

MINUTES

HOUSE JUDICIARY, RULES & ADMINISTRATION COMMITTEE

DATE: Tuesday, March 01, 2022

TIME: 1:30 pm or upon adjournment

PLACE: Room EW42

MEMBERS: Chairman Chaney, Vice Chairman Hartgen, Representatives Kerby, Amador, Ehardt, Scott, Marshall, Troy, Young, Nate, Cannon, Erickson, Skaug, Gannon, McCrostie, Ruchti, Nash

**ABSENT/
EXCUSED:** Reps. Ehardt, Scott

GUESTS: The sign-in sheet will be retained in the committee secretary's office; following the end of the session the sign-in sheet will be filed with the minutes in the Legislative Library.

Chairman Chaney called the meeting to order at 1:33 p.m.

Chairman Chaney turned the gavel over to **Vice Chairman Hartgen**.

Kathleen Elliott, Executive Director of the Public Defense Commission (PDC), introduced **David Carroll**, Executive Director of the Sixth Amendment Center. He explained his background, his experience, the organization and its funding sources. Criminal defense is a uniquely American ideal and he gave a brief history of the evolution of public criminal defense in the United States. As published in the 2010 Idaho Public Defense System Report (Executive Summary attached), Idaho did not meet the Fourteenth Amendment obligation to provide Sixth Amendment services because there was no state entity charged with setting the rules and standards ensuring that the county governments were providing due process. Great systemic deficiencies were revealed throughout the state. As an example, none of the counties had workload controls in place. One county was found with one public defender carrying the workload of four attorneys; another county with 950 cases assigned to one attorney in a year. The PDC was established in statute to make indigent defense independent and to enforce oversight. Mr. Carroll spoke in support of the PDC Rules saying they are conservative compared to other states, and they are consistent with the parameters of the Sixth Amendment.

Kathleen Elliott introduced **Scott Zanzig**, Deputy Attorney General, and counsel on the ongoing Tucker vs Idaho lawsuit. He explained that the Supreme Court has made it clear that the public criminal defense process is ultimately the State's responsibility, even if the State has delegated the responsibility to its counties. If the Federal District Court finds Idaho's public defense system is not meeting constitutional requirements, the relief sought is significant. Idaho would have to come to the court with a plan for a new criminal defense system and get the court's approval to put that system in place, and hire monitors to ensure that every detail is being done correctly. In addition, fines and fees and Court oversight at a magnitude Idaho has not experienced before. The PDC Administrative Rules are a significant part of the defense in this case because the PDC was put in place for the express purpose of setting and holding a standard for public defense across the State.

Rep. Cannon declared Rule 80.

Responding to a committee question, about whether adoption or rejection of these proposed rules would have any bearing on how the Tucker case gets resolved, **Mr. Zanzig** explained that a legislative rejection of the PDC Rules could send a message that the State is unwilling to accept its responsibilities in the area of indigent public defense.

Kathleen Elliott explained that the PDC exists to protect constitutional rights. If the government is going to take away the constitutional rights of individuals a well defined process should be in place to ensure that those who cannot afford counsel have been provided with competent counsel. The Federal Sixth Amendment Center review of the public criminal defense system in Idaho involved seven counties, and those counties failed the review, they were not found to be providing constitutional public defense. The counties reviewed were Ada, Bonneville, Blaine, Canyon, Kootenai, Nez Perse, and Power county. The Sixth Amendment Center, Idaho Criminal Justice Commission Subcommittee, Idaho Legislature Interim Committee on Public Defense Reform recommendations hit three elements: there must be state funding for public defense, there must be a state structure providing state oversight, and there must be adoption of nationally recognized standards. Director Elliott provided annual statistical data for Idaho's public defense cases, attorney to client ratios, and State/County budgets and expenditures.

**DOCKET NOS.
61-0101-2101
AND
61-0102-2101:**

Director Kathleen Elliott presented **Docket Nos. 61-0101-2101 and 61-0102-2101** and she explained why the proposed Administrative Rule changes are necessary. Public defense for indigent persons is all that stands between them and the loss of their constitutional rights. Because so much is at stake in public defense these rules need to meet constitutional standards. The PDC has engaged in negotiated rule-making for these Rules since 2016, and active negotiated rule-making did occur over this past year.

Director Elliott introduced **Tammy Zokan**, PDC Policy and Compliance Coordinator to address any committee questions on the appeal process. Ms. Zokan provided a brief overview of the attorney discipline process and responded to several specific committee questions.

Director Elliott responded to committee questions about the changes in the Administrative Rules and explained that except for the twenty one items that were modified during legislative negotiations last year, these rules are the same rules that were presented by her in detail the previous year.

Rod Beck, Chairman, Ada County Commission, spoke in **opposition to Docket Nos. 61-0101-2101 and 61-0102-2101**, saying there has been three separate commissions, one in 2017, then 2020, and now 2021. He submitted objections each time but he didn't feel heard. The Rules go beyond the law and he would like to see them rejected.

Aaron Bazzoli, Canyon County, spoke in **opposition to Docket Nos. 61-0101-2101 and 61-0102-2101**, saying the PDC Rules do not allow for adequate due process and the negotiations need to be more of a two way process.

Teresa Molitor, contract lobbyist representing the Idaho Association of Criminal Defense lawyers (IACDL), spoke **in opposition to Docket No. 61-0101-2101 and 61-0102-2101**. Objections were submitted during the negotiated rule-making process however repeatedly contentious issues were not discussed because they were not on that day's docket. The IACDL has existed since 1989, it has about 450 members, and it has been working to promote the expertise of criminal defense lawyers long before the PDC existed. The Rules call into question the competence of public defense lawyers, and attempt to micro-managing public defense lawyers. Issues of case load, meeting space, vertical representation are issues of funding and appropriate for the PDC to address. The additional rules and regulations placed on one sect of attorneys are inappropriate and unnecessary. The conditions are making it more difficult to recruit and retain public defenders in Idaho. Complying with the Rules takes time away from attorney case-loads, and instead of helping solve systemic problems they are making things harder.

Elisa Massoth, a private attorney and contract capital defense attorney in murder cases, spoke **in opposition to Docket Nos. 61-0101-2101 and 61-0102-2101** saying the regulations don't have enough due process. She has been practicing law for twenty-three years in Idaho and she explained her recent negative experience with the PDC, involving a waiver she was expected to sign in order to continue being listed on the Capital Defense Roster. She has no problem complying with the requirements of the PDC but signing away rights in order to remain on a PDC roster is beyond the power given to the PDC by statute – it is abuse of power. The PDC Rules are not ready for acceptance, more negotiations are needed, negotiations that actually allow for both sides to contribute.

Anne Taylor, Kootenai County Chief Public Defender, spoke **in opposition to Docket Nos. 61-0101-2101 and 61-0102-2101**. She explained that she has worked in public defense since 2004 and she is the current Chair of the Idaho Association of Criminal Defense Lawyers All Things Public Defense Subcommittee. The PDC Rules lack due process and lack true negotiated rule-making processes, and she described her negative experience with the negotiated rule-making process.

Jordan Crane, Bonneville County Chief Public Defender, said he has worked in public defense since 2005 and he **opposes Docket Nos. 61-0101-2101 and 61-0102-2101** because the rules are incomplete and give too much power to a commission. In 2010, when the Sixth Amendment Center report was done, Bonneville County had six public defenders. Thanks to help from the PDC they now have fourteen attorneys. However, he is having trouble obtaining and retaining attorneys to fill those positions because of the possibility that some state agency could remove them without recourse; and no one knows who can appeal it, the Rules are that unclear.

Leslie Duncan, Kootenai County Commissioner, spoke **in opposition to Docket Nos. 61-0101-2101 and 61-0102-2101** due to the lack of due process and lack of real negotiations.

Tony Geddes, Chief Ada County Public Defender, spoke **in opposition to Docket Nos. 61-0101-2101 and 61-0102-2101**. He has been working in public defense for 27 years, and is qualified to be lead attorney in death penalty cases, and he feels the problem is not lawyers, the problem is lack of resources. Putting more rules and regulations on attorneys who already have too much to do is not the way to improve the public defense system in Idaho. He agrees the PDC is a good thing, and a necessary thing, but the negotiations are not working because they are more of a monologue than a dialog.

MOTION:

Rep. Amador made a motion to **reject Docket Nos. 61-0101-2101**.

Mr. Geddes responded to several very specific committee questions about the Public Defense Commission Rules.

**UNANIMOUS
CONSENT
REQUEST:**

Rep. Amador made a **unanimous consent request to withdraw the motion**. There being no objection the request was granted.

MOTION:

Rep. Amador made a motion to **reject Docket Nos. 61-0101-2101 and 61-0102-2101 in their entirety**.

Committee discussion included that the Legislature created the Public Defense Commission (PDC) to improve criminal indigent defense in Idaho and gave the PDC the authority to make that happen. Ever since the PDC was put in place there has been conflict between them and the public defenders and attorneys who provide criminal defense. Rejecting the proposed Rules again this year does not accomplish anything. Since improving the Rules is progress and these rules are an improvement, though not perfect, but in line with Idaho Statute and better than what presently exists, maybe the committee should accept them and then work out the problems that arise.

The Tucker lawsuit has a real potential to initiate a large scale change in Idaho public defense in the form of a huge overhaul of the whole system. Being forced into a State public defense system has already happened in Utah and Colorado.

MOTION:

Rep. Nate made a motion to **reject Docket No. 61-0101-2101 and 61-0102-2101**.

**VOTE ON
MOTION:**

Motion carried by voice vote.

Vice Chairman Hartgen turned the gavel over to **Chairman Chaney**.

Chairman Chaney placed the committee at ease at 3:22 p.m.

Chairman Chaney called the committee back to order at 3:36 p.m.

H 541:

Rep. Skaug presented **H 541** which revises provisions regarding an action to foreclose mortgage on real property. This bill is meant to provide clarification, however, the issues is still complicated. **Robert Canter**, mortgage expert, was introduced to explained the foreclosure process from a 10,000 foot view and he clarified details concerning the maturity date. Mr. Canter answered some specific committee questions about the right to foreclosure.

Harold Scoggins, Northwest Credit Union Association Legal Counsel, spoke **in opposition to H 541** saying it does not clarify maturity dates, it creates more confusion. And Mr. Scoggins responded to several very technical committee questions.

Ken Howell, Idaho Banking Association Legal Counsel, spoke **in opposition to H 541** saying that the current law has been in effect for seventy-one years without a problem. The current law says that the parties can agree in writing on what the maturity date is, and that upon the maturity date the statute of limitations begins running. There is no reason to change this, it just creates confusion.

Brent Wright, Idaho Banking Association CEO, spoke **in opposition to H 541** and he listed several organizations that also oppose **H 541**. He stated that this bill causes the opposite of what it is intended to accomplish and it will create more instances of litigation.

Mr. Canter spoke in more detail about maturity dates and addressed some of the committee's questions.

MOTION:

Rep. Nash made a motion to **HOLD H 541** in committee. **Motion carried by voice vote.**

Chairman Chaney turned the gavel over to **Vice Chairman Hartgen**.

H 623:

Chairman Chaney presented **H 623** which provides that a process server who is serving legal documents is not committing civil or criminal trespass.

Jonathan Baldauf, and Ted Teninty, Tri-County Process Services, spoke **in support of H 623**. The process server performs an essential function of the court process and due process as they facilitate service of court papers in both criminal and civil court cases. It is common for process servers to be initially charged with trespass and then be required to appear in court and explain the reason they entered property before the charges are dismissed. A process that involves unnecessary time, expense, and stress on the part of the process server and adds to the court case-loads. This legislation would allow process servers the same rights as meter-readers, a bail-bondsman, postal-employees, allowing them to legally enter onto property to perform their duty and provides them with protection from prosecution.

MOTION:

Rep. Troy made a motion to send **H 623** to the floor with **DO PASS** recommendation. **Motion carried by voice vote**. Chairman Chaney will sponsor the bill on the floor.

Vice Chairman Hartgen turned the gavel over to **Chairman Chaney**.

H 625:

Rep. Troy presented **H 625** saying that it provides for the crime of distribution of unsolicited sexual material. She introduced **Katelyn Hargigan**, Associated Students of the University of Idaho Vice President, who spoke **in support of H 625** and introduced a psychological study conducted in 2019 that found that 72% of women have received an unsolicited nude image. Receiving these types of unsolicited materials from a co-worker, friend, or stranger is shocking and makes women feel unsafe, afraid of further harassment, and humiliated. Receiving unsolicited sexual material causes a person to feel targeted, afraid, and too embarrassed to tell anyone about what is happening. Ms. Hargigan feels she is speaking for many women in Idaho when saying that women need protection from unsolicited sexual material. This is harassment and it impacts mental health, self esteem and social interactions. Sending sexual material is a sexual act, and like any other sexual act it requires consent; if it is unsolicited it is not consensual. Electronic devices, software, and platforms have developed incredibly quickly and it is imperative that state law evolves with them. This legislation is intended to be a deterrent to sending unsolicited sexual material.

Erica Marshall, Director of the Idaho Justice Project, testified **in opposition to H 625** saying that this bill has good intentions however it will increase criminal liability and pull more people into our criminal justice system. There are expenses connected to this legislation. Ms. Marshall stated she has concerns with the broadness of **H 625**, that it will have unintended consequences and result in the needless incarceration of individuals. Words like "nudity" or statements like "intended to annoy" need to be better defined in this legislation. As the statute stands right now an unsolicited You-Tube video sent to a friend with the intent to annoy could be a violation of this statute. Ms. Marshall responded to committee questions.

David Martinez, Bannock County Chief Public Defender, and a member of Idaho Association of Criminal Defense Lawyers (IACDL) Legislative Committee, testified **in opposition to H 625** saying that while the intentions are good the statute is too broad, and it probably won't stand a First Amendment claim. And in the case of existing relationships it could be used against a person later as a retaliatory device.

Jonathan Baldauf, private defense attorney, spoke **in opposition to H 625** saying it is over broad and there are some major issues with the wording. **H 625** needs to be narrowly tailored.

Holly Koole-Rebholtz, Idaho Prosecuting Attorney Association, spoke **in support of H 625** saying that prosecutors were involved in crafting it, it is narrowly tailored, and some of the language was taken directly from existing statutes. Ms. Koole-Rebholtz responded to some very specific questions from the committee and stated that it is very difficult to find the perfect language in cases like this and much will be determined by intent.

MOTION: **Rep. Hartgen** made a motion to send **H 625** to the floor with a **DO PASS** recommendation.

Committee members expressed concerns with passing a broad statute and leaving it to the prosecutors and courts to "sort out" seems to go against the basic purpose of a committee and the constitution. And that the committee has a responsibility to protect people from this kind of harassment, terms like "nudity" are defined in other statutes.

SUBSTITUTE MOTION: **Rep. McCrostie** made a substitute motion to send **H 625** to General Orders. **Motion passed by voice vote.**

H 629: **Rep. Troy** presented **H 629** which revises procedures for contested cases and hearing officers. Section I of the Fourteenth Amendment reads that "No state shall deprive any person of life, liberty or property without the due process of the law." Due process originally meant a criminal trial when government was small and limited. In the 1930's government expanded the role of administrative agencies to include administrative hearings, conducted by agencies, which do not include the same standards surrounding trials. Administrative hearings today make significant impacts in people's lives and they assign to Agencies the roles of investigator, prosecutor and judge. This raises reasonable concerns about bias or perceived bias. The Office of Professional Evaluation (OPE) surveyed Idaho agencies and ranked the risk of bias. The survey did not find a high risk of bias, but they did find some. The list of agencies identified with higher risks of bias were read – there were more than a dozen.

Rep. Troy introduced **Amanda Bartlett**, Office of Professional Evaluation (OPE) Principal Investigator. Ms. Bartlett explained factors of the OPE Study in more detail. It is difficult to determine bias in administrative hearings, which are designed to deliver decisions on contentious issues, and this factor alone can be the reason for dissatisfaction with the process.

Rep Troy introduced **Dr. Kathranine Miller**, Small Animal Veterinarian in Moscow, who spoke **in support of H 629** by sharing her negative experience with the Board of Veterinarian Medicine and their administrative hearing board. She explained how she was denied meaningful due process when no investigation was conducted into the denied charge, and she was never given a chance to defend herself. The Board's charges and decision cost her clinic much time and expense. In the end she was unable to resolve the issue, and choose to settled despite a heavy fine and one year of professional probation. All charges should be investigated and the power of agency directors should be monitored and controlled, they should not be allowed to act as judge, jury and executioner.

Rep. Troy introduced **Bryan McCully**, current Chair of the Region Four Assistance Panel, but sharing his own personal story. He spoke **in support** of **H 629** sharing an experience when he and his wife were providing foster care, and a young child was placed in their home for 14 months and then suddenly removed and placed with a different foster family. This is usually a very traumatic experience for a child and for the foster family. The reason given was that the child was getting too attached to them. They met with people about the decision and asked for it to be reviewed, and it turned out that the same people who made the decision were the administrative review. Eventually he realized that the meetings that occurred were never about reviewing the correctness of their decision, they were simply to check a box and reinforce their decision. He has seen many cases like this in the foster care system, and there is no recourse for these little foster children or the people who care for them. There is a difference between due process and fair due process and it is super important for people to feel like they have received a fair review of a decision which definitely affects their life, liberty and pursuit of happiness.

MOTION: **Rep. Nash** made a motion to send **H 629** to the floor with a **DO PASS** recommendation.

Committee members spoke about their personal experiences with Administrative Hearings and were very supportive of **H 629**.

VOTE ON MOTION: **Motion carried by voice vote.** Rep. Troy will sponsor the bill on the floor.

ADJOURN: There being no further business to come before the committee the meeting adjourned at 5:30 p.m.

Representative Chaney
Chair

Andrea Blades
Secretary