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The Honorable Greg Chaney
The Honorable Linda Wright Hartgen
The Honorable Ryan Kerby
The Honorable Paul Amador
The Honorable Barbara Ehardt
The Honorable Heather Scott
The Honorable Gary L. Marshall
The Honorable Caroline Nilsson Troy
The Honorable Julianne Young
The Honorable Ron Nate
The Honorable David M. Cannon
The Honorable Marco Erickson
The Honorable Bruce D. Skaug
The Honorable John Gannon
The Honorable John McCrostie
The Honorable James D. Ruchti
The Honorable Colin Nash

RE: Ada County Concerns Regarding Pending Public Defense Commission Rules Dated December 2, 2020

Dear Chairman Chaney, Vice-Chair Hartgen, Representative Kerby, Representative Amador, Representative Ehardt, Representative Scott, Representative Marshall, Representative Troy, Representative Young, Representative Nate, Representative Cannon, Representative Erickson, Representative Skaug, Representative Gannon, Representative McCrostie, Representative Ruchti and Represenative Nash:

The Board of Ada County Commissioners appreciates the opportunity to offer feedback on the Idaho Public Defense Commission ("PDC") pending rules. For the reasons set forth below, the Board respectfully requests that you reject the pending rules and direct that the rule first undergo a negotiated rulemaking process.

I. The Idaho Legislature Did Not Give the PDC Authority Over County Budgets

The Idaho Code gives the PDC the authority to set standards for defending attorneys and provide funding to meet those standards. The Idaho Code does not give the PDC authority over county budgets or county spending.

Boards of county commissioners are elected to serve as chief executive authority of the county government. I.C. § 31-828. Importantly, boards of county commissioners are responsible for managing county property and adopting the county budget. I.C. §§ 31-807, 31-1604, & 31-1605. As part of that obligation, "each county shall annually appropriate enough money to fund the indigent defense provider" selected. I.C. § 19-862(1). The PDC's pending rules diminish the important statutory budgetary obligation of county commissioners throughout the state.

The PDC's pending rules generally require counties to "[a]nnually appropriate enough money to fund [its] public defense model. . ." IDAPA § 61.01.02.020.01 (Dec. 2, 2020). In spite of boards' budgetary authority noted above, the rules allow the PDC to determine, in its sole authority, whether a board's budgetary determinations sufficiently fund public defense. The rules define "Deficiency" vaguely as "[t]he noncompliance with any Public Defense Rule by a county. . ." *Id.* at § 61.01.01.010.11. The rules allow PDC Staff to report deficiencies. *Id.* at § 61.01.03.050.01. Thus, if the PDC is displeased with a board's budgeting decisions, it can unilaterally require that county to resolve the "Deficiency." *See Id.* at § 61.01.03.050.02-05. If the county refuses to alter its budget, the rules vest the PDC with power to "contract with contract Defending Attorneys or other resources as deemed appropriate [by the PDC] to remedy to remediate at the county's expense." *Id.* The Idaho Legislature vested boards of county commissioners with county budgeting authority. See Idaho Code Title 31 Chapter 16. Notably, the Idaho Legislature has not authorized the PDC to undermine this authority via the PDC's rulemaking authority.

Furthermore, as noted briefly above, Idaho law already requires boards of county commissioners to adequately fund public defense. Boards of county commissioners are responsible for "establish[ing], maintain[ing] and support[ing]" the office of the public defender. I.C. § 19-860. Additionally, boards are required to "[p]rovide appropriate facilities including office space, furniture, equipment, books, postage, supplies and interviewing facilities in the jail, necessary for carrying out the public defender's responsibilities" or "[g]rant the public defender an allowance in place of those facilities." *Id.* However, the statutes do not require counties to "[e]nsure resources for compliance with Public Defense Rules" as pending rule 61.01.02.020.01.c states. It is our understanding that through the grant program, the state is providing the funds for compliance with the PDC rules. It is inappropriate for the rules to require more than the statute.

In addition, the rules noted above exceed the scope of the PDC's rulemaking authority. Per Idaho Code § 19-850(1)(a)(vi), the PDC is vested with authority to promulgate rules establishing "[p]rocedures for the oversight, implementation, enforcement and modification of indigent defense standards so that the right to counsel of indigent persons. . . is constitutionally delivered to all indigent persons in this state." The statute further clarifies that the PDC is to "[r]eview indigent defense providers and indigent defense standards <u>and the terms of state indigent defense financial assistance</u>." I.C. § 850(1)(c) (emphasis added). The rules do not provide the PDC with county budgeting authority, but rather, with the ability to withhold its PDC grants as an enforcement mechanism. The rule, as written, exceeds this authority.

II. The Idaho Legislature Did Not Give the PDC Authority Over County Hiring and Termination

Similarly, the rules undermine counties' employment decisionmaking. The pending rules exceed the Idaho Legislature's grant of authority by altering the statutory manner by which public defenders are selected. The Idaho Code already sets forth the manner by which public defenders are to be selected. Specifically, Idaho Code § 19-860(2) provides that the Administrative Judge will convene a panel of lawyers from the judicial district who will make a recommendation of 3 to 5 candidates to the Board of County Commissioners. The PDC, through the pending rule, attempts to change the statute, and limit the Board of County Commissioners employment decisions. Pending rule 61-0102-2002.030.02 requires the county to use an independent committee from within the county or regions for a recommendation. Per the pending rules, the independent committee is established by the judicial district and must include one attorney from each county in the judicial district AND cannot include any public defenders who work for the County making the selection. If members of an independent committee are not identified, the PDC will determine the independent committee members. This makes no sense for Ada County. The largest number of lawyers reside in Ada County yet the pending rules are requiring an independent committee with members from Elmore, Boise and Valley counties.

The rules also take employment authority from the public defenders over their staff. When reviewing pending rules, it is always helpful to review the statute that was enacted by the Legislature to ensure that the rules comport with the statute. Idaho Code § 19-861 provides that the public defender may employ assistant public defenders in the manner that the public defender chooses and further provides that the assistant public defenders serve at the pleasure of the public defender. In other words, in an institutional public defense office, the public defender holds sole supervisory authority over his/her operations. Once selected, the Idaho Code states that the chief public defender is responsible to hire employees, and all employees "serve[] at the pleasure of the public defender." It is not the board, but rather, the chief public defender, with ultimate supervisory authority over his/her employees.

Pending Rule 61.01.02.070.01 appears to conflict with the statute and diminishes the public defender's ability to supervise his/her employees. However, the rules give some of that authority to the PDC. The rules allow the PDC to remove attorneys from the roster—thereby prohibiting them from providing public defense in the state—"for failing to comply with Public Defense Rules under written findings of the Executive Director." IDAPA § 61.01.02.070.01.b. Thus, under this rule, a licensed attorney in the state of Idaho that has been hired by the public defender can be, in essence, terminated by the PDC.

Additionally, the rules state that "[a] Defending Attorney exercising their professional or ethical obligations or advocating for policies supporting constitutional representation of Indigent Persons is not cause for discipline or termination." IDAPA § 61.01.02.030.03. By limiting the chief public defender's supervisory authority in this manner, the PDC may actually prevent disciplinary proceedings against employees who are *inadequately* advocating for Indigent Persons. The chief public defender in any institutional office is in the best position to determine whether a member of his/her staff is representing indigent persons in an appropriate and sufficient manner because the chief actually sees the attorney practicing law. It appears that the PDC attempted to allay this concern in its redraft of the rule by adding the following language: "Nothing in this Subsection. . . is intended to prohibit the discipline or termination of a Defending Attorney who has violated county employment policy or Idaho Rules of Professional Conduct." *Id.* Even with this addition, the rule still does not allow public defenders to take disciplinary

action or terminate a public defender who does not appear to be effectively performing his/her role as advocate. While it may not amount to an employee policy violation, it is certainly cause for concern, and public defenders should remain empowered to make the best decision for their offices and for the indigent defendants served by them. Idaho is an at-will state—an employee's tenure of employment may be terminated at the will of either the employer or the employee.

In addition to the above, the above-mentioned rules intrude on the province of the Supreme Court of Idaho, which is vested with the authority to determine who may be licensed to practice law in the state of Idaho, through the Idaho State Bar. Further still, these provisions impinge on courts' ability to appoint counsel for the indigent accused. The Idaho Legislature authorized courts to appoint an attorney to represent an indigent person if "he is licensed to practice law in this state and is otherwise competent to counsel and defend a person charged with a crime." I.C. § 19-855. These rules will no longer allow courts to appoint individuals who meet these qualifications. The authority to determine who may practice law in Idaho properly belongs to the Idaho Supreme Court, Idaho State Bar, and Idaho judiciary, and it should not be transferred to a single person—the PDC Executive Director—with regard to public defense attorneys.

III. The Idaho Legislature Did Not Give the PDC Authority to Interfere With the Attorney-Client Relationship Between Counties and Their Legal Counsel

Idaho Code § 31-2604(3) gives the prosecuting attorney the authority "to give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers." Further, Idaho Code § 31-2607 makes the prosecuting attorney "the legal adviser of the board of commissioners; he must attend their meetings when required, and must attend and oppose all claims and accounts against the county when he deems them unjust or illegal."

Pending Rule 61.01.02.030.05 attempts to change the statute by rule. The rule states that a "county should engage independent legal counsel to review and negotiate Defending Attorney Contracts." According to the statutes, the review of civil contracts is the province of the board's attorney. And if there is a conflict, the Rules of Professional Responsibility require the prosecuting attorney to direct the board to seek outside representation. *See* I.R.P.C 1.7(a) and (b). The board setting a sum for a public defense contract does not create a conflict. The board's legal counsel is merely acting at the direction of the client.

IV. Other Rules that Exceed Rulemaking Authority

In addition to the above-noted concerns, the rules also exceed the PDC's rulemaking authority in other ways.

For instance, the rules exceed the PDC's statutory authority in requiring counties to ensure defending attorneys meet the indigent defense standards. Idaho Code 19-850(c) requires defending attorneys to meet the indigent defense standards. Indigent defense standards are a minor part of the pending rules yet the pending rules state that the counties must be in compliance with <u>all</u> PDC rules and <u>must provide resources to be in compliance with all PDC rules</u> 61-0102-2002.020.01.c. The Idaho Code allows the PDC to promulgate rules to ensure *defending attorneys'* compliance with the standards; it does not authorize the PDC to promulgate rules to regulate *county* compliance. In fact, the Idaho Code merely requires counties to "cooperate and participate" with the PDC in review of the services a county is providing. I.C. § 19-862A(1).

As further evidence of this, the indigent defense standards obligates defending attorneys to be independent of political or judicial influence. The pending rule goes one step further than contemplated by the statute—it requires counties to "ensure public defense is independent of political and to the extent possible judicial influence." IDAPA § 61.01.01.20.02.030. The statute did not authorize the PDC to obligate counties in this manner.

In addition, the pending rules allow the PDC to determine whether counties are meeting existing statutory obligations outside the PDC's rulemaking authority. Under Idaho Code § 19-850(a)(vii)(7), there must be reasonable equity between prosecutors and public defenders in resources, staff and facilities. Pending Rule 61.01.02.20.02.040 provides that "counties will provide adequate and equitable resources for public defense consistent with a properly funded prosecutor." The rule goes on to require "equal access to quality staff and facilities," "similar compensation," "equal access to resources," a "frequent[] review by county to assess equity between" the two offices, and "adequately budget" to meet needs of defending attorney. This leaves the determination of whether counties are meeting their obligation under Idaho Code § 19-850(a)(vii)(7) up to the PDC and allows the PDC to determine what a "properly funded prosecutor" is—another area where the PDC has the power to increase county funding.

V. Conclusion

Thank you for the opportunity to provide feedback on the pending rules. Based on the above concerns, the Board of Ada County Commissioners respectfully requests that this body reject the rule changes and first require that the rules undergo a negotiated rulemaking process where a consensus is reached between the PDC, the counties and the public defenders.

As Ada County has previously indicated, the PDC's overall goal is noble and valuable: to improve public defense throughout the state of Idaho and to ensure that every indigent defendants enjoys the safeguards of a constitutional right to counsel. Ada County shares that goal, and is happy to continue working with the PDC to modify the rules to ensure that they meet that goal within the bounds of the Idaho Code.

Sincerely,

ADA COUNTY BOARD OF COMMISSIONERS

Rod Beck, Commissioner

Ryan Davidson, Commissioner

Kendra Kenyon, Commissioner