



# ADA COUNTY

COMMISSIONERS'  
OFFICE  
200 W. Front Street  
Boise, Idaho 83702  
(208) 287-7000  
Fax: 287-7009  
boccl@adaweb.net  
www.adacounty.id.gov

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, 2017<sup>1</sup> 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:

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<sup>1</sup> 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.

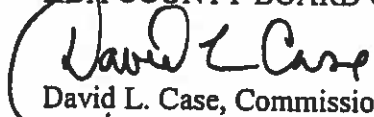
Ada County continues to have concerns that Proposed Rule 61.01.08.010.02 does not clearly state that, if the State Legislature fails to appropriate funds for grants, counties are not responsible for funding more than their local share. It should be made clear that enforcement procedures will not be taken 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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200 W. Front Street  
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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,

Idaho Public Defense Commission  
August 1, 2017  
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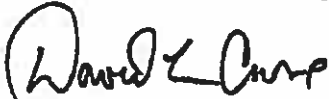
including murder cases, and they are in the best position to offer an analysis of whether the standards are measurable in a meaningful way.

**IV. Conclusion**

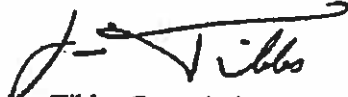
Finally, the state and the counties have limited resources. It appears from the rules that many of the resources that could be devoted to public defense will be expended on additional public defense staff who will need to be hired to implement all the rules. See initial reviews, periodic reviews and 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