

May 31, 2021

Kathleen Elliott, Executive Director  
Idaho Public Defense Commission  
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**RE: Proposed IDAPA 61.01.010.22 (Vertical Representation  
definition)  
Proposed IDAPA 61.01.02.030 (Public Defense System  
Independent of Political and Judicial Influence)**

Dear Director Elliott:

It is with some sadness that I feel compelled to comment on the proposed changes to the PDC's existing IDAPA rules. I am putting aside concerns I have about some of the other proposed rule changes to focus my attention on what I view to be the two most unnecessary but important changes: redefining vertical representation and retreating from political and judicial independence.

But first, I want to thank you, all members of the Public Defense Commission (PDC), and particularly the PDC staff, for all of your hard work and commitment to improving the quality of public defense in Idaho. I have always found the PDC to be receptive to suggestions and input from practitioners and stakeholders when proposing new IDAPA rules, or modifying existing rules. That was true of my experience when the original versions of these proposed rules were drafted, subjected to the negotiated rulemaking process, and then ultimately approved by the Idaho Legislature.

When I learned of the growing opposition to the PDC's proposed rules, I submitted written comments to legislators in support of the PDC's efforts. I also attended a number of committee hearings remotely and signed up to testify, but was never given the opportunity. Attending these hearings, it became clear to me that the PDC faced significant organized opposition not only to its proposed rules, but also to rules that had long ago been adopted and approved.

I firmly believe lawyers are necessities, not luxuries, especially when a person's life and liberty are at stake. Without a strong public defense system acting as a check on the prosecution, the criminal justice system ceases to be adversarial and there can be no faith in its ability to achieve fairness and justice. As further explained below, I believe the

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proposed changes to the Rules undermine the goal of improving Idaho's public defense system and undermine confidence in the ability of Idaho's criminal justice system to achieve fairness and justice.

**Proposed IDAPA Rule 61.01.010.22:** The proposed definition of vertical representation requires counsel for an indigent client to "make efforts" but not, as previously required, to make "**all** efforts" to "personally represent the client during all substantive proceedings where the facts of the case are discussed by counsel or the Court . . ." I believe the proposed rule will make vertical representation optional, not mandatory, and for that reason I oppose the proposed rule.

I understand vertical representation is more difficult to execute than horizontal representation, and it is probably less efficient for everyone *except* clients. But that's important. Vertical representation benefits clients. When clients hire private counsel, the same attorney represents the same client at every substantive hearing; that's vertical representation. It is essential to a client-centered practice and it was even recognized as best practice by the Idaho Legislature. *See* I.C. § 19-850 (a)(vii)(6). If Idaho's indigent defense system is to improve, it must be client-centered, not defense attorney-centered, or judge-centered or prosecution-centered. The first step toward a client-centered system is vertical representation.

I oppose the modification to this rule because it does not serve the goal of ensuring that each client is represented by a single attorney throughout the life of the client's case. And it does not improve Idaho's indigent defense system as a whole.

**Proposed IDAPA Rule 61.01.02.030:** This provision makes optional the working group staffed by a defense attorney who is neither the county prosecutor nor the Defending Attorney, to act as a liaison between public defenders and county stakeholders on issues of independence. And it permits counties to rely on prosecuting attorneys to negotiate defending attorney contracts. These changes undermine the independence of public defenders.

Not only are these proposed changes contrary to best practices as recognized by the Idaho Legislature (*see* I.C. § 19-850 (a)(vii)(1)), but they also give rise to both an appearance of a conflict of interest, as well as a veneer of impropriety. How does allowing prosecutors to choose their opponents benefit public defense generally, or individual clients? I wonder, will prosecutors seek to negotiate defense contracts with the most

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capable, skilled adversary, or the least? And it is difficult to see how making the working group to address issues of public defender independence optional, could possibly help rid the public defense system of political and judicial influence. I oppose these proposed changes to the rules because they do nothing to ensure the independence of public defenders from political and judicial influence, but do quite the opposite.

Thank you again for the opportunity to comment on the proposed Rules, and for taking my suggestions and concerns seriously throughout this process. And thank you again to you, the Commissioners, and PDC staff, for all of your hard work and efforts to improve Idaho's public defense system.

Warm regards,

/s/

Shannon Romero