

COUNTY NEWS

# COUNTIES LOOK TO CHANGE APPROACH TO INDIGENT DEFENSE

By [CHARLIE BAN](#) Jun. 16, 2014

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Tags: [Justice](#)



(Note: This is the second part in a two-part series, [click here](#) to see part one.) **Lessons from Idaho**

Idaho is indicative of a county-based indigent defense system on the brink that is changing its approach. On March 26, Idaho Gov. C.L. "Butch" Otter (R) signed into law House Bill 542 beginning the process of shifting more and more responsibilities for the oversight of indigent defense services to the state.

Specifically, the new law bans the use of flat-fee contracting and creates a state-funded, statewide commission with the authority to set standards for the delivery of indigent defense services and to immediately begin addressing the lack of public defense training throughout the state. The new commission also has authority to promulgate binding data-collection requirements.

The journey to having the state pick up more and more responsibility for indigent defense services is one that started several years ago when the ACLU was suing several Montana counties, and their Idaho counterparts felt they may be next since indigent defense in Idaho looked much like Montana's.

The Idaho Criminal Justice Commission (ICJC), a 25-member commission of criminal justice stakeholders, was created by executive order of the governor.

It includes prosecutors, judges, law enforcement, defense counsel, a county association representative, legislators and state executive branch representatives, among others, who meet regularly to collaborate and devise best practices to achieve a "safer Idaho." An ICJC-commissioned study determined that the state did, indeed, have a Sixth Amendment crisis.

In response, the ICJC first proposed three pieces of legislation that were adopted by the Idaho Legislature and signed into law by the governor to address several substantive issues related to public defense. Some of these issues included clarifying when a defendant is entitled to counsel and how to determine whether a defendant is indigent.

However, much was left undone. Therefore, the ICJC proposed that a legislative interim committee study the problem and make recommendations to rectify the crisis.

The concurrent resolution creating the interim committee identified numerous systemic deficiencies in the delivery of the right to counsel in Idaho.

After working throughout the summer and fall of 2013, the interim committee proposed the parameters of what became H.B. 542. Yet there was still a problem.

Over the course of 2013, the Legislative Interim Committee heard testimony from a number of groups (prosecutors, judges, etc.) which suggested that indigent defense services should remain county-funded and county administered.

This presented a difficulty regarding how to enforce the standards promulgated by the public defense commission. That is, if the state is not funding the system, what then is the mechanism for enforcing binding standards?

On Feb. 5, the Idaho Association of Counties (IAC) met to discuss these issues and ultimately concluded that the best policy for Idaho was to remove decision-making power over the right to counsel from local level.

Instead, IAC adopted a policy resolution that would cede to the state the power to enforce standards and administer the system at the state level, in exchange for capping county costs at their current spending levels.

Currently, Idaho's counties collectively spend approximately \$22 million annually on indigent defense, with an estimated \$10 million \$15 million needed to have the system come into compliance with constitutional adequacy.

The IAC proposal would require counties to continue contributing the collective \$22 million to the state public defense commission each year, with any new monies required to meet standards coming entirely from the state. Outside of the funding obligation, counties would have no further say over how services are administered.

This is being viewed in Idaho like a win-win solution, in that the counties cap their fiscal obligations in perpetuity, while the state gets the assurance that decisions about standard implementation is entirely state-million controlled. Under this proposal, the state also does not have to come up with \$32 million \$37 million for the system all on its own. Other states should consider emulating this process as a way forward.

Even as counties struggle to get state government to take responsibility for the right to counsel, there is a movement to get more federal help as well.

On Oct. 30, 2013, U.S. Rep. Ted Deutch (R-Fla.) entered a bill to create a federally funded National Center for the Right to Counsel to aid states and counties in meeting their constitutional obligations under the U.S. Supreme Court's 1963 Gideon v. Wainwright decision.

As presently conceived, the National Center will be a nonprofit 501(c)(3) entity authorized to award discrete two-year to three-year grants for the purpose of improving or establishing public defense systems.

The National Center would be authorized to promulgate standards to measure the effectiveness of the resources invested in states and counties, and to determine if a recipient has indeed improved services as intended.

NACo has endorsed the bill.

## ABOUT CHARLIE BAN [\(Full Bio\)](#)

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Charlie Ban writes for County News and helps manage NACo website content.

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