



Kimberly Simmons  
Executive Director  
Idaho Public Defense Commission

August 25, 2016

**Re: ACLU informal comments on the first draft of the PDC's "Standards for Defending Attorneys"**

The American Civil Liberties Union and the American Civil Liberties Union of Idaho asks the Idaho Public Defense Commission (PDC) to consider the following comments for the draft "Standards for Defending Attorneys" that were published online in August 2016, which propose rules regarding representation at initial appearances, caseload standards for defending attorneys, and performance standards pursuant to some of the requirements stated in Idaho Code § 19-850(1)(a)(vii).

We believe that the proposed standards in the draft will require further additions and revisions to ensure Idaho's indigent defense system is constitutionally compliant. Accordingly, we encourage the PDC to consider the following recommendations to strengthen the level of constitutional guidance provided to Idaho's defending attorneys:

1. Much of the language included in the draft proposed rules is permissive or suggestive, rather than mandatory. Without specific, definitive expectations that clearly instructs counties and defending attorneys of the level of service they are mandated to provide pursuant to the U.S. and Idaho Constitutions, the State through its counties may continue to provide inadequate resources for defending attorneys and their offices and firms. For example:
  - a. Section III, subsection C should clearly define "proportionately" for mixed caseloads;
  - b. In the same subsection, calculating "the percentage of time the lawyer devotes to public defense" is likely an impossible task, and therefore the subsection should instead require private-practice attorneys to allot a minimum amount of time, based on a caseload formula, to handle their public defense caseload;
  - c. Section III, subsection D should clearly define "adequate support staff," including investigators, and address what to do when cases are not evenly distributed throughout the year;
  - d. Section III, subsection E should specify a specific adjustment for caseloads for defending attorneys working in problem solving courts;
  - e. Section III, subsection F should list a separate list of maximum caseload numbers for supervising attorneys or include a percentage reduction formula;
  - f. Section III, subsection G should provide a separate list of maximum caseload numbers for attorneys handling complex cases or include a percentage reduction formula;
  - g. Section V should include requirements for knowledge to handle specialized types of cases, like those involving juvenile clients, clients with mental illness, or appeals. The standard should also include how defending attorneys will acquire such specialized knowledge, whether through attorney mentorship, ongoing training, or required experience at the time of hiring.
2. Some of the requirements should be bolstered and expanded to recognize practicalities of indigent defense in the 21st century.
  - a. Section V, subsection C should require that defending attorneys are familiar with technology used by law enforcement and other government detective and investigative officers;

- b. Section VIII, subsection A should also include training on developing effective attorney-client relationships, including guidance on how to identify and account for the impact that poverty, limited education or literacy, mental health issues, and/or substance abuse issues may have had on a client.
3. Caseload limits should not use data from the county grant applications, as has been discussed in previous PDC meetings. The data that has been recently collected does not reflect a constitutionally sound system in Idaho, and using it to set a standard will only further perpetuate intolerably high caseloads for defending attorneys, which in turn diminishes adequate representation for indigent clients. Instead, we encourage the PDC to simulate a Delphi study<sup>1</sup>, one of which was completed by the American Bar Association in Missouri in 2014, to create, at minimum, standards around the amount of time that should be spent on a particular type of case. In the absence of such a study, we recommend using the National Advisory Commission on Criminal Justice Standards and Goals (NAC) to develop interim specific caseload standards.<sup>2</sup>
4. While the ACLU recognizes the effort of the PDC in creating current training standards and the public involvement in creating the draft standards for defending attorneys, we respectfully urge the Commission to create rules immediately for all of the principles listed in Section 19-850(1)(a)(vii) Idaho Code. While the task at hand appears daunting, we also know that any further delay in providing defending attorneys the necessary standards for conducting their work will only continue to enable Idaho's current public defender crisis, disproportionately impacting Idahoans who are unable to afford a private attorney. Instead, we ask the Commission to move forward and draft standards consistent with all Ten Principles. This will ensure that counties adequately understand the full scope of reforms sought by the PDC, and it will secure public trust that the Commission prioritized their responsibility to provide relief to indigent Idahoans. The counties and defending attorneys deserve to have full appraisal of the existing service gap, rather than a series of moving goalposts. Moreover, the Ten Principles are interdependent; so, for example, without independence, it will likely be impossible to achieve compliance with the remaining principles.<sup>3</sup>

We appreciate the opportunity to provide informal comments on this critically important issue and look forward to working with the Idaho Public Defense Commission to collaboratively reform our indigent defense delivery system. Upon release of a formal draft, we will provide further, formal comment.

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<sup>1</sup> American Bar Association. The Missouri Project A Study of the Missouri Public Defender System and Attorney Workload Standards. [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/ls\\_sclaid\\_5c\\_the\\_missouri\\_project\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf) (Accessed August 25, 2016).

<sup>2</sup> "National standards point to the caseload maximums prescribed by the National Advisory Commission on Criminal Justice Standards and Goals (NAC), a 1973 U.S. Department of Justice-funded initiative, and which the ABA Ten Principles state "should in no event be exceeded." NAC Standard 13.12 prescribes numerical caseload limits of: 150 felonies per attorney per year; 400 misdemeanors per attorney per year; 200 juvenile delinquencies per attorney per year; 200 mental health per attorney per year; or, 25 appeals per attorney per year." Sixth Amendment Center. Sufficient Time to Ensure Quality Representation. <http://sixthamendment.org/sufficient-time-to-ensure-quality-representation/> (Accessed August 24, 2016).

<sup>3</sup> See *Washoe County Public Defender's Office v. Second Judicial District Court*, No. 61173, 2013 WL 5614272, at \*4 (Nev. Oct. 9, 2013).