

2-7-22

Testimony to Senate Judiciary and Rules committee

re: PDC rules **61-0101-2101** and **61-0102-2101**

February 7, 2022

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representing the Idaho Association of Criminal Defense Lawyers

Mr. Chairman, members of the committee:

My name is Teresa Molitor, and I am a contract lobbyist based here in Boise. I recently began representing the Idaho Association of Criminal Defense Lawyers and I want to tell you what a privilege it is to stand here before you and to speak on their behalf. We are asking that you reject these rules today.

I have distributed a copy of their one-pager explaining the objections, as well as a longer, multi-colored document with specific changes to every section, including: (1) definitions, (2) CLEs, (3) deficiencies, (4) removal from the roster without due process, and (5) excessive bureaucracy. There will be members of our association who will briefly speak to each of these issues today.

The Idaho Association of Criminal Defense Lawyers, also known as "IACDL", is an association of public and private criminal defense attorneys from across the state. It was founded in 1989 and has about 450 members. One of the objectives of the organization is to "promote ... **the expertise of the defense lawyer in criminal cases.**"

Indeed, IACDL has been concerned about the "expertise of the defense lawyer" a full 25 years before the Public Defense Commission was established in 2014. However, the PDC has proposed rules that essentially call into question its confidence in our public defense lawyers and go beyond the scope of the law. Specifically, the PDC has assumed the authority to remove attorneys from capital rosters, monitor and approve Continuing Legal Education classes for public defenders, and essentially micromanage the day-to-day decision-making of our public defenders. This is not acceptable.

We had a productive work session last week – thank you Chairman Ricks for facilitating that discussion between IACDL and the PDC. For the first time, public defenders felt heard. We hope our suggestions for change, which were all well-founded, will be seriously considered.

Issues of case load, meeting space, vertical representation, and the like, are issues of funding. If those issues are being addressed by the PDC, we applaud that. In the meantime, these additional rules and regulations are unnecessary and go beyond the scope of the law. For instance, we have an Idaho State Bar to decide who is fit to practice and who isn't. The PDC does not need to assume that role.

As the real issues of “inadequacy” continue to be addressed by funding, the PDC has been growing itself into an over-burdensome regulatory agency that is duplicating the roles and functions of other agencies and adding a layer of bureaucracy to this one sector of lawyers. It is putting our public defenders at risk of burnout and making it increasingly difficult to recruit and retain public defenders. Like a dog chasing its tail, these excessive regulations are setting us back and threatening the “adequacy” issues we were working to solve.

In closing, let me say that the IACDL strongly rejects the assertion that public defenders simply “don't want rules.” As I pointed out, IACDL has been interested in the “expertise of the defense lawyer” since it began in 1989. If, over the years, the state of Idaho did not properly fund its system, it has an opportunity to catch up now. But adding more regulation to one group of lawyers is absurd and does the opposite of what we all want – it takes public defenders away from their clients as they spend time filing more reports, attending more trainings, and fearing their license could be revoked by the PDC at any time. I don't think that is a situation any of us envisioned for our public defenders.

Thank you for your time. Please reject these rules today.



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## **OPPOSITION TO PUBLIC DEFENSE COMMISSION PROPOSED RULES 2022**

The IACDL and its membership continue to have great concerns regarding the Public Defense Commission's (PDC) rules propounded during rule making in 2020 and 2021. While the PDC did conduct public hearings and receive stakeholder input since the last legislative session, the input has been largely ignored.

Attorneys practicing public defense are bound by the same rules of professional conduct as every other attorney practicing any kind of law throughout Idaho. Adhering to certain conduct or rules is not what the stakeholder objections are about. The objections are that the rules are vague and centralize authority in an entity, with not a single public defender on it, who does much of its work behind closed doors and without due process. Decisions made about an attorney's conduct which exclude the attorney from rosters are without any formal, meaningful due process. The same is true for counties deemed deficient by the PDC.

### **IACDL opposes the PDC proposed rules generally as follows:**

- IDAPA 61.01.02.060 Defending Attorney Roster. It is up to the Executive Director and PDC to both approve and remove an attorney from the roster. An attorney can be removed for emergency or non-emergency reasons. An attorney must comply with each and every aspect of the rules to remain on the roster. If an attorney is removed there is no clear appellate process for the aggrieved attorney.
- IDAPA 61.01.03.80.2.a Capital Defending Roster. It is up to the Executive Director and PDC to both approve and remove an attorney from the capital defense roster. An attorney denied admission to the roster or removed from the roster does not have a clear appellate process.
- IDAPA 61.01.03.50.4.b.i Deficiencies. It is up to the Executive Director and the PDC to determine county deficiencies. If there is a finding by the PDC of a willful deficiency, the county does not have a clear appellate process and the process that is specified is different than the process afforded individual attorneys.
- IDAPA 61.01.03.90.1 CLE Requirements. The PDC has the power to disapprove mandatory continuing legal education credits unless they are pre-approved. This pre-approval requirement is extremely onerous for individual attorneys and counties because failure to comply with the mandatory credit requirement by the PDC is deemed a deficiency that must be cured.
- IDAPA IDAPA 61.01.01.22 Vertical Representation. The definition and duties imposed on defending attorneys and counties continues to be an issue that is unsettled.
- PDC rules conflict with Idaho Code and the powers of institutional defender offices to budget, determine who they are hiring as defending attorneys and train. If an attorney is deemed, by the PDC to be deficient, and in jeopardy of roster removal, the PDC works directly with that attorney. The result is that when a county has established an office for Public Defense the PDC rules allow for interference with the relationship between the county, the Public Defender and an employee defending attorney.

PDC RULES 2022 – TESTIMONY BEFORE SENATE JUDICIARY AND RULES COMMITTEE

I am Anne Taylor. I am a board member of IACDL (Idaho Association of Criminal Defense Lawyers) and chair of the sub-committee of Public Defense. I am the Chief Public Defender for Kootenai County, and an attorney. I became a lawyer in 1998 and have practiced in Idaho since that time. My background is primarily in indigent defense; although I have 6 years experience as a deputy prosecutor in Bannock, Kootenai and Latah counties. As a public defender I worked as a deputy public defender in Kootenai County between 2004 and 2012, then as a private practitioner taking conflict appointments in several counties in Idaho between 2012 and 2017. I have served as the Chief Public Defender for Kootenai County since July 2017.

I am here to ask you to reject the PDC Rules. I wrote in early 2021 asking the rules be rejected. I signed up to testify in the various sessions. I was optimistic when the rules were passed as temporary and there was a promise to have a workgroup convene before the 2022 session. That workgroup did not happen.

I have availed myself of opportunity to comment to the PDC, both verbal and in writing. I have attended negotiated sessions and other meetings requested by the PDC. I attended the special meeting with Senator Ricks and Representative Hartgen (2/2/2022) and appreciate that opportunity to express concerns.

I want you all to know my position is not about having rules to follow. I already follow rules and procedure. I have rules set by ISB, Rules of Professional Conduct, Court Administrative Rules, Local Rules and most importantly, expectation and needs of my client. I understand the Constitutional requirements of my job, and embrace them. I am guided by, and follow, the principles of indigent defense established by the American Bar Association and the National Association of Criminal Defense Lawyers. This is not about rules.

This is about overreach of the PDC with a lack of Due Process for any attorney choosing to practice indigent defense. The Rules place the PDC in position as gatekeeper for who may practice public defense – and that can change without the attorney having any recourse. There is no real process for an attorney removed from a roster, or found deficient.

This power is based in rules that are vague and subject to interpretation. That leaves too much up to a single person with control over an attorney's career and livelihood. This will make it less attractive for an attorney to decide to work in indigent defense.

The rules tread into the purview of ISB and its authority over all attorneys; the rules make indigent defenders subject to an additional level of scrutiny. The rules are contrary to statute.

There are things that have improved public defense – additional funding for more attorneys to reduce workload. The additional funding for case preparation and hiring experts. But these rules take the PDC oversight function and give them authority to say who gets to work in the field of public defense. This will deter experienced, capable attorneys from this field.

Mr. Chair and Members of the Committee:

The American Civil Liberties Union and the American Civil Liberties Union of Idaho (collectively, "ACLU") urge the Committee to reject a number of the Public Defense Commission's pending rules.

The PDC has a duty to promulgate rules related to the provision of indigent defense in Idaho, including establishing comprehensive caseload and reporting standards. These rules, like those they replace, fail to meet that duty. The proposed rules lack specificity and are often permissive rather than mandatory. This approach continues to fail to ensure that indigent Idahoans receive the defense to which they are constitutionally entitled.

### Enforceable Standards

The PDC continues to use language so permissive and vague that some rules are effectively unenforceable and therefore meaningless (i.e., proposed IDAPA 61.01.02.030.05 – "The county *should consider* engaging independent legal counsel to negotiate Defending Attorney Contracts"). These terms fail to ensure that the counties will comply with the standards or that their non-compliance will be actionable. Whenever prescribing standards, the proposed rules should use mandatory terms, such as "shall" or "must," to provide clarity and certainty to all stakeholders.

### Vertical Representation (IDAPA 61.01.01.010.22)

The revisions to the former proposed rule appear intended to weaken the vertical representation requirement. To the extent vertical representation is not feasible anywhere in Idaho, the proper response is to ameliorate excessive workloads, lack of independence, or court-imposed and other barriers to vertical representation—not to lessen the standards requiring it.

### Independence (IDAPA 61.01.02.030)

The rules would still give ultimate authority to county commissioners, who are partisan politicians who seldom have legal training, especially in criminal defense (much less public defense). The ABA Ten Principles of a Public Defense Delivery System, and Idaho Code 19-850(a)(vii)(1) in turn, make clear that public defense should be independent from political and judicial influence. As the Ten Principles explicate, a public defense system should be subject to judicial supervision only in the same manner and extent as retained counsel.

The proposed rules regarding the involvement of prosecuting attorneys (IDAPA 61.01.02.030.04–05) are too vague to ensure independence. The rules only require that counties "limit" prosecutors' involvement when it "may jeopardize" independence or undermine the delivery of public defense, and only encourage counties to "consider" engaging independent counsel to negotiate public defender contracts. Involvement of prosecuting attorneys in selecting defending attorneys, or making decisions about defending attorneys' budgets and operations, *always* jeopardizes the independence of defending attorneys and, at the very least, creates the appearance of impropriety, which inevitably undermines the delivery of public defense. Much as it would be inappropriate for defending attorneys

to advise the counties about prosecutor selection, budgeting, or operations, the proposed rules should remove prosecuting attorneys from any involvement in decision-making about public defender selection, budgeting, or operations.

#### Equity and Parity (IDAPA 61.01.02.040.02)

IDAPA 61.01.02.040.02 simply weakens and softens the former proposed rule, which was already problematic and ineffectual. The proposed rule is again plagued with vague and amorphous terms that make non-compliance non-actionable (i.e., "*So far as is possible*, Defending Attorneys and their staff will not be compensated less than a properly funded prosecutor and staff with similar experience and performing similar duties").

More generally—and as we said last year—in light of the constitutional crisis created by the deficiencies in Idaho's public defense system, the PDC should encourage all counties, through its proposed rules and legislative recommendations, to reduce the budgets for and scope and volume of prosecution and incarceration in order to address this urgent (and yet longstanding) crisis.

#### Defending Attorney Minimum Requirements (IDAPA 61.01.02.060.03.i (iv))

Previously, this rule provided that defenders were to encourage the entry of a not guilty plea at Initial Appearance except in *extraordinary* circumstances where a guilty plea is *constitutionally appropriate*. The word "extraordinary" has since been stricken at the expense of indigent clients.

Guilty pleas on the first appearance calendar should absolutely be extraordinary. At this stage in a criminal proceeding, public defenders may not have all of discovery or relevant Brady material, nor has the attorney had an opportunity to investigate, consult with experts, or built rapport with their client. For all these reasons, public defenders should be counseling against pleading guilty on the first appearance calendar unless there in the circumstances where a client may be facing felony exposure or a harsher filing if not for the plea. Absent this circumstance, there may instances where a defendant wishes to plead on the first appearance calendar; however, in those cases, the defense attorney must comply with constitutional requirements and their ethical obligations to ensure that their client is knowingly and voluntarily entering the plea, and that the client is fully advised as to why a guilty plea may not be in the his or her best interest in this very early stage in the case. The ACLU of Idaho applauds client-centered advocacy, but representation must be within the constitutional and ethical bounds required of defense attorneys when a client chooses to plead guilty.

#### Workload (IDAPA 61.01.02.060.05)

Though the PDC did not invite comments on this draft rule, it is so significant that we must reiterate what we have said before:

The counties have control over public defense caseloads, because it is the counties, through their prosecuting attorneys, that determine whether and when to bring criminal charges. These rules imply that excessive defending attorney workloads are a problem for defending attorneys alone to address, at pain of PDC action against public defense offices and individual defending attorneys. However, the

true causes of excessive workloads are the prosecuting attorneys' offices who bring an excessive number of juvenile and criminal charges, despite limited county resources, and the State's failure to provide funding for a sufficient number of additional defending attorneys.

Furthermore, the workload standards that the PDC adopts in these rules are not well-founded. These numerical standards were based on a number of dubious sources, including (1) the 2018 Idaho Workload Study, the reliability of which both the State and the authors have called into question, (2) data collected by the Ada County Public Defender's office, which has consistently denied the existence of any significant deficiencies in the delivery of public defense services in Idaho, and (3) conversations with various stakeholders—not including indigent defendants or those who have received public defense services in the past. Indeed, the sunset provision built into the Rules suggest that even the State recognizes the need to revisit the workload standard. But the PDC must complete a thorough and reliable workload study expeditiously, rather than waiting until 2023 (or later) to create evidence-based workload standards that allow defending attorneys in Idaho to provide constitutionally-sufficient representation to *all* of their indigent clients. In the meantime, the PDC should use the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") standards, with caveat that even the NAC numbers have been determined by experts in the field to be too high.

The assumptions upon which the numerical standards were based are not accurately reflected in the workload rules, to the harm of indigent defendants' constitutional rights. While the Standards expressly assume cases of average complexity, the numerical standards are based on the assumption that all cases would involve minimal work (low-level charges only, with no trial and minimal investigation): just 4 hours per misdemeanor case and 10 hours per felony case. Though the workload standards prescribe that caseloads should be adjusted to account for more complex cases, the proposed rules provide no instructions for making those adjustments. The rules must include specific guidance for making those adjustments.

The numerical workload standards are also expressly based on a number of faulty assumptions, including (1) that defending attorneys always have adequate support staff, (2) that defending attorneys have no supervisory duties outside of their docket, and (3) that defending attorney caseloads are reasonably distributed throughout the year. But the proposed rules do not define what level of support staff is adequate. The rules should specify what support staff of each type is adequate, as well as how to adjust caseload expectations to compensate for inadequate support staffing. The numerical standards should also require and specify how to adjust for defending attorneys that have supervisory or other administrative duties. Many public defenders have supervisory duties and also handle cases. The rules do not take into account time that many public defenders are required to expend on these roles. The standards also fail to include any process or adjustment for defending attorneys or offices whose caseloads are significantly uneven throughout a given year. Also, in a departure from the existing standards, the proposed rules fail to include any consideration of time defending attorneys spend handling clients in problem-solving courts. The rules must specify the appropriate adjustments for any such workloads.

In the event that defending attorneys or offices are unable to meet the workload standards, the proposed rules only require that the attorneys "request resources" and "notify the court" that caseload maximums are, or might be, exceeded. The rules permit defending attorneys to continue representing indigent defendants and take on additional cases, despite their acknowledgment that their workloads



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are too high and the inherent conflicts of interest present in carrying an excessive caseload. The rules must not allow defenders to take on any representation beyond the maximum workload limits, as adjusted to account for case complexity, support staffing, supervisory duties, and case distribution across time.

However, declining cases is not, alone, enough to resolve the constitutional deficiencies of the current public defense system. While case refusal may resolve ethical issues for defending attorneys, many indigent defendants will remain unrepresented, often while still in custody, until a defender becomes available. The State and the PDC must address excessive caseloads with more than just notification, requests for additional resources, or case refusal.

The comments above highlight some of our main concerns about the proposed rules. But to end Idaho's criminal legal system and public defense crises, the State and the PDC both have substantial additional work to do beyond improving these rules. Even if that additional work came immediately, it would be decades too late. These crises are daily devastating Idaho families' lives, young Idahoans' futures, and Idaho communities' economies and well-being.

Because the proposed rules require substantial revision, we urge the legislature to reject the rules as identified in this letter.

Respectfully,

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February 7, 2022

To Members of the Senate Judiciary & Rules Committee:

My name is Jeanne Howe, I am a Chief Deputy Public Defender in the Kootenai County Public Defender's Office. I've represented indigent clients in Idaho since 2013.

Please reject the current proposed rules before the Committee. I make this request for the logical and simple explanation that as a public defender, I am already subject (at a minimum) to the following governance, oversight and rules:

- My clients
- The Rules of Professional Responsibility (self-governance, colleague oversight and Grievance Procedures through the ISB)
- The Idaho State Bar (MCLE requirements and Grievance Procedures)
- The Idaho Supreme Court
- The Idaho Criminal Rules
- The Idaho Court Administrative Rules
- The Rules of Evidence
- My colleagues

The increased demand on time placed on meeting bureaucratic needs required by the PDC is harmful to the representation of indigent clients, and is frequently redundant and unnecessary.

I am not against rules ensuring effective and competent constitutional representation of indigent clients; but, I am concerned about the proposed rule language before the Committee, and respectfully request you consider rejecting the proposed rules.

The PDC has an opportunity to assist attorneys in constitutional representation of indigent clients in Idaho, and often does assist with resources and training, but my sincere concern is the PDC doesn't become a bureaucratic monolith defeating the purpose it was formed to address. Idahoans don't want to see is a governmental entity govern for the sake of governance (as becomes evident with redundancy), or to justify the existence of a lawsuit.

Thank you for your time and consideration.



Jeanne M. Howe