

# MEETING MINUTES

## STATE PUBLIC DEFENSE COMMISSION

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*Date | time* 1/28/2015 1:00 PM | *Location* 816 W. Bannock Street, 2<sup>nd</sup> Floor, SILC Conference Room

*Meeting* Model Contract Terms

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### Commission members present

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Molly Huskey, Chair, District Judge | Darrell Bolz, Vice Chair, Juvenile Justice Comm. | Kimber Ricks, Madison Co. Comm. | Sara Thomas, SAPD | William Wellman, Defense Attorney

Ian Thomson, Exec. Dir. | Nichole Devaney, Admin. Asst.

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### Commission members absent

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Jason Monks, Representative

Chuck Winder, Senator

Sara Thomas (arrived at 1:45 pm)

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### Others present

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Dan Chadwick, IAC

Dan Blocksom, IAC

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	<b>Item</b>	<b>Responsible</b>
1.	Welcome and call to order	Huskey
2.	Discussion of Model Contract Terms	Huskey, Ricks, Wellman
a.	<u>Background and Scope</u>	

Chair Huskey explained that originally the Commission had determined the need to set forth mandatory contract terms. Initially, Mr. Wellman was assigned to consider the types of cases to be covered, performance expectations, reporting requirements, and insurance; Chair Huskey took on the other factors, including training and qualification requirements. The sub-committee started down that path and quickly realized there was a tremendous amount of information available. Judge Huskey had made some attempts at drafting terms, but she believed that the Commission needed to first make some decisions about the breadth and scope of the terms to be included. Are the available model contract terms going to be available to the counties for incorporation into their own contracts, from a preselected menu, or was it the Commission's intention to simply offer general guidelines and principles?

Comm. Ricks explained that he would generally rely heavily on the county attorney, and would look for the attorney to weigh in. Mr. Chadwick does not believe that the prosecutor should weigh in, because of inherent conflict issues. Mr. Wellman suggested that there be a mechanism that would allow for consultation with outside counsel. Mr. Chadwick believes that the Commission should include a statement of independence. Counties need to hire outside legal counsel. Legal counsel should be impartial and not

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have any stake in the resulting contract or its effect on indigent representation, other than the Board of Commissioner's interests.

Judge Huskey asked whether the terms are recommendations or requirements. Mr. Chadwick believes they are simply models, or best practices and that the counties will still want some flexibility. It was suggested that the PDC might function in an advisory capacity to counties when constructing contracts. Mr. Bolz worries about there being an attorney-client relationship between the PDC and County Commissioners. Mr. Wellman inquired about the importance of consistency across the State, given the incredible diversity and the disparate needs of counties. Mr. Bolz suggested possibly offering a sample. Mr. Chadwick would like to encourage smaller counties to contract with nearby larger counties that already have institutional public defenders. Mr. Wellman has long argued for a district-wide public defender office. Chair Huskey asked whether Mr. Chadwick or Mr. Wellman's suggestions are visions that the PDC should start to recommend. Mr. Chadwick reminded those in attendance that the cost is going to be the biggest challenge. Mr. Wellman is cautious because he believes the PDC still needs solid data before the PDC can recommend any specific solution or ask for money from the legislature. Mr. Blocksom indicated that along with model contract terms, maybe the PDC could offer a model contract for a joint-power agreement for counties to use, like the Mini-Cassia model. (Mr. Thomson should obtain a copy of the Mini-Cassia contract.)

The inclusion of caseload numbers in model contract terms are a delicate issue. Any workload/caseload study used should come from similarly situated states. The Commission needs to look for rural states, or similarly sized states. In the event that something comparable could be found, they could be included. However, there is general consensus that such standards would not necessarily be adopted by PDC. There was a discussion about the difference and impact of vertical versus horizontal representation after an inquiry by Mr. Bolz.

b. Training and Qualifications:

There is general consensus that when including training requirements in contracts, if the intent is to create a standard, then the requirements need to be very specific. Judge Huskey inquired whether the training requirements should span the life of the contract (often three years), or whether they should be yearly. Mr. Wellman believes that they should be on an annual basis, and believes seven hours/year is realistic. Mr. Bolz agreed that the requirement should be yearly. Mr. Wellman suggested that the model contract terms suggest a three year contract. Mr. Thomson voiced concern that by setting specific requirements they will be treated as a ceiling instead of a floor and that as a result they should be set higher. There was general consensus, that the standards should be treated as minimum qualifications, and that as CLE study shows, many attorneys will exceed the "floor" established by the contract minimum.

Judge Huskey inquired about the necessary experience levels to accept certain types of cases. Ms. Thomas suggested that the contracts need not necessarily include specific qualifications, but instead the contract simply refer to the standards being set elsewhere (kept by the PDC). Mr. Thomson also suggested that the contract may need to identify not simply the contracting attorney, but the attorneys actually providing the representation. It is important that the qualification standards be applied to the in-court attorney, not just the supervising attorney. Ms. Thomas recommended an audit at the time a contract was signed or renewed. Another alternative would be to simply have the attorney certify at the time of payment, that the indicated attorney provided the services. Ms. Thomas believes

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the Commission could create a form that the County Commissioners could use for payment.

Mr. Wellman believes that it will be difficult to discriminate between various felonies. Ms. Thomas believes it is going to be difficult not to when setting standards. Chair Huskey explained that felony-possession of drugs allows for a sentence of up to 7 years. She believes this is a natural cutoff. She also suggests that felonies with maximums over fifteen years, or that have mandatory minimum sentences, or habitual offender cases be considered separately. (Rule 44.3 was brought up, and it was suggested that it be placed on the agenda for the next regular meeting.)

Juvenile cases should be juvenile specific and refer to the parallel requirements of the equivalent crime, were it being tried in District Court. There was a lengthy discussion on the number of years necessary for each specific type of case, and how many previous cases would satisfy a qualifications standard. Ms. Thomas and Chair Huskey suggest a three year requirement for serious felonies, and representation of an "entry-level felony" to two years of previous experience. Probation Violations must be mentioned, but would have a lower standard. Juvenile delinquency cases would require the same amount of prior experience as the felony crimes, but with the added requirement that the prior representation be of delinquency matters. Juvenile training requirements would be set at 7 hours every two years. Juvenile dependency cases would require one year of experience in dependency matters, one year in civil practice, or have second-chaired two or more cases with an attorney qualified under that section. Civil commitment cases would have fairly minimal standards (ie. having accompanied an attorney twice). For contempt, the same standards would apply as for a misdemeanor. The problem solving court qualifications would only require that the attorney meet the qualifications of the underlying crime. Post-conviction cases would require the same experience standards as an upper-level felony standards, and additionally require a demonstrated familiarity with civil rules and procedure. Ms. Thomas will write the qualifications necessary for appellate representation.)

Chair Huskey inquired whether the qualifications could include an "or otherwise demonstrate" clause, which would allow for a county to qualify a contract attorney who did not technically meet the requirements or who was already under contract at the time of adoption. Ms. Thomas thinks the requirements should be requirements; and then the requirements could be phased in.

Mr. Chadwick suggested that these qualifications be pitched as recommendations of best practices, because if the PDC tries to force standards on the counties they will not be well received. Mr. Chadwick suggested that these model contract terms and requirements be presented to the Commissioners at one of their meetings. They could be presented their options of how to proceed, what the PDC's recommendations are, and it should be explained that they are entitled to independent legal (conflict) counsel. The next commissioners meeting is on June 10<sup>th</sup> or 11<sup>th</sup>. The Commission could present to the entire body. (Mr. Thomson will follow up to make arrangements.)

Comm. Ricks mentioned his belief that the PDC is still largely misunderstood by Commissioners, legislators, and public defenders. (This topic will be placed on the next Commission meeting agenda.)

It was suggested by Mr. Wellman that counties should be using a board for hiring or selecting a public defender.

- c. The Commission discussed the implications of whether a judge was assigned at the time of arraignment.

d. Performance Expectations and Insurance

Mr. Wellman indicated that performance expectations should generally be tracked through reporting, which should be a requirement in any contract. Such reporting must be submitted in order to get paid. Ms. Thomas suggested simply using the ABA Guidelines for the Defense Function. (Some Commissioners are unfamiliar with those Guidelines, and would like a primer on those. This will be incorporated into a future Commission agenda.) The performance expectations could also include very specific requirements, like meeting privately with a client in advance of court.

Ms. Thomas indicated that North Carolina had done a study and issued a report on the effectiveness of public defender systems. (Mr. Thomson agreed to find and forward that report to her.)

It was generally agreed that the PDC standards should encourage counties to enter into conflict contracts. When discussing contract evaluations there are several standards already being used, including those issued by the National Center for State Courts and the NAC.

(Mr. Thomson agreed to obtain a copy of the Gem County contract.)

Comm. Ricks represented that most county commissioners believe funding these types of contracts, and the requirements they will impose, is a state problem. As a result, they are of the mind that there should be a state solution. His question is where the money comes from. Chair Huskey asked whether the requirements should include dedicated money for training. Ms. Thomas believes the contract needs to mention and account for case expenses specifically. Any resulting contract should include a mechanism and process for which the attorneys can qualify or seek case expenses.

Mr. Wellman inquired of the Commission regarding a requirement to include malpractice insurance and if it is required should the County have to bear that burden. The problem is that there is no way to cover public defender cases, without covering all cases that an attorney handles. Where an attorney has a mixed practice, how could the county cover the malpractice for the attorney? (Mr. Thomson will inquire of Dan Chadwick whether ICRMP would indemnify the county if a public defender does not carry malpractice insurance.)

Comm. Inquired about the distinction between caseload and workload. Ms. Thomas explained that a caseload generally represents the number of files being carried by any given attorney, whereas the workload represents the amount of work being required by the attorney given the number of cases. She used the SAPD's case weighting system as an illustration of the difference. Comm. Ricks also asked about the cutoffs for the determination of indigency. The statute was explained and Mr. Thomson provided a guideline chart of the presumptive qualification standards.

Next Meeting: Tuesday (February 3) at 1pm, at the Canyon County Administration Building.

(Mr. Thomson agreed to prepare a summary of the ABA Guidelines of the Defense Function for a brief presentation.)

## 3. Adjournment

Huskey