous meeting. **Representative Luker** asked **Ms. Thomas** what her opinion was of reporting on both crimes and charges. **Ms. Thomas** indicated that charges were the driving force as there could be instances where there were fifteen counts based on one crime, and that it would be the charges that would indicate how complex the case would be. **Representative Luker** suggested that they substitute charges for crimes. **Ms. Thomas** added that the charges would include the crime, as well as the extent to which that crime was charged.

Co-chair Lakey asked **Ms. Thomas** if the result of the charges would also be important, for instance if there were fifteen charges and the person pled to one and fourteen were dismissed. **Ms. Thomas** said that the result was important as that was information that the county commissioners would need to know; however, the difficulty would be in defining what sort of results they were looking for. **Mr. Chadwick** indicated that this was the issue that he had wanted to talk about because he felt that the original charges would govern the workload for the public defender to a certain extent, and then the final charge, or how it ended up, would be a part of that information as well. However the question would be at what point in time they would want that information.

Senator Mortimer indicated that at this time they were asking for very limited information, and he wondered if they should put in a broadening clause, in recognition that down the road they would be looking for more information in the reports.

Co-chair Perry said that she realized that they needed the numbers and types of cases because they needed to set some standards regarding work loads; however, she thought it would be helpful if **Judge Huskey** could advise the committee as to what is currently being reported. She also stated that before they took out the word "crimes" she thought they should find out where the crime information from the state came from that went into the FBI and other nationwide crime data bases.

Representative Trujillo indicated that she felt it was important to keep expenditures in the reporting requirements because they did not know what direction they were headed and would be unable to plan if they did not have data. She said that if they were looking at the possibility of the state picking up budget deficits it would be important to know what the budgets may be, and to have some basis to understand what the expenditures were.

Representative Gannon said that the one concern he had was that the charges involved may be unrelated to the crime, as in the case of someone who committed a crime and then was charged with resisting arrest. He also asked if, within the expenditures, they were considering mileage and those types of things or if they were talking about the number of hours spent. If that was the case then the charges definitely needed to be divided up. He indicated that giving the commission some latitude in collecting this data made a lot of sense, so the legislation would not have to be rewritten in another couple of years.

Representative Luker suggested that they itemize the charges by indictment or complaint or by petition in juvenile cases. **Co-chair Lakey** indicated that the concept was that they wanted to make sure that all of the charges, and/or the crimes, were covered in whatever fashion they came forward.

Co-chair Lakey indicated that he thought this draft still needed some work in terms of what they wanted to include in the reporting requirements. He asked the committee how much specificity they wanted to put in compared to the proposal that **Judge Huskey** had spoken about. **Senator Mortimer** asked what information was currently available in the new justice system, and stated that he would also like to know what the counties would like to have in the reporting requirements.

Co-chair Lakey indicated that they would pursue obtaining more information from the counties and from the judges, and they would bring something back for further discussion at the next meeting.

Senator Guthrie said that he would like to keep it minimal due to their concerns regarding micromanaging. **Co-chair Lakey** said that he was probably in that same camp as well.

The committee recessed for lunch. **Co-chair Lakey** called the committee back to order at 1:30 p.m. and indicated that they had wanted to have some time for discussion regarding the items they had discussed earlier in the day, as well as any of the previous topics. He said that he would like to hear from each of the committee members regarding where they wanted to go from this point and to come to some common understanding of the aspirations that the committee had with the session coming up shortly.

Co-chair Perry said that there were a few items that they still needed to follow up on, one of which was to move the law clerks back to the Supreme Court in order to save the counties some money. The other was the possibility of creating a fund where public defenders could go, instead of having to go to a judge or county commissioner for money, for something such as a special witness or test. She indicated that these were some other ways that the state could help in the realm of public defense.

Representative Luker said that based on what **Mr. Trimming** had said earlier about needing help with the technical parts of cases such as lab tests or special witnesses, he thought there was an area where the state could potentially add some money through the commission, as they did with training, to provide some type of grants. He suggested that **Mr. Hoskins** could look to see if there were models for that in other states. **Representative Luker** also indicated that although they had not come to grips with what model to follow it appeared there was a preference for county administration; however, he would like to hear more from the rural county commissioners or public defenders on their thoughts. He suggested that they could possibly explore a way to give an incentive to very rural counties that might be interested in a Mini-Cassia-type of cooperative, or to partner up with their closest urban neighbor, as he saw benefit to full-time public defenders, as opposed to someone who does public defense on the side. He stated his belief that they would obtain a higher quality, and better service if they had full-time public defenders; however, some rural counties would just not be able to afford that.

Senator Buckner-Webb said that she felt, if the committee could agree, that some of the principles or terms are appropriate, then that would answer the question about the rural communities. She said that once they had clarity on how the principles worked that would help the committee make the determination about how it should be implemented.

Representative Trujillo said that she appreciated the time and the effort that everyone had put in helping the committee. She indicated that the committee was now at a crossroads and needed to look at the recommendations and start making some decisions to see how it all fit together.

Co-chair Lakey said that he felt they needed to get something moving for consideration as far as the big picture, and make some decisions on what this is going to look like, and indicated that he liked many of the things he heard about Michigan and Indiana. He advised that he was not inclined to dictate to the counties what they had to do in terms of a regional or individual plan, and would like to leave that open. He said that he liked the approaches they had heard about from Michigan and Indiana that seemed to be more carrot-oriented. In other words, if the county met the standards they would qualify for the funding that is required to meet the constitutional minimums that had been established. He added that they did need to also have a stick in terms of reporting requirements, but felt this was one area that they needed a little more input from counties on those requirements. He said that he foresaw that if they advised the counties of the standards, then the committee was looking at implementing that the counties would ask for the money to do it. Ultimately although he would like their input, how it is funded, and how the committee moves forward are the questions.

The other thing that **Co-chair Lakey** said what he liked about Michigan was that it looked like they were able to incorporate the ABA Ten Principles in terms of things that had to be considered in drafting and preparing contracts, and he would like the committee to go that direction. He also indicated that he felt they should prepare legislation for the upcoming session as it was time to start making the big decisions.

Representative Trujillo said that she agreed, and in the quick review she had done of the Michigan and Indiana plans she was very impressed with what Michigan was doing and thought that was an area that the committee needed to explore further. She indicated that they had a great opportunity this session to get legislation in place and get some of the parts put into motion.

Senator Mortimer said that he wanted to echo what others had said about getting input from the counties regarding the requirements, and he also felt it was important to find out what reporting was already in place. He indicated that he was not sure that they would ever get parity, but they could get fairness. In talking about the ABA Principles, he felt they were good goals, and that direction was important,; however, he was cautious in saying those needed to be adhered to if they were not going to do the same thing for prosecutors and judges. Having said that he indicated that it was time to figure out some kind of a starting place on a funding mechanism. Senator Mortimer stated he felt they had to move forward this year with at least a start on funding, reporting, and direction.

Senator Guthrie said he felt they needed to make the decision whether the commission was going to continue so they could move forward with some certainty in naming an Executive Director. He indicated he thought that the funding model was something they could decide on. He mentioned the increase of 20 percent, which **Mr. Hoskins** had outlined which would be approximately \$5 million, and he was interested to know if the cost of the contract model would be more than that. He also indicated that he thought they could make a decision on whether they wanted to go with a centralized or decentralized model, or maybe the opportunity for both depending on what the preference of the counties would be. He said that he felt the contract model was a little too aggressive, and that was why he had pressed earlier about getting some feedback on where that could be softened or made a little more user-friendly for those that are going to have to do the reporting.

Representative McDonald said that before the next meeting, and before they make any decisions on some of the items, he would like to find out what the commission thinks their job duties and responsibilities are, and what they think they should be, in writing. He said that he did not think that the state should dictate to the counties because it is their responsibility, and he thinks that the counties should approach this problem with as much importance as the state does. He indicated

that he felt it would be hard for the counties to have to report to a legislative committee when they had the commission to answer to as well. He indicated that if anyone had to enforce any regulations it should not be the legislative branch because that was what the commission was for. He said he felt this could be done; but to make every public defender in Idaho accountable to this committee just added another layer of government to the situation, and he was apprehensive about doing that. He advised that he thought they were headed in the right direction, and now it was time to fish or cut bait, but before they did that, he would like to know how far the commission is willing to go with regard to management of the process.

Representative Gannon indicated that **Co-chair Lakey** had expressed a lot of his thoughts in moving ahead with some kind of outline and general legislation to address the issue. He said that he really liked the specifics that **Co-chair Perry** had discussed about some kind of fund that would assist with expert witnesses and those types of needs as there is an issue in going to county commissioners to request funding due to attorney-client privilege among other things. He also indicated that delegation was very important and advised against getting too specific. To illustrate, he gave the example of requiring that the public defender meet with their client within five days, when the case was a misdemeanor and the attorney was 60 miles away. He pointed out that there would need to be some mechanisms or flexibility whereby another attorney in town could substitute or associate in to have the initial discussion. He indicated that it appeared there were three mechanisms for funding; general funds, the counties raising their justice fund levies, and the fee idea that Nebraska has followed. He stated that they could do a combination of these three mechanisms, but what he liked about the fee idea was that everyone was going to pay something into it, and the bigger counties were going to pay more, so that would indirectly provide subsidies for other counties that were financially strapped.

Representative Luker said that he too was impressed with the Michigan model; however, he did have some concern with the cumbersome nature of establishing the standards, but he was open to looking at that in concept. He saw the commission as having a substantial role in evaluating the standards and also in administering funds so he isn't exactly sure how that plays into it. He indicated that they had three sources of revenue; dedicated funds, which could be from fees, general funds, and property taxes; however, he was hesitant to raise levy rates as he didn't think the legislature would be too anxious to raise property taxes with the increased levy limit. He indicated that the fee idea was intriguing, but in the long run that was going to come out of property taxes because the counties and cities were going to have to pay that fee. He suggested that the fee certainly allocated responsibility to where the use of the system was coming from, and he asked **Mr. Hoskins** to find out if other states are charging filing fees on criminal cases. He said that it seemed to him that they are probably looking at using general funds to make the state's contribution with the counties continuing to handle business in the normal sense. He indicated that funding was still going to be an issue so his preference would be a measured approach to adding on to the general fund contribution over the next five years with the anticipation that there will be an ongoing commitment to take a portion of general funds and put it towards this issue. He indicated that secondarily they could explore the fee concept; however, that would likely come out of property taxes because that was where the counties get their money. To summarize, he said that the Michigan model made the most sense, funding will probably need to come from general funds, and the commission is going to have an increased role with regard to standards and in funding allocation.

Representative Luker said that his concern was what the stick would be if there was not compliance with the standards in the Michigan model. **Mr. Hoskins** indicated that the stick was essentially the threat of state takeover, and the increased share of funding by the county. **Representative Luker** said that he did not know if the state was in a position to do that without hiring Ada County to handle it for them, but generally, in concept, he liked the idea behind the Michigan approach.

Senator Guthrie said that he still thought that they should look at opportunities for reimbursement from those that were helped. He indicated that this was done on medically indigent people by

placing a statutory lien on their property, so that if they receive an inheritance or something in five to ten years the state can go back and retrieve some of the money. He indicated that he would like to know if this was legally possible, and if there was any interest in rolling this into the model somewhere. **Co-chair Lakey** indicated that currently people who receive assistance from the public defender on cases that he has seen, get ordered to reimburse something to the public defender so he believed the ability was there to do that; however, the ability to lien property may take a little more exploration. **Senator Mortimer** said that he was wondering if they could ask **Mr. Hoskins** to look specifically at other states to see what they have done in terms of reimbursements.

Representative Gannon said that it was his understanding that if someone owned property or had assets they would not qualify for a public defender. **Co-chair Lakey** indicated that it was not simply the ownership of property and assets as there are a series of questions that the court goes through to determine the qualification based on 187 percent of the poverty level.

Ms. Thomas added that when someone is ordered to repay for their public defense services that goes into a very long list of other things that they have to pay. She indicated that the Idaho Criminal Justice Commission at this time has a Fines & Fees Subcommittee that is looking at all of the fines and fees and the order of priority of payment. She advised that she has a copy of the current list of these fines and fees and priority of payments that she would be happy to share with the committee, but noted that the public defense reimbursement was quite low on the priority list. She also indicated that there is a movement underway to increase the money that the Industrial Commission, which is second in priority, currently receives. She added that she would be very hesitant to lien someone's property when they are making their payments, even if those payments are not yet going to public defense.

Co-chair Lakey said that he agreed with a number of the comments made during the meeting so far, in that he sees an increased role of the commission, as in the models they had discussed earlier that have additional responsibilities related to evaluation, compliance, and perhaps enforcement and distribution of funds based on compliance of standards. In this way he did not see the role of the commission going away, he saw it expanding. He added that he was still in the de-centralized camp with appropriate standards and the funding to go with it.

Co-chair Perry disclosed that she sits on the Public Defense Commission. She then commented to the committee that they really needed to try not to shy away from the standards because part of the reason for the existence of the committee was due to the shape of public defense across Idaho, with its lack of standards or the lack of enforcement of standards. She indicated that those standards did come from the American Bar Association who understand how important these standards are. She stated that these were legitimate standards that Idaho should be looking at. She indicated that she was going to be doing some research on Michigan, and she was anxious to come back and see what they could put together on that.

Representative Luker said that it appeared that the Michigan and Indiana models stood out to many in the committee and he wondered if they ought to have Mr. Bush put together a working draft based on Michigan so they would have something to look at if that was the general consensus that was the direction the committee wanted to go.

Co-chair Lakey said that he echoed that and would volunteer himself and his co-chair to work with **Mr. Bush** to give the committee a working draft, incorporating some of the Indiana model, or including a choice. As there were no objections, **Co-chair Lakey** said they would proceed down that road.

The committee then discussed a date for their next meeting which was scheduled for Tuesday, November 10 at 9:00 a.m.

Co-chair Lakey adjourned the meeting at 2:15 p.m.