

**MINUTES**  
**Approved by the Committee**  
**Public Defense Reform Interim Committee**  
**Wednesday, December 16, 2015**  
**9:30 AM to 2:20 PM**  
**WW53, State Capitol**  
**Boise, Idaho**

Co-chair Senator Todd Lakey called the meeting to order at 9:30 a.m. and requested a silent roll call. Members present were: Co-Chair Representative Christy Perry, Senators Curt McKenzie, Dean Mortimer, Jim Guthrie, and Cherie Buckner-Webb and Representative Lynn Luker, Janet Trujillo, Patrick McDonald, and John Gannon. Legislative Services Office (LSO) staff members present were: Ryan Bush, Jared Hoskins, and Jackie Gunn.

Others in Attendance: Carlie Foster, Lobby Idaho; Kathy Griesmeyer, ACLU Idaho; Alan Trimming, Ada County Public Defender; Lorna Jorgensen, Ada County; Bill Wellman, Public Defense Commission; Larry Maneely, Ada BOCC; Dan Chadwick and Dan Blocksom, Idaho Association of Counties; Marilyn Paul; Twin Falls County Public Defender; and Scott Zanzig, Deputy Attorney General.

Note: Copies of the presentations, handouts, and reference materials can be found at: <http://www.legislature.idaho.gov/sessioninfo/2015/interim/defense.htm>.

Senator Mortimer moved to approve the committee's minutes from the previous meeting held November 10, 2015, with the corrections as noted by Senator Guthrie. The motion passed unanimously by voice vote.

Co-chair Senator Lakey welcomed Mr. Dan Chadwick, Director for the Idaho Association of Counties (IAC), who in turn introduced Mr. Dan Blocksom, Policy Analyst for the IAC. Mr. Blocksom provided an update on the counties' stance on public defense. He opined that it is ultimately the state that has the responsibility to ensure the constitutional right of its citizens to counsel. He stated that the objective of providing constitutional public defense can be broken down into three sub-objectives: standards, funding, and enforcement. He explained that the IAC Legislative Committee voted on December 15, 2015, to support and propose to the Legislature a public defense model that includes the following:

- The Public Defense Commission (PDC) would set the standards;
- The counties would contribute as much as they currently have been (contribution locked and no escalator);
- The state would be responsible to contribute any additional funds required to bring the system into compliance with the standards;
- The state would run this system entirely with state employees;
- The counties may elect to opt out; and
- Any counties that opt out are ineligible for any additional funding;

Mr. Blocksom stated that the model they approved, after much heated discussion, is similar to the operational model of the Department of Health and Welfare. He emphasized that the IAC's Legislative Committee vote for the model was not unanimous but it is the best attempt to accommodate everyone's concerns. There was a split of opinion among the larger counties; specifically, Canyon and Kootenai counties wanted the model, while Twin Falls and Ada counties did not. He added that the smaller counties are happy with the model, because they typically just need help with the actual running and management of their public defense.

Mr. Blocksom evaluated the model against the three sub-objectives of standards, funding, and enforcement:

- Standards – Objective satisfied: The PDC will be doing that;
- Funding – Objective satisfied: The counties and the state must work together. For this reason, the counties have decided to support the model that requires them to kick in this money. He stated that the requirement for the state to fund the gap in the rest of the funding is the critical piece. The total amount it will cost to bring the state into compliance is an unknown. He suggested that some counties might not need any money, while other counties will need far more than fifteen percent of their local share. He cautioned that if this model is adopted, the state needs to make sure that the PDC has enough money, whether the cost is \$5 million or a larger amount;
- Enforcement – Objective satisfied: He explained that this model will be staffed by state employees, presumably under the PDC. The state can hire, supervise, discipline, and terminate its employees. And, the state can apply its administrative expertise in this area. He continued, stating that if the state is making the decisions regarding hiring and supervising employees, then the state is liable for the inadequate indigent defense. However, if a county opts out then there is a strong argument that the county is liable for constitutional violations; and he states this can be a strong motivator and enforcer. Continuing on this point, he explained that a county that opts out of the model either: 1) is going to provide excellent service; or 2) in the event that the county is sued for not providing constitutional defense, the county's taxpayers will be held liable.

He restated that in order to reach the objective of ensuring the constitutional rights for indigent people, we need to satisfy the sub-objectives of standards, funding, and enforcement. Mr. Blocksom next shared his preliminary thoughts regarding both drafts by observing how they stand up to the sub-objectives:

#### Draft 042

- Standards – Good;
- Funding – Not good but realistic. He opined that the "fifteen percent cap until 2019" is not going to work. He suggested that maybe the opposite could work - "no cap until 2019." He added that if the state grant plus the local share is not enough, then the counties have to put in more and he emphasized that the counties they are most worried about will have nothing more to contribute;
- Enforcement – He cited the small budgets of several counties in order to buttress his point that expecting a small-budget county with limited resources to fill out these applications with a cost analysis is a tall order, and in some instances, it is unrealistic. Moreover, he stated that if the county can't practically comply with the analysis, then the State Tax Commission will withhold sales tax money from the county.

#### Draft 046

- Standards – Good;
- Funding – Same as mentioned in Draft 042;
- Enforcement – He stated that the IAC Legislative Committee earlier voiced concerns regarding the PDC model that makes it the responsibility for the regional public defenders to submit the applications and annual reports for their entire region. However, that model appears more manageable than the model suggested in this draft, where the counties are still responsible for filling out the applications. Also, he noted that its enforcement remedy, which is to have the PDC take over a county office, is expensive and unrealistic. He suggested that it makes more sense to afford the regional public defenders more regional authority to have this remedy.

Senator McKenzie voiced his concern regarding the provision that allows a county to opt out. Mr. Blocksom stated that majority opinion of the committee was that the opt out counties will understand that they are on the hook and this will serve as effective enforcement. Representative Gannon stated that his wish is to avoid litigation. Moreover, if the legislation provides the counties with the opportunity to opt out and one of these counties doesn't meet the standards, then the legislators aren't fulfilling the objective of providing the constitutional right to counsel. Mr. Blocksom responded that the committee has not endorsed any other enforcement mechanism, but he opined there will be very few counties that opt out. Representative McDonald asked if we are meeting the state responsibility to provide adequate defense now. Mr. Blocksom responded that it only matters what the courts think and, in answer to the representative's question, his organization would say that they are not meeting the mandate now. Representative McDonald asked if it is fair to say the state has never provided an adequate defense, and Mr. Blocksom answered that it is very possible that an adequate defense hasn't been provided.

Senator Guthrie asked how much he thinks the state should take on regarding the costs of administration and does he have an opinion on what an effective financial split might be. Mr. Blocksom responded that in order to answer the question, he would need to know how much additional money the counties would provide for administrative support. Senator Guthrie suggested freezing the support at the present local share amount. He also asked if staff would be paid for by the state. Mr. Blocksom stated that the money would be given directly to the state and the commission would hire employees and rearrange the required tasks, in order to get the standards up. He added there would be some logistical aspects to figure out but that the money goes to the state, so the state should use it as they think best.

Referring to the Michigan model and other examples presented at previous meetings, Representative McDonald asked which model does the draft legislation most closely resemble. Mr. Chadwick responded that he can't answer the question. Co-chair Perry noted that employing the threat of litigation as an enforcement mechanism is a dangerous policy position for the counties. Mr. Blocksom responded that the concern among the counties regarding enforcement is that the proposed enforcement mechanisms discussed recently here with the committee would be counterproductive. Following up, Co-chair Perry stated that the newest drafts seem to address his concerns, and she wondered if the drafts were circulated and reviewed by the IAC's Legislative Committee in advance of their vote. Mr. Blocksom explained that while the drafts were circulated, the committee's main discussion was focused on the three general concepts (grant model, regional model with the seven employees, and the state-run model), and much less on the specific details of the two drafts.

Co-chair Lakey asked, if the IAC's Legislative Committee had to step back from the statewide system, what other concerns should the interim committee members address. Mr. Blocksom stated that the biggest county concern is for the funding piece. The fifteen percent amount might work for some counties, but it will not come close for some counties, and still other counties will not need it. He also noted that it will be hard for some counties to comply with the application process. Co-chair Lakey stated that the funding piece is still up for discussion, and he asked Mr. Blocksom if he would provide any specific thoughts or solutions to address the various county positions.

Mr. Blocksom voiced support for the funding idea that gave the state the responsibility to contribute in those situations where the counties are locked in to an amount because they can't put in any more. Regarding the application piece, he agreed to go back to the Legislative Committee to get specific recommendations. Co-chair Lakey reiterated that they are looking for an ongoing partnership, that both parties should have skin in the game in order to have incentives to meet the standards and to ensure fiscal accountability for what is happening. Mr. Blocksom appreciated the co-chair's concern but he noted that the county commissioners feel they have already accepted the idea of giving over their collected tax moneys to the state to manage, emphasizing that this is a pretty big concession of their authority in their local jurisdiction.

Representative Luker stated that if the counties are reticent to turn money over to the state, he suggests that they keep the counties money and manage it, and the state will assist them. Mr. Blocksom stated that Ada and Twin Falls counties want to keep that local control, but for a lot of the smaller counties, he stated that this is not the best option for them; in fact, they want someone from the state to take that over. Representative Luker observed that in Draft 042 the smaller counties would get up to \$50,000 extra, and he asked if that would alleviate a lot of their concern. Mr. Blocksom answered that it could; however, the Legislative Committee has weighed the idea of local control and receiving the grants against the alternative and this is ultimately what they came up with.

Mr. Chadwick discussed the frustration some of the counties have experienced as they moved forward with local control. He noted there is at present a state lawsuit in the works in Canyon County regarding their in-house public defense office. The suit was brought by a former employee, who alleged poor performance of the office, and also the suit claims that another \$1 million is necessary to get the office up to the constitutional standard. He observed that the county gave

their best effort, created a local solution, and yet found themselves back in the courts when the defendant didn't think the service was up to the constitutional right to counsel standard. He emphasized that this responsibility was delegated to the county by the state, and not necessarily with the proper resources to carry that process out.

Noting that the county prosecutors in every county drive the agenda, Representative Luker asked if Mr. Chadwick would suggest we have state prosecutors instead of county prosecutors, in order to have apples with apples and oranges with oranges. Mr. Chadwick advised that the committee should not be talking about state prosecutors, but rather should keep their focus on the Sixth Amendment. Representative Luker stated that it gets back to the funding issue, and having a disconnect between the two programs (public defender and prosecutor) is problematic. Mr. Chadwick replied that he fears cash register justice, where the focus is on "how much does it cost to prosecute or how much does it cost to defend." He opined that the focus needs to be on the constitutional rights of individuals in Idaho. Representative Luker stated that the bottom line is whether the state supplements a sufficient amount of money to meet the standards, however those standards are implemented. Mr. Chadwick agreed, and commented that the interim committee members have received the best answer the IAC's Legislative Committee could come up with; but, he added the counties will implement whatever the Legislature tells them to. He emphasized that they will carry out the Legislature's authority. Regarding county funding, Representative McDonald asked what the cost is to the state for filling the gap between what the counties put in and what is necessary to meet the constitutional standard. Mr. Chadwick stated he did not have a specific dollar figure. He noted that there has been a cost associated with getting rid of the flat fee contracts and the counties have covered that cost for the whole public defense system of \$24 million per year. He suggested that we don't know what the gap amount is yet. Mr. Chadwick stated that he guessed the gap amount could be ten to fifteen percent, and then ultimately \$15 to \$20 million.

Mr. Jared Hoskins noted that in his handout, the middle column totals \$3.9 million, which assumes a fifteen percent increase in the costs counties are currently spending. He stated that some of the county amounts listed are estimates because some counties did not report their expenditures in fiscal year 2015. Following up, Representative McDonald asked if the \$3.9 million will cover everything that needs to be done to make the first year go. Mr. Chadwick responded that he doesn't think they know the answer, and suggested they need to wait and see what the requirements are going to look like. He discussed the large increase in spending in Montana, but explained that they are probably an outlier. Senator Guthrie asked if there is any hope that the counties will accept either of these drafts. Mr. Chadwick stated that they have given the interim committee their best take on what the IAC would like to see happen and they will work with the interim committee to fine tune the drafts and work out the best interests of the state and the counties. Representative Gannon asked if there was another check and balance that they could implement to ensure that the county that opts out complies minimally with state standards, other than the threat of lawsuits. Mr. Chadwick responded that one idea is to allow the opt out county to request assistance and have that money be both the carrot and the stick by requiring the opt out county to meet the standards in order to get the assistance.

Co-chair Lakey introduced Mr. Trimming, Ada County Public Defender, to share his thoughts with the committee. Mr. Trimming advised the members that if they are going to adopt any of the models discussed, they should keep the money in the county where it came from. He noted that raising taxes is a hotbed political consideration at any level. He opined that the decision some counties are making to raise taxes simply passes the hotbed political issue on to the Legislature. He closed his comments by stating that if he is given the standards and told what to do, he will do it. He observed that each county is uniquely qualified to figure out what they need. He opined that the hybrid regional system is simply adding another layer of absolutely unnecessary bureaucracy.

Co-chair Lakey introduced Ms. Kathy Griesmeyer, ACLU Public Policy Strategist. After reviewing the two drafts, she commented that she still has questions about the funding piece. She stated that the

fifteen percent cap, or the \$25,000, isn't adequate funding for the counties without additional state dollars. She added that after those dollars are allocated from the county Justice Levy Fund, the state says that if you run out of funds to provide public defense then it is back on the county to find those dollars. She emphasized that the financial piece that ensures that the resources are put in place is the critical element. She added that the ACLU is still concerned with the issue of independence, in terms of the oversight of public defense. Co-chair Perry observed that the independence part has not been discussed much by the committee, but it is considered in Draft 046. The co-chair then asked if it is helpful for county resource officers to be used as intermediaries between the Public Defense Commission and the commissioners. Ms. Griesmeyer said that it would be helpful and added that the revised language in the draft is a step in the right direction. However, she opined that they still have concerns regarding oversight. Specifically, there are political wills inherent in the commissioners if oversight is administered through prosecutors or judges. She stated this could skew the independence for the public defense system. She suggested there are ways to strengthen that piece as the committee focuses their attention on implementation.

Co-chair Lakey noted that funding is the 800-pound gorilla we are all trying to tackle. He observed that though the funding amount is unknown at present, the committee must try to build an interim additional amount of funding, as well as account for the fact that the amount will increase moving forward. He emphasized that this piece is difficult to build into the legislation. Ms. Griesmeyer agreed, and she added that \$25,000 per year doesn't get a county and their additional resources very far. She stated that the counties can speak more specifically to their needs. Co-chair Lakey stated the draft legislation is a dual approach, one where there must be a correct percentage linked with the funding amount. Ms. Griesmeyer reiterated that the members have made a good start and are moving in the right direction, but she emphasized more needs to be done with the funding issue.

After a short break, Co-chair Lakey asked Mr. Jared Hoskins to provide a summary of the amendments made to Draft 042:

#### SECTION 1 -- 19-850

- **PAGE 1**, Line 19 – Adds the authority to create model forms for data reporting;
- Line 31 – Adds authority to promulgate rules regarding administrative review and fair hearing in accordance with the Administrative Procedures Act;
- Line 33 – Adds qualifying language to the provision directing promulgation of standards, to ensure the standards adhere to principles "to the extent reasonably practicable."
- *Drafter's Note: 1) Use of aspirational language replaces mandatory language ("should" instead of "shall"); and 2) The provision requiring the court to ensure advisement of right to counsel is removed.*
- **PAGE 2**, Line 15 – The vertical representation provision is revised to clarify that it is aspirational, and specifies that, when possible, the same attorney continuously oversees the case and appears at substantive hearings;
- Line 19 - The parity provision is revised to reflect the aspiration of equity in terms of resources, staff, and facilities;
- *Drafter's Note: The provision referencing juvenile cases is removed;*
- Line 29 – The "identification of conflicts of interest" language is amended to include constitutional standards, in addition to professional standards.
- **PAGE 3**, Line 23 – Clarifies that the commission may conduct training for defending attorneys;
- Line 29 – Allows the commission to make rules establishing a process for providers to apply to the commission for extraordinary litigation costs;
- Line 33 – A disclaimer is added, stating that the violation of standards does not constitute ineffective assistance to counsel per se, but may be relevant.

## SECTION 2 -- 19-851

- **PAGE 4**, Line 19 - Clarifies the calculation of "local share" to exclude amounts derived from state indigent defense grants and expenditures related to capital cases beyond deductibles and premiums paid in accordance with the Idaho Capital Crimes Defense Board of Directors;
- Line 28 – The "indigent defense provider" definition is revised to include the commission when it has undertaken the provision of indigent defense services;
- Line 39 – Calculation of state indigent defense grant is revised to: 1) Be capped at 15% of the local share or \$25,000, whichever is greater; and 2) Allow for an additional \$25,000 for counties that join with another to create a joint office.

## SECTION 3 -- 19-853

- *Drafter's Note: No Changes.*

## SECTION 4 -- 19-862

- **PAGE 5**, Line 35 – The term "administer" is changed to "fund";
- Line 40 – The exception to the minimum funding requirement is changed from "compliance with grant terms" to "compliance with indigent defense standards."

## SECTION 5 -- 19-862A

- **PAGE 6**, Line 9 – The application for grants is changed from mandatory to optional ("shall" to "may");
- Line 30 – The reference to the section that articulates the dispute process is removed and replaced by references to the Administrative Procedures Act and the rules to be promulgated regarding dispute resolution.
- **PAGE 7**, Line 11 - Requires counties to comply with standards, as opposed to grant requirements, by April, 2017, regardless of whether a grant application has been filed;
- Line 16 – Gives the commission two options in the event it discovers material non-compliance with standards: 1) Allows the commission to bill the county for the full cost of compliance incurred by the commission in providing representation, notwithstanding the county's local share; and 2) Directs the Tax Commission to withhold sales tax revenue in the event the county does not pay its bill;
- Line 36 – Provides counties with due process, by requiring notice and an opportunity for a hearing, in accordance with the Administrative Procedures Act and rules to be promulgated regarding the fair hearing process.

## SECTION 6 -- 19-864

- *Drafter's Note: Sections were removed that articulated the dispute resolution process, which had included "meet and confer, mediation, and litigation."*
- **PAGE 8**, Line 5 - Clarifies the contents of annual reports required to be filed by all defending attorneys.

## EMERGENCY CLAUSE

- *Drafter's Note: Emergency clause added.*

Co-chair Lakey asked Mr. Ryan Bush to provide a brief overview of Draft 046. Mr. Bush explained that the draft creates seven regional public defenders, within the seven judicial districts, who are responsible for administering the standards of training and enforcement. He reviewed the following sections of the draft:

## SECTION 6 -- 19-862B

- *Drafter's Note: The changes made in Draft 042 are also evident in this draft.*
- **PAGE 8**, Line 19 - Lists the regional public defender qualifications;
- Line 28 - States that the commission will come up with other public defender qualifications, as it deems necessary;
- Line 32 - Lays out the structure and the duties for the regional public defenders.

## SECTION 1 -- 19-850

- **PAGE 2**, Line 34 - Indicates that the commission will promulgate rules regarding the procedures by which the regional public defenders will perform their duties, citing Section 19-862B, Idaho Code;
- **PAGE 3**, Line 4 - The language "in conjunction with the regional public defenders pursuant to Section 19-862B" is folded into this subsection (1)(c) that delineates the commission's charge of developing and overseeing the implementation, enforcement and modification of indigent defense standards;
- Line 9 - The language "in conjunction with the regional public defenders pursuant to Section 19-862B" is folded into this subsection (1)(d) that delineates the commission's charge of investigating and reviewing the operations of indigent defense providers and defending attorneys;
- Line 15 - Subsection (1)(f) identifies that the seven regional public defenders will be hired by the commission and the seven public defenders will be responsible for the duties included in Section 19-862B;
- Lines 24, 27, and 31 - The language "and regional public defenders" is folded into this subsection (2)(b) and (c);
- Lines Line 35 - The language "in conjunction with the regional public defenders pursuant to Section 19-862B" is folded into this subsection (2)(d).

## SECTION 2 -- 19-851

- **PAGE 4**, Line 46 - Subsection (10) defines "regional public defender" and delineates that the duties of these seven commission-appointed public defenders are listed in Section 19-862B.

Co-chair Lakey suggested that the members review the drafts section-by-section, offering their suggested changes, and begin with Draft 042. Senator Mortimer noted the use of the phrase "reasonably practicable" in Draft 042, on page 1, line 34, regarding the public defense standards and asked why the language on page 2 gets more specific. He cautioned against employing language that is too specific. Mr. Hoskins replied that the language used on page 2 is aspirational and common in the law. Senator Mortimer pointed to page 2, line 4, where the phrase "should be controlled" is used, and he stated it places the burden on the state. He suggested the phrase be replaced. Co-chair Lakey remarked that they need to strike a balance between what they "shall" be responsible for and the "may" language that gives them latitude. Representative Luker suggested replacing "controlled" with "maintained." Co-chair Lakey agreed with this suggestion.

Representative Luker stated he had more global questions and comments. In Draft 046 he observed that the seven regional public defenders appear to be an arm of the commission, responsible for monitoring and enforcement. Mr. Bush replied that Representative Luker is correct, and explained the seven public defenders would be licensed attorneys. He also suggested the term could be amended to "regional public defender resource officer."

Representative Luker stated that Draft 046 is not a true regional public defense model; but rather, it is just an oversight mechanism. He opined that it is not needed now. He remarked that this is a county model with more bureaucracy folded in and he suggested that the committee discuss Draft 042. Addressing Representative Luker, Co-chair Perry stated that Draft 046 was designed to help the Public Defense Commission by providing seven regional public defenders who would perform the local work of administration and enforcement. She encouraged the members not to discard the idea completely. She stated that there needs to be some sort of liaison created, one that works in conjunction with the commission.

Representative Luker agreed with Co-chair Perry, and he suggested providing more funding to the office and allow the commission to decide how to proceed with the specifics. Following up on Representative Luker's suggestions, Representative Trujillo agreed that this is not a regional model, but just a layer that should be under the commission. She remarked that when Judge Huskey spoke about the regional system, the model she proposed was much stronger; specifically, it was a model that would have the state providing the resources for the smaller counties that they couldn't provide for themselves. And, Judge Huskey added that a regional system won't work if there are opt outs.

After stating that he believed the standards language in Draft 042 was appropriate, Senator McKenzie stated the following concerns:

1. When we put in an arbitrary cap, should we allow the commission to exceed the cap when its required. In Section 19-851(10), Idaho Code, he suggested giving the commission the ability to go over the cap and lay out the process of how the process would work. Specifically, he suggested that the state and county would be matching above the cap, until the counties hit their public safety budget cap. Above that point perhaps it would be state funded; so, by giving the commission the opportunity to go over the cap, they would be able to meet the constitutional standards; and
2. We have yet to agree on the appropriate enforcement mechanism and he voiced his uncertainty whether the committee could make this piece happen.

Co-chair Lakey asked if the members wished to discuss Draft 046 in any more detail. He stated that he did not want a regional system where it is mandated to the counties exactly how to do a regional system. He suggested allowing the commission to establish how the regional approach is implemented across the state. Senator Mortimer stated that a regional concept should be optional. For example, if there are counties that want to come together, and feel that they need a regional public defense office for the public defense, he stated they should have that. And, referring to Draft 042, he questioned whether the legislation should give direction regarding governance of how the counties should put the regional office together. He suggested that there could be a governing board established like District 7 Health. He stated that Draft 046 isn't where he wants to go. Representative McDonald noted that while Draft 046 creates a regional system, it also creates a bureaucracy that will cost a lot of money. He added that he hesitates to force anyone to have to go to their constituents to raise taxes, when the objective is to have the Legislature create standards. He stated that Draft 046 exceeds what is needed.

Senator Guthrie suggested addressing how to administer the enforcement mechanism and also assessing how much it will cost to administer the effort. Co-chair Perry stated that while Draft 042 was amended by committee input, creating a regional model draft was difficult. Draft 046 became specifically a regional model of oversight that would provide the commission with some eyes and ears on the ground. She explained it was intended to incentivize the counties to consider something regional. She stated that she supports Draft 042, as long as the commission has the ability to have their eyes and ears on the ground. Senator Buckner-Webb agreed with Co-chair Perry and supports Draft 042, stating that she'd like to have some autonomy for the commission. Representative Trujillo stated that of the two drafts, she likes Draft 042. And, referring to that draft, she stated that despite the fact that the juvenile section was removed because juvenile defense is so different, she still wants it in there.

Following up on the concern voiced by Senator Mortimer regarding regional cooperation, Representative Luker stated that this is covered in Section 19-859(2), Idaho Code. The provision allows that the county commissioners of one or more other counties within the same judicial district to establish and maintain a joint office. Addressing Representative Trujillo's concern, he stated that it is covered under the training aspect of all of the standards enunciated in the draft. Mr. Hoskins affirmed that Representative Luker is correct, noting that training in association with juveniles and child protection cases is specifically mentioned on page 2, line 14. Also, on page 1, line 16, uniform training requirements include specific reference to juveniles. Representative Trujillo stated that having it included in the training element isn't the same because it is lost in the vertical parity. She encouraged the members to keep an eye on this area moving forward.

Representative Luker noted that on page 1, line 33, the word "adhere" is not aspirational, and he suggested replacing it with something more generic, like the phrase "should utilize, to the extent reasonably practical." Regarding the phrase used on page 1, lines 39 through 41, he asked if the sentence ending with the phrase "of the private bar" is necessary. Co-chair Lakey responded that it ties back to whether there is a caseload that is too high and whether it needs to be addressed. He stated that perhaps they could take out "of the private bar," because it is really the caseload that needs to be addressed by having additional staff. Representative Luker stated that this is covered on

page 2, lines 4 through 7, so maybe the language on page 1, lines 39 through 41 is not necessary. Co-chair Lakey stated he agrees with Representative Luker, as did Senator McKenzie.

Representative Luker continued, pointing to the paragraph beginning on page 2, line 1, and asked if the language could be made more generic. He suggested that the vertical representation language on page 2, lines 17 and 18, should be reworded, observing that though it is a good aspiration, at present it doesn't allow enough leeway. He recommended that the members focus on the workload piece before addressing parity, and stated that the parity language on page 2, lines 19 through 21, should not be placed within the standard itself, because it puts a target on the backs of the legislators. On page 2, line 2, Senator McKenzie noted that the term "sufficient time and private space" is good but it is important to include "sufficient physical space to comply with their duties." And, he suggested keeping the parity language in the standard because it is all interrelated. Representative Trujillo agreed with Senator McKenzie, observing that physical space is provided for prosecutors but not for public defenders. And, referring to the parity issue, she asked the members to consider who would provide the oversight.

Referring to his global concerns regarding the enforcement mechanism, Representative Luker suggested that taking the funding is not a good idea. Also, he stated that he couldn't see how the commission would come in and take over an office. He suggested they are a bit premature on the enforcement piece, because it isn't clear that there is going to be a problem. He reminded the members of Mr. Trimming's earlier statement of his intent to comply with the standards that the committee creates. Representative Luker suggested that the commission should be an assisting body, and that the interim committee can always put teeth in the legislation later. With regard to the funding formula, Representative Luker stated that he likes the idea of providing extra money for the incentivizing approach, but wondered if \$25,000 might be too high, and he suggested \$15,000 might be more realistic. He noted that another fiscal issue is the grant process, and he questioned whether it would be an ongoing grant. If it is, he stated that each year when there are new standards added, there would be another level of grant, and the budget would rapidly escalate. Representative Luker encouraged the members to think about how the grants will work in the future. Representative McDonald stated that of the two drafts, he prefers Draft 042 because it gets to the standards.

After the lunch break, Co-chair Lakey suggested that the members make comments pertaining to Draft 042 on the conceptual level, section-by-section.

#### SECTION 1 -- 19-850 -- Standards.

Senator McKenzie questioned the inclusion of constitutional rights language in Draft 042, Sections 1 and 5. Co-chair Lakey explained that the language came from the Michigan model. The intention was to not make it a strict compliance list. Senator Mortimer stated that he shared Senator McKenzie's concern that the language doesn't seem to fit; however, he understands that it is used as a catch-all reference. Senator Guthrie stated that he sees the relevance of it being there. Representative Gannon stated that it should be there; absent the reference, he opined that there could be a per se violation. Co-chair Lakey considered that if it is left in place, the court might ignore it. Senator McKenzie suggested that a legislative intent section could be added and the reference to constitutional rights could be inserted there. He emphasized that he didn't believe it will have an effect.

#### SECTION 2 -- 19-851 -- Funding.

Co-chair Lakey asked where the floor figure of \$25,000 was derived and Co-chair Perry stated that the floor figure came about because Mr. Blocksom indicated that fifteen percent will not cover the need for the rural counties. In response to Mr. Blocksom's analysis, the \$25,000 figure was inserted, with the idea being that the state and the county matching amount would go up together. Representative Trujillo suggested leaving the \$25,000 amount in place, as it is a good incentive for

the rural counties to come together. Representative Gannon stated that he didn't know if \$25,000 was enough, and suggested that the counties should be asked if there is a way to tweak the incentive to make it more effective.

Co-chair Lakey invited Mr. Chadwick to join the discussion. Mr. Chadwick encouraged the members to view the \$25,000 as seed money to start. And, he suggested creating a pool of money that a county could draw on when there are significant costs in particular cases. Referring to page 3, Subsection (2)(e), line 29, Co-chair Lakey asked Mr. Chadwick for his opinion on this language. Mr. Chadwick stated that there needs to be a starting point, and then, as the counties move forward, the Legislature can revisit the issue after three years.

Senator Guthrie suggested that if the maximum is going to be awarded for everybody, perhaps a fund can be created where the counties are entitled to the higher of either (15% or \$25,000) but if they don't use it then that amount would be invested and available under the county's name for use for those extraordinary costs. This pool would be maintained by the state and would promote effective use of the funding so the counties would have an incentive to build a savings account through the extra money they didn't use. Co-chair Lakey agreed with Senator Guthrie explanation of the present grant amount options, and he asked if the members accept fifteen percent as a starting number. Representative Trujillo suggested raising it to twenty percent because without the data to confirm what is really needed, she'd rather have it higher and scale it back as necessary. Senator Guthrie suggested that the state shoulder the expenses for the training, reporting, and administration. After the funding is awarded, he suggested freezing the base for three years and then reengaging the counties financially with an incremental increase in terms of cost sharing. He emphasized that if we are willing to put this in statutes we should be willing to fund it.

Co-chair Perry stated that she believed there will be some other up-front costs for the counties that will stabilize out over time. She commented that she is more comfortable with the fifteen-to-twenty percent range because of the up-front costs. She suggested putting a sunset in this funding piece of the legislation, and in three years come back and revisit the issue. Senator McKenzie stated that, given the committee's mission, he is still struggling with the arbitrary cap. He suggested that the grant not have a cap, but instead create a matching requirement between the state and the county, making sure the county has skin in the game. Co-chair Lakey noted that with a matching approach there is still a need to establish what the matching amount will be. Senator McKenzie suggested that the matching amount be based upon how much it costs the counties to implement the legislated requirements for defense. Co-chair Lakey suggested that the additional costs to the counties will be made evident as the standards are developed by rule.

Mr. Chadwick stated that he agreed with the idea of providing some base amount and then perhaps some kicker added to that based on experience, and then tying it all to a mandated review in three years time, in order to assess the impacts on the counties. He cautioned against committing every dime from the Justice Fund for public defense, and he asked that the amount of support be rational and based on real data. Representative Trujillo asked if the numbers the members have are based on the total cost of public defense or on the Justice Fund, and Mr. Chadwick answered that the \$25,500,000 figure was based on the actual public defense costs and not on the Justice Fund. Representative Gannon asked for the total public defense expense in 2014 and Mr. Chadwick responded that he believed it was in the \$22 to \$23 million range, with a lot of the increase due to the elimination of the flat fee contracts.

#### SECTION 5 -- 19-862A -- Enforcement.

Co-chair Lakey asked the committee to continue their review of Section 5 by discussing the consequences of non-compliance. Senator Guthrie stated that he doesn't support taking sales tax money, because it is too punitive. He suggested perhaps they should consider something that would trigger a third party to step in. Co-chair Lakey asked if establishing a consequence is

necessary. Senator Mortimer agreed with Representative Luker's observation that this effort is in the preliminary part of the process. He suggested giving the counties the chance to participate, and then, at some point in the future, corrective action can be taken. However, the implementation and formula criteria should be set now. He also suggested giving the counties the opportunity to comply before putting in the consequence. Senator McKenzie suggested that perhaps Subsections (7), (8), and (9), are not necessary, given that the requirements are already laid out. He added that the enforcement mechanism can continue to be how it has been through history, which is that the courts are left to determine whether it is constitutionally required or not. Representative Trujillo stated that she preferred a type of enforcement where, if a lawsuit is judged to have standing, then the county would be responsible for the cost of the lawsuit. She suggested to not include punishment in the legislation at this time, and review the process in three years.

Co-chair Lakey asked for Mr. Chadwick's thoughts on whether a stick is needed. Mr. Chadwick stated that he is not a fan of the sales tax stick and he advised that a stick is not needed. Continuing, he stated that the counties will put forward their best efforts to comply with what the Legislature enacts and he emphasized that their purpose is to carry out the policy of the state. He added that he agreed with the value of building in a review after three years. Senator Guthrie suggested providing a more friendly process where the counties could voluntarily enlist the additional help if they need it. Senator McKenzie concurred with Representative Trujillo and others regarding the importance of reviewing the progress in three years. He added that in Subsection (6) the county is required to provide funds in excess of its local share in the event the cost of successfully executing its plan exceeds the sum of its local share. He suggested not changing that funding mechanism, but rather committing to a later review that would assess the fairness to the counties.

The gavel was passed from Co-chair Lakey to Co-chair Perry, and she recognized Representative Gannon. Representative Gannon suggested that if Subsections (7), (8), and (9) are removed, we could insert a provision that states: if a county is sued for not providing adequate counsel, the county would have to pay for the costs for the attorney's fees and damages sustained by the plaintiff if it was found they hadn't complied with the requirements of this act. He suggested this could be a fair incentive. Co-chair Perry stated she was not advocating for or against eliminating Subsections (7), (8), and (9), and she presented two concerns: 1) if we make the state responsible for constitutional public defense, the committee has to consider what happens when the standard isn't met; and 2) the Public Defense Commission has already voiced concern about what the enforcement mechanism will be. She opined that most committee members believe this piece is still a bit too rough, and she suggested they direct some more serious thought to this area.

#### SECTION 3 -- 19-853 -- Duty to Notify Accused of Right to Counsel.

No comments.

#### SECTION 4 -- 19-862 -- Appropriation for Public Defender.

Referring to Subsection (2), Representative Trujillo asked for clarity regarding how the counties payment amount will be determined. Co-chair Perry commented that the intent is to just cover the counties through the highs and lows, and she stated that the counties do not have to expend all of the funding they receive.

#### SECTION 6 -- 19-864 -- Records of Defending Attorneys/Reporting of Defending Attorneys.

Representative Trujillo suggested that the teeth could be inserted here, referring to the non-compliance language from the earlier draft. Co-chair Perry stated that if the law requires them to do the reporting, then they should be doing just that, though she suggested that it might not be completed in a timely way. Representative Trujillo asked that they keep an eye on the data collection and reporting over the next three years.

Co-chair Perry asked if the members had any further comments. Hearing none, she made the following observations and requests:

- Noting that the committee is still not comfortable with the enforcement mechanism piece, she suggested that it remain in place for now, providing time for the members to further consider what it should look like;
- She asked the members to consider whether there should be a sunset clause inserted in Draft 042, and if so, what should the date of the sunset be;
- She reminded the members that there must be consensus on the starting-level funding amount;
- She noted that some of the dates presented in Draft 042 haven't been confirmed with the dates from the commission.

Representative Gannon asked if it is a concern of the commission that the state will end up paying when a county does not comply with the standards. Co-chair Perry responded that she can't speak for the commission but she thinks there is a concern regarding what role the commission plays in enforcement, and whether the commissioners could get caught up in lawsuits. She asked the members if they thought the commission should be the enforcer, and if so, what will it look like. Conversely, if the commission is not the enforcer, what would that look like.

Senator Guthrie suggested that the members trust the counties to carry out the charge they are given. Referring to Co-chair Perry's question regarding the insertion of a sunset clause, Senator Mortimer stated that there should be a 3-year sunset clause. Co-chair Perry recalled that Judge Huskey stated in her earlier testimony that if there are no enforcement mechanisms then the standards will not hold up. She stated her intent to follow up with the commission and get their reaction to Draft 042, as well as to the other suggestions expressed at this meeting. She suggested that the members continue to consider the issue of enforcement and, at the next meeting, they will also settle on the funding piece.

The members agreed to Wednesday, January 13, 2015, at 4 p.m. for the next committee meeting date and time. Co-chair Perry adjourned the meeting at 2:20 p.m.