

Draft PDC Temporary Rules Approved on March 5, 2021 for Presentation to Legislature

Chapter 1 – 61.01.01

61.01.01.010.22 Vertical Representation. A Defending Attorney is responsible for the continuous and personal representation and oversight of an Indigent Person's case, to the extent reasonably practicable, through trial proceedings and preservation of right to appeal. For purposes of this definition reasonably practicable means a Defending Attorney will make efforts to personally represent the client during all substantive proceedings where the facts of the case are discussed by counsel or the Court, provide unavailable dates at the time of setting and seek continuances in the case of unforeseen absences. The Indigent Person may consent to have another Defending Attorney appear at a hearing. Each county is responsible to support and provide resources as necessary to ensure Vertical Representation.

Chapter 2 – 61.01.02

61.01.02.020.01.a Employ or contract with attorneys to provide public defense services from the Defending Attorney Roster or if the attorney is not yet on the Defending Attorney Roster, have the attorney complete and submit to the PDC the Roster form within thirty (30) days from the date of their employment or contract under Subsection 070. of these rules;

61.01.02.030.02.a. Selection Recommendation Committee. The county will use an independent committee from within the county or region for recommendations to the Board of County Commissioners for the selection of the lead institutional Defending Attorney or primary contracting Defending Attorneys as the main providers of public defense services as set forth in Sections 19-859 and 19-860(2), Idaho Code; and

61.01.02.030.02.b. Independence Working Group. Each judicial district may establish an independent working group of one (1) attorney for each county who practices public defense in or who is familiar or will become familiar with public defense in the county and who is not a Defending Attorney for the appointing county and who is not a prosecutor, to act as a liaison in independence issues between Defending Attorneys and county stakeholders. The Administrative District Judge (ADJ) or Trial Court Administrator (TCA) will identify the members of the working group for their District, and if the ADJ or TCA does not, the Commission will identify group members.

61.01.02.030.05. Independent Contract Negotiation. The county should consider engaging independent legal counsel to negotiate Defending Attorney Contracts.

61.01.02.040.02. Pay. So far as is possible, Defending Attorneys and their staff will not be compensated less than a properly funded prosecutor and staff with similar experience and performing similar duties.

61.01.02.050.02.a.ii. Inquire about the Defending Attorney's Workload to ensure compliance with the Public Defense Rules;

61.01.02.050.04. Except as provided in Subsection 050.01.a of these rules, attorneys who are not approved for inclusion on the applicable Roster are not eligible to represent Indigent Persons at public expense.

61.01.02.060.03. Qualifications. Have the ability, training, experience and understanding necessary for their appointed Cases to do the following:

- a. Apply laws, rules, procedures and practices to the case and perform thorough legal research and analysis;
- b. Protect client confidentiality, and if breached, notify the client and any other entities when necessary to preserve the client's constitutional and statutory rights;
- c. Ensure Vertical Representation from the time a Defending Attorney is appointed in each Case. Nothing in this rule is intended to prohibit a different Defending Attorney from representing the client at Initial Appearance. Defending Attorneys who are unable to comply with this rule will notify their supervisor, Board of County Commissioners or the Court and request appropriate resources;
- d. Dedicate sufficient time to each Case;
- e. Promptly and independently investigate the Case;
- f. Request funds as needed to retain an investigator;
- g. Request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case;
- h. Continually evaluate the case for defense investigations or expert assistance;
- i. Be present at the Initial Appearance and available to the Indigent Person in person or via technology, and;
- i. Preserve the client's constitutional and statutory rights;

- ii. Discuss the charges, case and potential and collateral consequences with the client;
- iii. Obtain information relevant to Idaho Criminal Rule 46 (bail or release on own recognizance) and if appropriate, seek release;
- iv. Encourage the entry of a not guilty plea at Initial Appearance except in circumstances where a guilty plea is constitutionally appropriate;
- j. Work within Caseload or Workload limits, defined in Subsection 060.05 of these rules. If a Defending Attorney's Caseload exceeds the numeric standard, the attorney must disclose this in the Annual Report. The Report must include the reasons for the excessive Caseload or Workload, and if and how the representation met constitutional standards;
- k. Have sufficient time and private space to confidentially meet with Indigent Persons;
- l. Have confidential and secure information systems for Indigent Person's confidential information;
- m. Identify and resolve conflicts of interests in compliance with Idaho Rules of Professional Conduct (IRCP) and other applicable laws and rules;
- n. Be familiar with and competent to identify or use:
 - i. Forensic and scientific methods used in prosecution and defense;
 - ii. Mental, psychological, medical, environmental issues and impacts;
 - iii. Written and oral advocacy;
 - iv. Motions practice to exhaust good faith procedural and substantive defenses;
 - v. Evidence presentation and direct and cross examination;
 - vi. Experts as consultants and witnesses and expert evidence;
 - vii. Forensic investigations and evidence;
 - viii. Mitigating factors and evidence;
 - ix. Jury selection methods and procedures;
 - x. Electronic filing, discovery and evidence and systems;
 - xi. Constitutional representation; and
 - xii. When a Defending Attorney's abilities do not match the nature and complexity of the Case, they will seek the advice of experienced attorneys, training, or decline appointments.

61.01.02.060.04.a Have advanced familiarity and demonstrated competence with the above minimum requirements for Defending Attorneys; and as lead appellate or lead post-conviction counsel will meet or exceed the following experience levels:

61.01.02.070.01. Defending Attorney Roster.

- a. Attorneys who complete the PDC form verifying they meet the items in this Subsection 070.01 will be automatically included and remain on the Defending Attorney Roster until they request removal or are removed for failing to comply with Public Defense Rules. Attorneys who are unable to verify the items in this Subsection 070.01 may submit a new verification form at any time.
 - i. Have an active license to practice law in Idaho;
 - ii. Attest they are in compliance with the Public Defense Rules or will comply with the Rules when appointed and representing an Indigent Person;
 - iii. New attorneys admitted to the Idaho State Bar within the previous year will name and be mentored by an experienced Defending Attorney on the Defending Attorney Roster;
 - iv. Have completed the minimum continuing legal education ("CLE") requirements in Paragraph 090.03 of these rules within the previous year or within the next ninety (90) days of being placed on the Roster;
 - v. Attorneys on the Defending Attorney Roster will complete Annual Reports as set forth in IDAPA 61.01.03, "Records, Reporting and Review," Paragraph 020.01.a. Attorneys who at the time of inclusion on the Defending Attorney Roster are not under contract with a county will promptly provide PDC Staff notice and copy of any county contracts entered after inclusion.
- b. Continuing Eligibility.
 - i. To remain on the Defending Attorney Roster attorneys must
 - (a) Comply with the Public Defense Rules and:
 - (b) Have completed the minimum CLE requirements under Subsection 090.03 of these rules; and
 - (c) Have completed an Annual Report.
 - ii. To address Defending Attorney Deficiencies:
 - (a) PDC Staff will review reported Defending Attorney Deficiencies and work directly with the Defending Attorney, and the county when appropriate, to resolve them.
 - (b) If the Deficiency cannot be resolved at the review, PDC Staff may ask the Defending Attorney to submit a plan to cure the Deficiency with proposed detailed action items and completion dates.
 - (c) If a plan is requested and is not submitted or completed, or if the Defending Attorney Deficiency is not cured, it will be referred to the Commission with the Executive Director's order of removal, which the Defending Attorney may appeal as set forth in Subsection 080.04 of these rules. County Deficiencies, which are not Defending Attorney

Deficiencies, are the responsibility of the counties and not the Defending Attorney. County responsibilities are set forth in these rules including without limitation Subsection 020. of these rules and subject to the county Deficiency process set forth in IDAPA 61.01.03, "Records, Reporting and Review," Paragraphs 050.-060.

61.01.02.070.02.a.iii. Have completed Capital Defending Attorney Roster forms.

61.01.02.080.03.a. To prevent or avoid immediate danger when:

- i. An attorney's Idaho license to practice law is suspended;
- ii. An attorney is disbarred in Idaho; or
- iii. An attorney's Idaho license status is inactive;

61.01.02.080.03.c. An appeal of the removal under Subsection 080.03 of these rules, will be reviewed by the Commission in an emergency proceeding under Section 67-5247, Idaho Code;

61.01.02.090.01 Approval. CLE credits that meet the requirements in Subsection 090.02 of these rules will count toward minimum requirements. Roster members have the option, but are not required, to request advance of approval of a CLE course to confirm the course meets minimum requirements. Courses that are not pre-approved by PDC Staff will not be approved if they do not meet these requirements.

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