



ADA COUNTY

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September 24, 2021

Via Email

Darrell Bolz, Chairman
Angela Barkell
Justice Linda Copple Trout
Senator Jim Woodward
Eric Fredericksen
Representative David M. Cannon
Dan Dinning
Sean Walsh

- RE: 1. Comments on the Temporary Public Defense Rules that took effect July 1, 2021 but that the Idaho Legislature has not approved
2. Comments on the Additional Changes that the PDC is recommending to the Temporary Public Defense Rules

Dear Commission Members:

The Board of Ada County Commissioners (“Board”) provides these comments on the Temporary Public Defense Rules that took effect July 1, 2021, but that the Idaho Legislature has not approved and the additional changes that the PDC is recommending to the Temporary Public Defense Rules. Based on the reasons outlined below, the Board will ask the Legislature not to adopt the rules during the 2022 session. We are also providing these comments to members of the pertinent legislative committees so they are aware of Ada County’s on-going concerns with the Public Defense Commission (“PDC”) Rules.

I. Ada County’s Active Participation Has Been Ignored

The Board and the Ada County Public Defender have been actively engaged in providing written comments on proposed rules and have participated in public hearings for proposed rules since the inception of the Public Defense Commission (“PDC”). In fact, when the PDC asked for specific language, Ada County provided language in its letter of October 28, 2020. The Board’s comments and suggestions and the Ada County Public Defender comments have largely been ignored as is reflected in the attached documents. There is a level of frustration that the PDC appears to be tone deaf to the concerns of counties, like Ada, who sufficiently fund and offer competent public defense to indigent clients.

II. County Budget Concerns

Ada County has expressed concerns since 2017 regarding the PDC's attempts to determine how Ada County budgets its limited resources. *See* attached letters from 2017.

In the Fall of 2020,¹ Ada County expressed concerns about the definition of Deficiency in IDAPA 61.01.01.010.12. The broad definition allows the PDC to find the County is not in compliance with providing the resources the PDC deems adequate even when the County does not have the resources to provide. The PDC ignored the County's comments. The additional changes that the PDC is now proposing add to the definition of vertical representation: "Each county is responsible to support and provide resources as necessary to ensure vertical representation." Counties may not have the property tax resources to ensure vertical representation which in turn will lead to the PDC claiming a deficiency, noncompliance, and sanctions against the County.

The rules continue to state that counties must "provide resources for compliance with Public Defense Rules." 61.01.02.020.01.c. As noted below, the rules are so replete with undefined, vague and overbroad terminology that the PDC is allowed to subjectively decide whether a county is in compliance, i.e. is the County budgeting enough resources that the PDC wants the County to spend, irrespective of the property taxpayers who are funding the system and irrespective of actual need.

III. Employment Decisions

The PDC rules interfere with county employment decisions by requiring that a county hire attorneys only from the PDC Defending Attorney Roster. 61.01.02.020.01.a. If the PDC decides to remove an attorney from the Roster, the person hired can no longer do the job that a county hired the attorney to do, even if the attorney has exemplary performance reviews. Attorneys who have been admitted to practice law in Idaho can defend those charged with a crime. There should not be a different standard for the attorneys that a county chooses to hire for public defense, especially when those attorneys are supervised, trained and mentored in an institutional office.

The PDC rules refer to defending attorneys who are competent. 61.01.02.060.02. The PDC should not be put in the position through rulemaking to interfere with county employment by deciding who is a competent attorney. The supervising attorney, or lead institutional officer of a county observes the actual performance of a defending attorney, hears from judges who observe a defending attorney in the courtroom, hears from other attorneys who interact with the defending attorney, and consequently is the person who is in the position to determine competence, and whether the defending attorney should be retained. Yet, the PDC through its rulemaking retains the authority to determine whether a defending attorney should be removed from the Defending Attorney Roster, even though the PDC has no first-hand knowledge or observation regarding a defending attorney's actual performance and competence.

¹ See October 13, 2020 Letter to the PDC. Also, see proposed changes to definition of October 28, 2020; letter of January 22, 2021 to Idaho Senate Judiciary & Rules Committee and letter of January 25, 2021 to the Idaho House Judiciary, Rules and Administration Committee

Further, the PDC through its rulemaking interferes with the county employment relationship because the PDC puts itself in the position of identifying deficiencies of attorneys. If the deficiency is not resolved to the PDC's satisfaction, the Executive Director can order removal. Since a county is required to hire from the Public Defense Roster, the county is put in the position of potentially having to terminate an employee who may have excellent county evaluations but may have a deficiency due to the vague and undefined terms in the PDC rules that the PDC functions under.

Additionally, because the PDC is interfering with a county employment relationship, it is making decisions that create liability for counties. By interfering with counties employment decisions, the PDC puts counties at risk of employment lawsuits from defending attorneys who will sue the counties, and the PDC, for wrongful termination and/or tortious interference with employment. Should the PDC continue to insert itself in the employment relationship, the counties will be forced to ask the Legislature to require the PDC to indemnify the counties and hold the counties harmless from civil liability related to PDC interference.

Ada County recommended in the Fall of 2020 that if there was disagreement regarding a defending attorney being on the Defending Attorney Roster, the Executive Director should contact the Board of County Commissioners to discuss perceived deficiencies of a county employee or contractor. The PDC rejected this approach. The PDC is putting counties in an untenable position while at the same time ignoring the counties' input.

IV. Rules are Vague with Undefined Terms that Lead to Subjective Decision making.

The Rules are replete with vague statements and undefined terms that have real world implications. For example, the PDC recently informed Ada County that it was removing an attorney from the Roster with over 15 years of experience because in the PDC's view, the person was not zealous or diligent enough. Those words have no definitions and no measurable criteria in the rules so an attorney would have no idea how to comply. In fact, the PDC has not provided any evidence to the attorney, the Chief Public Defender or to Ada County to support the decision.

The Rules provide that "Information about an attorney's fitness to represent Indigent Persons is confidential and exempt from the Public Records Act." 61.01.02.030.02.c. The PDC has taken this rule to mean that all information and discussion is kept secret—even from the attorney that the PDC has deemed unfit. The PDC also keeps the information secret from the supervising attorney and from the county that is actually employing the public defender. In contrast, when there are allegations against an attorney before the Idaho State Bar all information is provided and attorneys are allowed to defend themselves. The PDC is using its rules to deny defending attorneys the right to due process and again creating liability for counties and the PDC

Other vague and undefined terms that are likely to cause problems for public defenders and counties in the future are:

- Provide "constitutional representation" 61.01.02..020.02.d; 060.03n.xi. Constitutional representation is not defined and there is no criteria to measure this vague term. Without measurable criteria in its rules, the PDC cannot support a finding that constitutional representation is lacking when making decisions. Without the measurable criteria, the PDC is left open to make subjective decisions.

- “Counties will ensure public defense is independent of political and to the extent possible, judicial influence.” 61.01.02.030. The Rules do not explain how the counties will ensure independence, especially when they have no jurisdiction over the judiciary.
- “The county’s selection of Defending Attorneys will not involve conflicts of interest.” 61.01.030.01. Conflicts of interest is not defined which leaves a void for the PDC to fill with whatever the PDC subjectively determines might be a conflict.
- “Defending Attorneys who are competent.” 61.01.02.060.02. The PDC does not have measurable criteria in its rules that would support a reasoned finding that a defending attorney is not competent.
- “Ability and understanding” 61.01.02.060.03. The PDC does not have measurable criteria in its rules to make a reasoned finding that a defending attorney lacks ability or does not understand the law.
- “Where a guilty plea is constitutionally appropriate,”- 61.01.02.060.03.iv. Constitutionally appropriate is not defined so leaves the PDC to make subjective decisions about public defenders that cannot be rationally explained.

V. Additional Work for Counties When Information is Available On-line

Many counties provide budget and expenditure information in an online format that is available to anyone seeking the information. In the Fall of 2020, Ada County recommended that the PDC should obtain county budget and expenditure information, public defense records, line items, etc. from the on-line information if it was available. The PDC rejected the approach, instead requiring counties to provide the information directly to the PDC. This is an additional burden on counties. With the Controller’s transparency program beginning and Ada County participating as part of the pilot project for online budget information, the County should not have to do additional work, particularly when the information is easily accessible to the PDC online. The PDC should utilize the online resources that are readily available.

Conclusion

The PDC was formed with the goal of ensuring that public defenders provided indigent clients with adequate representation. The PDC has not focused on its mission with its rules and is attempting to insert itself into decisions that the Legislature has statutorily vested with counties. It would benefit the PDC and the counties if the PDC were to revise its rules and focus its efforts on well-defined standards with corresponding measurable criteria that do not leave room for subjective decisions. Without such definitions, it will be impossible for counties and public defenders to understand the PDC requirements and adhere to those requirements.

September 24, 2021

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Sincerely,

ADA COUNTY BOARD OF COMMISSIONERS



Rod Beck, Commissioner



Ryan Davidson, Commissioner



Kendra Kenyon, Commissioner

Enclosures

cc: Members of the Senate Judiciary & Rules Committee (Chairman Todd M. Lakey, Vice-Chairman Doug Ricks, Patti Anne Lodge, Abby Lee, Kelly Arthur Anton, Steven P. Thayn, Christy Zito, Grant Burgoyne, Melissa Wintrow

Member of the House Judiciary, Rules & Administration Committee (Chairman Greg Chaney, Vice-Chair Linda Wright Hartgen, Ryan Kerby, Paul Amador, Barbara Ehardt, Heather Scott, Gary L. Marshall, Caroline Nilsson Troy, Julianne Young, Ron Nate, David M. Cannon, Marco Erickson, Bruce D. Skaug, John Gannon, John McCrostie, James D. Ruchti, Colin Nash

Kathleen Elliott, Executive Director



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January 25, 2020

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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 Representative 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 and the terms of state indigent defense financial assistance.” 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 all PDC rules and must provide resources to be in compliance with all PDC rules 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 defendant 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



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January 22, 2021

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The Honorable Todd M. Lakey
The Honorable Doug Ricks
The Honorable Patti Anne Lodge
The Honorable Abby Lee
The Honorable Kelly Arthur Anthon
The Honorable Steven P. Thayn
The Honorable Christy Zito
The Honorable Grant Burgoyne
The Honorable Melissa Wintrow

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

Dear Chairman Lakey, Vice Chairman Ricks, Senator Lodge, Senator Lee, Senator Anthon, Senator Thayn, Senator Zito, Senator Burgoyne and Senator Wintrow:

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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.

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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 all PDC rules and must provide resources to be in compliance with all PDC rules 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.

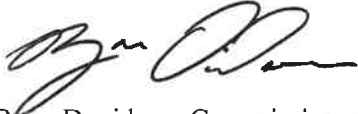
As Ada County has previously indicated, the PDC’s overall goal is noble and valuable: to improve public defense throughout the state of Idaho and to ensure that every indigent defendants enjoys the safeguards of a constitutional right to counsel. Ada County shares that goal, and is happy to continue 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



ADA COUNTY

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October 28, 2020

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Boise, Idaho 83702

Sen. Chuck Winder
5528 N. Ebbetts Avenue
Boise, Idaho 83713

RE: Suggested Edits to the Public Defense Commission Rules Proposed October 7, 2020

Dear Executive Director and Commission Members:

Enclosed, please find Ada County's suggested edits to the Idaho Public Defense Commission's proposed rules regulating public defense in Idaho as discussed during the hearing on October 14th and our October 22nd meeting.

Public Defense Commission
October 28, 2020
Page 2

We appreciate your consideration and welcome further discussion the proposed rules.

Sincerely,

ADA COUNTY BOARD OF COMMISSIONERS

A handwritten signature in black ink that reads "Kendra Kenyon". The signature is written in a cursive style with a large, sweeping "K" and "Y".

Kendra Kenyon, Commissioner

A handwritten signature in black ink that reads "Diana Lachiondo". The signature is written in a cursive style with a large "D" and "L".

Diana Lachiondo, Commissioner

A handwritten signature in black ink that reads "Patrick Malloy". The signature is written in a cursive style with a large "P" and "M".

Patrick Malloy, Commissioner

**THE FOLLOWING IS THE PROPOSED TEXT OF DOCKET NO. 61-0101-2002
(Chapter Re-Write/New Chapter)**

IDAPA 61 – IDAHO STATE PUBLIC DEFENSE COMMISSION

61.01.01 – GENERAL PROVISIONS AND DEFINITIONS

00. LEGAL AUTHORITY.

This chapter is adopted under the legal authority of Section 19-850(1)(a), Idaho Code. ()

01. TITLE AND SCOPE.

This chapter is titled “General Provisions and Definitions,” and contains general provisions and definitions applicable to IDAPA 61. ()

02. ADMINISTRATIVE APPEALS.

01. Intermediate Administrative Appeal Procedure. Except as set forth herein, IDAPA 04.11.01, “Idaho Rules of Administrative Procedure of the Attorney General,” shall apply to IDAPA 61. ()

02. Confidential Information Exempt From Public Records. Documents containing confidential information and submitted in any administrative proceeding must be redacted or filed under seal. ()

03. FILING OF DOCUMENTS.

Unless otherwise set forth in a Notice of Rulemaking or Order of the Commission or Executive Director, all written communications and documents that are intended to be part of an official record for decision in a rulemaking or contested case must be filed with the Executive Director. No copies in addition to the original document need be filed with the agency unless requested by the Executive Director or Commission. ()

04. – 009. (RESERVED)

10. DEFINITIONS.

01. **Active Case.** A Capital Case is active when it is not stayed. All other Cases are active when there is an appointment, appearance, filing or investigation in the reporting period or it is not stayed. ()

02. **Annual Report.** The Defending Attorney report required by Section 19-864, Idaho Code, including CLEs, Caseloads, Workloads and other information requested for the October 1 through September 30 reporting period to complete the Annual Report form provided by PDC Staff. ()

03. **Capital Case.** A case in which the state has given notice it will seek the death penalty or is legally entitled to seek the death penalty under Section 18-4004A, Idaho Code. ()

04. **Capital Defending Attorney.** A Defending Attorney who meets the qualifications for and is on the Capital Defending Attorney Roster. ()

05. **Capital Defending Attorney Roster.** The PDC's list of Defending Attorneys eligible for appointment by a court to represent an Indigent Person in a Capital Case. Some attorneys on the Capital Defending Attorney Roster may not currently be employed or under contract with a county. ()

06. **Case.** All related charges against an individual from a single incident, transaction or occurrence filed within a single case number. A probation violation or motion for contempt is counted as a separate Case. ()

07. **Caseload.** A Defending Attorney's total number of Active Cases during the applicable reporting period as counted under IDAPA 61.01.02, "Requirements and Procedures for Representing Indigent Persons," Paragraph 060.05.c. A county's total Caseload to determine compliance with Workload rules is calculated as the mean of the Felony Case Equivalent calculation for each of the preceding three (3) years. ()

08. **Compliance Plan.** A county's plan for meeting applicable Public Defense Rules and curing any Deficiencies including detailed action items and completion dates. ()

09. **Cost Analysis.** A detailed explanation of the expected expenses for the county to complete its Compliance Plan and how the county is proposing to pay for those expenses. Such analysis shall also include whether the county must increase property taxes to pay for the expenses. ()

09,10. **Chief Public Defender.** a public defender of an institutional office selected according to the requirements of Idaho Code § 19-860. It includes a temporary Interim Chief Public Defender, and designees of the Chief Public Defender. ()

10. **Defending Attorney.** Any attorney employed by a county or under contract with a county as an institutional Defending Attorney or a contract Defending Attorney to represent adults or juveniles at public expense. ()

11. **Defending Attorney Roster.** The PDC's list of Defending Attorneys eligible for appointment by a court to represent an Indigent Person in a non-capital Case. Some attorneys on the Defending Attorney Roster may not currently be employed or under contract with a county. ()

12. **Deficiency.** The noncompliance with any-an applicable Public Defense Rule by a county, Defending Attorney, employee, contractor, representative or other agent. A deficiency specifically does not include a county's taxing decisions, a county's budget decisions, a county's employment decisions and court decisions. ()

13. **Executive Director.** PDC employee appointed by the Commission under Section 19-850(2)(a), Idaho Code. ()

14. **Felony Case Equivalent (FCE).** The calculation after all Case types are converted to their felony equivalent to determine compliance with Caseload rules. ()

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Right: 0", Line spacing: single, No bullets or
numbering, Tab stops: Not at 1.08" + 6.21"

15. **Financial Assistance.** The state funding a county may request and may be awarded under Section 19-862A, Idaho Code. ()

16. **Indigent Person.** A person who, at the time his need is determined under Section 19-854, Idaho

Code, is unable to provide for the full payment of a Defending Attorney and all other necessary expenses of representation. ()

17. Initial Appearance. The first appearance of the defendant before any judge. In the event a defendant appears before more than one judge, the first appearance before the first judge constitutes the Initial Appearance. ()

18. Material. An action or failure to act that could have an immediate and significant negative impact on the effective representation of Indigent Persons or result in the misuse of state funds. ()

19. PDC. The Idaho State Public Defense Commission including PDC Staff and the Commission. ()

20. PDC Staff. Employees of the Commission who report to the Executive Director. References to PDC Staff include the Executive Director unless otherwise specified. Information reported to the PDC will be reported using available PDF forms ()

21. Public Defense Rules. Any rule promulgated by the Commission adopted by the Idaho Legislature that is in accordance with the statutory requirements of ~~and~~ Section 19- 850(1)(a), Idaho Code. ()

22. Vertical Representation. The Defending Attorney who is appointed by a court to represent an Indigent Person ~~shall~~ shall as practicable, continually and personally represent that client through trial proceedings and the preservation of issues for appeal. ~~Limited~~ Exceptions include such things as can be made in the event of the appointed attorney's illness, vacation, court schedules and other unavoidable absence or for coverage on strictly procedural issues. ()

23. Willful. An action or failure to act that is deliberate and with knowledge. ()

24. Workload. A Defending Attorney's Caseload adjusted to account for available support staff, Case complexity, and distribution through the reporting year and other duties such as supervision. ()

11. – 999. (RESERVED)

THE FOLLOWING IS THE PROPOSED TEXT OF DOCKET NO. 61-0102-2002
(Chapter Re-Write/New Chapter)

IDAPA 61 – IDAHO STATE PUBLIC DEFENSE COMMISSION

61.01.02 – REQUIREMENTS AND PROCEDURES FOR REPRESENTING INDIGENT PERSONS

00. LEGAL AUTHORITY.

This chapter is adopted under the legal authority of Section 19-850(1)(a), Idaho Code. ()

01. TITLE AND SCOPE.

This chapter is titled "Requirements and Procedures for Representing Indigent Persons" and contains the minimum requirements for representation of indigent persons. ()

02. – 009. (RESERVED)

10. DEFINITIONS.

For the purposes of this chapter, the definitions in IDAPA 61.01.01, "General Provisions and Definitions," apply. ()

11. – 019. (RESERVED)

20. ADEQUATELY RESOURCING PUBLIC DEFENSE BY COUNTIES TO ENSURE EFFECTIVE REPRESENTATION IS PROVIDED TO INDIGENT PERSONS.

Counties shall ensure effective representation is provided to Indigent Persons by adequately resourcing public defense as follows: ()

01. **Supported Defense Model.** ~~Annually appropriate enough money to fund the indigent defense provider it has selected~~ Sufficiently fund the public defense model selected under Section 19- 859, Idaho Code: ()

a. ~~Employ or contract attorneys from the Defending Attorney Roster or require the attorney to apply for the Roster under Subsection 070.03 of these rules;~~ ()

b. Employ or contract with qualified staff and contractors with professional certificates, licenses and permissions as required by applicable rules and laws; and ()

c. ~~Ensure~~ Provide resources for compliance with applicable Public Defense Rules. ()

02. **Defending Attorney Resources.** ~~Ensure~~ Provide Defending Attorneys ~~have with~~ resources for carrying out the Defending Attorney's responsibilities, including: ()

a. Confidential office, jail and courthouse meeting rooms; ()

b. ~~Confidential servers and systems~~ Maintaining confidential information; ()

c. Equipment, technology, supplies; and ()

d. Other resources needed to provide ~~effective and zealous~~ representation. ()

03. **Contracting.** Counties and contract Defending Attorneys will enter into a contract for public defense services as required by Section 19-859, Idaho Code, which must include the following core terms: ()

a. All parties will comply with applicable Public Defense Rules; ()

b. Description of services and Case types included in the contract; ()

c. Prohibition of a single fixed fee for services and expenses; ()

d. Fee structure and amount for services; ()

e. The county will pay client related expenses and costs; ()

f. Defending Attorney will safeguard and retain case files and records as necessary to protect Indigent Persons, and, at termination of their contract, transfer files to the successor contract Defending Attorney; proper safeguards will be put in place to ensure no file is transferred to an attorney who may have a conflict; ()

g. All parties keep detailed records of their public defense services and expenditures; ()

h. Defending Attorney will notify the Chief Public Defender or the Board of County Commissioners ~~if there is no Chief Public Defender~~ county if the Idaho State Bar or other licensing organization files formal charges against a Defending Attorney or non-attorney staff; and ()

i. Authorization for and disclosure of the contract to the PDC. ()

04. **Communication.** The County will frequently meet with the ~~lead institutional~~ Chief Public Defender or ~~primary~~ contracting Defending Attorneys who are the main providers of public defense services about the following: ()

a. Review compliance with Public Defense Rules, including monitoring Workloads and Vertical Representation; and ()

Commented: Who decides what is effective or zealous
Effective representation should not be equated with winning.

b. ~~Review county budget and expenditures for sufficient allocation to fund of public defense resources~~ and assess need for Financial Assistance ~~from the state.~~ ()

21. – 029. (RESERVED)

30. **PUBLIC DEFENSE INDEPENDENT OF POLITICAL AND JUDICIAL INFLUENCE.**
Counties will ensure public defense is independent of ~~county political and judicial influence. The Idaho Supreme Court will ensure that public defense is independent of judicial influence.~~ ()

01. **No Judicial, Political or Conflict Influences.** The county's selection and retention of Defending Attorneys will not involve ~~judicial or political influences or other conflicts of interest.~~ ()

02. **Independent Committees.**

a. ~~The county will use an independent committee from within the county or region for recommendations to the Board of County Commissioners shall select the Chief Public Defender in accordance with section 19-860 for the selection of the lead institutional Defending Attorney or primary contracting Defending Attorneys as the main providers of public defense services as set forth in Sections 19-859 and 19-860(2), Idaho Code; and~~ ()

b. ~~Each judicial district will establish an independent committee of one (1) attorney from each county who practices public defense in or who is familiar or will become familiar with public defense in the county and who is not a Defending Attorney for the appointing county and who is not a prosecutor, to act as a liaison in independence issues between Defending Attorneys and county stakeholders. The Administrative District Judge (ADJ) or Trial Court Administrator (TCA) will identify the members of the committee for their District, and if the ADJ or TCA does not, the Commission will identify committee members.~~ ()

c. Information about an attorney's fitness to represent Indigent Persons is confidential and exempt from Public Records Act under Section 74-105(18)(a), Idaho Code. ()

03. **Independent Advocate.** The county will not take action against a Defending Attorney for advocating for Indigent Persons. ()

04. **Independence.** The county will limit prosecutor involvement in public defense matters that may jeopardize the independence of any Defending Attorney or undermine the delivery of public defense. ()

05. **Independent Contract Review.** ~~In the event the Board of County Commissioners determines there is a conflict of interest of having the Board's attorney review a contract, the Board will. The county should engage independent legal counsel to review and negotiate Defending Attorney Contracts.~~ ()

31. – 039. (RESERVED)

40. **COUNTIES TO PROVIDE CONSISTENT RESOURCES FOR PUBLIC DEFENSE.**
Counties will provide adequate and equitable resources for public defense consistent with ~~a properly funded the resources provided to the~~ prosecutor. ()

01. **Staff and Facilities.** Defending Attorneys and prosecutors will ~~be provided with resources so each~~ ~~has~~ have equal access to quality staff and facilities. ()

02. **Pay.** Defending Attorneys and their staff will receive similar compensation as ~~a properly funded~~ prosecutor and staff with similar experience. ()

03. **Other Resources.** Defending Attorneys and the prosecutor will have equal access to resources necessary for legal representation. This includes but is not limited to the independent investigation and evaluation of evidence. ()

04. **Equity Review.** The county will frequently review and assess equity between, and resource needs of, Defending Attorneys and prosecutors. ()

Commented: The counties do not have control over the judiciary so cannot ensure that the judiciary is not exercising any influence. The rule should make the Idaho Supreme Court responsible

Commented: Other conflicts of interest needs to be defined

05. **Budget for Equity.** The county will frequently review resource needs with Defending Attorney

and ~~if raising property taxes is necessary to~~ adequately budget to meet those needs, ~~shall require state funding to meet the needs.~~ ()

41. – 049. (RESERVED)

50. APPOINTMENT OF COMPETENT DEFENDING ATTORNEYS.

Courts will appoint defending attorneys who are competent to represent indigent persons. ()

01. **Appointment from Roster.** ~~Courts will appoint a Defending Attorney from the applicable Defending Attorney Roster.~~ ()

02. **Additional Requirements for Appointments in Capital Cases.** When appointing a Defending Attorney to a Capital Case the Court must also: ()

a. Assess the Defending Attorney's Workload to ensure compliance with the Public Defense Rules; and ()

b. At or before the Initial Appearance in a Capital Case, appoint no less than two (2) qualified Capital Defending Attorneys, one (1) designated lead and the other(s) as co-counsel. ()

03. **Appointment of Attorneys Who Are Not Engaged by County.** Courts will not appoint a Defending Attorney to a case in a county if the Defending Attorney is not employed or under contract to provide public defense services for the county. ()

a. The attorney will notify the Court if they are not employed by a county or do not have a contract with a county as required by Section 19-859(4), Idaho Code, and Public Defense Rules; and ()

b. The Court will verify the attorney is employed by a county or has a contract with the county containing the terms in Subsection 020.03 of these rules, and is on the applicable Roster, prior to appointment and commencement of representation. ()

04. **Conflicts of Interest.** A Court shall not appoint a Defending Attorney to any case with a conflict of interest in that case. ()

51. – 059. (RESERVED)

60. MINIMUM REQUIREMENTS FOR DEFENDING ATTORNEYS.

Defending attorneys shall meet the following minimum requirements ~~for providing effective representation to indigent persons.~~ ()

01. **Idaho State License.** Be licensed to practice law in Idaho and comply with Idaho State Bar rules. ()

02. **Public Defense Competency.** ~~Be competent to counsel and represent indigent persons.~~ ()

03. **Qualifications.** Have demonstrated ability, training, experience and understanding regarding representing Indigent Persons and do the following: ()

a. Apply laws, rules, procedures and practices to the case and perform thorough legal research and analysis; ()

b. Protect client confidentiality, and if breached, notify the client and any other entities when necessary to preserve the client's constitutional and statutory rights; ()

c. Ensure Vertical Representation ~~as much as practicable from the time a Defending Attorney is appointed in each Case, taking into consideration vacation, illness, and conflicting court schedules.~~ ~~Defending Attorneys who are unable to comply with this rule will notify their supervisor, Board of County Commissioners or the Court and request appropriate resources.~~ ()

Commented: This entire section appears to give the executive branch authority over the judicial branch. There is a separation of powers issue.

Commented: minimum requirements does not equate to effective representation. There is not a cause and effect relationship.

Commented: Who decides if the person is competent. If the person is licensed and meets the rules, does that make the person competent?

Commented: This is not a resource issue. It is a practical issue.

- d. Dedicate sufficient time to each Case; ()
 - e. Promptly and independently investigate the Case; ()
 - f. Request funds as needed to retain an investigator; ()
 - g. Request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case; ()
 - h. Continually evaluate the case for defense investigations or expert assistance; ()
 - i. Be present at the initial appearance and available to the Indigent Person in person or via technology, ()
- and:
- i. Preserve the client's constitutional and statutory rights; ()
 - ii. Discuss the charges, case and potential and collateral consequences with the client; ()
 - iii. Obtain information relevant to Idaho Criminal Rule 46 (bail or release on own recognizance) and if appropriate, seek release; ()
 - iv. Encourage the entry of a not guilty plea at initial appearance ~~except in extraordinary circumstances where a guilty plea is constitutionally appropriate;~~ ()
 - j. Work within Caseload or Workload limits, defined in Subsection 060.05 of these rules. If a Defending Attorney's Caseload exceeds the numeric standard, the attorney must disclose this in the Annual Report. The Report must include the reasons for the excessive Caseload or Workload, and if and how the representation met constitutional standards; ()
 - k. Have sufficient time and private space to confidentially meet with Indigent Persons; ()
 - l. ~~Have private and secure information systems to confidentially~~ access and store Indigent Person's confidential information; ()
 - m. Identify and resolve conflicts of interests in compliance with Idaho Rules of Professional Conduct (IRCP) and other applicable laws and rules; ()
- n. Be familiar with and competent to identify or use:
 - i. Forensic and scientific methods used in prosecution and defense; ()
 - ii. Mental, psychological, medical, environmental issues and impacts; ()
 - iii. Written and oral advocacy; ()
 - iv. Motions practice to exhaust good faith procedural and substantive defenses; ()
 - v. Evidence presentation and direct and cross examination; ()
 - vi. Experts as consultants and witnesses and expert evidence; ()
 - vii. Forensic investigations and evidence; ()
 - viii. Mitigating factors and evidence; ()
 - ix. Jury selection methods and procedures; ()

Commented: The second part of this sentence does not make sense.

Commented:

- x. Electronic filing, discovery and evidence and systems; ()
- xi. ~~Quality and zealous representation~~; and ()
- xii. Understand their own professional limitations and seek the advice of experienced attorneys or decline appointments when necessary. ()
- 04. Additional Qualifications for Capital Cases.** Capital Defending Attorneys must meet the following additional requirements: ()
 - a. Have advanced familiarity and competence with the above minimum requirements for Defending Attorneys; and ()
 - b. Have knowledge and experience in the following: ()
 - i. Capital laws, rules, procedures and practices; ()
 - ii. Capital mitigation; ()
 - iii. Use of mental health evaluations and evidence; ()
 - iv. Managing and litigating complex cases; ()
 - v. Assembling and leading a trial team; ()
 - vi. Capital jury selection methods and procedures; and ()
 - vii. Qualifications meeting or exceeding the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases to extent they do not conflict with Idaho law; ()
 - c. Lead trial Defending Attorney in Capital Cases will meet or exceed the following experience levels: ()
 - i. Active trial practitioner with no less than ten (10) years in criminal defense litigation; ()
 - ii. Lead counsel in no less than ten (10) felony jury trial tried to verdict; and ()
 - iii. Lead or co-counsel in no less than one (1) Capital Case tried to verdict or capital sentencing; ()
 - d. Trial co-counsel Defending Attorney in Capital Cases who are not qualified as lead trial counsel will meet or exceed the following experience levels: ()
 - i. Active trial practitioner with no less than five (5) years in criminal defense litigation; ()
 - ii. Lead counsel in no less than five (5) felony jury trial tried to verdict; and ()
 - iii. Lead or co-counsel in no less than one (1) Capital Case tried to verdict or capital sentence; ()
 - e. Lead appellate/post-conviction Defending Attorney in Capital Cases will meet or exceed the following experience levels: ()
 - i. Active appellate/post-conviction attorney with no less than ten (10) years in criminal defense litigation; and ()
 - ii. Lead counsel in no less than one (1) Capital or federal capital habeas corpus Case; ()

Commented: Vague language. Who determines if the representation is of quality or is zealous?

- f.** Appellate/post-conviction co-counsel in Capital Cases who are not qualified as lead appellate or lead post-conviction counsel will meet or exceed the following experience levels: ()
- i.** Active appellate and post-conviction practitioner with no less than five (5) years in criminal defense litigation; and ()
- ii.** Attorney in no less than one (1) Capital or federal capital habeas corpus Case; ()
- g.** Lead appellate and post-conviction counsel who do not meet the numeric years of practice or numeric number of trials/cases will meet the following alternate requirements: ()
- i.** Meet all the other minimum requirements to ensure their abilities, training, and experience are appropriate given the nature and complexity of a Capital Case, and ()
- ii.** Demonstrate they are qualified to provide lead trial representation or appellate and post-conviction representation in a Capital Case, as applicable, despite their years in practice and trials/cases handled; ()
- h.** Minimum requirements for Capital Case defense teams: ()
- i.** At least two (2) qualified Capital Defending Attorneys, one (1) designated lead and the other or others as co-counsel, appointed at or before the Initial Appearance; ()
- ii.** Immediate assembly of a team by Capital Defending Attorneys consisting of no less than the following: ()
- (1) Fact investigator; ()
- (2) Mitigation specialist; ()
- (3) Person trained and professionally qualified to screen for mental and psychological screenings; and ()
- (4) Other persons needed to provide effective and zealous representation; and ()
- (5) Require ongoing training and compliance with standards. ()
- 05. Caseloads and Workloads.** Defending Attorneys will have Caseloads and Workloads that are appropriately sized to permit effective representation as follows: ()
- a.** Caseload standard. Maximum Caseloads by Active Case type shall not during the reporting period exceed: ()
- i.** Two (2) Capital Cases at a time; ()
- ii.** Two hundred ten (210) non-capital felony Cases; ()
- iii.** Five hundred twenty (520) misdemeanor Cases; ()
- iv.** Two hundred thirty-two (232) juvenile Cases; ()
- v.** One hundred five (105) child protection or parent representation Cases; ()
- vi.** Six hundred eight (608) civil contempt or mental health Cases; and ()
- vii.** Thirty-five (35) non-capital substantive appeal Cases. ()
- viii.** To determine maximum Caseloads for mixed Case types, add the percentage of the maximum

Caseload for each category and the sum of those percentages is not to exceed one hundred percent (100%); and adjust the Caseload downward when the Case assignments are weighted toward more serious offenses, complex Cases, or those requiring significant expenditure of time and resources. ()

b. Maximum Caseloads will remain in effect until April 30, 2023, unless otherwise addressed by the Commission prior to that date. In the absence of a numerical Caseload rule, Defending Attorneys and counties should use the National Advisory Bar Association (NAC) Caseload limits recognized by the American Bar Association as a guideline for assessment. ()

c. Case Counting. ()

i. A felony Case is counted as follows: ()

(1) A Case filed as a felony is counted as one (1) felony, whether it is dismissed, remanded, pled, or tried to completion; ()

(2) A Case filed as a misdemeanor that is later amended to a felony is counted as a felony; ()

ii. A probation violation or motion for contempt is counted as a separate Case; ()

iii. A Case that is conflicted or consolidated is counted by the Defending Attorney assigned to the conflicted or consolidated Case and not counted by the initial Defending Attorney; ()

iv. A Case sent to a problem-solving court is counted once as initially filed as a felony, misdemeanor, or juvenile Case; ()

v. A Case is counted as a Capital Case if, in any part of the reporting period, the state is legally entitled to seek the death penalty under Section 18-4004A, Idaho Code; ()

vi. Post-judgment motions are not counted as a Case; ()

d. Defending Attorneys who are unable to comply with the Caseload rules will notify their supervisor, Board of County Commissioners or the Court and request appropriate resources. ()

e. Workloads. Caseloads maximums are based on the following considerations: ()

i. Adequate support staff; ()

ii. Cases of average complexity; ()

iii. Reasonable distribution of Cases throughout the year; and ()

iv. No supervisory duties; ()

f. Defending Attorneys who are unable to comply with the Workload rules will notify their supervisor, Board of County Commissioners or the Court and request appropriate resources. ()

61. – 069. (RESERVED)

70. ROSTER REQUIREMENTS AND PROCEDURES.

01. Defending Attorney Roster. ()

a. For the Chief Public Defender or the county, if there is no institutional office, to include an attorney on the Defending Attorney Roster, the attorneys must: ()

i. Have an active license to practice law in Idaho; ()

ii. Attest they are in compliance with the Public Defense Rules or will comply with the Rules when appointed and representing an Indigent Person; ()

iii. ~~New attorneys admitted to the Idaho State Bar within the previous year will name and be mentored by an experienced Defending Attorney on the Defending Attorney Roster;~~ ()

iv. Have completed the minimum continuing legal education ("CLE") requirements in Paragraph 090.03 of these rules within the previous year of being placed on the Roster or within the next sixty (60) days; ()

v. ~~Have completed the Defending Attorney Roster application and authorization forms.~~ ()

vi. Attorneys on the Defending Attorney Roster will complete Annual Reports as set forth in IDAPA 61.01.03, "Records, Reporting and Review," Paragraph 020.01.a. Attorneys who at the time of inclusion on the Defending Attorney Roster are not under contract with a county will promptly provide PDC Staff notice and copy of any county contracts entered after inclusion. ()

b. ~~The Executive Director will decide whether an attorney is included on the Defending Attorney Roster;~~ ()

c. Continuing Eligibility. To remain on the Defending Attorney Roster attorneys must comply with the Public Defense Rules and: ()

i. Have completed the minimum CLE requirements under Subsection 090.03 of these rules; and ()

ii. Have completed an Annual Report. ()

d. ~~In the event that the Executive Director disagrees with the Chief Public Defender or the Board of County Commissioners' decision to include an attorney on the list, such matter will be brought before the board of county commissioners for resolution, will remove attorneys who do not meet continuing eligibility requirements from the Defending Attorney Roster.~~ ()

02. Capital Defending Attorney Roster. ()

a. For Inclusion on the Capital Defending Attorney Roster, a Defending Attorney must: ()

i. Meet minimum qualifications under Subsection 060.04 of these rules; and ()

ii. Have completed minimum CLE requirements under Paragraph 090.03.b. of these rules within two (2) years; ()

iii. Have completed Capital Defending Attorney Roster application and authorization forms. ()

b. PDC Staff or contractor investigates an applicant for initial inclusion on the Capital Defending Attorney Roster. The Commission appointed subcommittee reviews applications and PDC Staff reports and makes recommendations to the Commission. The Commission makes the final decision. ()

c. Continuing Eligibility. To remain on the Capital Defending Attorney Roster Defending Attorneys must comply with the Public Defense Rules and: ()

i. Have completed the minimum CLE requirements under Subsection 090.03 of these rules; and ()

ii. Have completed Capital Case reporting and authorization forms by November 1 every other year. ()

d. PDC Staff or contractor investigates continuing eligibility to remain on the Capital Defending Attorney Roster. The Commission appointed subcommittee reviews continuing eligibility and PDC Staff reports and

makes recommendations to the Commission. The Commission makes the final decision. The Commission will remove attorneys who do not meet continuing eligibility requirements from the Capital Defense Roster. ()

~~03. Attorneys Engaged Prior to Roster Membership. Attorneys who are not on the Roster at the time of employment or contract to provide public defense services must apply for Roster membership within thirty (30) days from the date of their employment or contract. Attorneys who are not approved for inclusion on the applicable Roster are not eligible to represent Indigent Persons. ()~~

~~04.03. Confidentiality. Information about an attorney's fitness to represent Indigent Persons is confidential and exempt from the Public Records Act under Section 74-105(18)(a), Idaho Code. ()~~

71. - 079. (RESERVED)

80. REVIEW OF ROSTER DECISIONS.

~~01. Denial of Initial Inclusion on the Defending Attorney Roster. ()~~

~~a. An attorney may appeal a denial of initial inclusion on the Defending Attorney Roster by submitting a notice of appeal within twenty-one (21) days of the date of the Executive Director's notice of denial. ()~~

~~b. The Commission will review a timely appeal and issue a final agency order affirming or reversing the Executive Director's decision, or take other action deemed appropriate by the Commission. ()~~

02. Denial of initial inclusion on the Capital Defending Attorney Roster. ()

a. A Defending Attorney may appeal a denial of initial inclusion on the Capital Defending Attorney Roster by submitting a notice of appeal within twenty-one (21) days of the date of the Commission's notice of denial. ()

b. A hearing officer appointed by the Commission will review a timely appeal and issue a recommended order to the Commission. ()

c. The Commission will issue a final agency order adopting or rejecting the hearing officer's recommended order, or take other action deemed appropriate by the Commission. ()

03. Emergency Removal of an Attorney from the Defending Attorney Roster or Capital Defending Attorney Roster. ()

~~a. The Executive Director, Chief Public Defender or the Board of County Commissioners will take immediate action, as allowed by the contract or the county's employment policies, to terminate a defending attorney if to remove an attorney from the Roster to prevent or avoid immediate danger, and the Commission may act through an emergency proceeding under Section 67-5247, Idaho Code, when: ()~~

~~i. The attorney's Idaho license to practice law is suspended; ()~~

~~ii. The attorney is disbarred in Idaho; ()~~

~~iii. The attorney's Idaho license status is inactive; or ()~~

~~iv. The attorney is convicted of a serious crime as defined in IRPC 501(p). ()~~

~~b. The Executive Director will notify the attorney and Commission upon issuance of the order which will include a statement of the immediate danger and is effective immediately. ()~~

~~c. An attorney may appeal their emergency removal by submitting a notice of appeal and all supporting documentation within fourteen (14) days of the date of the Executive Director's order. ()~~

~~d. The Commission will review a timely appeal and issue a decision within twenty-eight (28) days of receipt of timely filed notice and materials. ()~~

~~e. The Commission may base its decision on a written record or elect to hold a hearing. ()~~

~~04. Removal of an attorney from the Defending Attorney Roster or Capital Defending Attorney Roster for Other Reasons. ()~~

~~a. An attorney removed from a Roster for reasons other than set forth in Subsection 080.03 of these rules, may appeal their removal by submitting a notice of appeal and all supporting documentation within twenty-one (21) days of the Executive Director's order of removal. ()~~

~~b. The Commission will review a timely appeal and issue a final agency order affirming or reversing the Executive Director's decision, or take other action deemed appropriate by the Commission. ()~~

~~05.04. Confidentiality. Information about an attorney's fitness to represent Indigent Persons is confidential and exempt from Public Records Act under Section 74-105(18)(a), Idaho Code. ()~~

81. – 089. (RESERVED)

90. CONTINUING LEGAL EDUCATION.

Roster members must complete the minimum continuing public defense legal education requirements as follows. ()

~~01. Approval. Approval of the Executive Director is required for CLE credits to count toward minimum requirements and courses completed without pre-approval may be disapproved. ()~~

~~02. Idaho Law. The Chief Public Defender or the Executive Director of the PDC if the Defending Attorney is under contract, will ensure that legal education must-is directly relate to Idaho substantive or procedural law and the Defending Attorney's public defense practice to count toward minimum requirements, and will not be approved if not substantially related. ()~~

03. Minimum Number and Type of CLEs Required for Each Roster. ()

a. Defending Attorney Roster – Minimum of seven (7) CLE credits by September 30 each year; ()

b. Capital Defending Attorney Roster – Minimum of twelve (12) CLE credits with at least ten (10) from a nationally recognized and well-established capital trial training program, by September 30 every other year. Attorneys on both Rosters may count capital CLE credits toward the seven (7) CLE credits. ()

c. Defending Attorneys with supervisory or management duties – Additional minimum of two (2) CLE credits each year in leadership skills, attorney management, or mentoring. ()

91. – 999. (RESERVED)

THE FOLLOWING IS THE PROPOSED TEXT OF DOCKET NO. 61-0103-2002
(Chapter Re-Write/New Chapter)

IDAPA 61 – IDAHO STATE PUBLIC DEFENSE COMMISSION

61.01.03 RECORDS, REPORTING, AND REVIEW

00. LEGAL AUTHORITY.

This chapter is adopted under the legal authority of Section 19-850(1)(a), Idaho Code. ()

01. TITLE AND SCOPE.

This chapter is titled "Records, Reporting, and Review," and contains minimum public defense recordkeeping and reporting requirements and PDC's review of this information. ()

02. – 009. (RESERVED)

10. DEFINITIONS.

For the purposes of this chapter, the definitions in IDAPA 61.01.01, "General Provisions and Definitions," apply. ()

11. – 019. (RESERVED)

20. INFORMATION REPORTED AND RETAINED BY ~~ROSTER MEMBERS~~ defending attorneys.

~~Roster members~~ Defending attorneys must keep and report information about representation of Indigent Persons ~~and their eligibility to remain on the roster.~~ ()

01. Compliance.

()

- a. All information regarding compliance with Public Defense Rules; ()
- b. Annual Report; ()
- c. Public defense contracts; ()
- d. ~~Line item public defense expenditures of county funds and Financial Assistance; and~~ ()
- e. Resource and Financial Assistance needs; ()
- 02. ~~Changes to Information. Notify the PDC of any change in address, employer or county contracts for public defense services within thirty (30) days of the change.~~ ()
- 03. Confidential Information. ()
 - a. Information reported to the PDC, the county, or administrative district judge must not include any records containing information protected or exempted from disclosure under the rules adopted by the Idaho Supreme Court, attorney work product, attorney-client privileged communication, or other confidential information. ()
 - b. Requests for and expenditures of Extraordinary Litigation Fund shall only be disclosed to the PDC. ()
- 21. – 029. (RESERVED)
- 30. INFORMATION REPORTED AND RETAINED BY COUNTIES.
Counties must keep and report information about how the county provides public defense. ()
 - 01. Compliance. ()
 - a. All information regarding a county’s compliance with applicable Public Defense Rules; ()
 - b. Public defense contracts; ()
 - 02. Changes to Public Defense Model or Defending Attorneys. Notify the PDC of any change to the county’s public defense model or the attorneys employed or contracted by the county within thirty (30) days of the change.
 - 03. Financial Information. ()
 - a. Line item budgets and expenditures of county funds and all Financial Assistance for Public Defense. ~~If such information is available in an on-line format, the PDC shall obtain the information from that source~~ ()
 - b. Extraordinary Litigation Fund reimbursements. ()
 - c. Annual financial reporting to the Commission. ()
 - i. Appropriation, budget, and expenditures for the immediately preceding county fiscal year identifying county funds, Financial Assistance, and other funds. ~~If such information is available in an on-line format the PDC shall obtain the information from that source.~~ ()
 - ii. The County’s annual financial report to the PDC is due by December 31 each year. ()
- 31. – 039. (RESERVED)
- 40. DETERMINATION OF COMPLIANCE.
PDC staff may request, and review, and audit county records to determine compliance with applicable Public Defense Rules and Financial Assistance. ()

- 01. **Financial.** County budget and expenditures. ~~If the county's budget is available in an on-line format the PDC must utilize the information that is available without causing counties to do additional work~~ ()
 - 02. **Contracts.** Public defense contracts. ()
 - 03. **Records.** Public defense records including Case names and numbers ~~as long as disclosure of such information does not require the county and or the Defending Attorney to redact confidential information in order to protect the attorney-client relationship-~~ ()
 - 04. **Annual Reports.** Information reported in Annual Reports. ()
 - 05. ~~Other-Other information requested by PDC Staff or the Commission.~~ ()
41. - 049. (RESERVED)
50. **DEFICIENCY REPORTING, REVIEW, AND RESPONSE.**
- 01. **Reporting.** ()
 - a. Counties and Defending Attorneys have a duty to report applicable Deficiencies to PDC Staff. ~~These rules do not provide a basis for Indigent Persons to bring suit against a county.~~ ()
 - b. ~~Perceived~~ Deficiencies ~~of Defending Attorneys~~ may be reported by Indigent Persons ~~to the PDC or the state bar, PDC Staff, or others.~~ ()
 - 02. **Review and Response.** PDC Staff will review reported alleged Deficiencies and may work directly with a county and Defending Attorney to resolve, make a report to the Commission, or both. ()
 - 03. **Non-Material Deficiencies.** If a Deficiency may be readily resolved with the assistance of PDC Staff, the Executive Director may ask the county to submit a plan to cure the Deficiency with proposed detailed action items and completion dates. If the plan is not submitted or not completed, or the Deficiency not cured according to the deadlines set by the Executive Director, the Non-Material Deficiency will be deemed Material. ()
 - 04. **Material but Non-Willful Deficiencies.** If the Commission determines a Deficiency is Material following review by PDC Staff and recommendation of the Executive Director or if a non-material Deficiency is not cured by the set deadline: ()
 - a. The county must consult with PDC Staff on a Compliance Plan and timely apply for Financial Assistance, if necessary; ()
 - b. The Compliance Plan must include timeframe to become compliant and progress reports from the county to PDC Staff; ()
 - c. If compliance is not achieved by the deadline set by the Executive Director, the Commission may designate the Material Deficiency as Willful. ()
 - 05. **Material and Willful Non-Compliance.** ()
 - a. If the Commission determines a Deficiency is Material and Willful following review by PDC Staff and recommendation of the Executive Director, and ()
 - b. The Commission gives notice of its intent to remedy specific Deficiencies to the extent necessary to comply with Public Defense Rules at the county's expense: ()
 - i. Within fourteen (14) days of the date of said notice, the Commission and the county or their designees shall meet to attempt resolve the issues of the Material and Willful Deficiency; ()

Commented: This section is troublesome. It opens the door for Indigent persons to bring suit against the county for all kinds of things. The focus should be on whether there was a deficiency in representation not whether the County supplied its budget.

- ii. If the Commission and the county are unable to resolve the Deficiency by meeting, and ()
- iii. The Commission determines it must take immediate action under Subsection 060.01 of these rules, the Commission may contract with contract Defending Attorneys or other resources as deemed appropriate to

remediate at the county's expense; or ()

iv. If the Commission does not proceed under Subsection 060.01 of these rules, the Commission and the county or their designees must agree on a mediator and a date for mediation within twenty-eight (28) days, with the cost of mediation to be paid equally by the parties; ()

v. If after mediation the Commission and the county are unable to come to a resolution, the Commission shall provide written notice of its decision to remedy specific Deficiencies and may with contract Defending Attorneys or other resources as deemed appropriate to remediate at the county's expense; ()

06. **Application to Resume Public Defense.** If the Commission remedies specific Deficiencies to the extent necessary to comply with Public Defense Rules at the county's expense, the county may make application to resume public defense upon showing the county is able to do so in compliance with Public Defense Rules. ()

51. – 059. (RESERVED)

60. REVIEW OF WILLFUL AND MATERIAL DEFICIENCY DECISIONS.

~~01. — Emergency Action. The Commission will take immediate action and contract with appropriate resources to remedy Willful and Material Deficiencies to avoid immediate danger and may act through an emergency proceeding under Section 67-5247, Idaho Code, when: ()~~

~~a. — A county is using a Defending Attorney who has been removed from the applicable PDC Roster for the reasons set forth in IDAPA 61.01.02, "Requirements and Procedures for Representing Indigent Persons," Subsection 080.03; or ()~~

~~b. — A county has not complied with or responded to a notice of Deficiency within thirty (30) days of the date of such notice; ()~~

~~c. — If the Commission issues an emergency order to remedy Willful and Material Deficiencies, the Commission will notify the county of its order. The Commission's order will include a statement of the immediate danger and is effective immediately; ()~~

~~d. — A county may challenge the Commission's emergency order to remedy Willful and Material Deficiencies hereunder by submitting a notice of appeal and all supporting documentation within fourteen (14) days of the date of the Commission's order; ()~~

~~e.a. — The Commission will review any timely challenge and issue an emergency decision within twenty-eight (28) days of receipt of timely filed notice and materials. The Commission may base its decision on a written record or elect to hold a hearing. ()~~

02. **Action for Other Reasons.** ()

a. If the county is subject to a Commission order to remedy Willful and Material Deficiencies for reasons other than set forth in Subsection 060.01 of these rules, the county may appeal the order by submitting a notice of appeal and all supporting documentation within twenty-one (21) days of the Commission's order. ()

b. A hearing officer appointed by the Commission will review a timely appeal and issue a recommended order to the Commission. ()

c. The Commission will issue a final agency order adopting or rejecting the recommended order, or take other action deemed appropriate by the Commission. ()

61. – 999. (RESERVED)

THE FOLLOWING IS THE PROPOSED TEXT OF DOCKET NO. 61-0104-2002
(Chapter Re-Write/New Chapter)

IDAPA 61 – IDAHO STATE PUBLIC DEFENSE COMMISSION

61.01.04 – FINANCIAL ASSISTANCE AND TRAINING RESOURCES

00. LEGAL AUTHORITY.

This chapter is adopted under the legal authority of Section 19-850(1)(a), Idaho Code. ()

01. TITLE AND SCOPE.

This chapter is titled "Financial Assistance and Training Resources," and contains requirements for public defense financial assistance and trainings offered through the PDC. ()

02. – 009. (RESERVED)

10. DEFINITIONS.

For the purposes of this chapter, the definitions in IDAPA 61.01.01, "General Provisions and Definitions," apply. ()

11. – 019. (RESERVED)

20. FINANCIAL ASSISTANCE FOR COUNTIES TO PROVIDE PUBLIC DEFENSE IN COMPLIANCE WITH PUBLIC DEFENSE RULES.

~~01. Information for Application. Counties making application for Financial Assistance to continue complying with Public Defense Rules or cure any Deficiency must provide the following information: Preference. Financial Assistance is subject to the availability for funds, with preference given:~~ ()

~~a. First, to counties that need assistance to cure Deficiencies;~~ ()

~~b. Second, to counties that need assistance to continue complying with Public Defense Rules; and~~ ()

~~02. Third, to counties for other improvements to public defense.~~ ()

03. Information for Application. Counties making application to the state through the PDC for Financial Assistance must provide the following information:

04.04. ()

- a. ~~If not compliant.~~ Compliance Plan and Cost Analysis; ()
- b. Compliance attestation required by Section 19-862A, Idaho Code; ()
- c. Itemization of the County's public defense: ()
- i. Expenditures for the prior county fiscal year; ()
- ii. Budget for the current county fiscal year; and ()
- iii. Anticipated budget for the upcoming county fiscal year; ()
- d. Information from Defending Attorneys necessary for the Compliance Plan and application; and ()
- e. Other information requested by PDC Staff or the Commission. ()

- ~~02.01. Preference. Financial Assistance is subject to the availability for funds, with preference given:~~ ()
- ~~a. First, to counties that need assistance to cure Deficiencies;~~ ()
 - ~~b. Second, to counties that need assistance to continue complying with Public Defense Rules; and~~ ()
 - ~~c. Third, to counties for other improvements to public defense.~~ ()

03.05. Financial Assistance for Workload. The Commission may award Financial Assistance for counties to pay for resources needed to meet the Workload rules in IDAPA 61.01.02, "Requirements and Procedures for Representing Indigent Persons," Subsection 060.05 ("Workload Financial Assistance") of these rules, which is subject to the following additional requirements: ()

- a. Workload Financial Assistance can only be used for attorneys, staff, and other resources to comply with the Workload rules; ()
- b. A county must specifically state in the Financial Assistance application all proposed designated uses for Workload Financial Assistance; ()
- c. A county can only use Workload Financial Assistance for the designated uses approved by the Commission; ()
- d. If Caseload or Workload maximums are being exceeded and the county has timely requested and not received Financial Assistance to pay for resources needed to comply with Caseload or Workload rules, the county's failure to comply with Caseload or Workload rules will not be deemed a Deficiency. ()

04.06. Financial Assistance for Joint Offices. The Commission may award additional Financial Assistance to counties that have established a joint office of public defender under Section 19-859(2), Idaho Code. ()

05.07. Review. PDC Staff will review county applications for Financial Assistance. The Executive Director or appointed subcommittee of the Commission will make recommendations to the Commission. The Commission will determine the type, terms, and amount of Financial Assistance. ()

06.08. Extraordinary Litigation Fund ("ELF"). The Executive Director or the Commission may award Financial Assistance for extraordinary litigation costs necessary for representation in a public defense case when such costs are a financial hardship on the county or when requesting from the court or the county may undermine an Indigent Person's case. ()

a. Defending Attorney applicants may apply exclusively for prospective litigation costs and any request seeking reimbursement for services already rendered or expenses already paid will be rejected. ()

b. Counties may request ELF Financial Assistance for reimbursement of extraordinary litigation costs paid and the application may only seek reimbursement for services rendered within the same state fiscal year. ()

c. Information provided in support of an ELF application is confidential and exempt from the Public Records Act under Section 74-105(18)(b), Idaho Code. ()

d. The Executive Director will approve or disapprove and will determine the amount of ELF assistance for costs other than attorney fees. The Commission will approve or disapprove and determine the amount of ELF assistance for attorney fees. ()

07.09. Independence. Counties applying for Financial Assistance must limit prosecutor involvement in the Financial Assistance process that may jeopardize the independence of any Defending Attorney or undermine the delivery of public defense. ()

21. – 029. (RESERVED)

30. TRAINING RESOURCES FOR DEFENDING ATTORNEYS ON THE DEFENDING ATTORNEY ROSTER, AND THEIR STAFF WHO DIRECTLY SUPPORT THE DEFENDING ATTORNEY'S PUBLIC DEFENSE PRACTICE.

01. PDC Training. The PDC may partner with outside organizations to present free or reduced cost training. ()

02. Scholarships. The PDC may award training scholarships for approved non-PDC training. ()

03. Non-Roster Attorneys. Attorneys not on a Roster and their staff are not eligible for PDC training or scholarships but may participate through a partner organization, if applicable. ()

04. Preference and Conditions. Training and scholarship funds are limited and subject to the following: ()

a. Preference is given to qualified applicants whose experience levels and compliance needs best fit the particular training program, and who did not attend a free or discounted training within the previous year; ()

b. Approved applicants must immediately notify PDC Staff if they cannot attend or fully participate in any training; and ()

c. Approved applicants who, without timely notifying PDC Staff, were absent from or failed to fully participate in a previous training, will not get preference and may not be eligible for training and scholarship benefits for the next twelve (12) months. ()

31. – 999. (RESERVED)



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RE: Response to Public Defense Commission Rules Proposed October 7, 2020

Dear Commission Members:

The Idaho Public Defense Commission (the "PDC") recently published proposed rules regulating public defense in Idaho. The PDC has historically stated that "Idaho's widely varied diversity in population and geography does not lend itself to a cookie-cutter approach to the practice of indigent defense." See Joint Mtn. for Summary Judgment, filed Nov. 20, 2018 in Idaho Fourth Dist. Case No. CV-OC-2015-10240 at 9. The proposed rules appear to forget that sentiment. The proposed rules are a cookie-cutter model, which is to be administered primarily at the discretion of the PDC's Executive Director. These rules fail to account for the realities of public defense in Idaho and, if adopted, will create a number of issues for counties and attorneys providing defense to indigent defendants throughout the state.

The PDC's proposed rules are troublesome in many respects, beginning with their truncated rulemaking process. The rules usurp budgeting authority from counties and the supervisory authority of those hired to oversee public defense. They attempt to allow PDC to access non-public county records. Additionally, counties will face unreasonable, unnecessary financial obligations if these rules are adopted.

The PDC's overall goal is noble and valuable: to improve public defense throughout the state of Idaho and to ensure that every indigent defendant enjoys the safeguards of a constitutional right to counsel. We share that goal. However, this cookie cutter approach in the proposed rules will not help us reach that goal. We will explain our reasoning in further detail below.

I. The PDC Did Not Properly Engage in the Negotiated Rulemaking Process

The PDC website states that the “[n]egotiated rulemaking is an informal part of the rulemaking process in which interested and affected persons and the agency seek to reach a consensus on the content of a rule.” This process did not occur. The notice for the negotiated rulemaking stated that the PDC was going to “rewrite all current rules to simplify and clarify.” Instead of providing the public with the specific language that the PDC intended to use to simplify and clarify, the public was presented with a vague outline that lacked any specificity regarding intent. The outline was discussed in a meeting on July 23, 2020. On October 7, 2020, the proposed rules were published. This process did not allow for interested and affected persons and the PDC to reach a consensus on the content of the rules. In addition, the proposed rules far exceed what was presented to the public as only simplification and clarification as further described below.

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

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. The PDC's proposed rules diminish the important statutory budgetary obligation of county commissioners throughout the state.

The PDC's proposed rules generally require counties to “[s]ufficiently fund [its] public defense model. . .” IDAPA § 61.01.02.020.01 (proposed Oct. 7, 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” 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 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] or its designees to remedy the specified Deficiencies at the county's expense” or mediate the issue. *Id.*

The Idaho Legislature vested boards of county commissioners with county budgeting authority. Notably, the Idaho Legislature has not authorized the PDC to undermine this authority via its rulemaking authority.

Furthermore, as noted briefly above, Idaho law already requires boards of county commissioners to adequately fund public defense. Boards 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.* Notably, the statutes do not require counties to “[e]nsure resources for compliance with Public Defense Rules” as proposed 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.

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

When reviewing proposed 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. The county commissioners appoint the public defender from a panel of 3-5 people designated “by a committee of lawyers appointed by the administrative district judge.” I.C. § 19-860. However, once selected, 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.

Proposed Rule 61.01.02.070.01 appears to conflict with the statute and diminishes the public defender’s ability to supervise his/her employees. According to the proposed rule, a licensed attorney in the state of Idaho that has been hired by the public defender can be terminated by the Executive Director of the PDC by not including the attorney on the Defending Attorney Roster. “The Executive Director will decide whether an attorney is included on the Defending Attorney Roster.”

Additionally, the rules state that “[t]he county will not take action against a Defending Attorney for advocating for Indigent Persons.” IDAPA § 61.01.02.030.03 (proposed Oct. 7, 2020). 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.

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.

IV. 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."

Proposed 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.

V. The Terms Utilized to Describe Minimum Requirements are Not Quantifiable for Employment Purposes

Proposed rule 61.01.02.060.02 states that the Defending Attorney must be competent but does not define who makes this determination. 61.01.02.060.03 states the Defending Attorney must have "demonstrated ability, training, experience and understanding." Again, it is unclear who makes this determination, or who determines whether attorneys "dedicate sufficient time," "promptly investigate" and provide "quality representation." The rules should use terms that are quantifiable so that when the county employer is making the decision whether to retain a particular defender, meaningful discussions regarding performance can take place.

VI. County Audit

Proposed Rule 61.01.03.040 allows the PDC to "request, review, and audit county records" to determine compliance with the rules. Specifically, the rule requires counties to provide the PDC with county budget and expenditures, public defense contracts, public defense records including

case names and numbers, information reported in Annual Reports, and “Other information requested by PDC Staff or the Commission.” *Id.*

The Idaho Legislature did not provide the PDC with carte blanche to access to all county records it requests. In fact, the Legislature did not authorize the PDC to access any non-public information. According to Idaho Code § 19-850(a), the PDC may only promulgate rules allowing them to obtain caseload, workload, and expenditure information. Therefore, the vague term “other information requested by [the] PDC” cannot allow the PDC access to any non-public county information. Because such information is not public, it is therefore not appropriate for distribution to the PDC.

VII. Counties Will Face Unreasonable Financial Obligations as a Result of the Rule Change

Outside Counsel

The proposed rules impose unreasonable financial obligations on counties. To begin with, requiring counties to engage independent legal counsel for civil contracts imposes an additional, often unnecessary, cost on counties. Instead of using salaried, in-house counsel, the PDC would have counties pay outside counsel instead, even where there may not be a conflict.

The Ada County Public Defender’s Office executes a large number of conflict counsel agreements each year, and every one of them is specifically tailored to the services provided by that particular attorney/firm. Counties often pay in excess of \$200 per hour for outside counsel. Paying outside counsel is unnecessary in those instances where the attorney ethics rules allow for in-house representation.

Confidential Servers

Proposed rules 61.01.02.020.02.b and 61.01.02.060.03.l. require counties to “[h]ave private and secure information systems to confidentially access and store Indigent Person’s confidential information.” They also require counties to maintain “[c]onfidential servers and systems” for such purpose. *Id.* These rules together seem to imply that counties should budget for a separate computer server and system for solely public defense records. Additionally, these rules together may require public defense offices to maintain Information Technology support completely independently from the county. This would amount to hundreds of thousands of additional property tax dollars required to fix a system that does not appear to be broken. With property taxes rising and counties being pressured to limit increases, such a requirement should not be made through rulemaking.

Training

The PDC’s proposed rules also impose training costs on counties. Practicing attorneys in Idaho must all be licensed through the Idaho State Bar (“ISB”). ISB requires all attorneys to obtain 30 Continuing Legal Education (“CLE”) credits every three years. Under the proposed rules, a certain portion of a Defense Attorney’s ISB-required CLE credits must be approved by the PDC Executive Director in order for that attorney to continue representing indigent defendants. *See*

IDAPA § 61.01.02.090.01 (proposed Oct. 7, 2020). If a county has already funded a particular training, the Executive Director may, in his/her own discretion, disapprove application of such credits toward the PDC's CLE requirements. In such instances, counties will be required to purchase additional CLE hours in order for that attorney to meet the PDC requirements.

VIII. Conclusion

Ada County supports the PDC's vision of enhancing public defense throughout the state. However, the proposed rules do not appear to serve that vision, and instead place unnecessary costs and burden onto public defense attorneys and counties. Based on the above, we respectfully request that the PDC opt against adopting the proposed rules.

Sincerely,

ADA COUNTY BOARD OF COMMISSIONERS



Kendra Kenyon, Commissioner



Diana Lachiondo, Commissioner



Patrick Malloy, Commissioner

cc (via email): Kathleen J. Elliott, PDC Executive Director, Kathleen.Elliott@pdc.idaho.gov



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August 1, 2017

Via Email

Idaho Public Defense Commission
816 W. Bannock, #201
Boise, ID 83702

Dear Public Defense Commission:

Thank you for providing the opportunity to comment on the proposed public defense rules. As county commissioners, we have a particular interest in how the rules might impact county budgeting and compliance, and the provision of public defense services in Ada County.

I. Conflicting Definitions Lead to Confusion

The first concern we have relates to the language used to describe the Indigent Defense Grant Application. Idaho Code §19-862A provides in relevant part:

[E]ach county may submit to the commission an application for a state indigent defense grant that shall include a plan that specifically addresses how indigent defense standards shall be met and, if applicable... how any deficiencies previously identified by the commission will be cured. (Emphasis added).

Under proposed Rule 61.01.08.010.01, an applicant is defined as a county that has a need for a grant "by submission of a compliance proposal."

Under proposed Rule 61.01.08.010.06 and .07, the "compliance proposal" and the "corrective action plan" can be perceived to be the same thing. Both definitions focus on how deficiencies identified by the Public Defense Commission are supposed to be addressed.

These proposed Rules and definitions create confusion, in that a grant application is also termed a "compliance proposal." This implies that if a county is applying for an Indigent Defense Grant that they are out of compliance, and in need of a corrective action plan.

According to the statute, a county may submit an application for a grant. This process should not come with an implication that the county is out of compliance. It seems that it would be more appropriate to separate the grant application process from issues related to compliance and/or corrective action.

In addition, proposed Rule 61.01.08.010.10 states:

A finding of compliance with recommendation refer to a condition whereby a county...may technically be in compliance with Indigent Defense Standards; however, the provision of indigent defenses services could be improved to ensure constitutionally sound representation or achieve compliance with indigent standards yet to be promulgated.

Such a proposal is troubling on two levels. First, it provides the staff for the Public Defense Commission the ability to make subjective determinations based on unknown criteria. A county can technically be in compliance, but still be determined to be in need of improvement as put forward in any recommendations. Second, the subjective recommendation can be related to prospective rules that have not yet been promulgated. This has the potential of holding the counties to an unachievable standard.

The purpose of the rules is to provide standards for the delivery of public defense. A county is either in compliance with the standards or they are not. The rules should not allow for subjective analysis, especially if such analysis can relate to standards not yet written. Idaho's legislature made it clear that the rules were to define what the standards of compliance should be (see Idaho Code §19-850(vi)). This definition as proposed is outside the bounds of what the statute allows and the legislature intended.

The final phase of the proposed rule is an overreach of what the statute allows, when it contemplates the possibility of a county technically being in compliance, but still with the possibility of the Public Defense Commission making the determination that they should still make improvements. This sets counties up for perpetual inability to satisfy the standards.

It was perhaps the intent of the drafters to say that a county can be in compliance, but the Public Defense Commission may have additional recommendations. If that is the intent the rule needs to be crafted to make that clear.

Our final concern relates to Proposed Rule 61.01.08.010.02. The last sentence of the approval definition states: "Disbursement of funds is subject to availability as appropriated by the State Legislature each year." There should be additional language that states that in the event funding in any given year is not appropriated by the legislature, the counties will not be obligated to fund more than their local share. This would be a situation beyond the counties control, and as such, should not subject the counties to make up the difference on their own, and/or potentially subject them to the enforcement provisions outlined in 61.01.06.026. This should be made clear in the plain language of the rule.

II. 61.01.06 – Proposed Rules Regarding Oversight, Implementation, Enforcement, and Modification of Indigent Defense Standards

Proposed Rule 61.01.06.021.02 deals with the roles of the Public Defense Commission Staff. This rule gives the staff authority to review counties for compliance. Our concern with the

language of this rule mirrors our previous concerns noted in the definitions section, in that it allows PDC Staff to make subjective determinations of compliance or noncompliance with a finding of “compliance with recommendation,” as stated in proposed rule 61.01.08.010.10. We feel this is inappropriate. The rule of law requires clarity so that the people can in good faith adhere to the law. This rule as proposed does not follow this principal.

Of further concern is Proposed Rule 61.01.06.021.02(f). It gives the PDC staff the authority to “review and assist with the creation of county indigent defense budgets.” There is no statutory authority for the PDC to review county budgeting or provide assistance with the creation of county budgets. County budgeting is governed by Idaho Code §§ 31-601 *et. seq.* All decisions related to the budget, and the adoption of the county budget is the sole province of the county commissioners, those elected to make the financial decisions of the county.

A similar overreach is seen in proposed rule 61.01.06.021.04. Idaho Code §19-862A provides that all counties shall cooperate with the commission in their review of indigent defense services. The counties cooperating with the public defense commission is quite different than stating that the county commissions “and other county staff necessary for the administration of indigent defense services, including but not limited to elected county clerks, are subject to the oversight program described herein.” The county commissioners and the county clerk are constitutional officers and their duties are defined by statute. The PDC does not have statutory authority to oversee the activities of elected county commissioners and/or elected clerks and/or their staffs.

It also appears that the word “oversight” is intended to tie into the Oversight Program Management (Rule 61.01.06.023) where the PDC, through proposed rule, attempts to have oversight of county budgets, court proceedings, and compliance with membership in the Idaho State Bar. Again, there is no statutory authority to oversee county budgets, to oversee the courts, the Idaho State Bar, or individual attorney’s compliance with State Bar membership.

Perhaps the most troubling statement comes at the end of Proposed Rule 61.01.06.026.06. It states that the PDC can determine a county has willfully and materially failed to comply “[e]ven if a county...complies with the black letter of this chapter, the PDC may make findings of non-compliance notwithstanding their cooperation.” That statement does not make sense – how can the PDC find that a county willfully and materially failed to comply if the county is complying with the requirements that are in that statute and in published rules. This is very concerning because if there is a finding that the county willfully and materially failed to comply, the statute allows the PDC to enact its enforcement authority. Idaho Code §§ 19-862A(11)-(12). Under the proposed rule, this remedy would be allowed even if a county were in black letter compliance because the “ultimate assessment of compliance is the responsibility of the PDC.” *See* 61.01.06.023.08.

III. 61.01.07 – Proposed Rules Regarding Standards for Defending Attorneys

The comments on standards for defending attorneys are being prepared by Ada County’s Chief Public Defender. He and his leadership team have many years of experience in criminal defense,

including murder cases, and they are in the best position to offer an analysis of whether the standards are measurable in a meaningful way.

IV. Conclusion

Finally, the state and the counties have limited resources. It appears from the rules that many of the resources that could be devoted to public defense will be expended on additional public defense staff who will need to be hired to implement all the rules. See initial reviews, periodic reviews and annual reviews. As county commissioners we face hard choices every year regarding funding and often have to step back and determine how to provide services to our constituents and make the budget work. We suggest that the public defense commission take a step back and prioritize those rules that will result in the effective delivery of public defense.

Sincerely,

ADA COUNTY BOARD OF COMMISSIONERS



David L. Case, Commissioner



Jim Tibbs, Commissioner



Rick Visser, Commissioner

cc: Kimberly J. Simmons, Executive Director, Public Defense Commission
County Commissioners



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October 30, 2017

Via Email

Idaho Public Defense Commission
816 Bannock #201
Boise, Idaho 83702

RE: Public Defense Proposed Rules

Dear Public Defense Commission:

Thank you for the opportunity to provide additional comments, following the October 11, 2017 public hearing held in Boise, on the Proposed Public Defense Rules. The comments previously made in Ada County's letter to the PDC dated August 1, 2017 were addressed, in part, at the hearing, and this letter will provide a response to those items, specifically. To the extent our concerns were not addressed, we will reiterate a few of the more troubling issues. To the extent our concerns are not reiterated herein, we request that our letter dated August 1, 2017¹ remain a part of the record, and the contents be considered in the PDC's future deliberations on these Proposed Rules.

Ada County continues to have reservations about inconsistencies in the Proposed Definitions and their use in the Proposed Rules. At the hearing on the Proposed Rules, the PDC explained that "Corrective Action Plans" were considered "less formal" than the Compliance Proposal process. It was stated, in essence, that no form for [Corrective Action Plans] had yet to be developed, and it was simply a way to help counties be compliant with issues of compliance they may have. After a more careful review of the Corrective Action Plan Rules, Ada County offers the following observations:

Proposed Rule 61.01.08.010.07 defines a Corrective Action Plan as a "plan developed by a county or defending attorney *with the assistance of PDC staff* that addresses any PDC designated deficiencies and how those deficiencies will be corrected."

Proposed Rule 61.01.06.021.02.c. states that the "PDC Staff shall: ...*Prepare and assist* in the implementation of corrective action plans."

Proposed Rule 61.01.06.025.01 under CORRECTIVE ACTIONS AND COMPLIANCE VERIFICATION states as follows:

¹ The letter is attached for your reference.

01. Corrective Action Plans. Upon report of non-compliance by PDC staff or PDC designation of non-compliance, a county *or* defending attorney shall describe a proposed corrective action to be taken. *The plan* shall be submitted to the PDC electronically using a reporting system specified by the executive director, as approved by the PDC.

Subsections a.- d. of that Rule continue by detailing, with great specificity, the required *separate* county *and* defense attorney responses to a PDC report of non-compliance, as well as monthly/annual follow-up PDC review requirements. While the “Corrective Action Plan” is defined as an electronic submission that *either* the county or defending attorney complete, the subsequent provisions require a *separate* response from *both* the county and the defending attorney. Which of these (if either) is the actual “Corrective Action Plan” to be implemented? Why separate responses? Why is there no required cooperation between the county and defending attorney in creating their respective responses and/or the creation of *the* Corrective Action Plan? Within “not more than 60 days following *receipt of a response* to a report,” subsection c. states that the PDC staff *shall* conduct a follow-up review, to occur monthly thereafter, until “complete implementation of the corrective action has occurred.” However, either entity can seek a 60-day extension in providing a response. Is the follow-up review process held in abeyance until both responses are received? Will the Rule provide for this contingency?

Moreover, these provisions do not contain *any* directives for PDC staff to take part in this response process. How are the PDC staff duties to “*prepare and assist* in the implementation of corrective action plans” being addressed by Proposed Rule 61.01.06.025.01.a. – d., if these are, in fact, true duties? Further, where in Proposed Rule 61.01.06.025.01.a. –d. is the required “assistance” of the “PDC staff” in helping the county or defending attorney develop a Corrective Action Plan, as described in Proposed Rule 61.01.08.010.07? There appear to be no mechanisms for a county and/or defending attorney to seek *assistance* from the PDC to develop a Corrective Action Plan.

The inconsistencies of these proposed provisions should be addressed before the Rules are finalized, so that the roles and responsibilities of the parties are clearly understood, as well as the mechanics of *creating* an actual “Corrective Action Plan.” Pursuant to proposed Rule 61.01.06.026.02, the failure of a county or defending attorney to respond to a reported deficiency within the required time appears to be the first step toward a potential enforcement action under I.C. § 19-862A. In the interests of due process, it is critical that the Rules governing the creation and implementation of the Corrective Action Plans be exceedingly clear. With all due respect, the PDC may wish to consider a less “bureaucratic” approach to an issue of non-compliance.

Further, in the spirit of compliance with the I.C. § 19-862A (1) directive that “counties, indigent defense providers and defending attorneys shall *cooperate and participate with the commission* in the review of their indigent defense services,” it would seem fitting that the Corrective Action Rules incorporate some degree of PDC assistance to counties and defense attorneys in developing Corrective Action Plans to correct identified compliance issues.

Ada County is still troubled by the use of the Proposed Rule 61.01.08.010.10 definition: Findings of Compliance with Recommendation. It was explained, at the hearing, that the PDC will be aware of “things that are coming,” and that a county, even though currently compliant, will have room to improve, based on the standards *yet to be promulgated*. Again, either a standard *is or is not* in existence, at any given point in time. When it becomes a standard, it must be complied with, and *at that point in time*, a finding of compliance should or should not be issued. If a county or defending attorney chose not to follow a “recommendation,” would the PDC act on it in some capacity? The Proposed Rules only allow the PDC to issue reports of non-compliance with standards that currently exist. It would seem that the PDC will have plenty to do without assuming the additional responsibility of recommending that counties adhere to standards that do not yet exist.

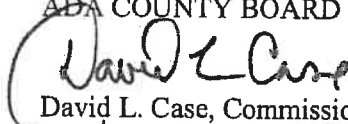
Ada County continues to have concerns that Proposed Rule 61.01.08.010.02 does not clearly state that, if the State Legislature fails to appropriate funds for grants, counties are not responsible for funding more than their local share. It should be made clear that enforcement procedures will not be taken against counties that are forced into a state of non-compliance with the standards, *through no fault of the county*.

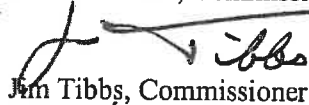
Proposed Rule 61.01.06.021.04 states that counties...“are subject to the oversight program described herein.” Again, Ada County reiterates its position that a statutory duty to “*cooperate and participate with the commission in the review of [its] indigent defense services*” is a far cry from being “overseen” by the PDC. The PDC does not have the statutory authority to “oversee” the activities of county officers, and the wording of this Proposed Rule should reflect the actual statutory directive that does exist.

Finally, Ada County appreciates the opportunity to engage in the current rule-making process, and it is hopeful that this input will assist the PDC in its efforts to create a system that will better deliver indigent defense services to the citizens of Idaho.

Sincerely,

ADA COUNTY BOARD OF COMMISSIONERS


David L. Case, Commissioner


Jim Tibbs, Commissioner


Rick Visser, Commissioner

cc: Kimberly J. Simmons, Executive Director, Public Defense Commission
County Commissioners



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August 1, 2017

Via Email

Idaho Public Defense Commission
816 W. Bannock, #201
Boise, ID 83702

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II. 61.01.06 – Proposed Rules Regarding Oversight, Implementation, Enforcement, and Modification of Indigent Defense Standards

Proposed Rule 61.01.06.021.02 deals with the roles of the Public Defense Commission Staff. This rule gives the staff authority to review counties for compliance. Our concern with the

language of this rule mirrors our previous concerns noted in the definitions section, in that it allows PDC Staff to make subjective determinations of compliance or noncompliance with a finding of “compliance with recommendation,” as stated in proposed rule 61.01.08.010.10. We feel this is inappropriate. The rule of law requires clarity so that the people can in good faith adhere to the law. This rule as proposed does not follow this principal.

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A similar overreach is seen in proposed rule 61.01.06.021.04. Idaho Code §19-862A provides that all counties shall cooperate with the commission in their review of indigent defense services. The counties cooperating with the public defense commission is quite different than stating that the county commissions “and other county staff necessary for the administration of indigent defense services, including but not limited to elected county clerks, are subject to the oversight program described herein.” The county commissioners and the county clerk are constitutional officers and their duties are defined by statute. The PDC does not have statutory authority to oversee the activities of elected county commissioners and/or elected clerks and/or their staffs.

It also appears that the word “oversight” is intended to tie into the Oversight Program Management (Rule 61.01.06.023) where the PDC, through proposed rule, attempts to have oversight of county budgets, court proceedings, and compliance with membership in the Idaho State Bar. Again, there is no statutory authority to oversee county budgets, to oversee the courts, the Idaho State Bar, or individual attorney’s compliance with State Bar membership.

Perhaps the most troubling statement comes at the end of Proposed Rule 61.01.06.026.06. It states that the PDC can determine a county has willfully and materially failed to comply “[e]ven if a county...complies with the black letter of this chapter, the PDC may make findings of non-compliance notwithstanding their cooperation.” That statement does not make sense – how can the PDC find that a county willfully and materially failed to comply if the county is complying with the requirements that are in that statute and in published rules. This is very concerning because if there is a finding that the county willfully and materially failed to comply, the statute allows the PDC to enact its enforcement authority. Idaho Code §§ 19-862A(11)-(12). Under the proposed rule, this remedy would be allowed even if a county were in black letter compliance because the “ultimate assessment of compliance is the responsibility of the PDC.” See 61.01.06.023.08.

III. 61.01.07 – Proposed Rules Regarding Standards for Defending Attorneys

The comments on standards for defending attorneys are being prepared by Ada County’s Chief Public Defender. He and his leadership team have many years of experience in criminal defense,

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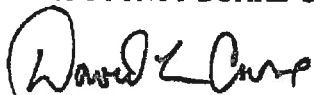
including murder cases, and they are in the best position to offer an analysis of whether the standards are measurable in a meaningful way.

IV. Conclusion

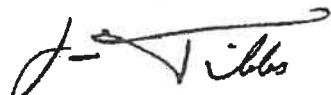
Finally, the state and the counties have limited resources. It appears from the rules that many of the resources that could be devoted to public defense will be expended on additional public defense staff who will need to be hired to implement all the rules. See initial reviews, periodic reviews and annual reviews. As county commissioners we face hard choices every year regarding funding and often have to step back and determine how to provide services to our constituents and make the budget work. We suggest that the public defense commission take a step back and prioritize those rules that will result in the effective delivery of public defense.

Sincerely,

ADA COUNTY BOARD OF COMMISSIONERS



David L. Case, Commissioner



Jim Tibbs, Commissioner



Rick Visser, Commissioner

cc: Kimberly J. Simmons, Executive Director, Public Defense Commission
County Commissioners

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My team and I have carefully reviewed the proposed standards. We have a few comments and observations.

On the whole, they are appropriate and well-reasoned. Some of the language, however, needs to provide more clarity so defending attorneys know exactly what is expected.

I. I'll start with standard V, which states training and experience should match the nature and complexity of the cases. This is of course intuitive, and it is how we operate, requiring attorneys to advance through various levels of trial advocacy as they gain the appropriate experience.

The one concern with this standard relates to entry level attorneys who are fresh off the bar exam. Misdemeanor, Juvenile and Child Protection are often "entry level" positions. It is difficult to find attorneys specifically trained in juvenile and child protection cases.

There should be language in this standard that allows for new attorneys with little to no experience to handle these types of cases, but under the supervision and training of a more experienced attorney.

Public Defenders and Prosecutors are often the training ground for inexperienced attorneys to obtain trial experience. This is an important role and I would not like to see this standard inhibit that. There must be a mechanism by which attorneys can be trained up without running afoul of this standard.

II. Standard V (H) causes me concern in that it requires 3 hours of extra CLE attendance if you have a case that is deemed to require "specialized knowledge." The standard lists a through g as being subject to this standard, but then includes the catch all phrase "included but not limited to."

That language is problematic in that it potentially allows any type of case we handle as defending attorneys to fall within this category.

Depending on who is defining "cases that require specialized knowledge," that could include anything. Drug cases require specialized knowledge in search and seizure law, K9 deployment, lab testing, etc. DUI's require specialized knowledge in intoxilyzer machines, blood draws, FST's, driving patterns, effects of drugs and alcohol on the central nervous system, etc. Crimes of violence require specialized knowledge in forensics, injuries, bruising, the veracity of witness testimony, medical expertise, etc. Sex cases require specialized knowledge in child testimony, delayed disclosure, DNA, physical manifestations of sexual abuse, etc.

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The point is that every type of case we handle could potentially be a case requiring, "specialized knowledge." This has defending attorneys potentially required to attend issue specific CLE's continuously to the detriment of actually working our cases.

Additionally, it is sometimes difficult to find specialized CLE's. My juvenile division, for instance, informs me that there has been one juvenile specific CLE, and that occurred in 2015.

This standard is too broad and potentially puts defending attorney in the untenable position of never being in compliance.

III. Standard **VI (A)** advises encouraging the entry of a not guilty plea in all but the most extraordinary circumstances. I understand the principle, but it sets defending attorneys up to be in violation when our clients insist on pleading guilty against our advice, or for pleading a homeless person to a camping ticket at video arraignments.

IV. Standard **VIII (A)** requires defending attorneys to attend 7 hours of CLE credits per year "relevant to representation of indigent defendants..."

This doesn't make sense to me on two levels. First, why do defending attorneys require more stringent training requirements than other attorneys? Why the more rigorous standard from what the State Bar requires? Other than death penalty cases, I see no justification for that, and it potentially sends the wrong message to defending attorneys.

Second, none of the CLEs we attend are necessarily geared toward indigent clients. Mental health, substance abuse, and other issues related to the law in criminal cases, are not specific only to indigent defendants. This would be better written to basically say the bulk of your CLE credits should be relevant to your practice. I believe you have to be careful here not to add unnecessary burdens on defending attorneys. We attend CLE's relevant to criminal defense. We don't have time to do otherwise.

V. The capital standards are fine on the whole. However, if the standard intends to require much more enhanced and specific training, perhaps there should be language in there that the PDC will be actively involved in organizing and funding such training.

VI. Capital standard **B (2)** states that at least one member of the team should be qualified by training and experience to screen individuals for the presence of mental health issues.

This needs better wording. Attorneys hire mental health professionals to make those determinations, and a mental health professional is a critical part of the team. This standard should say that, instead of implying that an attorney should take that role.

VII. Capital standard **B (4)** outlines setting up the defense team. I feel this proposed standard is too rigid.

Many murder cases that could be death penalty cases don't end up having notices filed. In those instances, the defense team knows it won't be a death penalty case, so why waste the resources immediately retaining mitigation specialists when you know they won't be needed in the capital case context?

The team should include at least two attorneys, a fact investigator, and a mental health professional (as any murder case needs a full psych workup irrespective of whether it becomes a death penalty case).

The specialists specific to death penalty cases, mitigation specialists, DIVO specialists, jury selection experts, etc., only need to be assembled when it is certain to be a death penalty case.

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This shouldn't be too much of a concern as the designation of whether or not the case will actually be a death penalty case, is usually known fairly early in the process.

VIII. Finally, standard number IX addresses review and supervision of defending attorneys for compliance with indigent defense standards.

It appears that this is presumed to mean that the PDC will review attorneys for compliance, and supervision should take place in house by the attorney's supervisor, but it doesn't actually make that clear.

The statutory authority given to the PDC contemplates review (§19-850(1)(c)), but not supervision. It is my view that supervision of individual attorneys is the province of the Chief Public Defender or supervising attorney, and not the PDC.

This proposed standard's intent as to "review" and "supervision" needs to be clearly delineated.

This is the input that we have at this time. Thank you for the opportunity to comment, and please do not hesitate to contact me with questions as needed.

Sincerely,

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Chief Public Defender

ARG/mo

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