

**CORRECTED MINUTES**  
**Approved by the Committee**  
**Public Defense Reform Interim Committee**  
**Tuesday, November 10, 2015**  
**9:00 AM to 3:00 PM**  
**WW53, State Capitol**  
**Boise, Idaho**

Co-chair Representative Perry called the meeting to order at 9:00 a.m. and requested a silent roll call. Members present were: Co-chair Representative Perry, Co-chair Senator Lakey, Representatives Lynn Luker, Janet Trujillo, Partick McDonald and John Gannon and Senators Curt McKenzie, Jim Guthrie, and Cheri Buckner-Webb. Senator Dean Mortimer was absent and excused. Legislative Services Office (LSO) staff members present were Ryan Bush, Jared Hoskins, and Jackie Gunn.

Others present: Dan Blocksom, Idaho Association of Counties; Lorna Jorgensen, Ada County; Kathy Griesmeyer and Lindy High, ACLU Idaho; Alan Trimming, Ada County Public Defender; Larry Maneely, Ada County Board of County Commissioners; Michael Henderson and Andrea Patterson, Idaho Supreme Court; Carlie Foster, Lobby Idaho; Sara Thomas, State Appellate Public Defender; and Skip Nakashima.

Note: Copies of presentations, handouts, and reference materials can be found at: [www.legislature.idaho.gov](http://www.legislature.idaho.gov) and are also on file at the Legislative Services Office.

Representative Luker moved to approve the committee's minutes from the previous meeting held October 16, 2015, and the motion was approved unanimously.

**Co-chair Representative Perry** introduced **Mr. Dan Blocksom**, Idaho Association of Counties, who provided an [Update on the Public Defense Costs for the Counties in FY 2015](#). After reviewing the chart of the actual expenditures by county, he highlighted the following overall statistical averages:

- FY15 expenditures: \$21,897,508.87 (35 out of 44 counties responding to both Summer and November 2015 surveys);
- FY14 to FY 15 increase: Average = 20.00%; Median = 10.68% (24 out of 44 counties responding to Summer and November 2015 surveys);
- FY12 to FY 15 increase: Average = 33.96%; Median = 20.38% (24 out of 44 counties responding to both Summer and November 2015 surveys).

**Mr. Blocksom** stated that the large difference between the average and the median percentages is most probably caused by the average being skewed by the data from Boise County. He presumed that this abnormal increase is due to one or two expensive cases in that county. Also, he stated that though some counties did not report, most of the big counties did submit reports. Referring to his [PowerPoint Charts](#), **Mr. Blocksom** highlighted the counties with large expense increases from fiscal year 2014 to 2015 and again between fiscal year 2012 to 2015. He noted that all of the reporting counties, except Twin Falls and Canyon counties, use contract attorneys.

**Representative Luker** asked if the \$21 million total comes from the 35 reporting counties and **Mr. Blocksom** confirmed that it does. **Co-chair Representative Perry** asked if there is also a calculated average from the counties with decreases in expenditures during these two time periods. **Mr. Blocksom** stated that from fiscal year 2014 to 2015 there were three counties (Gooding, Kootenai and Valley) that went down in expenditures and he stated his uncertainty as to the reasons why. **Representative Gannon** asked if he could project what the size of the nine counties that did not report, in order to estimate their expenditures. **Mr. Blocksom** stated that most of the nine are small counties, save for Bannock and Gem counties. Following up, **Representative Gannon** asked if \$25 million is a fair estimate and **Mr. Blocksom** stated his guess is \$25 million. **Co-chair Senator Lakey** stated he assumed that for any county with a capital case, the costs associated with those cases are

incorporated into the expense totals just reviewed by the committee. Given that, he asked whether the capital case costs were reimbursed or not. **Mr. Blocksom** responded that he did not know. He emphasized that those counties should have included what they spent for their Capital Crimes Defense Fund (CCDF) dues but not count the amount they were going to be reimbursed. He added that this could be the reason why the Boise County totals are so high. He shared that there are pending cases in Boise, Kootenai, Shoshone, and Latah counties and, except for Shoshone County, it appears the CCDF reimbursements are not included. **Co-chair Senator Lakey** asked **Mr. Blocksom** to identify the counties that have pending capital crime cases and to provide his analysis of any corresponding relationship between the capital cases and the reported percentage increases.

**Co-chair Representative Perry** asked if there is a growth in the number of attorneys either being contracted or hired on and if so, is that reflected in the numbers. **Mr. Blocksom** stated he did not know, but explained that the Public Defense Commission surveyed public defenders and the actual numbers of attorneys. **Representative Trujillo** commented that if Bonneville County had reported, the data would have reflected new hires, so consequently, their numbers would have skewed the survey totals. **Co-chair Representative Perry** added that Canyon County recently entered into an in-house arrangement, so their numbers reflect that change over as well. **Representative Luker** asked if any of the smaller counties contract with independent offices or do they just contract with private counsel in a larger county and **Mr. Blocksom** responded that he does not know.

**Co-chair Representative Perry** introduced **Mr. Michael Henderson**, Legal Counsel at the Idaho Supreme Court, who provided pertinent details regarding the proposal to transfer law clerks to state employment. He outlined the present situation, where there are 45 elected district judges who all have law clerks. He observed that the law clerk for the SRBA is state-employed but that the others are county employees and all are performing vital court functions. **Mr. Henderson** emphasized that without the clerks the district judges could not handle their caseloads nearly as efficiently or effectively. With regard to the transfer of law clerks to the state and costs, he explained that one of the possibilities suggested by the committee is the transfer of clerks from county payrolls to state employment, with the resulting savings in county funds being directed to the funding of public defense services. He recounted that this idea was put forward to the Legislature in 2001 by the Idaho Association of Counties in the form of House Bill 136. Additionally, he remarked that this possibility has long-been supported by the Supreme Court but it has not wanted to propose such an action until there is clear support from the Legislature to increase the Supreme Court's appropriation, which would absorb the related costs. He indicated that **Ms. Patterson** will present a summary of the estimated cost of transferring the 44 law clerks to state employment, a cost estimated at just under \$4 million.

**Mr. Henderson** stated that at present, Section 1-1613, Idaho Code, provides that the counties will provide facilities, equipment, and personnel for the district court. This personnel includes, at present, law clerks. He suggested that a statute providing that law clerks shall be employed and compensated by the state, along the lines of House Bill 136 would be needed, along with the necessary appropriation. He noted other benefits beyond freeing up county funds, including: 1) there would be clear lines of authority with regard to law clerks and would remove any ambiguity or confusion as to their status; 2) the transfer would make clear that law clerks are state employees for all liability purposes; 3) making law clerks state employees would allow for the adoption of consistent salary standards throughout the state, which would aid greatly in recruitment, particularly in the more rural counties of the state; and 4) present cost-sharing agreements that reach over county lines sometimes make it difficult to ensure that the costs of the law clerks are distributed equitably across the counties. Making law clerks state employees would remove any inequity resulting from these situations.

**Co-chair Representative Perry** introduced **Ms. Andrea Patterson**, Human Resources Director, Idaho Supreme Court, who reviewed [The Chart for Law Clerks Annual Costs](#). She highlighted the \$19,000 salary difference between the lowest paid and the highest paid law clerk across the 44 counties,

noting the lowest paid ones are in the rural counties, which keeps judges from recruiting the best and the brightest. **Senator McKenzie** asked how long the clerks serve and who makes the hiring decision and the decision to retain them longer. **Ms. Patterson** answered that the hiring decision is usually made by the district judges, but in a few instances in a few counties state judges have hired county-paid law clerks. It is a one-year or a two-year term, though some judges in the rural districts are moving toward a three-year to four-year term. **Representative Luker** asked if there is a list of current expenditures broken down by county. **Ms. Patterson** stated that her list has that data, but it is alongside other data, including the salaries of the prosecutors and the public defenders. She agreed to provide a clean list for the committee. **Co-chair Senator Lakey** asked her also to provide a list of the counties where the district judges and law clerks are housed and **Ms. Patterson** agreed to provide this information.

**Senator Guthrie** asked if there are other ancillary costs and he asked how she felt about the Legislature directing by statute that the savings to the county be strictly used for the public defense effort. **Ms. Patterson** opined there should be thoughtful consideration of statutory direction about how any savings would be used. Continuing, she opined that the counties have long been supportive of having clerks employed by the state. She will also include with the data the numbers for the ancillary costs. **Mr. Blocksom** stated that he too believed the counties support making clerks state employees. But, he added that the counties that have the law clerks may or may not be the counties that need the help with public defense costs. For example, many smaller counties are right at 100 percent of their Justice Levy, so they may not see much savings. **Senator Guthrie** asked if \$1 million will reconcile the gap in funding and **Mr. Blocksom** stated possibly, if the money is distributed differently, but not if that amount stays where it is right now. **Senator McKenzie** opined that it is somewhat arbitrary to mandate that on the one hand the clerks will be paid through the judiciary but on the other hand we are going to mandate the counties use the funds for public defense. **Representative Luker** asked **Ms. Patterson** to note whether the funds are coming from the Justice Fund or from current funds for the counties, and **Ms. Patterson** responded she would include the source for all the law clerk salaries.

**Co-chair Senator Lakey** stated that in moving forward from the comments made at the last meeting, he along with **Co-chair Representative Perry, Mr. Bush, and Mr. Hoskins** amended the draft. He provided a brief explanation of the work done in each section of the draft and these comments are included at the beginning of each section below. He indicated that they leaned toward the Michigan model, as their concepts resonate with this meeting's discussion points. Following his comments, he asked for input from committee members as they reviewed the draft section by section.

## **SECTION 1. Section 19-850**

### **POWERS AND DUTIES OF THE PUBLIC DEFENSE COMMISSION.**

**Co-chair Lakey** commented that language was added here to flesh out more of commission's responsibilities, including model contracts and procedures for the counties to apply to the commission to receive reimbursements to maintain standards that are adopted. He noted the section covers the basic principles as it ties into the ABA principles. He stated their idea is to have the guidelines in statute and the commission would promulgate rules to deal with the specific standards, in terms of caseload and staffing levels. This section also gives the commission authority to investigate, review, and audit the operations of the individual defense providers and their compliance with the standards.

#### **Representative Luker:**

- On page 1, line 36 - He voiced uncertainty with the "proposed model contracts" language;
- And on line 47 - He stated that "adhere" seems strong; **Senator McKenzie** voiced agreement, stating that we didn't need the enforcement arm, because it already exists;
- In paragraphs 1. through 12., under (1)(a)(v) - He suggested the use of uniform syntax throughout the listing of the standards;

- In paragraph 3. - He questioned the language "Trial courts shall assure." He noted that there is already a section on right to counsel in Section 3, so if this issue needs to be addressed, it should be done there;
- In paragraph 5. - He questioned using the language "are controlled to permit," stating we don't want to get the commission into control language;
- In paragraph 8. - He suggested using "reasonable parity" instead of "parity." He would like to see some rough standard of parity mentioned in the guidelines, so the prosecution isn't outrunning the defense. He also wondered if the dates expressed in a later section of the draft are ones the counties can reasonably comply with;
- On page 3, in subsection (1)(d) - He stated his concern is with finding the proper balance. He envisions a behemoth commission with all of these employees going out doing both investigative and auditing work, and he asked "is this too much?"

**Co-chair Senator Lakey** commented that Michigan does break out a few of the standards in a more mandatory sense. He opined that some of the standards are mandatory and others are simply broad, overall guidelines.

**Representative Trujillo:**

- In paragraph 3. - Referring to the "Trial courts shall assure" she asked if this isn't already happening;
- In paragraph 5. - In line 17, she asked if "shall be avoided" is strong enough, suggesting instead to perhaps use "enhance the ability to provide";
- In paragraph 7. - She asked why in some instances attorneys did not have to appear;
- In paragraph 8. - She asked for a definition of "parity" and wonders how we will provide it;
- In paragraph 9. - She suggested that the word "relevant" be replaced;
- In paragraph 10. - She stated there is a need for clarification of the phrase "review at the local level." She stated she would prefer that the reviews be done by the commission;
- In paragraph 11. - She agrees there is redundant language here but believes it is necessary, explaining that Michigan went into more detail over what was entailed with their juvenile system. She suggested their language would be good to emulate;
- In paragraph 12. - She asked if the Idaho Rules of Professional Conduct are not in statute, are we giving the Supreme Court the authority on these matters;
- At the top of page 3, in lines 2 through 3 - She suggested not striking the language regarding training and continuing legal education;
- On page 3, line 13, she disagreed with having the commission define and promulgate the rules for the indigent defense standards. **Co-chair Senator Lakey** responded that he didn't anticipate removing the language on page 3, line 2. He suggested the benefit of the committee discussing the standards versus the ABA guidelines. Also, he identified a challenge is to determine whether we leave this "by statute" or "by rule"; at present the language is "by rule" because we thought it provided balance. **Representative Luker** suggested the members first refine the list of standards, having one be a list of aspirational ABA standards and the other be a list of the specific requirements. The second list can be placed in a another section of the draft. **Co-chair Representative Perry** stated that the Public Defense Commission is interested in using the negotiated rulemaking process so all the stakeholders come to the table.

**Co-chair Senator Lakey** stated that they will look into the "may" and "shall" language. Regarding right to counsel, standards demand that the right begins at the initial appearance in front of the judge. He opined that the same attorney does not need to be at every appearance.

**Senator McKenzie:**

- In (1)(a)(iii) - He questioned whether the commission needs to draft model contracts;
- In (1)(a)(v) - He stated he doesn't know if that is a standard you can set for a public attorney and then tell the court how to do that. He also voiced concern regarding how to define and ensure "parity";
- In paragraph 2. - He suggested getting rid of the language "is sufficiently high." Also, he noted that the phrase "other members of the state bar" is unclear;
- In paragraph 7. (and throughout the statute where appropriate) - He suggested adding the language "as reasonably practicable" after "the same defending attorney";
- In paragraph 11. - He questioned why this paragraph states that juveniles have a due process right when this same language is in the constitution. Also, he suggested replacing "emphasize the importance of" with language that expresses the requirement for attorneys to be competent in representing juveniles. Or, he added, this could be just redundant.
- In paragraph 12. - He suggested that this paragraph is unnecessary.

**Co-chair Senator Lakey** replied that the language "if the caseload is sufficiently high" goes back to the definition of defense attorney. He stated the idea is that they have the option to go outside of the contract.

**Representative Gannon:**

- On page 2, lines 1 through 3. - He stated that paragraph 2. is a good idea, and it will help when the office has too much work. He thinks the standards are general enough to give the commission flexibility;
- In paragraph 7. - He suggested tweaking the term "hearing" and continue to work on the entire paragraph 7;
- In paragraph 8. - He suggested "parity" will cost money because the public defenders will have to be paid what the prosecutors are getting paid;
- He restated he is uncomfortable with adopting the standards for indigent defense in this section because they are too specific.-He likes the flexibility general standards afford. He stated that if they are adapted to conform to rules, they could be modified fairly easily; whereas, amending statutes would be a more difficult process;
- In paragraph 12. - He suggested that this paragraph is unnecessary because every lawyer is supposed to comply with the Rules of Professional Conduct; except that the rules are not enforceable in a malpractice case nor can you use it as a standard for conduct in civil litigation.

**Senator Guthrie:**

- On page 1, line 34 - Referring to the language "but not limited to," he stated that this code section gives an incredible amount of power to the Public Defense Commission;
- And, in lines 43 and 44 - He noted the large amount of latitude afforded the commission;
- In (1)(a)(i) - He suggested that the definition of indigent defense provider be changed to reflect someone appointed or hired by an agency, entity, or organization; otherwise, he voiced his concern that you'll drag all those other agencies, entities, or organization into fulfilling the CLE requirements and other requirement listed;
- In paragraph 8. - He agreed with the concern regarding "parity" and cautions the members to be careful;
- In paragraph 10. - He stated that the "reviewed locally" language obligates accountability to a group already overworked and understaffed;
- He noted that the language on page 1, lines 43-44, and the language on page 2, in paragraph 5., appear to be contrary. **Co-chair Senator Lakey** responded that the intent was to put a carrot

out for the counties to comply and to have financial assistance to comply with the minimum standards. One of those standards should be that the individual defending attorney providers shouldn't have finances as a main concern in their representation of the parties like the flat fee contracts that we prohibited before. So, he stated, it's more of a carrot to ensure there is compliance but, at the specific level providing those services, the financial decision should be removed when it comes to the specific attorney or the specific provider representing their client to the best of their ability to meet the constitutional standard.

**Senator Guthrie** asked if there is a public defender who sits on the Public Defense Commission and **Co-chair Representative Perry** stated that **Mr. Bill Wellman** from Canyon County is a contract public defender for Owyhee County and he sits on the commission.

**Co-chair Senator Lakey** stated the committee decides how much power to give the commission and he encouraged more discussion on this topic. Referring to the definition of indigent defense provider, the Co-chair agreed with **Senator Guthrie's** take on how definitions must fit and he shares the concern voiced about the term "parity." He added that he thinks in some instances we will have to obligate folks.

**Senator Buckner-Webb:**

- In paragraph 3. - She noted that the language "as soon as" seems vague and suggested it should be more definitive.
- In paragraph 7. - Referring to "attorney continuously represents," she suggested adding language that requires the attorney to have some rudimentary familiarity with the case.

## **SECTION 2. Section 19-851**

### **RIGHT TO REPRESENTATION BY COUNSEL – DEFINITIONS.**

**Co-chair Senator Lakey** stated in this section they modified the defending attorney definition a bit and added additional provisions regarding the commission and then how local share is calculated.

**Representative Luker** stated that based on the morning conversation about the skewing of the expenditure averages, he suggested that in subsection (7) there should be some language excluding capital defense costs, which are reimbursed from the state. With regard to the state share award in subsection (10), **Representative Luker, Co-chair Senator Lakey and Co-chair Representative Perry** discussed the language that refers to the commission providing support for training. **Representative Luker** stated that in some rural counties 15 percent won't be enough and these counties need more help than larger counties. Also, he expressed concern about offsetting this state share with the training expense, which he believes is coming out of a different area. **Co-chair Senator Lakey** shared that when this funding language was added it was understood that there might be adjustments needed as things are implemented and he suggested the members discuss this point in more detail. **Co-chair Representative Perry** stated her understanding was that the commission gets a certain amount for conducting the training and the share funds should be about delivering the services and she noted this is not separated out in the draft. **Co-chair Senator Lakey** asked if there is a need to separate this out, as long as the training funding that comes from the state for prosecutors and public defenders is comparable. **Representative Luker** stated he did not want to get into bean counting, so he suggested having the phrase read, "training, not including... ."

**Representative Trujillo** commented she believes it should be separated a bit. Also, she stated the 15 percent is a pretty good number to start with, based on the data we have received. And, in subsection (9), she stated the definition for "indigent defense standard" needs work.

**Representative Gannon** asked **Mr. Blocksom** what the counties think about the local share determination. **Mr. Blocksom** stated he will take that question back to the committee. He commented that if a county has already been putting up more than its fair share or has been adequately funding it, they would get less money potentially from the state than a county that has

been systematically under-funding their defense all along. **Representative Luker** suggested looking at the premium base being included but not the reimbursed amount. **Senator Guthrie** commented that if the benchmark is driven up by the outliers or anomalies, then it seems this could put a county in the unfavorable position of having to maintain something that was more of an anomaly than something that is a consistent average.

**Mr. Blocksom** stated that it is definitely a potential problem. He prefers considering some objective benchmark figures based upon 1) the number of misdemeanors and felonies that occur in a county; 2) county population; 3) county property tax totals; and 4) the county budget. **Senator Guthrie** stated the definition of "indigent defense provider" in subsection (8) needs to be worked on.

### **SECTION 3. Section 19-853**

DUTY TO NOTIFY ACCUSED OR DETAINED OF RIGHT TO COUNSEL.

**Co-chair Senator Lakey** stated in this section they switched from the term "defending attorney" to the term "indigent defense provider."

**Senator Guthrie** stated that the provision in subsection (3) is overbroad. **Senator McKenzie** stated that in the existing code language in subsection (1) "serious crime" needs to be cleaned up.

### **SECTION 4. Section 19-862**

APPROPRIATION FOR PUBLIC DEFENDER – PRIVATE CONTRIBUTIONS.

**Co-chair Senator Lakey** stated this section provides that the counties meeting the standards are not required to fully expend all of what they receive.

**Representative Luker** suggested an edit in subsection (1), to change "administer" to "fund" to properly complement the amended language that directly follows.

### **SECTION 5. New Section 19-862A**

FILING OF COMPLIANCE PLANS AND COST ANALYSES – STATE SHARE AWARDS.

**Co-chair Senator Lakey** stated that in this section they diverted from the application process that Michigan uses, stating they preferred having it go through the Legislature as part of rulemaking, instead of through the Supreme Court. The counties would put together their compliance plan, their costs and what they are doing to meet the standards and their requests to cover those costs. They would submit their plan to the commission, it would then be reviewed and funds approved based on the submitted plan, or the commission could direct them to modify the plan.

In subsection (2), **Representative Trujillo** observed that the indigent defense standards should be promulgated already, so she suggested the phrase "in the event the commission has not yet promulgated any indigent defense standards" is awkward. **Co-chair Senator Lakey** stated that Michigan's model is a roll out model; they adopted the broader ABA-type standards we're looking at here, and they took them a bite at a time. He stated he's not sure if our commission will choose this approach. The priority is to get funding in place, even if the county hasn't put all of the standards in place. Continuing, he stated the standards will get fine-tuned as Odyssey comes on board and more data from the counties is received. **Representative Trujillo** restated the importance of putting some of these standards in place. **Representative Luker** stated the county has to identify all the ways in which they are noncompliant and this is a daunting task because they may not identify everything, which is difficult if there has not been an audit. Also, he noted that the sizable cost attached to the review and wonders who is going to pay for that cost. He asked if state funding will be required to give these counties an allowance to complete the plan and he asked whether the commission will be able to complete their approval process within the 60 days. **Representative Trujillo** recognized that funding will necessarily have to be attached to these efforts. Referencing subsection (8), she asked if the money is in a pool, how do we best ensure that the money goes to public defense. She suggested tightening up the language a bit. **Representative Gannon** stated that it would be good to

hear from counties regarding how much staff time they think would be necessary for preparing the compliance program. Following up, **Co-chair Representative Perry** invited **Mr. Blocksom**, as well as the stakeholders involved, to attend the committee's December meeting and report.

**Representative Luker** suggested a different approach from the one where the county complies with a whole list of standards. It would be a positive approach: one where a county would apply for the grant of 15 percent; their application would present a compliance plan that details the number of things they can do within that budget; and they would identify their greatest need. With regard to the phrase in subsection (2), "other improvements may include," he suggested creating something similar to the Capital Defense Fund, where all the counties throw in some money and when a county has an extraordinarily bad year, they can apply to this fund, a technical assistance fund, and we'd fund that with state money and the commission can administer that. **Co-chair Representative Perry** asked in reference to a technical assistance fund, does that mean funding for the expert witnesses and the investigations, and are you envisioning it as a separate fund or in this 15 percent. **Representative Luker** suggested a separate fund similar to the Capital Defense Fund, perhaps with a threshold, where to sweeten the pot the state pays in half and the counties contribute to it. Referring to the provision in subsection (6), and then recognizing the disparity that exists in public defense expenditures between Ada and Adams counties, **Senator Guthrie** stated concern that there will be a wedge driven between the have and have not's.

#### **SECTION 6. New Section 19-862B** DISPUTES – NON-COMPLIANCE.

**Co-chair Senator Lakey** stated this section delineates a dispute resolution process with administrative review that could go to court if need be.

**Representative Luker** stated that if the committee chooses the grant method, where a county can apply for a grant to meet certain standards, this section can be converted to present the grant review process to assure they have complied with the terms of the grant. **Co-chair Senator Lakey** stated he too preferred not to make it an adversarial situation. Also, he asked the members if the counties should have an appeal avenue if they disagree with their evaluation of compliance with the grant criteria. **Representative Trujillo** asked how the state pays for their mediation and she asked about the practicality of the mediation process, when it comes back to the commission for their final decision. **Senator Guthrie** questioned whether the little counties could really have the time to go through the progressive legal steps in district court. **Co-chair Senator Lakey** responded that they are taking the ideas from the Michigan model and trying to find a balance; in this instance, providing the counties with an avenue like mediation, which may be a less expensive option than district court.

Referring to subsection (7), **Representative Trujillo** stated she appreciates the need to put some teeth in this but she cautions against making it so punitive that it is used as a mechanism for counties to bail out. **Representative Luker** stated that if it is a grant program, there would be a different negotiation process. He suggested letting the commission help clarify goals and build in a mechanism if the counties don't comply with the terms of the agreement. He added that some grants would have to be ongoing in nature, and there would have to be compliance auditing. He emphasized that the goal of the counties and the commission is to make it work. **Representative Gannon** stated that a mediation procedure, and ultimately the court procedure, could be helpful with getting the judges input to avoid problems moving forward. **Senator Guthrie** stated that the penalties involved are daunting, and the committee should pause to consider this. **Representative McDonald** stated his support for the sanctions because there must be due process, and he noted the importance of allowing the counties recourse. **Co-chair Representative Perry** stated that the sanctions are included to get feedback from the committee. She noted that the committee has received word from some counties that they do not plan on complying; so, she stated the question is how do we manage oversight. **Representative Trujillo** stated this section is needed; the mechanism must ensure that we are efficiently funding public defense. **Representative Gannon** suggested that if the county does not

want to comply, one remedy is to hold the county taxpayers responsible; for example, he briefly explained what recently happened in Boise County. **Co-chair Lakey** stated that he is a carrot guy, as far as how he'd like to approach it with the counties. He stated that some of the counties wrote in that they didn't have time to complete the report, so he stated there needs to be some sort of sanction in place. **Representative Luker** stated that he agreed with **Representative Gannon's** idea regarding legal indemnity. He emphasized the need to incentivize the counties to apply for grants. He added that it does put pressure on the committee to provide a realistic grant for them.

#### **SECTION 7. Section 19-864**

##### **RECORDS OF DEFENDING ATTORNEYS – ANNUAL REPORT OF DEFENDING ATTORNEYS.**

**Co-chair Senator Lakey** stated this section adds language about reporting requirements, as well as the rules that would be promulgated.

**Senator McKenzie** asked for clarification regarding the reporting requirements and asked if the phrase "totaled by kind" is intended to mean the kind of crime. **Co-chair Senator Lakey** noted that the phrase "totaled by kind" is in existing language, so suggested the members look into it. **Representative Luker** stated that at the last meeting "crimes" was changed to "charges" for clarity as well as to identify which statutes we are involving. He asked if there are any incentives or disincentives for filing of the report. He suggested that something should be there to encourage the filing of the report. **Representative McDonald** requested data on the charges, but also the convictions, in order for the members to monitor the effectiveness of the process. **Senator Guthrie** stated that we are taking a big step away from coaching and mentoring and into punitive action, where the carrots are much less than the hammers. By putting this in statute, he suggested that the structured process we subscribe to gives potential litigators a toehold. He asked if the prosecutors have similar oversight and if so, is there also punitive action. He remarked that he doesn't agree with putting the responsibility back on the county taxpayers.

**Representative Luker** stated that he agreed with most of the concerns voiced, except the last one. He opined that for these reasons, we should have a grant program process and general aspirational standards. The more specific we get with the standards, the more we set up the counties to be in violation of some particular standard. The commission should be there to help consult and, most importantly, to help counties identify their most exigent needs and help the counties put their reports together. However, the need for a public defense is generated by the county and the prosecutor, so he suggested responsibility does come back to the county residents. This is why he likes **Representative Gannon's** idea, because ultimately it is the county taxpayers that elect the commissioners and prosecutors.

**Representative Trujillo** stated she prefers a regional system in which the state funds it. However, because of the ways things have been set up, she stated that we must work with the system that is in place and this draft is a good start. **Representative Gannon** observed that cities generate a lot of these prosecutions too. He asked the members to think about this. **Co-chair Representative Perry** added that Alaska has a specific statute that does something for the cities. She suggested taking a look at that. **Co-chair Senator Lakey** stated that he does not want to go with a statewide system funded by the state, because there isn't enough fiscal control over the state agency, and there would be more fiscal control working through the counties. Yet, he stated that the standards must be put in place. He would rather have it driven by a grant carrot but, if counties refuse to meet the standards, there should be some consequence and it should not come back to the state. He emphasized that the draft is intended to prompt discussion. He hopes it will generate specific language change suggestions from the members, in an effort to have a revised draft ready for the next committee meeting.

**Co-chair Representative Perry** invited **Mr. Alan Trimming**, Ada County Public Defender, to present his thoughts pertaining to the preceding conversation. He stated that he hoped the members

reviewed his 12-page letter, as it addresses a number of the issues brought up today. He explained that his focus is on how he can implement the standards once they are enunciated. He stated that at present he does not have the manpower to survey or the computing capability, but he will comply to the degree that he can. He encouraged the committee to adopt their standards because he can't respond to them until he knows what they are. At that point, each office will assess how it fits, how it complies, and how it does not. Each office will have to determine what will need to be done to reach compliance. At this point, he suggested that a schedule needs to be established that would allow an adequate time frame for compliance, whether by legislative action or by commission edict. Looking to financial support, he suggested that the 15 percent might not be enough for an office of his size to comply with the guidelines. He closed, stating that if he is given the funding, he will make it work. Regarding litigation, he confirmed what had been mentioned by the committee earlier, that someone will most surely sue once standards are established.

After the lunch break, **Co-chair Representative Perry** introduced **Mr. Skip Nakashima**, who testified before the committee on his thought and concerns. **Mr. Nakashima** retired in 2001 after 33 years of service to the city as a Boise policeman. He is also a retired member of the United States Marine Corps, and served in the U.S. Marine Corps Reserves after his active service. He briefly reviewed a few experiences he had on the force. **Mr. Nakashima** stated that his philosophy centers on individual rights and individuals taking responsibility for their actions. The role of the public defender is to protect their client's constitutional rights and to make the prosecutor prove guilt beyond a reasonable doubt. The role of policymakers in sentencing is to assure that the proper level of punishment is applied for the given crime. He suggested to the committee that they consider doing away with both the state offices of the prosecutor and the public defender and create in their place a State Attorney's Office that would pool all the attorneys, and these attorneys would serve both sides of the law. He stated that this method of representation is used in Europe and in the U.S. Marine Corps and it works well. He closed, noting that when the indigent cannot pay for their public defense services, any process that demands payment from them is seen as inconsequential.

**Co-chair Representative Perry** introduced **Ms. Sara Thomas**, State Appellate Public Defender, who provided her thoughts on some of the statements made during the draft discussions. She stated she agrees with **Representative Trujillo's** request for keeping the training language in the draft. She continued, suggesting that under Section 1 authority could be given to the Public Defense Commission to create standardized forms for reporting data. In paragraph 3, she stated that this standard relating to the trial court could be positioned later in the statute. Additionally, she suggested that the language "trial courts shall assure" should be changed to read "the trial court's responsibility." Pointing to the reference to the Idaho Rules of Professional Conduct in paragraph 12., she noted there are different standards of professional conduct when it comes to conflict. There are the Rules of Professional Conduct and there are also constitutionally-based standards. She stated they are discrete and they both should be covered. She explained that the Rules of Professional Conduct are used in civil cases but not in typical civil cases; they are used in post-conviction to determine if someone has received effective counsel.

Recalling a statement made earlier in the meeting that suggested counties could apply for grants, **Ms. Thomas** cautioned that in some instances there are use restrictions attached that may inhibit the ability to treat grant funds as state funds. She emphasized that as a member of the commission, what makes it difficult is having the responsibility without having the tools of enforcement. She noted that Idaho has a history of providing counsel and protecting liberty and she encouraged the members to avoid simply reacting; for example, relying on legal indemnity. She encouraged the members to be proactive, to look to what will make the system better and then to make the hard decisions to get there. She observed that the system won't work if there is no authority to enforce the standards.

**Representative Luker** suggested moving grant details to subsection (8) of Section 5. **Representative Gannon** asked if **Ms. Thomas** had any enforcement mechanisms to recommend and **Ms. Thomas** responded that she appreciates the mediation portion in the draft and believes it can serve as

one part of the solution. She opined that the carrot of grants would be helpful; but pointed out that in Indiana half of the counties opted out, so she suggested it might not work in Idaho. She emphasized the strengths of the Public Defense Commission's recommendation of creating a regional system with regional directors, where the enforcement mechanism and accountability rests with the regional district representatives. **Representative Gannon** asked what happens when the regional office doesn't have all that is needed to do the job. **Ms. Thomas** responded that in some instances the county's feet will need to be held to the fire, and agreed this might result in litigation. But, she emphasized, the priority is to get the resources and the information. **Senator McKenzie** asked for more detail on the commission's regional approach and **Ms. Thomas** explained there would be seven regional public defenders who are state employees. They would run an office in each judicial district with local attorneys who are county employees. The seven public defenders do their own evaluations and their own audits, and they are answerable to the Public Defense Commission if they are not meeting the standards.

**Senator Guthrie** agreed with **Ms. Thomas's** point about the problem of opting out. He opined that if you make the hill so steep that the little counties can't climb it, they will opt out, and then there will be a disparity caused by incomplete information. He asked **Ms. Thomas** if there was a model she could suggest the committee consider, one that would allow all the counties to get on board at the ground floor. **Ms. Thomas** agreed that the opting out is a concern; in Indiana, the opting out was directly caused by no enforcement mechanism being in place. But, she stated that the seven regional public defenders can garner the training in specialized areas, and this regional system can take advantage of economies of scale; for example, instead of having 44 counties with 44 plans, the regional system would provide seven plans with seven people. And, the savings could go toward public defense. Following up, **Senator Guthrie** asked if she could suggest a successful enforcement mechanism model for getting the counties on board. **Ms. Thomas** responded that if a regional system isn't provided in statute, then she suggested implementing an approach that incentivizes the counties to join together in a regional approach.

**Co-chair Representative Perry** invited **Mr. Henderson** back to the podium. He stated that the court will review the draft, as well as the comments made today by the members. He observed that the standard of a criminal defendant's right to counsel in paragraph 3. of Section 19-850, is already enunciated in Section 19-853(1). He added that the term "serious crime" is defined in section 19-851. He cautioned against making the standards too rigid, like with vertical representation in paragraph 7 of section 19-850. He stated the court will look into the mediation process under discussion and he will bring back comments to the committee.

**Co-chair Representative Perry** invited **Mr. Blocksom** back to the podium. He stated he spoke with **Mr. Dan Chadwick** during the lunch break and he wished to share those thoughts with the members. **Mr. Chadwick** observed that the ultimate question is does the solution give us the counties and the state the time, the funds, and the resources to comply with the 6th Amendment. **Mr. Chadwick** believes parity is the wrong question to be focusing on; rather, the focus should be centered on creating a system that is fair and protects Idahoans rights. Specifically, he shared: 1) the time required to come up with the compliance plan and cost analysis could be problematic; 2) the committee might consider basing the local share of funds on four objective data areas: (i) the number of times a crime occurs in the county; (ii) county population; (iii) property tax totals; and (iv) county budget; 3) he is concerned about withholding the state tax revenue portion altogether but; if there is a revenue stream based on some objective criteria and if the penalty for reporting data is to have the stream stopped, he suggested that will get the attention of the counties. He added that vertical representation is difficult to deploy and it is expensive. **Representative Gannon** commented that if public defense money is withheld, those who need a public defender will suffer and this will spiral into more problems. **Mr. Blocksom** agreed with that observation and stated that the association has not come up with a solution. **Co-chair Representative Perry** asked if the counties would still be comfortable with the formula if the amount turns out to be much greater

than the amount they presently contribute. **Mr. Blocksom** stated he is not sure but he stated that the objective data points are available now.

**Representative Luker** noted there aren't full-time public defenders in the rural areas and the regional system could respond to this. He suggested that Section 19-859(4) should be modified to require contracting a full-time public defender that does not have a side caseload of any kind, which may force smaller counties to band together. Continuing, he suggested creating a funding limit as a carrot to draw the counties together. He suggested the starting point would be to get rid of the contract attorneys. **Mr. Blocksom** stated he doesn't know why more counties haven't gone that way, and in some instances, he agrees that incentivizing the bonding together of counties could be a viable approach. However, he stated the geographic realities in Custer County do limit the options in play. Following up, **Representative Luker** clarified that he is speaking to those counties that qualify for the assistance. He emphasized the need for full-time public defenders, where this service can be contracted, but they would qualify for extra state funds if they combine counties. **Mr. Blocksom** recommended the carrot approach. **Representative Trujillo** stated her support for the regional system and asked the members to consider ways to apply it.

**Co-chair Representative Perry** asked the members to share their thoughts regarding an alternative draft. She also reminded the members that the funding issue still needed to be addressed. **Representative Luker** stated the present draft should be the primary focus and then look at the alternative approach. **Representative Gannon** concurred. **Senator McKenzie** stated that it makes sense to also look at an alternative approach, as the members move forward with what they will present to the germane committee. **Representative Trujillo** stated that addressing both drafts is a good idea, but in the end the interim committee must accomplish its goals. She emphasized that the draft is a good start but voiced concern that a county opting out would result in sending the committee back to the starting point. **Representative Luker** observed that in the past the enforcement authority has always been through the courts. He suggested that the committee not go overboard on enforcement and he suggested that the delivery system can be regional. Also, he suggested that the Legislature should set standards and provide incentives for the counties and maybe the counties should pay the consequences for the decisions of their elected officials. **Senator Buckner-Webb** stated she supported the efforts made on improving the draft and asked that the members look at costs and also look at a regional approach.

**Co-chair Representative Perry**, at the members' request, reviewed the draft for a second time, section by section.

#### SECTION 1. Section 19-850

**Representative Luker** asked for consensus on where to go with the standards. He suggested deleting paragraph 3., and tightening up the others principles. He stated the ABA standards are okay as aspirational concepts, except for parity and vertical representation, because the commission can use them as a foundation for creating more specific standards.

Referring to paragraph 10., **Representative Trujillo** asked if the term "local level" has been defined.

Referring to subsection (d), **Representative Luker** suggested changing the phrasing in order to guard against over charging the Public Defense Commission with duties. He suggested the subsection can be used to ensure compliance for the grants that are awarded.

#### SECTION 2. Section 19-851

Referring to subsection (10), **Representative Gannon** suggested that instead of setting a 15 percent share for the benchmark, include an additional factor for the state share award amount be the number of misdemeanor and felony charges that the county experienced.

**Representative Luker** stated the 15 percent won't do anything for the rural counties, and he asked the members to consider substituting an amount as a place holder, such as, "not to exceed \$100,000, nor shall it exceed 15 percent." Also, he suggested including language that gets more money to rural counties.

**Representative Trujillo** agreed that it is difficult to determine what the properly funded amount is for each county. She also voiced concern about how much these pieces of legislation the committee puts together will cost the state in the end.

SECTION 3 AND SECTION 4. **Sections 19-862 19-853.** No additional comments.

SECTION 5. **Section 19-862A**

**Representative Luker** stated he preferred to eliminate most of this code section, and turn it into a grant application process. The grant process will provide that the county may, by a certain date, submit a plan to improve certain standards and apply for a grant to do so, in consultation with the Public Defense Commission. In this manner, the commission would be less the heavy hand and more the resource and consultation source.

**Co-chair Representative Perry** asked the members if they support exploring the grant idea and there was no voiced response to her question.

**Representative Trujillo** stated that she preferred to remove subsection (8).

**Representative Gannon** suggested that the catchline for Section 4 of the draft could be modified. He added that perhaps the members should consider inserting a new subsection (3) that would encourage two counties to consolidate, where the incentive is an award greater than the 15 percent.

Referring to the suggestion raised by **Representative Trujillo** to remove subsection (8), **Representative Luker** asked whether the members want the commission to go out and get federal money that has strings that maybe the Legislature does or doesn't agree with. He suggested that subsection (8) should stay in some form, in order to provide the option to collect the federal money if it is there. He stated he doesn't want to provide carte blanche authority to obtain money with strings that the Legislature might not want to commit to.

SECTION 6. **Section 19-862B**

**Representative Trujillo** commented she didn't think the mediation process makes sense; the commission is a party in the dispute yet the dispute recommendation returns to the commission for their final decision. **Co-chair Representative Perry** suggested that it would be helpful to find out how the state handles various other mediations. **Representative Luker** observed that it gets back to whether the committee agrees to primarily employ a grant process. He stated there would be few disputes over the grants. He added that the commission should have the authority to recover the money if compliance hasn't happened. He supports the idea of seeking out more examples of how mediation is used in practice.

SECTION 7. **Section 19-864**

**Senator Guthrie** asked if the members are in agreement to develop a separate draft - one that is more sensitive to a regional system. He opined there is a need to take the teeth out of the draft under discussion a bit, or it won't pass the Legislature. He stated his concern that all of the required reporting will eat up the money, and he stated that accountability can be ensured without such an onerous process. **Co-chair Representative Perry** responded that there is agreement to explore a second option; the present draft will be redone to reflect concerns voiced by the members and the committee will also look at a regional approach. **Senator McKenzie** suggested that counties be given the money and resources they need with the state involved in just the critical parts.

There were no other comments regarding the draft. The committee agreed to meet again on Monday, December 14, 2015. **Co-chair Representative Perry** adjourned the meeting at 3:05 p.m.