

ACLU sues Idaho; statutory changes too slow to implement

By David
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Pleading the Sixth: One June 17, 2015 the American Civil Liberties Union (ACLU) filed a class action lawsuit against the state of Idaho for failing to ensure a meaningful right to counsel. Wait a minute... didn't the State of Idaho comprehensively fix the right to counsel in 2014 by creating a statewide commission and banning flat fee contracts? The 6AC explains.

On March 26, 2014 Idaho Governor C.L. Butch Otter signed [House Bill 542](#) into law creating the Idaho public defense commission and banning flat fee contracts that give lawyers a financial incentive to dispose of indigent defense cases quickly rather than justly. Now, a little more than a year later, the Governor and the seven members of the State Public Defense Commission (SPDC) are named defendants in an American Civil Liberties Union (ACLU) [class action lawsuit](#) alleging that indigent defendants are denied the constitution right to a competent attorney at critical stages of criminal proceedings. The ACLU is seeking injunctive relief requiring the state to propose, and the Court approve, “a plan to develop and implement a statewide system of public defense that is consistent with the U.S. Constitution and the Constitution and laws of the State of Idaho,” including a system to enforce uniform standards related to attorney workload, performance and training.



Though Idaho is one of only nine states that require local governments to shoulder the vast majority of the funding and administration of trial-level indigent defense services, it is important to note that Idaho county governments were not named defendants in the lawsuit. This, despite the fact that the four named plaintiffs allegedly received unconstitutional representation in four different Idaho counties: Ada (Boise), Bonner, Payette, and Shoshone.

Naming state actors as the only defendants appears to be in recognition that *Gideon v. Wainwright* made the provision of Sixth Amendment right to counsel services incumbent upon state government through the Fourteenth Amendment. Though it is not believed to be unconstitutional for a state to delegate its constitutional responsibilities to its counties and cities, in doing so the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so. Thus, if Idaho cities or counties are proven unable to provide adequate indigent defense services, it is the state – as original obligator – that remains culpable.

(For more on the problems that counties face when shouldering the state's right to counsel obligations, see this two-part article by the Executive Director of the Idaho Association of Counties and the 6AC, [here](#) and [here](#).)

Thus, this lawsuit serves as a warning to the other eight similarly situated states: Arizona, California, Illinois, Mississippi, South Dakota, Pennsylvania, Utah and Washington.

What went wrong with the 2014 reforms?

Actually nothing. It is just that the simple creation of, and initial funding for, a statewide public defense commission cannot in and of itself change the multifaceted right to counsel deficiencies occurring throughout Idaho that were first documented in the National Legal Aid & Defender Association 2010 report, [The Guarantee of Counsel: Advocacy and Due Process in Idaho's Trial Courts](#).

Because of the depth and breadth of indigent defense problems in Idaho, there was a conscious recognition on the part of the 2014 legislature that it would take considerable time to unify the practices of 44 county-based “non-

systems” into a statewide whole. Therefore, the 2014 reforms anticipated that over the first year of post-legislative reform the most that could be hoped for was to have various appointing authorities name the members of the commission, have the commission set a meeting schedule, advertise for and hire an executive director, instruct the director to begin to hire additional staff to accomplish the immediate goals of training lawyers, drafting standards and collecting data from county indigent defense services (all of which occurred or is soon to occur).

Therefore, the Idaho Legislature also passed a 2014 concurrent resolution, **HCR 40**, reconstituting a Legislative Interim Committee to continue the work of how best to fund a coordinated state system and to enforce commission standards, even as the SPDC got up and running. But the question of funding led first to an effort to decriminalize low-level, non-violent offenses and/or reclassify certain crimes to violations (requiring only the payment of a fine rather than a threat of jail). The idea being that the amount of state money needed to fund indigent defense is less if the legislature could decrease the number of people requiring a public lawyer. And, though several pieces of legislation passed on this front, there is little doubt that tens of thousands of poor people continued to have their constitutional rights violated while these efforts were debated. The lawsuit appears to have been triggered, in the words of the ACLU, because “[a]stoundingly” the state “failed yet again” to “fund or improve its public defense system” in the 2015 legislative session.

Where does Idaho go from here?

When Montana created its statewide indigent defense system in 2005, the state, like Idaho, struggled with how to pay for the improved services. After exploring many options, Montana elected to cap the indigent defense spending of counties at the rate of spending for the immediate prior year. The state then made an adjustment to the matrix of state funding obligations to counties, essentially offsetting the capped amount and lowering the state’s financial obligations to the counties by that same amount.

In effect, it became a 100% state funded system, though the state did not have to come up with the entire amount in year one. This was a good deal for counties because the counties were assured that their spending on indigent defense was never going to increase regardless of any future expansion of the right to counsel by the U.S. Supreme Court. And, it was easier to enforce state standards because now everything was under the obligation of the state commission and it was contingent on the commission to argue for adequate resources to meet standards through the normal state budgeting process.

(Read how the Montana indigent defense system matured over time to address excessive public defender caseloads, [here](#)).

Perhaps Idaho state policymakers will consider something similar to what Montana did to settle the lawsuit quickly, rather than dig in its collective heels to fight, considering Governor Otter stated that Idaho’s “current method of providing legal counsel for indigent criminal defendants does not pass constitutional muster,” in his January 2015 [“State of the State” address](#).