

MINUTES
Approved by the Committee
Public Defense Reform Interim Committee
Wednesday, January 13, 2016
4:00 PM to 6:00 PM
WW53, State Capitol
Boise, Idaho

Co-chair Representative Perry called the meeting to order at 4:05 p.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 Dean Mortimer, Jim Guthrie, and Cherie Buckner-Webb. Senator Curt McKenzie 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; Alan Trimming, Ada County Public Defender; Paul Panther, Attorney General's Office; Kimber Ricks, Darrell Bolz, and William Wellman, Public Defense Commission; Nancy Werdel, Ada County Prosecutor's Office; Marilyn Paul, Twin Falls County Public Defender; Kathy Griesmeyer, ACLU Idaho; Larry Maneely, Ada County Board of County Commissioners; Michael Henderson, Idaho Supreme Court; Sara Thomas, State Appellate Public Defender; and Adam Jarvis, Department of Financial Management.

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

Representative Luker moved to approve the committee's minutes from the previous meeting held December 16, 2015, and Senator Buckner-Webb seconded the motion. The motion was approved unanimously.

Co-chair Representative Perry introduced Ms. Marilyn Paul, Public Defender, Twin Falls County, who presented her comments, as well as those of Mr. Dennis Byington, Cassia County Public Defender. Mr. Byington's letter can be reviewed at: <http://legislature.idaho.gov/sessioninfo/2015/interim/defense.htm>.

Ms. Paul thanked the committee for including a parity provision in the draft legislation. She emphasized the role parity plays in public defense attorney retention, and she discussed two challenges her office faces:

- Though the training dollars are very well spent for raising the quality of public defense, she stated that it is essential to recognize that they may find themselves having to replace departing attorneys with inexperienced new hires when the trained attorneys leave for higher paying jobs elsewhere; and
- The idea of standards for different levels of practice within the public defender's office is not a popular idea with public defense attorneys, which she suggested is due to the fact that prosecutors do not have comparable required standards.

Representative Gannon asked what it costs her office to provide expert witnesses in criminal defense cases. Ms. Paul stated that their overall caseload is 4,000 cases per year, taking out the murder cases. She noted that murder cases have used the largest percentage of expert witness funds by far. She explained that tallying a total cost for expert witnesses is difficult because it depends on how one defines the term "expert witness." Out of the 4,000 cases per year, probably about twenty involve retaining expert witnesses. She estimated that the approximate cost for providing expert witness services in the non-murder cases is in the neighborhood of \$1,500 per case if they testify, though she added that some cases cost less than that. Representative Gannon asked how attorney retention in her office compares to the retention rate in the county prosecutor's office. Ms. Paul stated that the prosecutor's office has the better retention rate. Representative McDonald asked what the attorney entry level wage disparity is between the two offices and Ms. Paul responded that she didn't know the job entry wage for the prosecutor's office but the entry level wage in her office

is \$56,000, with county benefits. Mr. Trimming noted that the starting wage for attorneys in the Ada County Public Defender's office is \$57,000. Representative Luker asked for a comparison of the criminal staff numbers between her county's public defender and prosecutor's city and county offices, and Ms. Paul emphasized that the public defender's office is notably deficient in staffing compared to the prosecutor's office. She also noted a large pay differential between the offices' attorneys.

Co-chair Perry introduced Mr. Paul Panther, Criminal Law Division Chief, Attorney General's Office. Mr. Panther stated that he wished to discuss the unintended consequence that might occur if a narrow part of the proposed statute remains in place. He pointed to Section 19-850(1)(a)(vi), and suggested that the list of principles should be preceded with a disclaimer that clarifies that they are not the constitutional standards but rather a list of standards that will be specifically employed to provide defense for indigent people in Idaho.

Senator Lakey stated that their discussion with the Attorney General's Office resulted in the following proposed draft changes:

- Page 2, line 4 - Move the text in paragraph (c) to Page 1, and insert it as the new (vi);
- Page 2, line 2 - End the sentence after "effective representation" and move the remaining language in that sentence up to the top of the standards section so that the consideration language applies to all standards;
- Page 3, line 35 - Cite reference corrected to "(1)(a)(vii)" and the sentence is edited to end after "post-conviction relief."

Senator Guthrie asked if the "commission shall" language on page 7, in both subsections (8) (b) and (9), might create a liability issue and Mr. Panther responded that in terms of liability, the Attorney General's Office advised there is not anything in the draft that would create any more liability than would be evident with any other commission, though he stated he hadn't evaluated the specific area Senator Guthrie points to. Representative Luker agreed with Co-chair Lakey's proposed changes and suggested that the phrase "in and of itself" on page 7, line 42, should also be scrutinized. Representative Trujillo asked Mr. Panther to explain his reasoning for distinguishing between providing effective indigent counsel standards and constitutional standards. Mr. Panther explained that the two must be distinct; for example, if Ms. Paul's office has fewer resources than the prosecutor's office, this disparity should not be construed as an unmet constitutional standard.

Senator Mortimer made the following suggestions on page 2:

- Subparagraph 7. - Mention of standards here opens the door to litigation;
- Subparagraph 3. - Remove "be maintained to" and insert "should permit";
- Subparagraph 6. - Remove "same"; and
- Subparagraph 9. - Remove all of the text after "supervised."

Co-chair Lakey agreed with Senator Mortimer's suggestions and stated that the standards presented in the draft are an effort to provide effective counsel without touching upon the constitutional rights. Mr. Panther agreed with Co-chair Lakey and reiterated that his comments are focused on the unintended consequences. Pointing to the language on page 5, line 8, "upon commencement of detention," Representative McDonald asked if a clearer definition of "detention" is necessary and Mr. Panther answered that the present language is sufficient.

Co-Chair Perry introduced Ms. Sara Thomas, State Appellate Public Defender, who discussed the suggestions put forward by the Public Defense Commission at their last meeting. Ms. Thomas noted the following:

- Page 4, lines 12 thru 20 - Make the language consistent regarding reference to "includes" and "excludes" state funding;
- Page 7, line 16 - Clarify the language to reflect the intended relationship between the applicant's compliance with standards and their eligibility to apply for grant money; and
- Page 8, line 6 - Add the phrase, "any defending attorney whose information is not otherwise included" in an indigent defense provider report.

Ms. Thomas noted that the principles laid out in the draft are understood to be guidelines, whereas the Idaho Supreme Court and the U.S. Supreme Court focus on the ABA standards and those standards ultimately promulgated by the Public Defense Commission when they adjudicate deficient indigent counsel lawsuits. Co-chair Lakey asked if the term "standards" mentioned on page 1, line 33, should be replaced with the term "principles." Ms. Thomas suggested leaving "standards" in line 33, and then using "principles" in the text that follows.

Co-chair Perry asked Representative Luker to review his list of suggested edits. Representative Luker's list is available at: <http://legislature.idaho.gov/sessioninfo/2015/interim/defense.htm>. At the conclusion of his remarks, Representative Luker asked if the dates in the draft will work in concert with the Legislature's appropriation schedule. Co-chair Perry remarked that the timelines stated within the draft are not set in stone, as the commission still needs to look at dates in terms of what they can get accomplished. Referring to page 8, line 5, Senator Mortimer suggested removing "On and after November 1, 2016, and" so that the sentence will now begin "By November 1st of each year."

Co-chair Perry asked the members to share their thoughts regarding Representative Luker's suggested edits. Co-chair Lakey stated he is considering something between fifteen and twenty percent and Senator Mortimer stated he preferred starting with fifteen percent. Additionally, he suggested removing the phrase on page 3, line 28, regarding the counties applying for funds to be used for extraordinary litigation costs. Co-chair Perry asked for clarification regarding the funding for commission staff, and Senator Mortimer answered that funding for the other areas stand in addition to the fifteen percent. Senator Guthrie asked for more clarity regarding the "up to \$25,000" phrase, and Co-chair Lakey stated it is not an automatic \$25,000 grant.

Representative Luker identified the four funding buckets: 1) grant money up to \$25,000; 2) merger money - \$1.1 million; 3) money for the operation expenses associated with the commission's expanded duties; and 4) the training money - \$100,000. He suggested that the committee needs to decide the amount to appropriate for training. He stated that his rough total, after adding up the four buckets is in the \$6 million range. Co-chair Lakey stated that the total can be quite a bit less, given that it is unlikely that all 44 counties will get grant money. Representative Trujillo stated she is more comfortable with eighteen to twenty percent. Representative McDonald stated he believes fifteen percent is a good start.

Representative Luker agreed with Representative McDonald, and suggested they take the first step and see how it unfolds. Senator Guthrie suggested there needs to be clearer language inserted on page 4, lined 37 through 40, in order to distinguish between the options of maximum percentage and the ceiling amount of \$25,000.

Co-chair Lakey stated he wants to ensure there is enough money going to the counties, in order to help them offset the losses from removing the model contracts. He emphasized that there will be a sunset on these standards and the Legislature can modify the funding as things develop. He also observed that the Governor's proposed benchmark of \$5 million should cover what will be needed, if the fifteen percent is applied and the other three funding buckets are filled as suggested.

Representative Gannon questioned whether the "not to exceed" language means that every county necessarily gets the maximum percent. Senator Mortimer stated that from a budgeting standpoint, one should assume that in the first year or two everyone is going to use the maximum amount. Co-chair Lakey stated that he anticipates that counties are going to be either all or nothing, and those counties that participate are going to try to get the full fifteen percent. Co-chair Perry added that for decision making purposes it is a safe assumption that everyone is all in. Representative Luker stated that 24 counties would be under \$25,000, so if the amount was bumped to \$30,000, that would be another \$125,000.

The next meeting of the interim committee is Thursday, January 21, 2015, at 4:30 p.m. The meeting adjourned at 6:05 p.m.