ACLU of Idaho
PO Box 1897 Boise, ID 83701
(208) 344-9750
www.acluidaho.org

Mr. Chair and Members of the Committee:

The American Civil Liberties Union and the American Civil Liberties Union of Idaho (collectively, "ACLU") urge the Committee to reject most of the Public Defense Commission's pending rules (Senate Judiciary & Rules Committee Pending Rules Review Book pages 10 – 60). These pending rules repeal the existing Indigent Defense Standards and ***all*** PDC rules already in place, replacing them with new rules that suffer from the same as well as new problems that have kept the State of Idaho's disastrous Public Defense System under litigation for over a half a decade.

The PDC has had a duty for over four years to promulgate rules related to the provision of indigent defense in Idaho, including establishing comprehensive caseload and reporting standards. These rules, like those they replace, fail to meet that duty. The proposed rules lack specificity and are often permissive rather than mandatory. This approach continues to fail to ensure that indigent Idahoans receive the defense to which they are constitutionally entitled.

Enforceable Standards (throughout)

Throughout the proposed rules, the PDC continues to use permissive language and vague terms, such as "may" or "should" (i.e., proposed IDAPA 61.01.02.030.05 – "The county *should* engage independent legal counsel to review and negotiate Defending Attorney Contracts"). These terms fail to ensure that the counties will comply with the standards or that their non-compliance will be actionable. Whenever prescribing standards, the proposed rules should use mandatory terms, such as "shall" or "must," to provide clarity and certainty to all stakeholders.

Workload (proposed IDAPA 61.01.02.060.05 (pp. 30–31))

The counties have control over public defense caseloads, because it is the counties, through their prosecuting attorneys, that determine whether and when to bring criminal charges. These rules imply that excessive defending attorney workloads are a problem for defending attorneys alone to address, at pain of PDC action against public defense offices and individual defending attorneys. However, the true causes of excessive workloads are the prosecuting attorneys' offices who bring an excessive number of juvenile and criminal charges, despite limited county resources, and the State's failure to provide funding for a sufficient number of additional defending attorneys.

Furthermore, the workload standards that the PDC adopts in these rules are not well-founded. These numerical standards were based on a number of dubious sources, including (1) the 2018 Idaho Workload Study, the reliability of which both the PDC and the study's own authors have called into question, (2) data collected by the Ada County Public Defender's office, which has consistently denied the existence of any significant deficiencies in the delivery of public defense services in Idaho, and (3) conversations with various stakeholders—not including indigent defendants or those who have received public defense services in the past. Indeed, the sunset

ACLU of Idaho
PO Box 1897 Boise, ID 83701
(208) 344-9750
www.acluidaho.org

provision built into the Rules suggest that even the State recognizes the need to revisit the workload standard. But the PDC must complete a thorough and reliable workload study now, rather than waiting until 2023 (or later) to create evidence-based workload standards that allow defending attorneys in Idaho to provide constitutionally-sufficient representation to *all* of their indigent clients. In the meantime, the PDC should use the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") standards, with caveat that even the NAC numbers have been determined by experts in the field to be too high.

The assumptions upon which the numerical standards were based are not accurately reflected in the workload rules, to the harm of indigent defendants' constitutional rights. While the Standards expressly assume cases of average complexity, the numerical standards are based on the assumption that all cases would involve minimal work (low-level charges only, with no trial and minimal investigation): just 4 hours per misdemeanor case and 10 hours per felony case. Though the workload standards prescribe that caseloads should be adjusted to account for more complex cases, the proposed rules provide no instructions for making those adjustments. The rules must include specific guidance for making those adjustments.

The numerical workload standards are also expressly based on a number of faulty assumptions, including (1) that defending attorneys always have adequate support staff, (2) that defending attorneys have no supervisory duties outside of their docket, and (3) that defending attorney caseloads are reasonably distributed throughout the year. But the proposed rules do not define what level of support staff is adequate. The rules should specify what support staff of each type is adequate, as well as how to adjust caseload expectations to compensate for inadequate support staffing. The numerical standards should also require and specify how to adjust for defending attorneys that have supervisory or other administrative duties. Many public defenders have supervisory duties and also handle cases. The rules do not take into account time that many public defenders are required to expend on these roles. The standards also fail to include any process or adjustment for defending attorneys or offices whose caseloads are significantly uneven throughout a given year. Also, in a departure from the existing standards, the proposed rules fail to include any consideration of time defending attorneys spend handling clients in problem-solving courts. The rules must specify the appropriate adjustments for any such workloads.

In the event that defending attorneys or offices are unable to meet the workload standards, the proposed rules only require that the attorneys "request resources" and "notify the court" that caseload maximums are, or might be, exceeded. The rules permit defending attorneys to continue representing indigent defendants and take on additional cases, despite their acknowledgment that their workloads are too high and the inherent conflicts of interest present in carrying an excessive caseload. The rules must not allow defenders to take on any representation beyond the maximum workload limits, as adjusted to account for case complexity, support staffing, supervisory duties, and case distribution across time.

ACLU of Idaho
PO Box 1897 Boise, ID 83701
(208) 344-9750
www.acluidaho.org

However, declining cases is not, alone, enough to resolve the constitutional deficiencies of the current public defense system. While case refusal may resolve ethical issues for defending attorneys, many indigent defendants will remain unrepresented, often while still in custody, until a defender becomes available. The State and the PDC must address excessive caseloads with more than just notification, requests for additional resources, or case refusal.

These problems described above are compounded by the provision in the proposed rules that makes clear that the PDC will not find a county deficient if it is above the workload limits but has requested financial assistance from the PDC. This ignores the fact that excessive caseloads are caused primarily by the State and the counties filing more criminal and juvenile cases than defending attorneys can competently handle. The rules cannot let counties off the hook for excessive caseloads that they themselves cause simply because they have requested assistance.

Training and Qualifications (proposed IDAPA 61.01.02.060, 61.01.02.070 (pp. 26–32))

The proposed rules apparently remove the existing Indigent Defense Standard (V.D) that requires defenders to be familiar with mental health, substance abuse, poverty, education, and other psychological, medical, and social issues that affect the lives of their indigent clients. The proposed rules should continue this requirement. Failure to do so will mean that defending attorneys across the state will be less equipped to address issues that are likely to arise for their clients in the context of their criminal cases.

Though we support proposed IDAPA 60.01.02.070.01.a.iii, which would require newly admitted attorneys to be mentored by an experienced defender, the proposed rules apparently remove the existing Indigent Defense Standard (V.F) requiring defending attorneys handling serious and complex cases to have experience or training in less complex cases, or at least have consulted with an experienced attorney beforehand. The proposed rules should require defending attorneys handling serious and complex cases to have experience and training in less complex cases beforehand.

The proposed rules also apparently remove the existing Indigent Defense Standard (V.H) requiring defenders handling matters involving juvenile, child protection, parental rights termination, civil contempt, immigration, or significant mental health issues to have at least three continuing legal education ("CLE") hours in the applicable specialized area. The proposed rules should continue this requirement as well.

The proposed rules requiring defending attorneys to investigate cases, and to request funds for investigators and assistance of experts, should be further defined. These proposed rules do not define what an "investigation" entails. To ensure a clear understanding among defending attorneys, we suggest integrating the NLADA's 2006 "Performance Guidelines for Criminal Defense Representation," particularly guidelines 4.1 through 4.3. In addition, we recommend including the ABA's Defense Function Standard on Investigation, Standard 4-4.1, specifically subsection (d), which reads as follows: "Defense counsel should determine whether the client's

ACLU of Idaho
PO Box 1897 Boise, ID 83701
(208) 344-9750
www.acluidaho.org

interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation." The rules should further clarify that "[e]xcept in exceptional cases that may not lend themselves to investigation, a defending attorney shall request funds to retain an investigator, or, for defending attorneys working for an institutional public defender office with investigators on staff, shall submit a request for investigative support, to assist with the client's case."

Independence (proposed IDAPA 61.01.02.030.04, 61.01.04.020.07 (pp. 25, 51)

The proposed rules still give ultimate authority to county commissioners, who are partisan politicians who seldom have legal training, especially in criminal defense (much less public defense). The ABA Ten Principles of a Public Defense Delivery System, and Idaho Code 19-850(a)(vii)(1) in turn, make clear that public defense should be independent from political and judicial influence. As the Ten Principles explicate, a public defense system should be subject to judicial supervision only in the same manner and extent as retained counsel.

The proposed rules regarding the involvement of prosecuting attorneys (proposed IDAPA 61.01.02.030.04 and 61.01.04.020.07) are too vague to ensure independence. The rules only require that counties "limit" prosecutors' involvement when it "may jeopardize" independence or undermine the delivery of public defense. To be clear, the involvement of prosecuting attorneys in selecting defending attorneys, or making decisions about defending attorneys' budgets and operations, *always* jeopardizes the independence of defending attorneys or, at the very least, creates the appearance of impropriety, which inevitably undermines the delivery of public defense. Much as it would be inappropriate for defending attorneys to advise the counties about prosecutor selection, budgeting, or operations, the proposed rules should remove prosecuting attorneys from any involvement in decision-making about public defender selection, budgeting, or operations.

We support the proposed rule prohibiting counties from taking action against defending attorneys for advocating for indigent persons (proposed IDAPA 60.01.02.030.03). However, the proposed rule should make clear that "advocating for indigent persons" includes seeking additional resources for public defense cases or systems, as well as reporting excessive caseloads or other possible violations of PDC rules, or constitutional or ethical requirements. The proposed rule should also prescribe both the procedure and remedies for implementing the proposed rule.

The proposed rules also fail to require efforts to achieve diversity in attorney staff, as prescribed in the ABA's independence principle.

Equity and Parity (proposed IDAPA 61.01.02.040.02, 61.01.02.040.03 (p. 25))

ACLU of Idaho
PO Box 1897 Boise, ID 83701
(208) 344-9750
www.acluidaho.org

We assume that proposed IDAPA 61.01.02.040.03 (requiring that "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") requires accounting for the prosecutor's use of local, state, and federal law enforcement officers, agencies, and resources for investigation, testing, and expert analysis. The proposed rule should make that expressly clear.

The existing standards additionally provide that "[r]easonable requests for funds to retain an investigator or expert must be funded as required by law." The proposed rules should continue this requirement, modified to expressly provide that "Requests for funds by a defending attorney or Indigent Defense Provider to pay for investigators, experts, or forensic testing must be funded unless the entity receiving the request can establish by clear and convincing evidence that the services will not assist in the defense for which they are sought."

Proposed IDAPA 61.01.02.040.02 requires defending attorneys to receive "similar" compensation as prosecutors and staff with "similar experience." This permits counties to justify underfunding public defense by hiring or selecting defenders with minimal experience.

In light of the constitutional crisis created by the deficiencies in Idaho's public defense system, the PDC should encourage all counties, through its proposed rules and legislative recommendations, to reduce—not increase—the budgets, scope, and volume of other aspects of Idaho's criminal legal system in order to address this urgent (and yet longstanding) problem.

Monitoring and Enforcement (proposed IDAPA 61.01.01.010, 61.01.03.050 (pp. 15–17, 42–43))

The proposed definition of "material" (as used in determining material deficiencies) requires "immediate and significant negative impact on the effective representation of Indigent Persons or result in the misuse of state funds." The immediate impact requirement ignores extensive research on the long-term and collateral impacts of incarceration and other involvement in the criminal and juvenile legal systems. The proposed rules should provide, as the existing rules do, that all violations of the PDC's standards for defending attorneys are material (existing IDAPA 61.01.06.026.06) and presume that material deficiencies are caused by the State and the county.

The proposed definition of "willful" (as used in determining willful deficiencies) requires an act or omission that is "deliberate and with knowledge." The proposed rules should continue the existing willfulness standard: violation of an established standard that is done voluntarily with either an intentional disregard of, or indifference to, the requirements of PDC rules (existing IDAPA 61.01.06.026).

The proposed rules should ensure that the PDC monitors caseloads, extent of investigation, rates of cases taken to trial, motions filed, and pretrial release efforts, and gather information from supervisors, when monitoring and evaluating county public defense operations.

ACLU of Idaho
PO Box 1897 Boise, ID 83701
(208) 344-9750
www.acluidaho.org

The proposed rules should identify indigent criminal and juvenile defendants as the primary stakeholder in monitoring and enforcement of PDC rules. The proposed rules should expressly require that the PDC interview and gather information from indigent defendants themselves, including about their experiences of and the outcomes from Idaho's criminal legal system.

Overall, the proposed rules represent an effort to primarily address the concerns and operations of counties, courts, and attorneys. Instead, the experiences and outcomes of indigent criminal and juvenile defendants must be at the very center of the rules, as well as the PDC's monitoring and enforcement efforts. We urge the PDC and the legislature to consider the systemic failures in our criminal legal system that impact the ever-increasing numbers of public defense cases: over-policing of poor people and people of color, reduction in public assistance and services, overzealous prosecutors, inadequate access to mental health and substance abuse treatment, and an underfunded public education system. A holistic view of the intersections of policing, prosecution, public health, and poverty should be a critical element of the PDC's work in all aspects, from rulemaking to monitoring and enforcement and also to its recommendations for additional legislation.

The comments above highlight some of our main concerns about the proposed rules. But to end Idaho's criminal legal system and public defense crises, including its profoundly shameful addiction to mass incarceration, the State and the PDC both have substantial additional work to do beyond improving these rules. Even if that additional work came immediately, it would be decades too late. These crises are daily devastating Idaho families' lives, young Idahoans' futures, and Idaho communities' economies and well-being.

Because the proposed rules require substantial revision, we urge the legislature to reject the rules as identified in this letter.

Respectfully,

Lauren Bramwell
Policy Strategist, ACLU of Idaho
Phone: 208-344-9750 x 1204
Email: LBramwell@acluidaho.org