COSMETIC REPAIR TO A CRUMBLING FOUNDATION: A CRITICAL EXAMINATION OF IDAHO'S MOST RECENT INDIGENT DEFENSE LEGISLATION

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COSMETIC REPAIR TO A CRUMBLING FOUNDATION: A CRITICAL EXAMINATION OF IDAHO'S MOST RECENT INDIGENT DEFENSE LEGISLATION*

He who has not first laid his foundations may be able with great ability to lay them afterwards, but they will be laid with trouble to the architect and danger to the building. ~Machiavelli[1]

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* While this issue has received much attention over the last year, as this article goes to press, indigent defense in Idaho continues to crumble. However, the American Civil Liberties Union's (ACLU) litigation against the State has forced legislators to review the possibility of indigent defense reform, which is a step in the right direction.

1. NICCOLÒ MACHIAVELLI, THE PRINCE: BOLD-FACED PRINCIPLES ON TACTICS, POWER AND POLITICS 79 (Rob McMahon ed., W.K. Marriott trans., Sterling Publishing 2008).

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I. INTRODUCTION

Ask any U.S. citizen to describe a right guaranteed to her by the Constitution, and the likely answer will be quick: freedom.[2] It is the first thing schoolchildren learn about their country, and the only memory that lasts a lifetime. But even though far fewer people could name them, that one big right—being free—is built on a base of many smaller constitutional promises. Among those structural supports is the right to counsel.[3]

For many people, the right to be free never hinges on their right to counsel. But for criminal defendants, the rights are often intertwined: no counsel, no freedom. In those cases, what happens to the broader guarantee if there are cracks in the smaller, foundational right? Unfortunately, indigent defendants in Idaho are finding out.

Near the Clerk's window in one Idaho courthouse hangs a sign warning defendants, in bold type, that the services of its attorneys are "NOT FREE!"[4] While the sign means to describe the potential monetary cost of having appointed counsel, it could just as easily be describing the fate of most low-income defendants, who generally cannot afford proper representation. Without the means to pay a lawyer—even a reduced-cost public defender—indigent defendants often find themselves navigating a complicated legal system alone.

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2. *See, e.g.*, U.S. CONST. pmbl. (noting that the Constitution exists to "secure the Blessings of Liberty" for U.S. citizens).

3. *See* U.S. CONST. amend. VI.

4. *See generally* Richard J. Wilson, *Compelling Indigent Defendants to Pay the Cost of Counsel Adds Up to Bad Policy, Bad Law*, 3 CRIM. JUST. 16 (1988). The sign, which really did exist, read in its entirety: "If you apply for a Public Defender and the service is granted to you IT IS NOT FREE! You may be required to reimburse Nez Perce County." The sign no longer hangs near the clerk's window. However, indigent defendants in Nez Perce County are still warned that they may have to pay for the right to receive an attorney. On the application for a public defender, the defendant is warned, in all capital letters right above the signature line: "I HEREBY ACKNOWLEDGE THAT I MAY BE REQUIRED TO REIMBURSE NEZ PERCE COUNTY FOR THE SERVICES OF THE PUBLIC DEFENDER." Affidavit of Financial Status, Application for Public Defender, and Order, Nez Perce County (Oct. 2013) (blank application form) (on file with author). For the reader's convenience, a copy of the Nez Perce County public defender application form is included as Appendix A.

That is a problem of constitutional magnitude. As the U.S. Supreme Court has made clear, a person's right to an attorney does not depend on his ability to pay for one.[5] But most indigent defendants do not understand that they can be required to pay, if anything, only what they can actually afford. Thus, because someone in an Idaho courthouse chose to hang a sign that improperly informs defendants of the scope of their right to counsel, those defendants could very well end up not free.

Although that sign is one of the most colorful examples of the problems within Idaho's current indigent public defense system, it is far from the only one.[6] Indigent defendants in Idaho suffer the consequenc-

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5. *See* U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (noting that the "noble ideal" that "every defendant stands equal before the law . . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him"). Some states have adopted indigent-defense cost recovery, on the theory that it can be psychologically beneficial for a near-indigent defendant to help with the cost of his defense. *See generally* Wilson, *supra* note 4.

6. For example, on June 17, 2015, class action litigation against the State (discussed in Part IV.A, *infra*) was filed on behalf of four named indigent defendants and other similarly situated defendants who have not received constitutionally adequate counsel. Class Action Complaint for Injunctive and Declaratory Relief, Tucker v. Idaho, No. CV-OC-2015-10240 (2015), https://acluidaho.org/wpsite/wp-content/uploads/ACLUIdahoPubDefenseComplaintFilestamp-sm.pdf [hereinafter Complaint].

These four, more recent—but equally egregious—examples of Idaho's constitutional indigent defense failures show that Idaho's most recent legislation (discussed in Part III.C, *infra*) has done little to improve the state of indigent defense since the Defender's Association's grim report in 2010:

Officers arrested Tracy Tucker in Bonner County on March 6, 2015. *Id.* at 3. No attorney represented Tucker at his first appearance where the judge set bail at $40,000. *Id.* at 4. Tucker was unable to make bail or make any arguments as to why bail should be reduced. *Id.* Thus, Tucker remained in jail for three months. *Id.* Over the course of those three months, Tucker met with his attorney for a total of twenty minutes over three meetings of which two were at Tucker's court appearances. *Id.* Tucker tried to contact his attorney by phone over fifty times but was unable to reach his attorney. *Id.* Tucker's attorney was so overburdened that even ten days before Tucker's trial date, he had not done any meaningful discovery or investigation. *Id.* Tucker faced up to fifteen years in prison after he pled guilty to attempted strangulation. *Id.*

Similarly, "officers arrested Jason Sharp in Shoshone County [o]n May 16, 2014 pursuant to a warrant charging burglary and grand theft." *Id.* Sharp also was not assigned counsel during his first appearance and bail was set at $50,000. *Id.* Unlike Tucker, however, Sharp was able to convince the court to release him so he would not lose his job. *Id.* at 4–5. In the year after his release, Sharp was unable to communicate effectively with his attorney. *Id.* at 5. His attorney did not provide him, even after he requested it, with discovery materials relating to the state's evidence against him. *Id.* Sharp's attorney did not file any substantive motions, like suppression motions, on Sharp's behalf except for motions to continue his trial. *Id.* Sharp faced up to thirty years in prison if convicted. *Id.*

Named Plaintiff Naomi Morley was arrested for DUI and possession of controlled substance on March 14, 2014 in Ada County after she was involved in a car accident. *Id.* Morley's bail was set at $15,000, which she could not afford and she remained in jail for three weeks despite her serious injuries caused by the accident. *Id.* at 5–6. Morley's attorney told her that if she wanted experts to challenge the state's evidence, she would have to pay

es of altogether inconsistent, county-implemented systems that are failing to provide even the bare minimums of the constitutional right to counsel. Idaho is in desperate need of indigent defense reform.

After the National Legal Aid & Defender Association (Defender Association) released a report about the dismal state of Idaho indigent defense services in 2010,[7] the Idaho Legislature has glacially and incompletely moved toward reform. In the last eighteen months, the Legislature has taken two steps forward,[8] but neither of those has addressed the underlying structural problems Idaho faces.[9] Instead, the recent measures are nothing more than a new coat of paint on a crumbling foundation.

Idaho is at a critical juncture, and has to choose: should it continue to gloss over precarious and systemic flaws, or should it take its public defense delivery method down to the studs and rebuild? This Article suggests that now is the time for Idaho to construct a more sustainable system for delivering indigent defense services.

To give Idaho a head start in doing so, Part II of this Article describes the attributes of a good public defense system, including the con-

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for them herself. *Id.* at 6. Without the help of her attorney, Morley herself obtained a sworn affidavit from the person acknowledging responsibility. *Id.* Morley's attorney was so overburdened that he had no time to review Morley's extensive notes on the police reports and did not investigate the vehicle before the state destroyed it (and the evidence it contained). *Id.* Morley believed her attorney was pressuring her into a plea agreement due to lack of resources and time to prepare for trial. *Id.* Instead of taking a plea deal for ten years in prison, Morley faced up to fifteen years in prison if convicted at her trial. *Id.*

Jeremy Payne spent five months in jail after officials arrested him for possession of a controlled substance and drug paraphernalia. *Id.* Payne was unable to afford bail, which was set at $30,000, but was released from jail after the State failed to bring a timely trial. *Id.* at 6–7. Even though Payne was assigned a public defender, he went unrepresented at his first appearance. *Id.* at 6. Additionally, while he was in jail, Payne was unable to communicate with his attorney. *Id.* at 7. Payne's meetings with his attorney at the jail and in court, immediately before court appearances, were always extremely brief, totaling between thirty and forty-five minutes since Payne was arrested. *Id.* Payne's trial was continued three times and he faced seven years in prison if convicted at trial. *Id.*

On January 22, 2016, the Idaho district court judge presiding over the case dismissed the ACLU's lawsuit stating that the lawsuit "invites the court to make speculative assumptions regarding the outcomes of individual cases" and presume "that all indigent criminal defendants in all counties are recieiving the same ineffective assistance of counsel." Kimberlee Kruesi, *Idaho Judge Dismisses ACLU Lawsuit Over Public Defense*, WASHINGTON TIMES (Jan. 22, 2016), http://www.washingtontimes.com/news/2016/jan/22/judge-dismisses-aclu-public-defense-lawsuit/. The judge did, however, agree that Idaho's indigent defense system is problematic. *Id.* Unsurprisingly, the ACLU appealed the ruling. Betsy Z. Russell, *ACLU Appeals Dismissal of Public Defense Lawsuit*, SPOKESMAN.COM (Jan. 25, 2016), http://www.spokesman.com/blogs/boise/2016/jan/25/aclu-appeals-dismissal-public-defense-lawsuit/.

7. *See generally* Nat'l Legal Aid & Defender Ass'n, *The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Courts*, BOISE WEEKLY (Jan. 2010), http://www.boiseweekly.com/pdf/idaho_report.pdf [hereinafter NLADA].

8. IDAHO CODE §19-850 (2015); IDAHO CODE §19-859 (2015).

9. David Carroll, *Idaho Governor Signs Public Defense Commission Bill Into Law*, SIXTH AMENDMENT CENTER (April 1, 2014), http://sixthamendment.org/idaho-governor-signs-public-defense-commission-bill-into-law/.

stitutional right to counsel and the different models of indigent defense delivery available to states and local governments. Part III focuses on the current methods of indigent defense delivery services being used in Idaho, the inherent problems with those systems, and the recent legislative action aimed at fixing those problems. It argues that both statutes are inadequate to produce sustainable reform in Idaho. Finally, Part IV illustrates the real damage Idaho faces due to pending litigation, which resulted from failing to achieve reform, and suggests that State oversight is the best solution for Idaho's failing system. It proposes that Idaho should take over responsibility for providing constitutionally mandated counsel using county-operated, dedicated public defense offices.

II. THE BUILDING BLOCKS OF A GOOD INDIGENT DEFENSE SYSTEM

Forty years before the U.S. Supreme Court decided this issue in 1963, the Idaho Supreme Court stated that:

> It is the public policy of this state, disclosed by constitutional guarantees as well as by numerous provisions of the statutes, to accord to every person accused of a crime, not only a fair and impartial trial, but every reasonable opportunity to prepare his defense and to vindicate his innocence upon a trial. In a case of indigent persons accused of crime, the court must assign counsel to the defense at public expense.[10]

Thus, even before the U.S. Supreme Court took on the issue, Idaho understood the important public policy of providing legal defense services to its poor.[11]

While the Idaho Supreme Court's words are powerful, this important public policy is unrecognizable in the State today.[12] It is unidentifiable because Idaho is one out of only three states that provides no state-level financial support for its indigent defense services.[13] And because Idaho has abandoned this important public policy by not implementing state-supported public defense, it continually fails to meet foundational right to counsel minimums.

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10. State v. Montroy, 217 P. 611, 614, 37 Idaho 684, 690 (1923).

11. *See id.*

12. *See Idaho Project Page*, SIXTH AMENDMENT CENTER, http://sixthamendment.org/what-we-do/our-current-projects/idaho-project-page/ (last visited Mar. 3, 2016).

13. *Id.*; Morgan Boydston, *Idaho, ACLU Go to Court Over Public Defense System*, KTVB.COM (Dec. 16, 2015), http://www.ktvb.com/story/news/local/2015/12/17/judge-hears- arguments-in-public-defense-case-against-state/77463752/. Idaho does not provide any state-level financing for trial-level, non-capital indigent defense. *See* Idaho Project Page, *supra* note 12.

A. The Constitutional Right to Counsel

The Sixth Amendment to the United States Constitution assures that defendants are afforded the assistance of counsel in all criminal prosecutions.[14] And the Constitution's Fourteenth Amendment—making the Sixth Amendment applicable to the States—ensures that all defendants are guaranteed that right.[15]

The Supreme Court famously interpreted the Sixth Amendment when it decided *Gideon v. Wainwright*[16] in 1963. In *Gideon*, Florida charged the defendant, Gideon, with breaking and entering with intent to commit a misdemeanor, a felony in Florida.[17] Gideon asked the Florida trial court to appoint him a lawyer.[18] The trial court stated it could not appoint counsel because Florida did not charge Gideon with a capital offense—a requirement for appointment of counsel.[19] On appeal, the U.S. Supreme Court reasoned that not only did precedent require it to find that indigent defendants are entitled to the right to counsel but also that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[20] A concurring Justice noted "[t]hat the Sixth Amendment requires appointment of counsel in 'all criminal prosecutions' is clear, both from the language of the Amendment and from this Court's interpretation"[21] and went on to say that the Sixth Amendment's right to assistance of counsel provision does not distinguish between capital cases and non-capital cases.[22]

In *Gideon*, the Court made it clear that—through the Fourteenth Amendment—each state is responsible for implementing the Sixth Amendment's guarantee of counsel and for delivering the assistance of counsel to its indigent defendants.[23] The state itself is ultimately responsible.[24] If a state chooses to delegate this responsibility to its counties or local governments, the state is not then relieved of its obligation.[25] States must ensure that its counties and local governments are providing the minimum constitutionally required indigent defense services and must intervene if those systems are failing.[26] Thus, if the local-

14. U.S. CONST. amend. VI.
15. U.S. CONST. amend. XIV, §1.
16. Gideon v. Wainwright, 372 U.S. 335, 348 (1963).
17. *Id.* at 336.
18. *Id.*
19. *Id.*
20. *Id.* at 344.
21. *Id.* at 348 (1963) (Clark, J., concurring).
22. Gideon, 372 U.S. at 349.
23. NLADA, *supra* note 7, at 1.
24. NLADA, *supra* note 7, at 1.
25. NLADA, *supra* note 7, at 1.
26. NLADA, *supra* note 7, at 1.

ly implemented indigent defense delivery systems are collapsing, responsibility reverts to the state.[27]

Idaho has chosen to delegate its constitutional responsibility to counties and has left it up to each county to determine the method of supplying indigent defense services.[28] This county-specific patchwork-quilt of systems contributes to Idaho's crumbling indigent defense foundation.

B. Three Types of Indigent Defense Delivery Systems

States (and local governments) have choices when determining how to provide public defender services to its indigent citizens: a state can choose to regulate indigent defense services at the state level or pass its responsibilities on to local governments.[29] Delivering indigent defense services is the state's responsibility according to the Fourteenth Amendment and *Gideon*.[30] In attending to its responsibility, a state—or local government entity if the state chooses to shift its responsibility—can deliver indigent defense services in three typical ways: 1) through a dedicated public defender office, 2) through a contract system, or 3) through an assigned counsel system.[31]

1. Dedicated Public Defender Office System

If a state or local government chooses the first model, it means that there will be a dedicated public defender's office.[32] These offices are typically situated near the courthouse and are usually staffed with attorneys, support staff, and—in larger offices—with social workers and investigators.[33] All hired parties are government employees and are paid by the state.[34]

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27. *See* NLADA, *supra* note 7, at 1.
28. *See generally* NLADA, *supra* note 7, at 1.
29. *See* NLADA, *supra* note 7, at 2.
30. *See supra* Part II.A.
31. *See* NLADA, *supra* note 7, at 14. However, Idaho has a few counties that choose none of the three systems listed. Those counties are discussed in detail below. *See also* Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S. U. L. Rev. 245, 249 (2004).
32. Wisconsin uses this model and operates a main dedicated public defender branch office in Madison. Wisconsin has also established branch locations throughout the state to deliver indigent defense services. NLADA, *supra* note 7, at 14.
33. NLADA, *supra* note 7, at 14.
34. NLADA, *supra* note 7, at 14.

Even though the dedicated public defender office model is the optimal system because it best protects indigent defendant rights and public defense standards, dedicated offices are expensive to operate.[35]

A state or local government may not have the resources or the clients to warrant a dedicated office.[36] If lack of resources or client base is a problem, States or local governments may decide to implement another less expensive system such as the contract system or assigned counsel system.[37]

2. The Contract System

Sometimes states or local governments choose the second model—the contract system.[38] In the contract model, a state or county contracts with a law firm, a non-profit organization, or individual attorneys to handle a certain type of case or a certain number of cases.[39] The individual attorney or office is paid a contractually agreed rate to deliver all indigent defense services.[40]

Some of the features of this model include contracts that are administered by an independent oversight commission and include strict caseload controls, training, and extra funding for investigators and experts.[41] Even though this system is an effective delivery system,[42] other states and local governments have decided that neither the dedicated office nor contract system is right for its citizens and have implemented the assigned counsel system as a way to provide indigent defense services.

3. Assigned Counsel System

The assigned counsel system, the third model, allows attorneys to agree to have their names placed on an assigned counsel roster that judges use to assign attorneys to indigent defendants on an as-needed

35. StreetLaw, Inc., *Chasing Gideon: Issues in Public Defense* (2013), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiUyKyOqqXLAhVK6mMKHe2NC7UQFggcMAA&url=http%3A%2F%2Fwww.street-law.org%2FDocuments%2FDocument%2FDocument%2F1436&usg=AFQjCNEFsoB6Cf3md36Mf19YZnv1k7w7XA.

36. *See id.*

37. *See infra* Part II.B.2 & II.B.3.

38. Oregon uses this contract model and delivers defense services through a mixture of private attorney contracts and non-profit organization contracts. The contractors provide indigent defense representation at the county level. NLADA, *supra* note 7, at 14.

39. NLADA, *supra* note 7, at 14.

40. NLADA, *supra* note 7, at 14.

41. NLADA, *supra* note 7, at 14.

42. NLADA, *supra* note 7, at 14.

basis.[43] Judges rotate the attorneys on the roster and the attorneys are paid by the hour or by the case.[44]

A state using this assigned counsel system provides direct supervision at the local level to ensure compliance with national and state standards.[45] If the assigned attorneys are paid an hourly rate, in this system, the hourly rate can incrementally increase based on factors such as attorney caseload and specific case complexity.[46]

Of course, the available indigent defense delivery models are three common ways in which States and local governments can provide these services. But indigent defense delivery systems must also be guided by structural and individualized representation standards.

C. National Indigent Defense Delivery Standards

National associations like the Defender Association and the American Bar Association (ABA) have developed standards for adequate indigent defense standards.[47] These types of associations play leadership roles in developing standards for indigent defense systems and indigent defense representation.[48] These standards are not binding on the states or local governments, but they do guide policy makers as they enact jurisdiction-specific indigent defense statutes.[49]

1. A Brief History of the ABA's Ten Principles of a Public Defense Delivery System

Before the ABA's Ten Principles of a Public Defense Delivery System (principles) were developed and adopted in 2002, the U.S. Department of Justice compiled national guiding standards in a five-volume work.[50] These standards were available to attorneys, policy-makers, and public defense leaders.[51] However, the standards needed to be revised, updated, and distilled to better reflect the problems affecting indigent defense services and to help guide policymakers in a more succinct way.[52]

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43. Massachusetts uses the assigned counsel system. The state utilizes an independent indigent defense commission in Boston. NLADA, *supra* note 7, at 14.
44. NLADA, *supra* note 7, at 14.
45. NLADA, *supra* note 7, at 14.
46. NLADA, *supra* note 7, at 14.
47. Wallace & Carroll, *supra* note 31, at 252.
48. Wallace & Carroll, *supra* note 31, at 252.
49. Wallace & Carroll, *supra* note 31, at 253.
50. Wallace & Carroll, *supra* note 31, at 252.
51. Wallace & Carroll, *supra* note 31, at 252.
52. *See* Wallace & Carroll, *supra* note 31, at 252.

The principles' purpose is to distill the voluminous national standards for indigent defense systems down to their most basic elements.[53] The principles are based on papers written by major players in the indigent defense arena.[54] Those papers referenced all the then-present national indigent defense delivery standards, which contained over three decades of black-letter principles.[55] Because there were three decades of black-letter principles available, officials and policy makers needed a succinct, easily reviewed and applied compilation.[56]

The principles are a reference point for discussion of the ten most important areas of indigent defense standards.[57] The ABA House of Delegates recommends that jurisdictions use the principles as an easy way to assess the needs of its public defense delivery system and then communicate those needs to the policymakers who are responsible for designing public defense delivery systems.[58] The principles help guide government officials and policy makers when designing indigent defense systems that provide effective and efficient representation for indigent defendants.[59] Since their adoption, the principles have been instrumental in states' efforts to improve public defense systems.[60]

2. The Ten ABA Principles Examined

Each of the ABA's ten principles are interdependent and an indigent defense system cannot be critiqued by averaging the performance under each principle.[61] For example, a jurisdiction cannot simply meet seven out of the ten principles and then conclude that it is meeting the needs of indigent defendants.[62] The defense delivery system used must meet performance standards under each one of the principles for the jurisdiction to conclude that the system is meeting constitutional minimums.[63] Close is not good enough.

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53. Wallace & Carroll, *supra* note 31, at 258–59.

54. *See* Wallace & Carroll, *supra* note 31, at 259 n.21.

55. *See* Wallace & Carroll, *supra* note 31, at 259 n.21.

56. *See* Wallace & Carroll, *supra* note 31, at 259.

57. *See* Wallace & Carroll, *supra* note 31, at 259.

58. Terry Brooks & Shubhangi Deoras, *ABA's Principles of Public Defense*, 17-SUM CRIM. JUST. 68, 68 (2002).

59. *See generally* American Bar Association, *ABA, Ten Principles of a Public Defense Delivery System* (Feb. 2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [hereinafter Ten Principles].

60. Brooks & Deoras, *supra* note 58, at 68–69 (discussing the use of the principles in Texas, Montana, Georgia, and Michigan).

61. NLADA, *supra* note 7, at 6.

62. *See generally* NLADA, *supra* note 7, at 6.

63. NLADA, *supra* note 7, at 6.

> **The public defense function, including the selection, funding, and payment of defense counsel, is independent.** ~ ABA Principle 1[64]

Principle 1 requires that indigent defense system be free from political influence, judiciary oversight, and be maintained by a non-partisan commission.[65] Principle 1 also suggests that the chief defender and staff defenders should be awarded the positions based on merit and should involve goals of diversity recruitment in staff.[66] A public defense system must be free from political attacks in order for it to achieve ethical client representation goals.[67] This principle is especially important when a state or local government uses a dedicated public defender office.[68] Where a chief public defender is appointed by a government official, political influence concerns increase because the focus is on influencing appointment decisions and not indigent defendants.[69]

> **Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.** ~ ABA Principle 2[70]

Principle 2 allows for the state bar's participation when caseloads exceed expectations, meaning that a state bar association may alleviate defender workload by appointing part-time defenders, contracting for services, or by implementing a controlled assigned counsel procedure.[71] Excessive workloads are a contributing factor in poor indigent defense systems because, if attorneys are facing excessive workloads, it means that they do not have adequate time to spend with each client.[72] Involving the private bar when caseloads become overwhelming helps public defenders diligently represent their clients.[73]

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64. Ten Principles, *supra* note 59, at 1.
65. Ten Principles, *supra* note 59, at 1.
66. *See* Ten Principles, *supra* note 59, at 2.
67. Wallace & Carroll, *supra* note 31, at 260.
68. *See* Wallace & Carroll, *supra* note 31, at 260.
69. *See* Wallace & Carroll, *supra* note 31, at 261.
70. Ten Principles, *supra* note 59, at 1.
71. *Id.* at 2.
72. *See* The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel, Report of the National Right to Counsel Committee*, 66 (2009), http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf [hereinafter *Justice Denied*]; *see also* NLADA, *supra* note 7, at 6.
73. *See generally* ABA Standing Comm. on Legal Aid and Indigent Defendants, *Eight Guidelines of Public Defense Related to Excessive Workloads* (August 2009), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf [hereinafter *Eight Guidelines*]; American Council of Chief Defenders Statement on Caseloads and Workloads, American Council of Chief Defenders, National Legal Aid & Defender Association (August

Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. ~ ABA Principle 3[74]

The ABA's principle 3 addresses the need for early eligibility screening and counsel appointment.[75] Eligibility screening needs to be uniform and needs to treat defendants with limited resources equally.[76] Counsel needs to be provided for the defendant within twenty-four hours after he is arrested, detained, or requests counsel.[77] Appointing counsel to defendants early in the adjudicatory process helps ensure that defendant's rights are protected because counsel is there to help explain and safeguard the defendant's legal rights.[78]

Defense counsel is provided sufficient time and confidential space within which to meet with clients. ~ ABA Principle 4[79]

Principle 4 ensures attorneys are provided with confidential meeting spaces so that the attorney's client feels free to openly discuss his case with his attorney.[80] This requires private meeting spaces in jails, prisons, and courthouses.[81] The availability of private meeting spaces ensures that the attorney's professional ethical obligations are protected and preserves attorney-client confidential information.[82] After all, where life and liberty are at stake, it is important that a client trust his public defender and it is hard for him to build that trust with his defender if the communications are not private.[83]

Defense counsel's workload is controlled to permit the rendering of quality representation. ~ ABA Principle 5[84]

Principle 5 requires caseload control.[85] An attorney's workload should never be so high that counsel would be forced to breach ethical obligations, nor should it be so high that it interferes with counsel's ability to provide quality representation.[86] An attorney who tries to repre-

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24, 2007), http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf [hereinafter ACCD].

74. Ten Principles, *supra* note 59, at 1.
75. *Id.*
76. *See* Wallace & Carroll, *supra* note 31, at 265.
77. Ten Principles, *supra* note 59, at 2.
78. *Id.*
79. *Id.*
80. *See id.*
81. *Id.*
82. Wallace & Carroll, *supra* note 31, at 267.
83. *See id.*
84. Ten Principles, *supra* note 59, at 2.
85. *Id.*
86. *Id.*

sent too many clients is limited in the number of hours she can spend with each client, thus the defense she presents on behalf of her client suffers.[87] A jurisdiction that allows the attorney to carry private cases in addition to her public defender workload must make sure that the attorney's entire workload is considered for caseload maximums.[88] If there is ever a point in which counsel feels that her workload is too overwhelming, counsel is obligated to decline further appointment of indigent defendants or take on more cases.[89] Particularly, contract defenders should have a release valve for excess caseloads or overly complex cases.[90]

Several organizations provide guidance on public defender caseload limits and benchmarks.[91] These types of caseload limit guidelines set a maximum number for the specific types of cases attorneys should be handling on a yearly basis.[92] For example, the American Counsel of Chief Defenders suggests that a single felony attorney should not take on more than 150 felony cases per year.[93]

Defense counsel's ability, training, and experience match the complexity of the case. ~ ABA Principle 6[94]

For this principle, it is the appointed counsel's responsibility to refuse assignment of a case if he lacks the experience or training needed to provide ethical, high quality representation.[95] This principle is usually implemented by classifying attorneys according to their training and experience.[96] For example, death penalty cases are unique and complex therefore they require special attorney qualifications.[97]

87. *See id.*
88. *See id.*
89. *Id.* at 1.
90. Ten Principles, *supra* note 59, at 3.
91. *See, e.g.*, *Eight Guidelines*, *supra* note 73; ACCD, *supra* note 73.
92. *See, e.g.*, *Eight Guidelines*, *supra* note 73; ACCD, *supra* note 73.
93. A misdemeanor attorney should not take more than 400 non-traffic misdemeanors per year; a juvenile attorney should not take on more than 200 juvenile cases per year; a civil commitments attorney should not take on more than 200 mental health cases per year; and an appellate attorney should not take on more than 25 non-capital appeals per year. National caseload standards should never be exceeded. *See, e.g.*, *Eight Guidelines*, *supra* note 73; ACCD, *supra* note 73.
94. Ten Principles, *supra* note 59, at 3.
95. *Id.*
96. Wallace & Carroll, *supra* note 31, at 263.
97. *Id.* at 264.

The same attorney continuously represents the client until completion of the case. ~ ABA Principle 7[98]

Principle 7 recommends vertical representation—where the same attorney represents the client from the beginning of the case through the trial's completion and sentencing.[99] Vertical representation does not necessarily extend through all appeals because in an appeal, the client should be assigned an attorney who has appellate expertise.[100] But the assigned appellate attorney should represent the client until the direct appeal's completion.[101]

While horizontal representation—where one attorney sees all clients in a particular stage of the process before passing the client on to the attorney responsible for the next stage—is a mechanism used to save time and money, it inhibits the establishment of the attorney-client relationship.[102] Vertical representation helps to solidify the relationship plus helps to build trust between client and attorney.[103]

There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. ~ ABA Principle 8[104]

Principle 8 requires that the financial resources available to indigent defense attorneys should match those available to the prosecution.[105] Defense attorneys and prosecutors should receive equal treatment in areas such as access to support staff, investigators, experts, and personal benefits.[106] And contract based defense attorneys should never be selected primarily on the basis of lowest fee.[107] This treatment ensures that indigent defendants are afforded the ability to present a defense proportional to the prosecution's case.[108] Public defenders should have the same amount of resources that are provided to the prosecution; they should be equal.[109]

98. Ten Principles, *supra* note 59, at 1.
99. *Id.* at 3.
100. *Id.*
101. *Id.*
102. Wallace & Carroll, *supra* note 31, at 263.
103. *See id.*
104. Ten Principles, *supra* note 59, at 1.
105. *Id.* at 3. In Idaho, in 2014, the amount spent on public defense throughout the counties was $14,001,709 whereas the counties collectively spent $21,924,407 on prosecuting attorney services. These numbers suggest that there was not parity between the prosecutorial and defense functions. Jared Hoskins, LSO PACKET FOR PUBLIC DEFENDER INTERIM COMMITTEE MEETING (on file with author).
106. Ten Principles, *supra* note 59, at 3.
107. *Id.*
108. *See generally id.* This principle assumes that the prosecutor in a particular jurisdiction is adequately funded and well supported.
109. *Id.*

Defense counsel is provided with and required to attend continuing legal education. ~ ABA Principle 9[110]

Defense attorneys and support staff should be provided with systematic and comprehensive training in their practice area.[111] And, in harmony with Principle 8, the education should be equal to what the prosecutor receives.[112] This principle is the first to endorse a requirement of mandatory continuing legal education for public defense attorneys.[113]

Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. ~ ABA Principle 10[114]

Principle 10 requires that defense attorneys be supervised and reviewed on a periodic basis.[115] In addition to public defenders, support staff should be evaluated from time to time to ensure quality representation and competence.[116] More specifically, attorneys should be evaluated against performance standards, which prescribe basic duties the attorney is expected to perform during all litigation stages.[117]

Many states, local governments, and professional organizations throughout the country use the principles as a "best practices" tool to guide public defenders or model their own legislation after the principles.[118] The ABA principles serve as the structural framework needed to build a sturdy foundation of a public defense delivery system. States or local governments can use the principles to construct a constitutionally sound indigent defense system.

110. *Id.* at 1.
111. *Id.* at 3.
112. Ten Principles, *supra* note 59, at 3.
113. Wallace & Carroll, *supra* note 31, at 264.
114. Ten Principles, *supra* note 59, at 1.
115. *Id.*
116. *Id.* at 3.
117. Wallace & Carroll, *supra* note 31, at 268.
118. *See, e.g.*, Policy and Leadership, PHILADELPHIA BAR ASSOCIATION, http://www.philadelphiabar.org/page/ResJune11_2?appNum=4 (last visited January 24, 2015) (presenting a Resolution of the Philadelphia Bar Association Adopting and Endorsing the American Bar Association's *Ten Principles of a Public Delivery System*); *Guidelines on Indigent Defense Services Delivery Systems*, THE STATE BAR OF CALIFORNIA (2006), http://www.calbar.ca.gov/LinkClick.aspx?fileticket=fwTzyTmupEY%3D&tabid=2326 (last visited January 24, 2015).

III. IDAHO'S CRUMBLING INDIGENT DEFENSE SYSTEM

Currently, 30 states have relieved counties of the burden of funding indigent-defense counsel, but not every state chooses to adopt a state-operated indigent defense delivery system.[119] In fact, Idaho has not relieved its local government of indigent defense responsibilities.[120] Instead, Idaho continues to delegate the responsibility of indigent defense to its counties.[121] But, as in other states that have delegated indigent defense responsibilities to local government, Idaho's local government-based systems are inherently flawed and structurally unsound.[122]

When counties (or local governments) fund indigent defense, there are inevitable inequities from county-to-county.[123] Inescapably, urban counties will have more cases than rural counties, which overburdens attorneys and strains resources.[124] Additionally, rural counties are left with fewer resources and can be financially crippled by even a single murder case, or—as is the case in some rural Idaho counties—the county often has a fewer number of attorneys so they can quickly become overburdened if the caseload increases just slightly.[125] Idaho's system suffers from these types of defects and indigent defendants suffer the consequences of the crumbling system.

A. How the Current Indigent Defense Systems in Idaho Are Working

Idaho's current indigent defense system is codified in the Idaho Code as the Idaho Public Defense Act.[126] Other than appellate indigent defense—which is an Executive Branch agency and operated at the state level—Idaho's indigent defense obligation is delegated to each individual county.[127] Even though there are three traditional ways to delivery indigent defense,[128] the Idaho legislature chose not to codify the assigned counsel system.[129] Additionally, the Idaho Legislature created an extra approach under both the dedicated public defender office model and the contract system resulting in four methods available to Idaho counties.

By statute, each county can implement one of four systems for providing indigent defense services.[130] Counties can choose from one of these four approved methods: (1) a county can establish and maintain a

119. NLADA, *supra* note 7, at 2.
120. *See id.* at 2–3.
121. *See id.*
122. *See Justice Denied*, *supra* note 72, at 55.
123. *Id.*
124. *Id.*
125. *See Justice Denied*, *supra* note 72, at 55.
126. IDAHO CODE §§ 19-848–866 (2014).
127. *Idaho Project Page*, *supra* note 12.
128. *See supra* Part II.B.
129. IDAHO CODE § 19-859(1)–(4) (2014).
130. *Id.*

dedicated public defender office, (2) a county can jointly establish and operate a dedicated public defender office, (3) a county can contract with another county's office for services, or (4) a county can contract with a private attorney.[131]

Seven Idaho counties have decided to implement the first option in Idaho— establish and maintain a dedicated public defender office.[132] Currently, there are two counties in Idaho that have opted for the second choice and have entered into an agreement with a neighboring county to establish a joint public defender's office.[133] But no counties in Idaho have implemented the third delivery option; thus, no county contracts with an outside public defender office.[134] And last, thirty-four counties in Idaho have chosen the fourth option and currently contract with private attorneys for the delivery of indigent defense services.[135]

Despite the four statutory systems available to Idaho counties, some counties chose not to implement any of the available methods and chose to create their own delivery system.[136] This "we do what we want" approach creates a chaotic patchwork of implemented systems in Idaho.

In 2010, the Defender Association—which frequently evaluates indigent defense delivery systems throughout the country—produced its evaluation of indigent defense systems in Idaho.[137] The evaluation's results were grim.[138] No counties evaluated in Idaho had indigent defense delivery systems that were constitutionally adequate.[139] More specifically, the Defender Association concluded "the state of Idaho fails to provide the level of representation required by our Constitution for those who cannot afford counsel in its criminal and juvenile courts."[140] Thus, indigent defendants suffer because of Idaho's constitutionally inadequate systems.

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131. *Id.*

132. Ian H. Thomson, *Report to the Legislature*, IDAHO STATE PUBLIC DEFENSE COMM'N, 5 (2015) (on file with author); Complaint, *supra* note 6, at 18.

133. Thomson, *supra* note 132, at 6.

134. *See generally id.*

135. *Id.* at 6.

136. *See* Complaint, *supra* note 6, at 18.

137. *See generally* NLADA, *supra* note 7; *NLADA Publications & Reports*, NAT'L LEGAL AID & DEFENDER ASS'N, http://nlada.net/publications-reports (last visited Feb. 9, 2016).

138. *Idaho Report*, NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada100years.org/node/5245 (last visited Feb. 9, 2016).

139. *Id.*

140. NLADA, *supra* note 7, at 2. Much of the information used in this article is based on the Defender Association's study conducted in 2010. Consequently, the information is out of date, but it is the best data available in Idaho with little exception. Additionally, the report only covers a sampling of Idaho's forty-four counties. When available, this article will provide updated information and will supplement with county information not included in the Defender Association's report.

1. Counties with Dedicated Public Defender Offices

Today, Idaho has seven counties that have dedicated public defender offices.[141] These offices employ 115 full time public defenders and another forty-one conflict defenders.[142]

In Bonneville County, at the time of the report, indigent defense services were provided through a small public defender office that housed five attorneys including the chief public defender.[143] All conflict cases were contracted to an attorney who, in turn, subcontracted cases to two additional attorneys.[144] The County commissioners selected all the public defenders and the conflict attorney; and the commissioners determined the amount of funding that should be allocated to indigent defense, including payment to the conflict attorney.[145]

Additionally, the Bonneville public defenders were allowed to have private practices in addition to their indigent defense duties.[146] With one of the five attorneys handling 1,154 misdemeanors at the time of the evaluation—nearly three times the national recommended amount—it is likely that a single private practice case will significantly interfere with a defender's indigent defense duties because there will be less time available for the attorney's indigent defense clients.[147] Or there will be an incentive for the attorney to spend more time on cases where he is paid a higher hourly rate.[148]

Bonneville County public defenders were well aware of the impact their extremely high caseloads had on the quality of representation.[149] The single attorney handling all misdemeanor cases estimated that he was only able to spend about one hour on each case.[150] Additionally, there were three district judges in Bonneville County, and the attorneys from the public defender's office were assigned to argue all of their cases in front of one particular judge.[151]

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141. Thomson, *supra* note 132, at 5. These counties include: Ada, Bannock, Bonner, Bonneville, Canyon, Kootenai, and Twin Falls. *Id.*

142. *Id.* at 6.

143. NLADA, *supra* note 7, at 19. In 2014, Bonneville County created a separate Office of the Conflict Public Defender. This office employs two attorneys who handle conflict cases. Thomson, *supra* note 132, at 5 n.3.

144. NLADA, *supra* note 7 at 19, 22. The ABA Model Rules of Professional Conduct, Rule 1.7, states "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Defined conflicts of interest include: the representation of one client will be directly adverse to another client or representation of one or more clients will limit the lawyer's obligations to another client. MODEL RULES OF PROF'L CONDUCT, r. 1.7(a) (AM. BAR ASS'N 1983).

145. NLADA, *supra* note 7, at 19.

146. *Id.*

147. *Id.* at 20.

148. *Id.*

149. *Id.*

150. *Id.* at 19.

151. NLADA, *supra* note 7, at 21.

This system presented many risks, including harm to the client.[152] For example, the attorney may have a desire to keep the judge happy by keeping dockets moving and this will lead to focusing on the judge's preferences rather than advocating for the client and the client's needs.[153] Overall, the Bonneville County public defender's office lacked the necessary resources to provide adequate representation to its indigent clients, thus, chilling the right to counsel.[154]

In Ada County, on the other hand, the chief public defender had been in his position for over twenty-three years and was applauded for his dedication to his staff and continuing independence in operation.[155] However, despite the chief defender's leadership, the overall office workloads were too large to be manageable.[156] For example, in 2007, the office's felony caseload reached 2,750 cases.[157] At that time, there were twelve felony attorneys meaning that each felony attorney averaged just over 229 cases per attorney.[158] And the misdemeanor attorneys were even more overwhelmed than the felony attorneys taking on a staggering 700–800 cases per year, nearly double the national standard for misdemeanor attorneys.[159]

Kootenai County had the most client-centered approach to indigent defense representation out of all the counties visited.[160] In Kootenai County, the County commissioners directly appoint the chief public defender and, at the time of the investigation, the current chief public defender had been in office since the late 1980s.[161] The chief public defender was proud of his attorney's zealous representation of criminal defendants and the office's litigious nature.[162] However, because of this stance, it was well known that the public defender's office and the prosecutor's office had a contentious relationship.[163] The office had adequate

152. *See id.* at 19.
153. *Id.* at 21.
154. *Id.* at 20, 22.
155. *Id.* at 26.
156. *Id.* at 27.
157. NLADA, *supra* note 7, at 27.
158. *See id.* at 28. Two hundred and twenty-nine or more cases per year meant that each attorney was able to spend about two hours on each case no matter the case's seriousness. *Id.*
159. *See id.* A recent analysis revealed that at least six counties in Idaho have public defenders that are handling more than double the amount of work any one attorney should take on. Complaint, *supra* note 6, at 10. And, "[b]ased on recent court observations, public defenders in Kootenai, Nez Perce, Payette, Bannock, and Bonnevile counties, among others, have so many cases assigned to them that they are unable to even identify their clients until minutes before the defendants' court appearances." Complaint, *supra* note 6, at 39.
160. NLADA, *supra* note 7, at 35.
161. *Id.*
162. *Id.*
163. *Id.* at 35.

support staff and was well managed, but the caseloads of each individual attorney were well above the national standards as they are in most counties throughout Idaho.[164] For example, one attorney in Kootenai County handled 155 felony cases, which is right at the maximum recommended number of cases for a felony attorney, but the same attorney also handled 63 misdemeanor cases, a juvenile delinquency case, and five civil commitment cases.[165]

Public defenders in Kootenai County also faced egregious infrastructure problems within the court system, which undoubtedly had a negative impact on their clients.[166] The building that housed the holding cells where in-custody defendants would be held while awaiting hearings or trials had been condemned.[167] When public defender's had to bring clients to the courthouse, the defendants were held in a van in a yard outside the courthouse sometimes for hours at a time and with only portable lavatories available.[168] To make matters worse, two jury deliberation rooms had windows that overlooked this lot and, if they wanted to, jurors could look out and see defendants shackled and in jail uniforms.[169] These types of deficiencies negatively impact indigent defendants because it is hard to get a fair trial if jurors are allowed to see you shackled and confined—it creates an unnecessary prejudice against the defendant.[170]

Idaho counties that use a dedicated public defender office are significantly out-numbered by counties that use other forms of indigent defense delivery services. The system most often implemented by Idaho counties is the contract system.

2. Counties with the Contract System

Currently, thirty-four counties in Idaho have opted for the contract system and have contracted with private attorneys for the delivery of indigent defense services.[171] At the time of the Defender Association report, Nez Perce County used flat-fee contracts for its indigent defense services.[172] One law firm in Nez Perce County carried the contract and

164. *Id.* at 37.

165. NLADA, *supra* note 7, at 37. Further, as recently as 2014, "four of the office's [fifteen] attorneys handled well over 40 cases each, the bulk of which were felonies and misdemeanors. Another four defenders handled over 300 cases . . . including a mixture of felonies, misdemeanors, juvenile cases, and other proceedings . . . . Such caseloads are well above national standards and impossible for one person to handle effectively." Complaint, *supra* note 6, at 11.

166. *See* NLADA, *supra* note 7, at 37.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Thomson, *supra* note 132, at 6. A more recent survey indicated that at least nineteen counties in Idaho continue to use a flat-fee contract system despite recent legislation that abolished the practice. Complaint, *supra* note 6 at 10.

172. NLADA, *supra* note 7, at 10.

had the responsibility of selecting and paying conflict attorneys.[173] There were no caseload standards in effect in the County and the law firm decided how many attorneys to employ in order to provide defender services without any government oversight.[174] The firm also decided how many employees—including staff and administrators—to hire and how much to pay them.[175] The only limitation the County imposed on the law firm is that it must have dedicated "a majority" of its time to indigent defense clients.[176]

Fortunately, the County restricted the law firm from handling private cases inside of Nez Perce County. However, the County did not require the law firm to report how many private cases it handled outside of the County, and it was completely up to the firm to decide if a case was conflicted.[177] There were no oversight procedures in place so the County had no way to determine the overall quality of service it received for the contract price it paid to the law firm.[178] Though the contract price of $440,000 seems high for a law firm with two partners handling all the County's indigent defense services, the firm paid their one associate's salary, expenses, and overhead with that amount.[179] Thus, each attorney in the firm earned just above $61,000 per year for indigent defense representation and that figure is reduced further by the cost of actual representation such as experts, long-distance calls, investigations, and copies.[180]

Even more troubling is that not only were the firm's attorneys responsible for all standard felony, misdemeanor, and juvenile cases, they were also responsible for manning the County's many problem solving courts such as drug court, mental health court, family reunification court, and DUI court.[181] The associate attorney single-handedly staffed both the mental health court and the DUI court.[182] It is estimated that the associate attorney handled over 1,100 cases in 2008.[183] Of those cases, approximately 900, were misdemeanor cases.[184] The national standard for a single attorney is no more than 400 misdemeanor cases per

173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 10–11.
178. NLADA, *supra* note 7, at 10.
179. *Id.* at 11–13.
180. *Id.* at 13.
181. *Id.* at 15.
182. *Id.*
183. *Id.* at 16.
184. *Id.*

year meaning that the associate handled the recommended workload of nearly three attorneys.[185]

Additionally, Canyon County utilized a flat-fee contract with a private law firm to provide all the County's indigent defense services.[186] The annual contract price was $1,496,950 and the firm had total control over how to spend the money including how many attorneys it needed to employ to fulfill its contracted services.[187] Also, the firm had to pay the sub-contracted conflict attorneys out of the contract price.[188] Because the firm had to pay its conflict attorneys out of its own fee, there was a significant incentive for the firm to misidentify conflicts in order to retain more of the contract price.[189]

Also, an incentive existed to cut corners when it came to investigations.[190] If an attorney working under the contract is unable to conduct his or her own investigation, the firm's partners had to approve a request to hire an investigator.[191] Since the compensation for the investigator comes out of the contract price, there was an incentive for the partners to deny the request.[192] The law firm also had no workload controls for the amount of cases assigned to each individual attorney, thus several attorneys had caseloads double or triple the national standards.[193]

In Power County, indigent defense services were contracted out to three individual attorneys.[194] The system consisted of one primary contract attorney, one conflict attorney, and one overflow attorney (not on a contract with the County).[195] The previously elected prosecutor became a magistrate judge and had relationships with the criminal defense attorneys in the area.[196] Because of these relationships, the County commissioners sought the judge's recommendations when it decided which defense attorney should be awarded the indigent defense contract.[197] Thus, the defender system in Power County is subject to political and judicial influence because the defense attorneys had an incentive to keep the

185. NLADA, *supra* note 7, at 16–17.

186. *Id.* at 23. Canyon County now operates a dedicated public defender's office. It began operation on October 1, 2014. Tera A. Harden, *Public Defender*, CANYON COUNTY IDAHO, http://www.canyonco.org/PublicDefender (last visited March 8, 2015).

187. NLADA, *supra* note 7, at 23.

188. *Id.*

189. *Id.* at 25.

190. *See id.* at 19.

191. *Id.* at 23, 25.

192. *See id.* at 19.

193. NLADA, *supra* note 7, at 24–25. After the Defender Association's evaluation, the firm that held the contract walked away and settled a lawsuit it had filed against Canyon County after the county terminated its contract before its contracted end date. *Id.* at 24.

194. *Id.* at 30.

195. *Id.* at 30–31.

196. *Id.* at 30.

197. *Id.*

judge and commissioners happy instead of focusing on client representation.[198]

The conflict defender was paid $16,800 per year and could take up to eight cases per month.[199] So, if the conflict defender took on the maximum number of cases, he would be paid $175 per case no matter how serious the case,[200] and that number is extremely low. The attorneys, and conflict attorneys, were also allowed to maintain a private practice.[201] Additionally, there were no caseload limits and no caseload monitoring in Power County.[202]

In addition to dedicated public defender offices and contract-based systems, judicial-assigned counsel is an indigent defense delivery option available to states and counties; however, Idaho's legislature chose not to codify a judicial-assigned counsel system.[203] And some Idaho counties use unique delivery systems not even available by statute.[204]

3. Counties Using Other Systems

Currently, there are two counties in Idaho that have opted to enter into agreements with neighboring counties to establish a joint public defender's office.[205] This joint office employs five full-time public defenders and operates a small office in each of the two counties.[206] This system is unique because two counties pool their resources in order to provide indigent defense services.[207] This joint public defender office system is statutorily acceptable under the Idaho Public Defense Act's section two, but several counties throughout Idaho choose to operate under a system that is not defined in the Idaho Code.[208]

For example, Washington County currently does not use any of the four systems identified by statute.[209] Washington County has seven attorneys who are appointed by a judge on an as needed basis.[210] Even though a judicial appointment delivery system is one that some states and counties can choose to implement, it is not allowed in Idaho.[211] The

198. *See* NLADA, *supra* note 7, at 29.
199. *Id.* at 31.
200. *Id.* at 31 n.93.
201. *Id.* at 32.
202. *Id.*
203. *See generally id.*
204. *See generally* NLADA, *supra* note 7.
205. Thomson, *supra* note 132, at 6. The counties that have entered into an agreement to establish a joint public defender's office are Cassia and Minidoka. *Id.*
206. *Id.*
207. *See generally id.*
208. IDAHO CODE § 19-859(1)–(4) (2014).
209. Thomson, *supra* note 132, at 7; IDAHO CODE § 19-859(1)–(4).
210. Thomson, *supra* note 132, at 7.
211. IDAHO CODE § 19-859(1)–(4).

Idaho legislature, in drafting the statute, did not include a judicially appointed counsel delivery system as an option for Idaho counties.[212] This effectively means that Washington County is violating the statute.[213]

According to the Defender Association's report, Blaine County had one of the most unique systems of all the counties in Idaho.[214] The County operated by awarding contracts to a set of private law firms, each one on a contract that rotated monthly.[215] The County had contracted with five private law firms, and four sole practitioners.[216] The attorneys decided amongst themselves which months they would take throughout that year.[217] This structure meant that all indigent defense cases that came through the County during a particular month would be assigned to that particular attorney or firm regardless of the attorney's skill level or the case's complexity.[218]

In Blaine County, when a conflict arose, the case would be assigned to the "on call" attorney for the next month.[219] The contract attorneys were allowed to maintain a private practice.[220] In one particular firm, the average fee for indigent defense work was fifty dollars per hour whereas attorneys could charge up to $250 per hour to their private clients.[221] This discrepancy alone incentivizes attorneys to spend more time on, and more zealously advocate for, private clients than public defense clients.[222]

If the patchwork of County implemented systems seems chaotic, that's because it is. And that is part of the problem. Many of the systems Idaho counties choose to implement are flawed in one way or another. These flaws include violations ranging from failing to protect a defendant's right to a fair trial to operating a system not defined by statute. But one thing is for sure: most Idaho indigent defense delivery systems result in violations of the ABA principles and are not meeting constitutional minimums.

B. Idaho's Violations of the ABA Principles

Many counties in Idaho are failing to meet constitutional minimums for indigent defense and are violating the ABA's principles for indigent defense delivery.[223] Each county examined by the Defender's

212. *Id.*
213. *See id.*
214. NLADA, s*upra* note 7, at 33.
215. *Id.* at 32–33.
216. *Id.* at 33.
217. *Id.*
218. *Id.*
219. *Id.*
220. NLADA, *supra* note 7, at 34.
221. *Id.*
222. *Id.*
223. *See generally id.* at 52.

Association had multiple principle violations, which suggests that Idaho's defendants are not provided the foundational defense representation they are entitled to by the Constitution.[224] Though Idaho's systems violate all ten ABA principles in one way or another, the most egregious violations were abuses of principles 3, 4, 6, 7, 9, and 10.

1. Violations of ABA Principle 3

The ABA's principle 3 requires public defender systems to provide counsel to indigent defendants as soon as possible after arrest, detention, or request.[225] This should occur within twenty-four hours.[226] Early appointment of counsel ensures that the right to counsel at all critical stages of the prosecutorial process remains intact.[227] Several counties in Idaho violated principle 3.[228]

For example, in Bonneville County, a public defender was not present in the courtroom as indigent defendants were meeting with a prosecutor attempting to negotiate a plea deal.[229] And no one in Bonneville County checked for probable cause for the initial arrests.[230] Even long after the initial arrest, judges and public defenders were not present while prosecutors were striking plea deals with defendants.[231]

Additionally, in Kootenai County, public defenders were not present at first appearances.[232] In one particular instance, a prosecutor stood before a group of defendants prior to an arraignment hearing with no judge or public defender present.[233] The attorney said she would show a video explaining the defendant's rights after they had met with the prosecutor and said that if the defendants wanted to speak with an attorney, they should hire one.[234] The attorney did not mention the right to counsel if the defendants could not afford one.[235] When one defendant asked if the plea deal the prosecutor offered him would disappear if he asked to talk to a lawyer, the prosecutor simply said she could not advise the defendant.[236] This sequence happened in front of the other de-

224. *See generally id.*
225. Ten Principles, *supra* note 59, at 2.
226. *Id.*
227. *See* Miranda v. Arizona, 384 U.S. 436, 514 (1966).
228. NLADA, *supra* note 7, at 56.
229. *Id.* at 54–55.
230. *Id.* at 56.
231. *Id.*
232. *Id.* at 52. In fact, only five Idaho counties provide counsel to indigent defendants at first appearances, in violation of Idaho's laws. Complaint, *supra* note 6, at 20.
233. NLADA, *supra* note 7, at 54.
234. *Id.*
235. *Id.*
236. *Id.*

fendants making it likely that they too would be fearful of losing a decent plea deal if they asked for counsel.[237]

Similarly, in Nez Perce County, arraignments did not happen in the courtroom.[238] Arraignments happened in front of the Clerk's window where the defendant signed a waiver of rights form.[239] A sign near the Clerk's window read "[i]f you apply for a Public Defender and the service is granted to you IT IS NOT FREE! You may be required to reimburse Nez Perce County."[240] The defendant then waited to meet with the prosecutor to negotiate a plea agreement without ever having a public defender present to ensure the defendant's rights are protected.[241] By not requiring defense counsel present at arraignments, Nez Perce County violated the ABA's principle 3.

2. Violations of ABA Principle 4 and ABA Principle 7

Many counties in Idaho did not have private meeting spaces at the courthouses or in the jails where attorneys could meet confidentially with their clients, which is a violation of principle 4.[242] Private meeting spaces where attorneys and defendants can openly discuss the defendants' case are extremely important to preserving the defendant's right to present a defense.[243] Idaho counties violated defendants' constitutional rights by making it difficult for these types of meetings to occur.[244]

Additionally, many featured counties were in violation of the ABA's principle 7, the requirement for vertical representation.[245] Several counties in Idaho engage in horizontal representation.[246] Horizontal representation occurs when one attorney handles each separate part of a client's case like an assembly line; one attorney handles all arraignments, one attorney handles all trials, and so on.[247] This horizontal representation system was used in Ada County and other public defender offices throughout Idaho meaning that indigent defendant's in those counties are not benefitting from the continuity of communicating with one attorney throughout the entire process.[248]

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237. *Id.*
238. *Id.* at 52.
239. NLADA, *supra* note 7, at 52.
240. *Id.* See updated information in note 4, *supra*, and Appendix A.
241. *Id.*
242. *Id.* at 58, 62–66.
243. *See id.*
244. *See id.*
245. Ten Principles, *supra* note 59, at 3.
246. *Id.*; *see* NLADA, *supra* note 7, at 57.
247. NLADA, *supra* note 7, at 57.
248. *Id.* at 58.

3. Violations of ABA Principle 6 and ABA Principle 9

The ABA's principles 6 and 9 are linked.[249] Principle 6 requires that an attorney's experience, training, and ability be matched with the case's complexity.[250] And principle 9 requires that public defenders attend continuing legal education, thus, enhancing the training and ability required by principle 6.[251] Counties in Idaho are violating these two principles.

For example, while Ada County was commendable on its system of dividing public defenders and staff into teams based on experience, its lack of training available was a problem because in-house training was "virtually non-existent."[252] The same was true in Power County. The County imposed no training requirements on its contract defenders and offered no reimbursement for training.[253] Thus, the contract defenders simply met the minimum requirements imposed on them by the state bar association and many chose the least expensive classes, which they paid for out of their own pockets.[254] These principle violations hurt indigent defendants who need trained, experienced, and qualified attorneys to represent them.

4. Violations of ABA Principle 10

Lastly, many Idaho counties failed to meet the ABA's principle 10 requirements.[255] Principle 10 requires that all defense attorneys are "supervised and systematically reviewed for quality and efficiency" and many Idaho counties failed to supervise and review indigent defense attorneys for effectiveness.[256]

For example, while the Kootenai County office was large enough to require mid-level supervising attorneys, the evaluation and review of attorneys was informal and inadequate as none of the attorneys were evaluated annually.[257] The same lack of supervision and evaluation standards were reported in Bonneville County, Blaine County, and Nez Perce County.[258] For instance, Bonneville County had no policies on min-

249. *See id.* at 67.
250. Ten Principles, *supra* note 59, at 3.
251. *Id.*
252. NLADA, *supra* note 7, at 68. The Idaho State Public Defense Commission recently conducted a state-wide assessment and discovered that most indigent defense attorneys throughout Idaho do not receive adequate training relevant to representing indigent defendants. Complaint, *supra* note 6, at 11.
253. NLADA, *supra* note 7, at 69.
254. *See id.*
255. *Id.* at 69–73.
256. *Id.*; Ten Principles, *supra* note 59, at 3.
257. NLADA, *supra* note 7, at 70.
258. *Id.* at 70–73.

imum attorney qualifications and even one felony attorney said no one helped him on his first trial, nor did anyone supervise him in court.[259] These violations mean that Idaho defense attorneys are allowed to grow complacent or are unknowingly making errors that no one is correcting. Therefore, Idaho defendants may not be getting the representation they desperately need.

Even with the understanding of the egregious principle violations just described, because of Idaho's unique differences from county-to-county, there is no single best "cookie-cutter" public defense delivery system according to the Defender Association.[260]

However, "there are two primary factors that determine the adequacy of indigent defense services provided: (a) the degree and sufficiency of state funding and structure, and (b) compliance with nationally recognized standards of justice. So long as these two goals are met, Idaho policy-makers will have remedied the crisis."[261]

The Defender Association hoped its report would force legislators to take a closer look at the present system and see its constitutional inadequacies and that change would come before a class action lawsuit.[262] However so far, even with the two new legislative "patches," none of the changes have proven to be enough to push Idaho in the right direction.

C. A Cosmetic Patch: A Critical Examination of Idaho's Recent Legislative Attempt at Structural Repair

Recently, Idaho Legislators seem to be listening to the demands of indigent defense providers and passed legislation aimed at initiating reform, but it is not enough.[263] For instance, the House of Representatives passed resolutions creating a committee to determine the best way to implement state oversight of indigent defense.[264] The resolutions also acknowledged that Idaho's delivery of right to counsel services lacked uniformity in caseload requirements, in appointment of counsel practices, and in training.[265] The Committee studied two different state-managed indigent defense delivery models: (1) a county operated system—similar to the current system where counties can choose their de-

259. *Id.* at 71.

260. *Id.* at 89.

261. *Id.*

262. *Id.*

263. *See, e.g.*, IDAHO CODE §§ 19-849, 850 (2014); H.R. Con. Res. 26, 62nd Leg. 1st Reg. Sess. (Idaho 2013); *see also* Complaint, *supra* note 6, at 17.

264. Carroll, *supra* note 9; *Public Defense Interim Committee – HCR 40*, IDAHO LEGISLATURE, http://legislature.idaho.gov/sessioninfo/2014/interim/defense.htm (last visited Mar. 8, 2016) [Hereinafter HCR 40]. These Resolutions are HCR 026, representing the 2013 Committee, and HCR 040, representing the 2014 Committee. In January, 2016, Idaho's Governor set aside $5 million in his proposed 2016-2017 budget for the Committee's recommendations. Nathan Brown, *Lawmakers Discuss Fixing Public Defense*, MAGICVALLEY.COM (Jan. 14, 2016), http://magicvalley.com/news/local/govt-and-politics/lawmakers-discuss-fixing-public-defense/article_572ab574-b17b-5457-808b-ccc86a768e97.html.

265. Carroll, *supra* note 9.

livery method—but with a state-oversight commission that promulgates rules and enforces standards, and (2) a state-financed and managed system where all counties would be required to maintain a dedicated public defender office.[266]

Most recently, the Committee voted against a resolution that would have placed the responsibility on the State to assign public defenders finding that county officials have the local expertise to deal with these types of issues—at least according to one committee member.[267] This meant that individual counties were still responsible for indigent defense.[268]

During one of the Committee's meetings, the Idaho Supreme Court's Chief Justice stated that he supported the key areas of study including: "[t]he structure and organization of how Idaho will deliver its system of public defense; [h]ow the system will be held accountable; [t]he standards and funding for training; and [h]ow best to provide ongoing and stable funding to support Idaho's system of indigent defense."[269] The Chief Justice asked the Committee to look at specific problems throughout Idaho including workload standards, training for attorneys, and recruitment of qualified, experienced attorneys. He also asked the Committee to recommend to the legislature that flat-fee contracts be eradicated.[270]

The Chief Justice's comments are unique. It is a rare situation for a potential litigant or lawyer to receive insight on how a judge would rule on a particular issue. The Committee received that gift in the Chief Justice's comments. A Justice on a Supreme Court is the final arbiter of these types of issues and if he is recognizing the problem, it means there is a problem. If Idaho doesn't soon fix its problems, it could end up on the wrong side of a final decision.

In March 2014, the governor of Idaho signed House Bill 542 into law.[271] The law (1) prohibited the use of flat-fee contracts by Idaho's

266. *Id.* The committee held seven meetings during 2014. HCR 40, *supra* note 264.

267. HCR 40, *supra* note 264; Kimberlee Kruesi, *Legislative Panel Kills Public Defender Resolution*, IDAHO PRESS-TRIBUNE, Nov. 24, 2014, http://www.idahopress.com/news/local/legislative-panel-kills-public-defender-resolution/article_4fa73da2-7438-11e4-8c8e-bba37c2515b2.html [hereinafter IDAHO PRESS-TRIBUNE].

268. HCR 40, *supra* note 264; IDAHO PRESS-TRIBUNE, *supra* note 267.

269. The State of Idaho Supreme Court, *Remarks by Chief Justice Roger Burdick to Public Defender Interim Committee*, 1 (Aug. 15, 2013), http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815_burdick.pdf [hereinafter Remarks].

270. Jon Mosher, *Idaho Chief Justice Calls for the Eradication of Flat-fee Contracts*, SIXTH AMENDMENT CENTER, Aug. 16, 2013, http://sixthamendment.org/idaho-chief-justice-calls-for-the-eradication-of-flat-fee-contracts/.

271. Carroll*, supra* note 9.

counties, and (2) created the Idaho Public Defense Commission.[272] While these legislative measures appear to be a step in the right direction for Idaho, they equate to a shiny new coat of paint on Idaho's public defense system.[273] But this cosmetic touch-up does not repair the underlying problem—Idaho's crumbling indigent defense foundation.

1. Abolishment of Flat-Fee Contracts

Flat-fee contracts are prohibited under the ABA's principle 8.[274] The use of flat-fee contracts is problematic because the contracts encourage governments to contract with the lowest bidder of indigent defense services.[275] There are also implicit incentives for attorneys to do less.[276] For example, attorneys on flat-fee contracts get paid one flat rate for an unlimited number of cases and are not reimbursed for litigation-related expenses.[277] Thus, the more work an attorney does on a case, the less he gets paid, so there are financial motivations to spend less time with each client than if an attorney was being paid by the hour.[278]

In 2014, the Idaho Legislature banned the use of flat-fee contracts for indigent defense services.[279] The result was that counties could contract with a defense attorney for indigent defense services as long as the county abided by the following provision: "the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney."[280] This provision allows counties to continue to provide indigent defense services through contract attorneys as long as the county is not paying the flat-fee contract attorneys one flat rate, which includes the attorney's expenses.[281]

At first glance, this legislation makes it seem like the Idaho Legislature is being proactive about providing indigent defendants with a greater level of Sixth Amendment protections.[282] However, the statute may be flawed in the way it was written, allowing counties to find a loophole that allows them to continue providing flat-fee services,[283]

272. *Id.*

273. "Idaho has become the epitome of an indigent-defense system in crisis, notwithstanding the 2014 amendments to the public-defense statutes, which have done very little to address the underlying causes of the State's indigent-defense problem." Complaint, *supra* note 6, at 14.

274. Ten Principles, *supra* note 59, at 3.

275. Mosher, *supra* note 270.

276. *Id.*

277. *Id.*

278. *Id.*

279. *See* IDAHO CODE § 19-859(4) (2012).

280. *Id.*

281. *See id.*

282. *See* IDAHO CODE § 19-859 (2012).

283. *See* Ian H. Thomson, Executive Director, *State Public Defense Commission*, http://legislature.idaho.gov/sessioninfo/2014/interim/pdef1124_thomson.pdf (last visited March 8, 2016) [hereinafter Executive Director]. As of publication, Ian Thomson is no longer the Executive Director of the Idaho Public Defense Commission.

which are popular with flat-fee attorneys.[284] The statute uses the word *and*: "single fixed fee for the services *and* expenses."[285] The word "and" is a conjunctive connector meaning that it links two words or clauses and gives the clauses equal weight in the sentence.[286] Thus, it appears from the statute's plain meaning that the drafters meant to abolish only those contracts that are inclusive of both the attorney's fee for services *and* the attorney's expenses.[287] A contract price that excludes expenses may not be in violation of the statute.[288]

Counties are taking advantage of the statute's loophole.[289] Counties have interpreted the statute to mean that if a county agrees to pay an attorney a flat-fee but then pays for her expenses separately, it is not in violation of the statute.[290] At least for the time being, it will be difficult to determine if counties are actually following the statute, but it appears that these types of contracts are still being used in counties throughout Idaho.[291] Moreover, it is not hard to imagine that once counties following the statute discover that its neighboring counties are using this loophole, they may choose to return to their bad behavior and abandon the progress they have made.[292] There appears to be major problems with the way the legislation was drafted, causing the statute to do little for indigent defense services in Idaho.

2. Idaho Public Defense Commission

The creation of the Public Defense Commission (Commission) also does little to improve indigent defense services in Idaho as it violates principle 1. The Commission is responsible for and has the authority to provide training, to implement performance standards, and to set up a system for data collection.[293] However, just creating the Commission

284. Stephen Henderson, *New Contract for County's Public Defender*, TETON VALLEY NEWS (June 17, 2014 6:01 PM), http://www.tetonvalleynews.net/news/new-contract-for-county-s-public-defender/article_052a656a-f684-11e3-8278-001a4bcf887a.html.

285. IDAHO CODE § 19-859(4) (2012) (emphasis added).

286. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY 827 (3d. ed. 2001).

287. IDAHO CODE § 73-113(1) (2004) (stating "[t]he literal words of a statute are the best guide to determining legislative intent).

288. *See generally* Executive Director, *supra* note 283.

289. *See id.*

290. *See id.*

291. *See id.*

292. *See id.*

293. Carroll, s*upra* note 9. "The [Commission] is further responsible for making recommendations to the Idaho legislature, including an initial round of recommendations that was due by January 20, 2015, regarding a number of issues, including core requirements for indigent-defense contracts, qualifications and experience standards for defending attorneys

does not mean that Idaho's indigent defense problems disappear.[294] The Commission's powers and functionalities are flawed in three ways: (1) the Commission is not independent from judicial and political influence, (2) while the Commission has the power to create rules about the collection of data, it has no power to actually collect the data, and (3) the Commission has no power to enforce the rules and standards it creates.[295]

[and] enforcement mechanisms . . . " Complaint, *supra* note 6, at 19. However, as of June 17, 2015, the Commission had not yet done so. *Id.*

In January 2016, the Public Defense Reform Interim Committee signed off on a "draft bill that would give the Public Defense Commission the power to set public defense standards, provide training[,] and give out grant money to counties to help them comply." Nathan Brown, *Public Defense Commission Signs Off on Draft Bill*, MAGICVALLEY.COM (Feb. 9, 2016), http://magicvalley.com/news/local/govt-and-politics/public-defense-commission-signs-off-on-draft-bill/article_76166c29-5d21-5c58-8e4d-22a03a1c63f9.html. However, regarding the Commission's enforcement capabilities, the draft bill proposes that the Commisison first try to mediate if a county is not following the Commission's standards. *Id.* And only when mediation fails will the State step in and pay to fix the problem—a cost that will eventually have to be repaid by the county. *Id.* Additionally, regarding funding, the committee is recomending that $5.5 million go to providing grants to counties and paying the Commission's employees. *Id.* But even before the Commission's employees are paid, the grant money only leaves an average of $125,000 per county to supplement the current indigent defense deficiences. Five and a half million dollars is simply not enough to fix Idaho's indigent defense problems.

As an update, "[o]n March 22, 2016, a $5.4 million appropriations bill was passed authorizing the [Idaho State Public Defense Commission], in part, to disseminate $4,266,500 in grants to counties to offset the cost of compliance with indigent defense standards. This bill passed both chambers unanimously . . . . Another $550,000 was appropriated to encourage counties to merge trial-level services into regional systems, and $250,000 is available to assist counties with extraordinary litigation costs. The balance of $416,300 funds an expansion of [Commission] staff and associated overhead costs. David Carroll, *Idaho Empowers State Commission with New Authorities and New Funding*, SIXTH AMENDMENT CENTER (Mar. 23, 2016), http://sixthamendment.org/idaho-empowers-state-commission-with-new-authorities-and-new-funding/.

294. Carroll, s*upra* note 9. The Public Defense Reform Interim Committee proposed the legislation that created the Commission and the Committee's concern was that it would take at least a year for the commission to be up and running. Here is the good news: the Commission has been established and has started to make recommendations to the Legislature.

295. *See* IDAHO CODE § 19-849–850(1)(a) (2012). According to Idaho Code §19-849:

> (1) There is hereby created in the department of self-governing agencies the state public defense commission. The commission shall consist of seven (7) members as follows:
> (a) Two (2) representatives from the state legislature that shall include one (1) member from the senate and one (1) member from the house of representatives;
> (b) One (1) representative appointed by the chief justice of the Idaho supreme court; and
> (c) Four (4) representatives appointed by the governor and confirmed by the senate as follows:
> (i) One (1) representative from the Idaho association of counties;
> (ii) One (1) representative who has experience as a defending attorney;
> (iii) One (1) representative from the office of the state appellate public defender; and
> (iv) One (1) representative from the Idaho juvenile justice commission. . . .

Pursuant to the statute's language, the Commission's first flaw is that it violates principle 1.[296] A successful oversight commission needs to be able to assure quality indigent defense representation throughout the state and must be independent from political and judicial influence.[297] In Idaho, the Commission includes seven members.[298] Two members are appointed by the Legislature (one from the House of Representatives and one from the Senate) and it is likely that these appointments have political affiliations.[299] Additionally, Idaho Supreme Court's Chief Justice appoints one of the seven Commission members.[300] And the Governor, who has a political affiliation, appoints four of the Commission's seven members.[301] These appointments are likely to be influenced by strong party affiliations.[302] It is also likely that the appointments are heavily influence by people with robust connections to power and politics. Therefore, the Legislature violated the first principle's requirement that public defense systems be free from political influence or judicial oversight when it created the Commission.[303]

Consequently, the Commission, serving as overseer of the public defense function in Idaho, is not independent from political influence and judicial oversight. And because appointments come from all three branches of government, it appears the statute was designed so that the Commission is accountable to not a single branch of government but then all of them at the same time.[304] This set up causes two problems. First, if the Commission is not accountable to a single branch of government, then the Commission may choose to implement indigent de-

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According to Idaho Code § 19-850:

(1) The state public defense commission shall:
(a) Promulgate rules in accordance with the provisions of chapter 52, title 67, Idaho Code, establishing the following:
(i) Training and continuing legal education requirements for defending attorneys, which shall promote competency and consistency in case types including, but not limited to, criminal, juvenile, abuse and neglect, post-conviction, civil commitment, capital and civil contempt; and
(ii) Uniform data reporting requirements for the annual reports submitted pursuant to section 19-864, Idaho Code. The data reported shall include caseload, workload and expenditures. . . .

296. *See supra* Part II.B.4.
297. *Justice Denied*, *supra* note 72, at 148.
298. IDAHO CODE § 19-849(1)(a) & (b) (2012).
299. *See* IDAHO CODE § 19-849(1)(a) & (b) (2012).
300. IDAHO CODE § 19-849(1)(a) & (b) (2012).
301. IDAHO CODE § 19-849(1)(c) (2012).
302. *See* IDAHO CODE § 19-849(1)(c) (2012).
303. *See* H.R. 62-542, 2nd Reg. Sess. (Idaho 2014).
304. IDAHO CODE § 19-849(1) (2012).

fense changes not endorsed by any governmental branch. Second, if the Commission is accountable to all three branches of government at the same time, this likely will result in political gridlock where the Commission will be stalled from advancing any meaningful change. Accordingly, when the Legislature drafted the statute creating the Commission, it did not heed political independence recommendations.[305]

Second, the Commission is flawed because its power is empty.[306] The Commission's only two objectives are to promulgate rules for training and legal education for public defenders and to create rules for uniform data reporting requirements annual reports.[307] But—despite the power to create rules for data reporting—the Commission has no power to collect the data.[308]

Promulgating rules for data collection is a nice start for indigent defense reform in Idaho.[309] But until the Legislature gives the Commission the power and budget to collect the data, the Commission will have a hard time collecting the data it needs to convince the Legislature that drastic changes are needed in Idaho's indigent defense delivery system.[310]

Even if the Commission had the power to collect meaningful data, the Commission doesn't have enough money.[311] The Commission's working budget is approximately $100,000.[312] These resources are not enough for the Commission to even begin the process of collecting critical data on Idaho's indigent defense—assuming the Legislature gave the Commission any power to do anything besides promulgate rules. The ability to collect and analyze data is the most important and fundamental role of a commission such as this one.[313] Collecting essential data is only the first step in a long line of steps towards indigent defense improvement. If the Commission doesn't have the resources to collect the data, it surely won't be able to analyze the data and turn that data into vital suggestions for indigent defense system reform.

However, as strange as it seems, even when the Commission does promulgate and implement rules regarding training, education, and data collection, the Legislature gave it no power to enforce those rules.[314]

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305. *See* Jared C. Hoskins, Final Report to the Idaho Justice Commission's Public Defense Subcommittee, HOSKINS LAW & POLICY GROUP, PLLC, 60 (2013), http://www.idoc.idaho.gov/content/document/hoskins_final_report. These recommendations were advanced in the Final Report to the Idaho Justice Commission's Public Defense Subcommittee.

306. IDAHO CODE §19-850 (1)(a) (2012).

307. § 19-850(1) (2012).

308. *See* § 19-850(1)(a)(ii). See update in note 343, *infra*.

309. *See* § 19-850 (1)(a).

310. *See id.* See update in note 343, *infra*.

311. H.R. 634, 62nd Leg., 2nd Reg. Sess. (Idaho 2014). The Commission's budget for the 2014-15 fiscal year is $300,000. This number included the 1.5 full-time Commission staff members. Thomson, *supra* note 132, at 15.

312. *See id.* See update in note 293, *supra*.

313. Hoskins, *supra* note 305, at 68.

314. *See* § 19-850(1); Complaint, *supra* note 6, at 20. See update in note 343, *infra*

The statute gives the Commission power to create rules but leaves it with no statutory enforcement mechanism.[315] This essentially creates a Commission that is devoid of holding anyone who violates its rules accountable.[316]

The Public Defense Commission's third flaw is that it violates principle 4 and 5. The Legislature gave the Commission no power to implement any national standards of public defense delivery systems.[317] For example, the Commission is unable to set workload standards and limits recommended by ABA principle 5 and desperately needed by Idaho's overworked public defenders.[318] Additionally, the statute gives no power for the Commission to create rules and regulations for ensuring that public defenders are provided with confidential and private meeting spaces for client meetings, which is recommended by principle 4, and a problem occurring in many of Idaho's courthouses.[319]

Even with its flaws, the Commission is a step in the right direction for indigent defense reform in Idaho, but the Legislature has a long way to go before the steps it has taken will begin to effect meaningful change for Idaho's indigent defendants. First, the Commission needs to comply with the ABA's principles for indigent defense delivery systems. Next, the Legislature needs to supply the Commission with more money, more people, and more power so that it can collect the necessary data and analyze that data to help best effectuate indigent defense reform in Idaho. Even though home makeover shows give the impression that homes can be built (or re-built) within a matter of days, a structurally sound house can't be built overnight. It requires money, people, and power.

IV. RECONSTRUCTING A SOLID FOUNDATION: IDAHO'S NEED FOR INDIGENT DEFENSE REFORM

All three branches of Idaho's government have recognized that the current indigent defense system is broken.[320] But while all three see the

315. *See* § 19-850(1).

316. *Id.*

317. *Id.*; *e.g.*, Ten Principles, *supra* note 59. As a comparison, in the Clean Air Act, 42 U.S.C. § 7414(a)(3) & (5) (West 2013) Congress gave the Environmental Protection Agency the power to enforce the Act through civil lawsuits, the power to issue orders, and the power to impose penalties on violators of the Act. Generally, Congress must give power to the agency or commission to enforce its rules. If Congress intends for the agency or commission to have enforcement power, it says so. *See generally id.* See update in note 343, *infra.*

318. Ten Principles, *supra* note 59, at 2–3.

319. *Id.* at 2.

320. Idaho Transportation Department, *State of the State and Budget Address, Transcript of Address*, THE TRANSPORTER, Jan. 12, 2015, http://itd.idaho.gov/transporter/2015/011615_Trans/011615_StateoftheState.html.

problem—and one branch has taken small steps toward fixing it—none is doing enough.

What they are doing, at least, is talking about the crisis. For example, in January 2015, the Governor delivered his State of the State and Budget Address.[321] In that Address, he acknowledged the importance of overhauling Idaho's public defender system:

> The courts have made it clear that our current method of providing legal counsel for indigent criminal defendants does not pass constitutional muster. This is a priority for our counties so it also must be a priority for us. If we value the ideals embodied in the Fourth, Fifth, Sixth and Eighth amendments to the U.S. Constitution, then it is undeniably our responsibility to take the phrase "due process of law" as seriously as the Framers intended.[322]

As support for Idaho's serious new stance, and in acknowledgement of each branch's inherent role in tripartite government, the Governor called the Legislature to action: he encouraged legislators to create meaningful change by continuing the reform efforts.[323]

After such a long period of inaction, the Governor's words are promising. But they are incomplete. This could be in part because the Executive Branch is generally limited to enforcing the Legislature's laws, which means that the Executive Branch must wait for those laws to exist. But in the meantime, the Executive Branch could do more than talk. It could act. It could—perhaps by proposing practical steps for meaningful reform—help the Legislature do its job, which would bring Idaho closer to fulfilling its responsibility to offer adequate due process. However, those sorts of specific suggestions have yet to come.[324]

Possibly because of its particular expertise, Idaho's Judicial Branch identified the need for monumental change to the State's public defense system a little earlier than the Executive Branch did.[325] More than a year before the Governor addressed the crisis in his annual remarks, the Chief Justice of the Idaho Supreme Court noted the State's long history of safeguarding indigent defense:

> [S]ince 1923 Idahoans have had the right for every "reasonable opportunity" to prepare a defense. This starts with time—time to interview, investigate and prepare legal arguments. All of Idaho public defense attorneys do not have that time. Appropriate caseload numbers exist from state and national organiza-

321. *Id.*
322. *See id.*
323. *See id.*
324. *See* Kathy Griesmyer, *Governor Otter Falls Short on His Commitment to the Constitution*, ACLU OF IDAHO (Jan. 10, 2014), https://acluidaho.org/governor-otter-falls-short-on-his-commitment-to-the-constitution/.
325. *See* Remarks, *supra* note 269.

> tions. These should be closely examined by the interim committee and made enforceable. Every reasonable opportunity for a fair and impartial trial should include competent attorneys who are trained and have an experience level commensurate with the case or crime. . . . It has been the duty of this state before statehood and continues today. It is our duty to protect these fundamental ideals for the future.[326]

The Judicial Branch's well-established role as interpreter of the law gives it a good platform from which to protect those ideals.[327] As the branch invested with the authority to say what the law is, the judiciary could move indigent defense reform forward through precedential rulings.[328] And judicial guidance would be welcome, especially because "the legislature has been on notice for years and has failed to act. . . ."[329]

But the Judicial Branch has more to offer than just legal interpretation. In Idaho, it is also responsible for supervising attorneys.[330] Under that part of its power, the judiciary could promulgate rules requiring stricter adherence to model indigent defense standards.[331] Those rules—which could, for instance, cap public defenders' caseloads—would benefit both the overburdened lawyers and the clients they serve.[332]

Though the judiciary can help remedy the problem, both by interpreting existing laws and by creating attorney rules in the same spirit, its power is limited.[333] Judges can interpret only those laws the Legislature creates.[334] Thus, given its traditional role as the architect of laws, the Legislature is actually in the prime position to fix Idaho's system.

And it has tried. The legislative branch is currently the only one of the three to have gone beyond conversation and into action.[335] Recognizing the need for indigent defense reform, the Legislature created the Public Defense Interim Committee in 2013.[336] As noted earlier, the Committee quickly proposed two pieces of legislation, both aimed at improving the system in Idaho.[337] The legislation passed in 2014.[338]

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326. *Id.*

327. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); J.R. Simplot Co. v. Idaho State Tax Comm'n, 820 P.2d 1206, 1211, 120 Idaho 849, 853 (Idaho 1991).

328. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U REV. L. & SOC. CHANGE 427, 450 (2009).

329. *Id.*

330. *See generally* Judicial Branch, *Idaho Blue Book*, http://www.sos.idaho.gov/elect/bluebook/2016/00_Intro.pdf (last visited March 10, 2016).

331. *See* Drinan, *supra* note 328, at 450.

332. *See generally id.*

333. *See generally* Marbury, *supra* note 327; J.R. Simplot Co., *supra* note 327.

334. *See generally* Marbury, *supra* note 327; J.R. Simplot Co., *supra* note 327.

335. *See generally* IDAHO CODE § 19-859 (2015); IDAHO CODE § 19-849 (2015).

336. H.R. Res. 26, *supra* note 263.

337. *See* HRC 40, *supra* note 264; IDAHO CODE § 19-849; IDAHO CODE § 19-859.

Despite the Legislature's efforts, the recent statutes are not likely to do much to advance indigent defense reform.[339] Although the statutes show that the Legislature is aware of the problem and is trying to correct it, the new laws do not achieve the critical reform Idaho needs.[340] Maybe that's because new isn't always better—especially when there is a pre-existing blueprint for constructing an ideal indigent defense delivery system.[341]

Instead of trying to make something from nothing, the Legislature could look for guidance to the design the ABA has already drawn up; it could codify the ten principles of a constitutional indigent defense delivery system.[342] While that is not the only approach Idaho could take, it is one way the legislative branch could produce sustainable reform. But whatever option it chooses, Idaho should pick quickly: litigation against the State has arrived.

A. Idaho's Third-Generation Litigation

At the end of its 2015 Legislative session, Idaho again failed to fund or improve its indigent defense system.[343] Because of that failure, a class-action civil rights lawsuit on this issue was filed on June 17, 2015.[344] As one of three remaining states not providing state-funded indigent defense, Idaho was at particular risk of being sued by a watchdog group aiming to force the State to change its ways.[345] Idaho is out of time to change its ways as the ACLU, ACLU of Idaho, and the global law firm Hogan Lovells filed a lawsuit on behalf of defendants who were

338. H.R. 542, *supra* note 303. For an update, see note 343, *infra.*

339. *Id.*

340. *See supra* Part III.C.

341. *See supra* Part II.C.2.

342. *See infra* Part IV.B.

343. Complaint, *supra* note 6, at 3. The ACLU lawsuit may have been enough to force legislators to make much needed changes to Idaho's crumbling system. In fact, March 2016, proved to be a victorious month for Idaho's indigent defendants. "On March 15, 2016, the Idaho Senate unanimously voted to enact . . . HB 504 – a bill with the expressed legislative purpose of 'improving the delivery of trial-level indigent defense services by providing funding to counties and creating standards with which counties must comply.' The bill had previously passed the House . . . and authorizes the Idaho State Public Defense Commission . . . to promulgate and enforce standards, collect uniform data, enforce a ban on flat fee contracting, and grant state monies to counties." David Carroll, *Idaho Empowers State Commission with New Authorities and New Funding*, SIXTH AMENDMENT CENTER (Mar. 23, 2016), http://sixthamendment.org/idaho-empowers-state-commission-with-new-authorities-and-new-funding/. This is a victory (even if a small one) for Idaho because HB 504 now requires the Idaho State Public Defense commission to promulgate standards that are consisted with the ABA's Ten Priciples of a Public Defense Delivery System, which is exactly something this article advocates for. David Carroll, *Idaho Empowers State Commission with New Authorities and New Funding*, SIXTH AMENDMENT CENTER (Mar. 23, 2016), http://sixthamendment.org/idaho-empowers-state-commission-with-new-authorities-and-new-funding/.

344. Complaint, *supra* note 6, at 3.

345. Hoskins, *supra* note 305, at 72–73; Boydston, *supra* note 13.

deprived constitutionally adequate representation in Idaho.[346] Lawsuits of this type—called third-generation indigent defense litigation—have been successful in other jurisdictions as a last resort for reform.[347]

In fact, one of the earliest examples of a successful third-generation lawsuit targeted Idaho's eastern neighbor, Montana. Before the lawsuit, which the ACLU initiated in 2002, Montana's indigent defense system was a mixed bag of private contract attorneys, county-employed defenders, and judge-appointed private attorneys.[348] Even employing all of those methods of delivering indigent defense services, however, the State was failing to fulfill its duty to provide adequate counsel.[349]

In response to widespread dissatisfaction with Montana's patchwork, county-operated system—which often led to disparities in the quality of representation from county to county—the ACLU filed a lawsuit in 2002 against seven counties in Montana.[350] That lawsuit challenged the constitutionality of the State's indigent defense system and sought to reform it.[351] Although Montana courts were not forced to resolve the litigation because the Legislature acted before the end of the litigation, the ACLU lawsuit is often cited as the catalyst for change that prompted Montana to reform its ailing indigent defense system.[352]

That reformation came in 2005, when the Montana Legislature passed the Montana Public Defender Act.[353] The Act created a statewide public defense system, which completely overhauled the old county-operated system.[354] Montana's new system included a state oversight commission, ensured that adequate funding for indigent defense was provided by the state, and included an office of the state public defender, which prepared regional plans and caseload management programs.[355]

Legal experts, including the ACLU of Idaho (the group that is perhaps best suited to know), have been warning Idaho legislators since the 2010 Defender Association's report that the State's current public de-

346. Leo Morales, *ACLU Sues Idaho over Defective Public Defense System* (June 17, 2015), http://acluidaho.org/aclu-sues-idaho-over-defective-public-defense-system/.

347. *Id.* at 73 ("If policy makers are unable or unwilling to address systematic concerns with Idaho's indigent defense system, litigation could be considered as a last resort.").

348. Jessa DeSimone, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 CRIM. L. & CRIMINOLOGY 1479, 1494–95 (2006).

349. *Id.* at 1498.

350. *Id.* at 1498–99.

351. ACLU OF MONTANA, MONTANA'S PUBLIC DEFENSE SYSTEM: AN EVALUATION FIVE YEARS INTO THE STATEWIDE SYSTEM 3 (2011), http://publicdefender.mt.gov/forms/pdf/ACLUmontanaopdreport.pdf; DeSimone, *supra* note 348, at 1498.

352. DeSimone, *supra* note 348, at 1498.

353. *Id.* at 1504.

354. *Id.*

355. *Id.* at 1505–07.

fense system could be ripe for litigation.[356] The day has come. Litigation against Idaho is now pending, which shows that such warnings should not have been taken lightly. As Montana's experience shows, lawsuits brought on behalf of indigent defendants, especially lawsuits with the backing of national organizations like the ACLU, can trigger needed change, but they do so at a high cost. Third-generation litigation is expensive.[357]

Now that a lawsuit has been initiated against the state, Idaho will of course have to spend money litigating the lawsuit.[358] And that expenditure is in addition to the cost of making the necessary systemic changes themselves.[359] Idaho would certainly have saved money if it took action before being forced. But by failing to move toward meaningful reform before the ACLU commenced its litigation, Idaho now has to spend the money on defending a lawsuit instead of on something of real value: a systematic public defense program that has the necessary funding, is properly administered, and divides resources evenly among the prosecution and defense functions.[360]

B. Codifying the Ten ABA Principles

Idaho does not have to wait for a lawsuit to arrive to get some help identifying how to improve its system. The template for a functioning model exists outside of a Complaint's demands. To build a constitutional foundation for delivering indigent defense services, Idaho needs only to look to the ABA's ten principles.[361] Codifying those principles as part of

356. IDAHO PRESS-TRIBUNE, *supra* note 267. There are six principles that call for initiating litigation to prompt public defense reform: 1) litigation should be instituted on behalf of all or a class of indigent defendants so that a positive result will impact a large group of defendants; 2) litigation should be instituted pretrial, rather than post-conviction, thereby avoiding the need to demonstrate prejudice; 3) legal representation should be provided by disinterested lawyers experienced in civil litigation serving as pro bono counsel; 4) strong factual support that shows how the system adversely affects indigent defendants should be assembled and presented; 5) counsel should present to the appropriate court persuasive legal authority to justify judicial intervention; and 6) media coverage and public support should be encouraged. *See Justice Denied*, *supra* note 72, at 141.

357. *See* Hoskins, *supra* note 305, at 72–73.

358. *See* Boydston, *supra* note 13. On December 16, 2015, attorneys for the State argued a motion to dismiss the case, arguing that the plaintiffs sued the wrong defendants. *Id.* The right defendants, the State argued, are the individual counties, county commissioners, and district judges, as Idaho does not have a state-wide public defense system but, by statute, indigent defense is provided at the county level and it is not the State's responsibility. *Id.* Conversely, the plaintiff's attorneys argued that the counties and county officials do not have the resources, guidance, or training necessary to carry out the indigent defense responsibilities. *Id.* Ironically, the State's attorneys are using Idaho's problem as its defense.

359. *See id.*

360. DeSimone, *supra* note 348, at 1507; *see* Hoskins, *supra* note 305, at 72–73.

361. *Minutes*, PUBLIC DEFENSE REFORM INTERIM COMMITTEE (September 12, 2013), http://legislature.idaho.gov/sessioninfo/2013/interim/defense0912min.pdf. See update in note 343, *supra.*

a statewide oversight system would put Idaho one step closer to sustainable indigent defense reform.[362]

As discussed in Part II.C.2, each of the ten principles represents one facet of a structurally sound public defense delivery system.[363] With each principle it codifies, then, Idaho adds one support beam to a badly decaying infrastructure. If, for example, Idaho were to adopt Principles 2 and 5, which are aimed at caseload control, individual public defenders could provide better representation because workload caps would give them more time with each defendant.[364] Codification of Principle 4 would give each defendant a private space in which to meet with his attorney, a critical component to preserving the client's right to confidentiality and encouraging him to participate in his own defense.[365] And, maybe most importantly for the defendants themselves (and for fulfilling *Gideon*'s promise), adopting Principle 3 would ensure that every defendant is promptly appointed an attorney, regardless of his ability to pay for one.[366]

Codified together, the ABA's ten principles would provide Idaho a strong foundation for indigent defense delivery. But, as structurally necessary as they are, the principles are actually only constitutional minimums.[367] States can do more. If Idaho chooses to lay the groundwork for solid and lasting indigent defense reform with the ABA principles, it can then build on top of that base by removing the responsibility of indigent defense services from counties, where it currently resides. To finish the job—and ensure once and for all that defendants are afforded their Sixth Amendment right to counsel—Idaho should take responsibility back from its counties and provide financing, oversight and county-operated public defender offices.

C. State-managed, County-operated Dedicated Public Defender Offices

On average, each state in this country spends $11.86 per person on indigent defense.[368] By contrast, Idaho spends only $7.83—more than

362. *Indigent Defense*, ACLU OF IDAHO, https://acluidaho.org/issues/criminal-justice/indigent-defense/ (last visited March 10, 2016). Of course, the Legislature would also have to include an appropriate enforcement mechanism to ensure that the minimums set out in the principles are being met. It could include enforcement tools as part of the reimagined statute, for example, or authorize a state agency to promulgate rules for compliance.

363. *See supra* Part II.C.2.

364. CRIMINAL JUSTICE REFORM: ADDRESSING DEFICIENCIES IN IDAHO'S PUBLIC DEFENSE SYSTEM, ACLU OF IDAHO 4 (last visited March 10, 2016), http://acluidaho.org/wpsite/wp-content/uploads/Gideon-Legs-Booklet-Final.pdf [hereinafter CRIMINAL JUSTICE REFORM].

365. *Id.* at 5.

366. CRIMINAL JUSTICE REFORM, *supra* note 364, at 5.

367. NLADA, *supra* note 7, at 6.

368. *See id.* at 4.

four dollars less per person than the national average.[369] In fact, Idaho has one of the lowest state indigent defense expenditures in the country, ranking forty-second out of fifty.[370] Idaho also falls well below the national average on per-capita spending on indigent defense, with a similarly dismal ranking of forty-second out of fifty.[371]

These numbers do not have to be the end of the story for Idaho, though. Other states have seen improvement in both raw numbers and ranking as they have transitioned to providing state-based indigent defense services.[372] Idaho could follow a similar trajectory if it creates a state-based system instead of continuing on with its county-operated system.[373]

Support for such an idea is both statewide and national. Many organizations and entities are currently pushing for exactly this kind of public defense reform.[374] Recently, for example, individual counties joined together in an attempt to convince the State Legislature that reform is desperately needed in Idaho.[375]

In September 2014, County officials from across the State gathered at the Idaho Association of Counties Convention.[376] There, officials made clear that indigent defense reform was one of the County Association's priorities and suggested that the State should take over control of indigent defense rather than leaving the burden on individual counties.[377] One County even proposed a resolution that would have accomplished exactly that, giving the State government responsibility for overseeing and implementing a state public defender system.[378] The County Association approved the resolution,[379] but the Idaho Public Defense Reform Interim Committee voted against it in November 2014.[380] As a result of the Committee's de facto veto, individual counties remain in control of indigent defense in Idaho.[381]

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369. *See id.*

370. U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008-2012-UPDATED, http://www.bjs.gov/content/pub/pdf/idsus0812.pdf; NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM, SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS iii (2008), http://courts.mi.gov/education/mji/Documents/2014/MI%20Indigent%20Defense.pdf.

371. *See* NLADA, *supra* note 7, at 4.

372. *See id.*

373. *See id.*

374. *See, e.g.*, *Idaho Association of Counties Resolution Number 2014-01*, IDAHO ASSOCIATION OF COUNTIES (Feb. 5, 2014), https://acluidaho.org/wpsite/wp-content/uploads/IAC-Public-Defender-Resolution-2014-01.pdf.

375. *See, e.g.*, Kathy Hedberg, *Counties Want to Hand Off Public Defense to State*, LEWISTON TRIBUNE, Sept. 16, 2014, at C1.

376. *Id.*

377. *Id.*

378. Kootenai County proposed the resolution. *See Idaho Association of Counties Resolution Number 2014-01*, *supra* note 374.

379. *Id.*

380. IDAHO PRESS-TRIBUNE, *supra* note 267.

381. *Id.*

This development is disheartening because a radical departure from the current county-operated system would do Idaho good.[382] As the County Association's resolution recognized, a district-wide office with state oversight deserves consideration from state legislators.[383] It is true that there are several models available to reformers trying to design a new indigent defense delivery system;[384] but of these options, a state oversight system best protects a defendant's constitutional right to counsel.[385] A state-managed system is best because it could potentially provide uniform practice standards, uniform hiring guidelines, and uniform budgetary controls for county-operated offices. Because it is best, Idaho should implement a state-managed system that provides for county-operated dedicated public defender offices. Doing so will ensure that, as Idaho fixes the footing of its indigent defense system, it constructs a durable, high-quality structure atop that base.

Aside from assuring that Idaho's future indigent defense delivery system is built to last, creating a state-managed, county-operated model has another benefit: it most closely tracks recent guidance from the federal government about how to safeguard the Sixth Amendment right to counsel.[386] Last year, in the course of third-generation litigation in New York state court, the U.S. Attorney General submitted a Statement of Interest outlining the federal government's views on public defense reform.[387] Interestingly, the Attorney General chose to comment in a case challenging a system that looks very much like the one currently in effect in Idaho; the New York lawsuit alleged that the State's public defender system, which the State conferred upon the counties, resulted in inadequate representation for indigent defendants.[388]

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382. William Wellman, *Indigent Defense Deserves the Serious Reform Now Being Considered*, Vol. 56, THE ADVOCATE at 16 (2013), https://isb.idaho.gov/pdf/advocate/issues/adv13oct.pdf.

383. *Id.*

384. *See supra* Part II.B.

385. *See Settlement Begins Historic Reformation of Public Defense in New York State*, NEW YORK CIVIL LIBERTIES UNION (Oct. 21, 2014), http://www.nyclu.org/news/settlement-begins-historic-reformation-of-public-defense-new-york-state [hereinafter Settlement].

386. *See generally* Statement of Interest of the United States at 2, Hurrell-Harring v. New York, Index No. 8866-07 (New York 2014), http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf.

387. Settlement, *supra* note 385. For context, the New York case reached a settlement in October 2014. The settlement overhauled the public defender systems in five counties throughout the state. The lawsuit that was the catalyst for the settlement agreement alleged that the state's public defender system, which the state conferred upon the counties, resulted in inadequate representation for indigent defendants. The settlement agreement contains many provisions for the improvement of indigent defense including requiring attorneys present at first appearances, increasing staff attorneys to ensure all indigent clients have lawyers, and implementing caseload maximum standards.

388. Settlement, *supra* note 385.

The Attorney General's Statement in the New York case was notable, as it marked the first time the U.S. Department of Justice has expressed in state court its opinion about how states provide indigent defense.[389] The Statement proposed that states be held accountable—by third-generation lawsuits or federal government intervention—if they fail to provide adequate legal services to indigent people accused of crimes.[390] And after taking such an unprecedented step to add the federal government's voice to the dialogue about state public defense systems, the Attorney General did not mince words:

> The United States has an interest in ensuring that all jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon*. . . . It's time to reclaim *Gideon's* petition—and resolve to confront the obstacles facing indigent defense providers.[391]

Thus, it appears that even the Department of Justice—recognizing the country's deficiencies in indigent defense and reflecting its natural inclination to protect constitutional rights—has identified a state-managed system based on ABA principles as the best solution to the problem.[392]

Whatever else it does, the federal government's position definitely reflects one particular understanding: without guidance from the state, counties will continue, inadvertently or intentionally, to neglect their obligations to provide defendants with the counsel they are constitutionally guaranteed.[393] Unless Idaho wants to be next on the Attorney General's radar, it needs to engage in an indigent defense delivery system overhaul and reassume its constitutional responsibility.[394]

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389. *Id.* The Attorney General had previously submitted a Statement of Interest in federal court in 2013. *See generally* Statement of Interest of the United States, Wilbur v. City of Mount Vernon, 989 F. Supp. 2d. 1122 (W.D. Wash. 2013) (No. C11-1100RSL).

390. Settlement, *supra* note 385.

391. *Hurrell-Harring*, *supra* note 386, at 2.

392. *See generally id.*

393. NLADA, *supra* note 7, at 52.

394. Idaho is too late. The Department of Justice's interest in Idaho's deficiencies is now evident. In April, 2016, (as this article was in its final stages of editing) the DOJ "moved for permission from the Idaho Supreme Court to file an amicus brief supporting the ACLU. . . . In support of its motion, the [DOJ] cited 'the United States' strong interest in ensuring that indigent criminal defendnts receive the full measure of rights the constitution guarantees, as well as its practical expertise in access-to-justice issues.'" *See* Motion for Leave to File Brief as *Amicus Curiae*, Tucker v. Idaho, No. 43922-2016 (Idaho Apr. 29, 2016), https://idreports.files.wordpress.com/2016/05/2016-04-29-supp-mot-for-brief-amicus-curiae.pdf; Defendants-Respondents' Response to United States of America's Motion for Leave to File Brief as Amicus Curiae, Tucker v. Idaho, NO. 43922-2016 (Idaho Apr. 28, 2016), https://idreports.files.wordpress.com/2016/05/tucker-v-state-of-idaho-defendents-brief.pdf; *see also* Sam Wright, *Public Defender Roundup*, ABOVE THE LAW (May 10, 2016), http://abovethelaw.com/2016/05/public-defender-roundup/.

Even the leading experts in indigent defense reform are not sure what that overhaul looks like for Idaho.[395] But what is clear is that the most recent steps are not enough. Because "[t]he state is obliged to ensure that the counties are capable of meeting [*Gideon's*] obligations and that counties actually do so," Idaho must act now.[396] As "the original obligor," Idaho must step in and succeed where its counties have failed.[397] Idaho must create a state-managed, county-operated network of dedicated public defender offices.

State funding for county-operated dedicated public defender offices is the best delivery method for protecting indigent defendant's constitutional rights in Idaho. To employ this system, the Legislature could begin the renovation by codifying the ABA's ten principles. Additionally, the Legislature could give the existing Commission the power to create a public defender hiring agency, which could create guidelines for hiring government employees that meet certain industry standards. And to achieve systemic quality representation, the Commission could provide those defenders with training, guidance, operating manuals, and information on best practices.

V. CONCLUSION

Forty states throughout the country currently have some form of state oversight of their indigent defense delivery system.[398] It is time for Idaho to join them. Doing so will allow Idaho to rebuild a solid structure where one is presently rotting away.

Indigent defendants in Idaho need public defense reform now. They are the ones paying the highest price because of Idaho's crumbling foundation. A person stands to lose his liberty, or even his life, when indigent defense delivery systems are insufficient.[399] If defendants do not have adequate representation, it can be, literally, a matter of life and death.[400]

Idaho's recent past is riddled with constitutional violations that need immediate, reconstructive attention. If meaningful indigent defense reform does not arrive in Idaho soon, the State's government officials risk costly third-generation litigation. These lawsuits will come even though "Idaho's public defenders are not bad lawyers—they've

395. *See generally* Hoskins, *supra* note 305.

396. *Id.* at 6.

397. *See id.*

398. Hoskins, *supra* note 305.

399. Ritchie Eppink, *"The Joke's On Us": Pausing to Reflect on the 50th Anniversary of Gideon v. Wainwright*, Vol. 56, THE ADVOCATE at 18 (Jan. 2013), https://isb.idaho.gov/pdf/advocate/issues/adv13jan.pdf.

400. *See id.*

simply been given the impossible task of representing too many clients with too few resources."[401]

But as distressing as the ramifications will be for Idaho officials, maintaining the status quo will have an even more devastating impact on Idaho's indigent defendants. If Idaho continues trying to fix a structural problem with cosmetic touch-ups—or trying to build a new framework without first laying the proper foundation—its indigent defense system will, before long, come crashing down on top of it.[402]

Bonnie C. Groller[**]

401. *Id.*

402. *See* MACHIAVELLI, *supra* note 1, at 79 ("He who has not first laid his foundations may be able with great ability to lay them afterwards, but they will be laid with trouble to the architect and danger to the building.").

** J.D., University of Idaho College of Law, May 2016. The author would like to thank her entire family for their unwavering love and support, especially her husband. Additionally, the author would like to thank Professor Brooke Hardy for her encouragement and mentorship.

APPENDIX A

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STATE OF IDAHO, Plaintiff, vs. _____, Defendant.	CASE NO. _____ AFFIDAVIT OF FINANCIAL STATUS, APPLICATION FOR PUBLIC DEFENDER, AND ORDER

This application must be filled out **completely** before it can be reviewed for assignment of a public defender. All questions must be answered. NO EXCEPTIONS.

Personal Information

Full Name: _____ Date of Birth: _____

Address: _____ Phone #: _____

City: _____ State: _____ Zip: _____

Income Information

Are you employed: No _____ Yes _____ Where? _____

What is your **gross** income (amount **before** taxes or any other withholdings are taken out)?

Monthly: $_____ Bi-weekly: $_____ Weekly: $_____

What is your **hourly** income? $_____ How many hours do you work per week? _____

Married? No _____ Yes _____ Spouse's Name: _____

What is your spouse's **gross** income (amount **before** taxes or any other withholdings are taken)?

Monthly: $_____ Bi-weekly: $_____ Weekly: $_____

Do you have any other sources of income? No _____ Yes _____

If yes, from whom? _____ How much per month? _____

Please list which, if any, of the following public assistance you receive:

_____ Self Reliance Program Funds _____ SSI or SSDI _____ Food Stamps

_____ County or General Relief _____ Medicare/Medicaid _____ Cash Assistance

_____ Other. Please specify: _____

Household Information

Please list each of the following dependents which reside in your household and for whom you are financially responsible:

_____ Spouse
_____ Children. How many total? _____ Please list age of each child: _____
_____ Other. Please specify relationship: _____

Debts

Please list the following debts you pay per month:

Mortgage/Rent: _____ Food: _____ Utilities: _____
Car: _____ Medical: _____ Credit Cards: _____
Loans: _____ Child Support: _____ Other: _____

Assets

Do you own your home? No _____ Yes _____ Equity: _____
Do you rent your home? No _____ Yes _____
Do you live with your parents? No _____ Yes _____
Please list the approximate value of the following property you own:
Motor Vehicles: How many? _____ Total Value of All Vehicles: $_____
Make and Model of Each Vehicle: _____
Furniture/Appliances/Electronics: $_____
Sporting Equipment: $_____ Guns: How many? _____ Value: $_____
Boats/Recreational Vehicles/Motorcycles/Snowmobiles: $_____
Money in savings/checking accounts: $_____ Name of Bank: _____
Cash on hand: $_____ Stocks/Bonds: $_____
Jewelry: $_____
Other. Specify: _____ $_____
What is the last year you filed an income tax return? _____ Amount of gross income listed on tax return $_____ Amount of refund: $_____
Can you borrow money to pay an attorney? No _____ Yes _____ If yes, how much? $_____

I HEREBY ACKNOWLEDGE THAT I MAY BE REQUIRED TO REIMBURSE NEZ PERCE COUNTY FOR THE SERVICES OF THE PUBLIC DEFENDER.

I HEREBY CERTIFY THAT ALL OF THE ANSWERS TO THE FOREGOING QUESTIONS ARE UNDER OATH AND SWEAR THAT THE SAME ARE TRUE AND CORRECT. IF I HAVE INTENTIONALLY ANSWERED ANY OF SAID QUESTIONS INCORRECTLY, I MAY BE PROSECUTED FOR PERJURY.

Dated this _____ day of _____, 20____.

_____
Defendant's Signature

ORDER

Based upon the information contained in the Court record and on the above-filed affidavit, the Court hereby ____ GRANTS ____ DENIES the defendant's application for public defender. _____ is hereby appointed as counsel to represent the defendant in the above-entitled case.

Dated this ____ day of _____, 20____.

_____
Magistrate Judge