

EXTRAORDINARY LITIGATION FUND POLICY

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Policy and Purpose

This policy establishes the procedures for Defending Attorneys and Counties to apply for funding for extraordinary litigation costs as set forth in Idaho Code §19-850(2)(e). Extraordinary litigation costs are the costs necessary for representation of an Indigent Person at public expense when requesting funding from the Court or the County may undermine an Indigent Person’s case or when such costs are a financial hardship on the County. Eligible extraordinary litigation costs may include, but are not limited to, expert witnesses, evidence testing and investigation, but do not include costs associated with capital crimes. Factors that may make a litigation cost extraordinary include: the complexity and/or uniqueness of the case, the magnitude of the criminal charges involved, the accessibility of the expert, investigation or other needed services, the availability of County funds to pay the costs and the County’s past and present funding of public defense.

The Commission desires to maximize opportunities for Defending Attorney requests for these funds so there is no chilling effect on their providing constitutional defense due to (1) fear of paying for extraordinary litigation costs that may not be reimbursed, or (2) risking loss of confidentiality of defense strategy by disclosing it to the Court as part of requesting funding from the Court. Idaho Code §19-850(2)(e).

The Commission urges Counties to proactively plan for and fund public defense to ensure anticipated costs are covered. Litigation costs are not extraordinary when County funds are not available because the County failed to do these things.

References

Idaho Code §19-850(2)(e)

Idaho Code §74-105(18)(b)

IDAPA 61.01.04.020.06

1. Requirements & Eligibility

- A. Approval of ELF applications is subject to available funds as appropriated by the Idaho State Legislature.
- B. Defending Attorney requests get priority over County requests.

- C. Applicants must demonstrate costs are extraordinary litigation costs.
- D. Defending Attorneys and Counties in compliance with Public Defense Rules are eligible to apply for ELF funds.
- E. Defending Attorney applicants must be on the PDC Defending Attorney Roster or appointed by the Court under IDAPA 61.01.02.050.01.a.
- F. Court-ordered services and costs associated with capital crimes are not eligible for ELF funds.
- G. Counties are not permitted to use ELF funds to supplant County funding of indigent defense.
- H. Awarded amounts for prospective extraordinary litigation costs will be paid directly to the service provider (expert, investigator, etc.) in accordance with section 2 of this policy. The recipient must provide PDC Staff a W-9 prior to payment. Awarded amounts for reimbursed extraordinary litigation costs will be paid directly to the County in accordance with section 3 of this policy.
- I. Applicants must use ELF forms provided by PDC Staff.

2. Defending Attorney Application Process

- A. **Prospective Costs:** Defending Attorney applicants may apply exclusively for prospective litigation costs occurring in the next six (6) months. Any request seeking reimbursement for services already rendered or costs already paid will be rejected.
- B. **Timely Application:** As soon as a Defending Attorney anticipates that costs will qualify as extraordinary litigation costs, the Defending Attorney should file an application for ELF funds.
- C. **County Funds:** If doing so would not undermine an Indigent Person's case or rights, a Defending Attorney may meet with the County Clerk or BOCC to discuss the funds available in the County's indigent defense budget for case costs. This is not required in order to be eligible for ELF. The application must include an explanation as to why the County does not have funds for the case costs or why the Defending Attorney did not contact the County Clerk or BOCC.
- D. **Court Funds:** If doing so would not undermine an Indigent Person's case, a Defending Attorney may make a motion in the appropriate Court for funding prior to an application to the ELF. This is not required in order to be eligible for ELF. The application must include an explanation regarding the ruling of the Court or why the Defending Attorney did not make a motion.
- E. **Unused ELF Award or Request for Additional ELF Funds in the Same Case:** If ELF funds are awarded and funds are not used or paid for the case within the 6-month period*, or additional funds are needed for the same case for a subsequent 6-month period, the Defending Attorney must submit a supplemental request form within the 6-month period. If a timely request is not made, any remaining ELF award is cancelled unless (1) it is the first time the Defending

Attorney has failed to submit a timely supplemental request for ELF funds (for any ELF award) and (2) the supplemental form is submitted by the extension deadline designated by PDC Staff. If a timely request is not made for ELF funds (for any ELF award) thereafter, any remaining ELF award is cancelled.

*ELF awards predating this August 19, 2021 policy revision are not subject to the 6-month time limit. However, to free up ELF funds to pay for extraordinary litigation costs in other cases, the PDC strongly encourages any individual who has unused ELF funds predating this August 19, 2021 policy revision to submit invoices for approved awards or give notice that funds are no longer needed as soon as possible.

- F. **Request for ELF Funds for a New Case:** If a Defending Attorney seeks funds for services in a new case, a new ELF application must be submitted.

3. Board of County Commissioner's Application Process

- A. **Reimbursement:** Counties may apply for reimbursement of extraordinary litigation costs, which are a financial hardship on the County.
- B. **Timely Application:**
 - i. County applications for ELF funds must be submitted to the PDC within sixty (60) days of the County incurring the extraordinary litigation cost or by May 15th, whichever is earlier.
 - ii. A County application must be for reimbursement of extraordinary litigation costs for services rendered within the same State fiscal year.
 - iii. A County application must be signed and certified by the County Clerk and majority of the Board of County Commissioners.
 - iv. The Executive Director or Commission, as applicable, will render decisions on timely complete ELF applications during the State's fourth fiscal quarter.

4. Confidentiality of Information

ELF records that include information protected or exempted from disclosure under rules adopted by the Idaho supreme Court, attorney work product or attorney-client privileged communications are exempt from disclosure under Idaho Code §74-105(18)(b).

5. Application Process

- A. For confidentiality, PDC Staff will assign an ELF number to each ELF application.
- B. Once assigned an ELF application number, the applicable Regional Coordinator will review the application and report to the Executive Director.
- C. The Executive Director may approve or deny the application for extraordinary litigation costs, which are not attorney fees.

- D. An ELF application for attorney fees will be submitted to and decided by the Commission.
- E. PDC Staff or Commission may request additional information needed to review and decide an application.