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Jonathan Loschi  
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Linda Copple Trout  
*Idaho Court System*

Sean Walsh  
*Defending Attorney*

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Kathleen J. Elliott  
*Executive Director*

July 6, 2021

Erik Buchanan  
SCC/#59712/LB31  
1252 E. Arica Rd.  
Eloy, AZ 85131

In response to your February 5, 2021 letter, we are sending you the following rulemaking information:

1. **Negotiated Rulemaking** -- Email related to rulemaking that we received after the negotiated rulemaking deadline: [LakeySenatorEmailREPDC2021NegotiatedRulemakingRcd20210609](mailto:LakeySenatorEmailREPDC2021NegotiatedRulemakingRcd20210609)

2. **Proposed Rulemaking** –

- **Proposed Rules IDAPA 61.01.01 and 61.01.01.02**

The Commission reviewed and evaluated oral and written comments received during the negotiated rulemaking process and approved the proposed rules on June 15, 2021. The proposed rules will be published in the August 4, 2021 Administrative Bulletin. So it is easy to identify the differences between the negotiated rulemaking text and the proposed rules, the included proposed rules show only the changes to negotiated rule text (previously mailed to you) in legislative format. (The two changes are in proposed rules 61.01.02.060.03.n.xii and 61.01.02.090.01.) Note that the rules will go through standard formatting prior to publication, including formatting all negotiated rulemaking text, as revised in the proposed rules, in legislative format, so they will look different in the Administrative Bulletin.

- **Information about written comment**

You may comment in writing prior to the **comment deadline, which is August 27, 2021**. The Commission will consider all timely comments on the proposed rules and adopt pending rules. The pending rules will be published in the Administrative Bulletin. Publication of the pending rules completes the agency's rulemaking process. The pending rules will then be submitted to the 2022 Legislature.

- **Information about publication**

When the proposed rules and related notices are published in the August 4, 2021 Administrative Bulletin, we will send you a copy.

Please let me know if you need additional information. Thank you for your interest in the rulemaking process.

Sincerely, Tammy Zokan

**From:** [Tammy Zokan](mailto:Tammy.Zokan)  
**To:** [Tammy Zokan](mailto:Tammy.Zokan)  
**Subject:** FW: Rules  
**Date:** Thursday, June 10, 2021 9:23:30 AM

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**From:** Todd Lakey <[Todd@borton-lakey.com](mailto:Todd@borton-lakey.com)>  
**Date:** June 9, 2021 at 8:05:48 PM MDT  
**To:** Seth Grigg <[sgrigg@idcounties.org](mailto:sgrigg@idcounties.org)>  
**Cc:** Kathleen Elliott <[Kathleen.Elliott@pdc.idaho.gov](mailto:Kathleen.Elliott@pdc.idaho.gov)>  
**Subject: Fwd: Rules**

Seth - sorry the auto fill on the first email below used your old cities email. See below  
Thanks  
Todd

Sent from my iPhone

Begin forwarded message:

**From:** Todd Lakey <[Todd@borton-lakey.com](mailto:Todd@borton-lakey.com)>  
**Date:** June 9, 2021 at 6:41:39 PM PDT  
**To:** [kathleen.elliott@pdc.idaho.gov](mailto:kathleen.elliott@pdc.idaho.gov), Seth Grigg <[sgrigg@idahocities.org](mailto:sgrigg@idahocities.org)>  
**Subject: Rules**

Kathleen,

Reaching out on the rules process. I am sorry that the rules we went through this past session ultimately didn't get adopted by both bodies. I appreciate all the time and effort you put in and appreciate you following up with the temp rules in line with that work. I understand you are in the negotiated rule making process with one round complete and the next meeting in August. I wanted to reach out and see if a more working group type approach could be taken between meetings. I can't say that I have been through the negotiated ruling process myself so don't know what kind of limitations you may have. I worry that a standard meeting every couple months may yield a similar outcome to that we had last session.

If a few stake holders from the counties and defending attorneys etc could sit down between meetings and help work on the proposed language for the next meeting i think that may yield more consensus. I included Seth on this email but wasn't sure who to include in the defending attorney side. This is your rule making process and don't want to dictate in any way but simply offer suggestions.

Thanks again  
Sen. Lakey

Sent from my iPhone

# IDAPA 61 – IDAHO STATE PUBLIC DEFENSE COMMISSION

## 61.01.01 – GENERAL PROVISIONS AND DEFINITIONS

### 000. LEGAL AUTHORITY.

This chapter is adopted under the legal authority of Section 19-850(1)(a), Idaho Code. (7-1-21)T

### 001. TITLE AND SCOPE.

This chapter is titled “General Provisions and Definitions,” and contains general provisions and definitions applicable to IDAPA 61. (7-1-21)T

### 002. ADMINISTRATIVE APPEALS.

**01. Intermediate Administrative Appeal Procedure.** Except as set forth herein, IDAPA 04.11.01, “Idaho Rules of Administrative Procedure of the Attorney General,” shall apply to IDAPA 61. (7-1-21)T

**02. Confidential Information Exempt From Public Records.** Documents containing confidential information and submitted in any administrative proceeding must be redacted or filed under seal. (7-1-21)T

### 003. FILING OF DOCUMENTS.

Unless otherwise set forth in a Notice of Rulemaking or Order of the Commission or Executive Director, all written communications and documents that are intended to be part of an official record for decision in a rulemaking or contested case must be filed with the Executive Director. No copies in addition to the original document need be filed with the agency unless requested by the Executive Director or Commission. (7-1-21)T

### 004. – 009. (RESERVED)

### 010. DEFINITIONS.

**01. Active Case.** A Capital Case is active when it is not stayed. All other Cases are active when there is an appointment, appearance, filing or investigation in the reporting period or it is not stayed. (7-1-21)T

**02. Annual Report.** The Defending Attorney report required by Section 19-864, Idaho Code, including CLEs, Caseloads, Workloads and other information requested for the October 1 through September 30 reporting period to complete the Annual Report form provided by PDC Staff. (7-1-21)T

**03. Capital Case.** A case in which the state has given notice it will seek the death penalty or is legally entitled to seek the death penalty under Section 18-4004A, Idaho Code. (7-1-21)T

**04. Capital Defending Attorney.** A Defending Attorney who meets the qualifications for and is on the Capital Defending Attorney Roster. (7-1-21)T

**05. Capital Defending Attorney Roster.** The PDC’s list of Defending Attorneys eligible for appointment by a court to represent an Indigent Person at public expense in a Capital Case. (7-1-21)T

**06. Case.** All related charges against an individual from a single incident, transaction or occurrence filed within a single case number. A probation violation or motion for contempt is counted as a separate Case. (7-1-21)T

**07. Caseload.** A Defending Attorney’s total number of Active Cases during the applicable reporting

period as counted under IDAPA 61.01.02, "Requirements and Procedures for Representing Indigent Persons," Paragraph 060.05.c. A county's total Caseload to determine compliance with Workload rules is calculated as the mean of the Felony Case Equivalent calculation for each of the preceding three (3) years. (7-1-21)T

**08. Compliance Plan.** A county's plan for meeting Public Defense Rules and curing any Deficiencies including detailed action items and completion dates. (7-1-21)T

**09. Cost Analysis.** A detailed explanation of the expected expenses for the county to complete its Compliance Plan and how the county is proposing to pay for those expenses. (7-1-21)T

**10. Defending Attorney.** Any attorney employed by a county or under contract with a county as an institutional Defending Attorney or a contract Defending Attorney or otherwise appointed by a Court to represent adults or juveniles at public expense. (7-1-21)T

**11. Defending Attorney Roster.** The PDC's list of Defending Attorneys eligible for appointment by a court to represent an Indigent Person at public expense in a non-capital Case. (7-1-21)T

**12. Deficiency.** The noncompliance with any Public Defense Rule by a county, Defending Attorney, employee, contractor, representative or other agent. (7-1-21)T

**13. Executive Director.** PDC employee appointed by the Commission under Section 19-850(2)(a), Idaho Code. (7-1-21)T

**14. Felony Case Equivalent (FCE).** The calculation after all Case types are converted to their felony equivalent to determine compliance with Caseload rules. (7-1-21)T

**15. Financial Assistance.** The state funding a county may request and may be awarded under Section 19-862A, Idaho Code. (7-1-21)T

**16. Indigent Person.** A person who, at the time his need is determined under Section 19-854, Idaho Code, is unable to provide for the full payment of a Defending Attorney and all other necessary expenses of representation. (7-1-21)T

**17. Initial Appearance.** The first appearance of the defendant before any judge. In the event a defendant appears before more than one judge, the first appearance before the first judge constitutes the Initial Appearance. (7-1-21)T

**18. Material.** An action or failure to act that could have an immediate and significant negative impact on the effective representation of Indigent Persons or result in the misuse of state funds. (7-1-21)T

**19. PDC.** The Idaho State Public Defense Commission including PDC Staff and the Commission. Information reported to the PDC will be reported using available PDC forms. (7-1-21)T

**20. PDC Staff.** Employees of the Commission who report to the Executive Director. References to PDC Staff include the Executive Director unless otherwise specified. (7-1-21)T

**21. Public Defense Rules.** Any rule promulgated by the Commission under Section 19- 850(1)(a), Idaho Code. (7-1-21)T

**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. (7-1-21)T

23. **Willful.** An action or failure to act that is deliberate and with knowledge. (7-1-21)T

24. **Workload.** A Defending Attorney's Caseload adjusted to account for available support staff, Case complexity, and distribution through the reporting year and other duties such as supervision. (7-1-21)T

011. – 999. (RESERVED)

PDC Proposed Rules Approved 6/15/21

# IDAPA 61 – IDAHO STATE PUBLIC DEFENSE COMMISSION

## 61.01.02 – REQUIREMENTS AND PROCEDURES FOR REPRESENTING INDIGENT PERSONS

### 000. LEGAL AUTHORITY.

This chapter is adopted under the legal authority of Section 19-850(1)(a), Idaho Code. (7-1-21)T

### 001. TITLE AND SCOPE.

This chapter is titled “Requirements and Procedures for Representing Indigent Persons” and contains the minimum requirements for representation of Indigent Persons. (7-1-21)T

### 002. – 009. (RESERVED)

### 010. DEFINITIONS.

For the purposes of this chapter, the definitions in IDAPA 61.01.01, “General Provisions and Definitions,” apply. (7-1-21)T

### 011. – 019. (RESERVED)

### 020. COUNTIES TO ADEQUATELY RESOURCE PUBLIC DEFENSE TO ENSURE EFFECTIVE REPRESENTATION IS PROVIDED TO INDIGENT PERSONS AS PROVIDED IN SECTIONS 19-860(2), 19-861(2)-(3), 19-862(1) AND 19-862A(1), (2) AND (8), IDAHO CODE.

Counties shall ensure effective representation is provided to Indigent Persons by adequately resourcing public defense as follows: (7-1-21)T

**01. Supported Defense Model.** Annually appropriate enough money to fund the public defense model selected under Section 19-859, Idaho Code: (7-1-21)T

**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 Section 070 of these rules; (7-1-21)T

**b.** Employ or contract with qualified staff and contractors with professional certificates, licenses and permissions as required by applicable rules and laws; and (7-1-21)T

**c.** Provide resources for compliance with Public Defense Rules. (7-1-21)T

**02. Defending Attorney Resources.** Provide Defending Attorneys with resources for carrying out the Defending Attorney’s responsibilities, including: (7-1-21)T

**a.** Confidential office, jail and courthouse meeting rooms to protect client confidentiality; (7-1-21)T

**b.** Confidential servers and systems to protect client confidentiality; (7-1-21)T

**c.** Sufficient equipment, technology, supplies; and (7-1-21)T

**d.** Other resources needed to provide constitutional representation. (7-1-21)T

**03. Contracting.** Counties and contract Defending Attorneys will enter into a contract for public defense services as required by Section 19-859, Idaho Code, which must include the following core terms: (7-1-21)T

**a.** All parties will comply with Public Defense Rules; (7-1-21)T

- b. Description of services and Case types included in the contract; (7-1-21)T
- c. Prohibition of a single fixed fee for services and expenses; (7-1-21)T
- d. Fee structure and amount for services; (7-1-21)T
- e. The county will pay client related expenses and costs; (7-1-21)T
- f. Defending Attorney will safeguard and retain case files and records as necessary to protect Indigent Persons, and, at termination of their contract, transfer files to the successor contract Defending Attorney; proper safeguards will be put in place to ensure no file is transferred to an attorney who may have a conflict; (7-1-21)T
- g. All parties keep detailed records of their public defense services and expenditures; (7-1-21)T
- h. Defending Attorney will notify the county and the lead institutional or primary contracting Defending Attorney, as applicable, if the Idaho State Bar or other licensing organization files formal charges against a Defending Attorney or non-attorney staff; and (7-1-21)T
- i. Authorization for and disclosure of the contract to the PDC. (7-1-21)T

**04. Communication.** The County will frequently meet with the lead institutional or primary contracting Defending Attorneys who are the main providers of public defense services about the following: (7-1-21)T

- a. Review compliance with Public Defense Rules, including monitoring Workloads and Vertical Representation; and (7-1-21)T
- b. Review county budget and expenditures for sufficient allocation of public defense resources and assess need for Financial Assistance. (7-1-21)T

**021. – 029. (RESERVED)**

**030. PUBLIC DEFENSE INDEPENDENT OF POLITICAL AND JUDICIAL INFLUENCE.**

Counties will ensure public defense is independent of political and to the extent possible, judicial influence, provided however, the judiciary is encouraged to contribute information and advice concerning the delivery of public defense services. (7-1-21)T

**01. No Judicial, Political or Conflict Influences.** The county’s selection and retention of Defending Attorneys will not involve conflicts of interest. (7-1-21)T

**02. Independent Committees.** (7-1-21)T

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 (7-1-21)T

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. (7-1-21)T

c. Information about an attorney’s fitness to represent Indigent Persons is confidential and exempt



from Public Records Act under Section 74-105(18)(a), Idaho Code. (7-1-21)T

**03. Independent Advocate.** A Defending Attorney exercising their professional or ethical obligations or advocating for policies supporting constitutional representation of Indigent Persons is not cause for discipline or termination. Nothing in this Subsection 030.03 is intended to prohibit the discipline or termination of a Defending Attorney who has violated county employment policy or Idaho Rules of Professional Conduct. (7-1-21)T

**04. Independence.** The county will limit prosecutor involvement in public defense matters that may jeopardize the independence of any Defending Attorney or undermine the delivery of public defense. (7-1-21)T

**05. Independent Contract Negotiation.** The county should consider engaging independent legal counsel to negotiate Defending Attorney Contracts. (7-1-21)T

**031. – 039. (RESERVED)**

**040. COUNTIES TO PROVIDE CONSISTENT RESOURCES FOR PUBLIC DEFENSE.**

Counties will provide adequate and equitable resources for public defense consistent with a properly funded prosecutor as provided in Sections 19-860(1), 19-861(3) and 19-850(1)(a)(vii)7, Idaho Code. (7-1-21)T

**01. Staff and Facilities.** Defending Attorneys and prosecutors will have equal access to quality staff and facilities. (7-1-21)T

**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. (7-1-21)T

**03. Other Resources.** Defending Attorneys and the prosecutor will have equal access to resources necessary for legal representation. This includes but is not limited to the independent investigation and evaluation of evidence. (7-1-21)T

**04. Equity Review.** The county will frequently review and assess equity between, and resource needs of, Defending Attorneys and prosecutors. (7-1-21)T

**05. Budget for Equity.** The county will frequently review resource needs with Defending Attorney and adequately budget to meet those needs. (7-1-21)T

**041. – 049. (RESERVED)**

**050. COURT APPOINTMENT OF COMPETENT DEFENDING ATTORNEYS.**

Courts will appoint Defending Attorneys who are competent to represent Indigent Persons as provided in Sections 19-855 and 19-850(1)(a)(vi), Idaho Code, and Subsection 060 of these rules. (7-1-21)T

**01. Appointment in Non-Capital Cases.** (7-1-21)T

**a.** Courts will appoint a Defending Attorney from the Defending Attorney Roster except in extraordinary circumstances where the Court: (7-1-21)T

i. Finds there is good cause to appoint an attorney at public expense who is not on the Roster; (7-1-21)T

ii. Finds the attorney is competent to represent the Indigent Person in the particular case; and (7-1-21)T

iii. Directs the appointed attorney to notify the PDC of the appointment. (7-1-21)T

**b.** Every attorney appointed under this Subsection 050.01 to represent an Indigent Person at public expense must comply with Subsection 060 of these rules. (7-1-21)T

- 02. Appointment in Capital Cases.** (7-1-21)T
- a.** In Capital Cases, Courts will: (7-1-21)T
- i.** Appoint a Defending Attorney from the Capital Defending Attorney Roster to represent an Indigent Person at public expense; (7-1-21)T
- ii.** Inquire about the Defending Attorney’s Workload to ensure compliance with the Public Defense Rules; (7-1-21)T
- b.** At or before the Initial Appearance in a Capital Case, appoint no less than two (2) qualified Capital Defending Attorneys, one (1) designated lead and the other(s) as co-counsel. (7-1-21)T
- 03. Conflicts of Interest.** A Court shall not appoint a Defending Attorney to any case with a conflict of interest in that case. (7-1-21)T
- 04. Eligibility.** 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. (7-1-21)T

**051. – 059. (RESERVED)**

**060. DEFENDING ATTORNEY MINIMUM REQUIREMENTS.**

Defending Attorneys shall meet the following minimum requirements for providing effective representation to Indigent Persons as provided in Sections 19-855, 19-860(2), 19-850(1)(a)(vi) and 19-850(1)(a)(v)(ii)5 and 8, Idaho Code. (7-1-21)T

- 01. Idaho State License, Defending Attorney Roster, and County Employment or Contract Requirements:** (7-1-21)T
- a.** Licensed to practice law in Idaho and in compliance with Idaho State Bar rules; (7-1-21)T
- b.** Member of the Defending Attorney Roster, except as provided in Subsection 050 of these rules; (7-1-21)T
- c.** Employed or under contract to provide public defense services to a county; and (7-1-21)T
- d.** If a Court attempts to appoint an attorney to represent an Indigent Person at public expense and the attorney does not meet one or more of the requirements in this Subsection 060.01, the attorney will immediately notify the Court. (7-1-21)T
- 02. Public Defense Competency.** Be competent to counsel and represent Indigent Persons. (7-1-21)T
- 03. Qualifications.** Have the ability, training, experience, and understanding necessary for their appointed Cases to do the following: (7-1-21)T
- a.** Apply laws, rules, procedures, and practices to the Case and perform thorough legal research and analysis; (7-1-21)T
- 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; (7-1-21)T
- 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; (7-1-21)T
- d.** Dedicate sufficient time to each Case; (7-1-21)T
  - e.** Promptly and independently investigate the Case; (7-1-21)T
  - f.** Request funds as needed to retain an investigator; (7-1-21)T
  - g.** Request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case; (7-1-21)T
  - h.** Continually evaluate the Case for defense investigations or expert assistance; (7-1-21)T
  - i.** Be present at the Initial Appearance and available to the Indigent Person in person or via technology, and: (7-1-21)T
    - i.** Preserve the client's constitutional and statutory rights; (7-1-21)T
    - ii.** Discuss the charges, case and potential and collateral consequences with the client; (7-1-21)T
    - iii.** Obtain information relevant to Idaho Criminal Rule 46 (bail or release on own recognizance) and if appropriate, seek release; (7-1-21)T
    - iv.** Encourage the entry of a not guilty plea at Initial Appearance except in circumstances where a guilty plea is constitutionally appropriate; (7-1-21)T
  - 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; (7-1-21)T
  - k.** Have sufficient time and private space to confidentially meet with Indigent Persons; (7-1-21)T
  - l.** Have confidential and secure information systems for Indigent Person's confidential information; (7-1-21)T
  - m.** Identify and resolve conflicts of interests in compliance with Idaho Rules of Professional Conduct (IRCP) and other applicable laws and rules; (7-1-21)T
  - n.** Be familiar with and competent to identify or use: (7-1-21)T
    - i.** Forensic and scientific methods used in prosecution and defense; (7-1-21)T
    - ii.** Mental, psychological, medical, environmental issues and impacts; (7-1-21)T
    - iii.** Written and oral advocacy; (7-1-21)T
    - iv.** Motions practice to exhaust good faith procedural and substantive defenses; (7-1-21)T
    - v.** Evidence presentation and direct and cross examination; (7-1-21)T
    - vi.** Experts as consultants and witnesses and expert evidence; (7-1-21)T
    - vii.** Forensic investigations and evidence; (7-1-21)T
    - viii.** Mitigating factors and evidence; (7-1-21)T

- ix. Jury selection methods and procedures; (7-1-21)T
- x. Electronic filing, discovery and evidence and systems; (7-1-21)T
- xi. Constitutional representation; and (7-1-21)T
- 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, seek training, or decline appointments. (7-1-21)T

**04. Additional Qualifications for Capital Cases.** Capital Defending Attorneys must meet the following additional requirements: (7-1-21)T

**a.** Have advanced familiarity and demonstrated competence with the above minimum requirements for Defending Attorneys; and (7-1-21)T

**b.** Have knowledge and experience in the following: (7-1-21)T

i. Capital laws, rules, procedures and practices; (7-1-21)T

ii. Capital mitigation; (7-1-21)T

iii. Use of mental health evaluations and evidence; (7-1-21)T

iv. Managing and litigating complex cases; (7-1-21)T

v. Assembling and leading a trial team; (7-1-21)T

vi. Capital jury selection methods and procedures; and (7-1-21)T

vii. Qualifications meeting or exceeding the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases to extent they do not conflict with Idaho law; (7-1-21)T

**c.** Lead trial Defending Attorney in Capital Cases will meet or exceed the following experience levels: (7-1-21)T

i. Active trial practitioner with no less than ten (10) years in criminal defense litigation; (7-1-21)T

ii. Lead counsel in no less than ten (10) felony jury trial tried to verdict; and (7-1-21)T

iii. Lead or co-counsel in no less than one (1) Capital Case tried to verdict or capital sentencing; (7-1-21)T

**d.** Trial co-counsel Defending Attorney in Capital Cases who are not qualified as lead trial counsel will meet or exceed the following experience levels: (7-1-21)T

i. Active trial practitioner with no less than five (5) years in criminal defense litigation and one (1) of the following: (7-1-21)T

ii. Lead counsel in no less than five (5) felony jury trial tried to verdict; or (7-1-21)T

iii. Lead or co-counsel in no less than one (1) Capital Case tried to verdict or capital sentencing; (7-1-21)T

**e.** Lead appellate/post-conviction Defending Attorney in Capital Cases will meet or exceed the

following experience levels: (7-1-21)T

i. Active appellate/post-conviction attorney with no less than ten (10) years in criminal defense litigation; and (7-1-21)T

ii. Lead counsel in no less than one (1) Capital or federal capital habeas corpus Case; (7-1-21)T

f. Appellate/post-conviction co-counsel in Capital Cases who are not qualified as lead appellate or lead post-conviction counsel will meet or exceed the following experience levels: (7-1-21)T

i. Active appellate and post-conviction practitioner with no less than five (5) years in criminal defense litigation; and (7-1-21)T

ii. Attorney in no less than one (1) felony appeal with appellate argument, or if tried to evidentiary hearing either a post-conviction or federal habeas corpus Case; (7-1-21)T

g. Lead trial or appellate/post-conviction counsel who do not meet the numeric years of practice or numeric number of trials/cases will meet the following alternate requirements: (7-1-21)T

i. Meet all the other minimum requirements to ensure their abilities, training, and experience are appropriate given the nature and complexity of a Capital Case, and (7-1-21)T

ii. Demonstrate they are qualified to provide lead trial representation or appellate and post-conviction representation in a Capital Case, as applicable, despite their years in practice and trials/cases handled; (7-1-21)T

h. Minimum requirements for Capital Case defense teams: (7-1-21)T

i. At least two (2) qualified Capital Defending Attorneys, one (1) designated lead and the other or others as co-counsel, appointed at or before the Initial Appearance; (7-1-21)T

ii. Immediate assembly of a team by Capital Defending Attorneys consisting of no less than the following: (7-1-21)T

(1) Fact investigator; (7-1-21)T

(2) Mitigation specialist; (7-1-21)T

(3) Person trained and professionally qualified to screen for mental and psychological screenings; and (7-1-21)T

(4) Other persons needed to provide effective and zealous representation; and (7-1-21)T

(5) Require ongoing training and compliance with standards. (7-1-21)T

**05. Caseloads and Workloads.** Defending Attorneys will have Caseloads and Workloads that are appropriately sized to permit effective representation as follows: (7-1-21)T

a. Caseload standard. Maximum Caseloads by Active Case type shall not during the reporting period exceed: (7-1-21)T

i. Two (2) Capital Cases at a time; (7-1-21)T

ii. Two hundred ten (210) non-capital felony Cases; (7-1-21)T

iii. Five hundred twenty (520) misdemeanor Cases; (7-1-21)T

- iv. Two hundred thirty-two (232) juvenile Cases; (7-1-21)T
  - v. One hundred five (105) child protection or parent representation Cases; (7-1-21)T
  - vi. Six hundred eight (608) civil contempt or mental health Cases; and (7-1-21)T
  - vii. Thirty-five (35) non-capital substantive appeal Cases. (7-1-21)T
  - viii. To determine maximum Caseloads for mixed Case types, add the percentage of the maximum Caseload for each category and the sum of those percentages is not to exceed one hundred percent (100%); and adjust the Caseload downward when the Case assignments are weighted toward more serious offenses, complex Cases, or those requiring significant expenditure of time and resources. (7-1-21)T
- b.** Maximum Caseloads will remain in effect until April 30, 2023, unless otherwise addressed by the Commission prior to that date. In the absence of a numerical Caseload rule, Defending Attorneys and counties should use the National Advisory Commission (NAC) Caseload limits recognized by the American Bar Association as a guideline for assessment. (7-1-21)T
- c.** Case Counting. (7-1-21)T
- i. A felony Case is counted as follows: (7-1-21)T
    - (1) A Case filed as a felony is counted as one (1) felony, whether it is dismissed, remanded, pled, or tried to completion; (7-1-21)T
    - (2) A Case filed as a misdemeanor that is later amended to a felony is counted as a felony; (7-1-21)T
  - ii. A probation violation or motion for contempt is counted as a separate Case; (7-1-21)T
  - iii. A Case that is conflicted or consolidated is counted by the Defending Attorney assigned to the conflicted or consolidated Case and not counted by the initial Defending Attorney; (7-1-21)T
  - iv. A Case sent to a problem-solving court is counted once as initially filed as a felony, misdemeanor, or juvenile Case; (7-1-21)T
  - v. A Case is counted as a Capital Case if, in any part of the reporting period, the state is legally entitled to seek the death penalty under Section 18-4004A, Idaho Code; (7-1-21)T
  - vi. Post-judgment motions are not counted as a Case; (7-1-21)T
- d.** Defending Attorneys who are unable to comply with the Caseload rules will notify their supervisor, Board of County Commissioners or the Court and request appropriate resources. (7-1-21)T
- e.** Workloads. Caseloads maximums are based on the following considerations: (7-1-21)T
- i. Adequate support staff; (7-1-21)T
  - ii. Cases of average complexity; (7-1-21)T
  - iii. Reasonable distribution of Cases throughout the year; and (7-1-21)T
  - iv. No supervisory duties; (7-1-21)T
- f.** Defending Attorneys unable to comply with the Workload rules will notify their supervisor, Board of County Commissioners or the Court and request appropriate resources. (7-1-21)T

**061. – 069. (RESERVED)**

**070. ATTORNEY ROSTERS REQUIREMENTS AND PROCEDURES.**

**01. Defending Attorney Roster. (7-1-21)T**

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. (7-1-21)T

i. Have an active license to practice law in Idaho; (7-1-21)T

ii. Attest they are in compliance with the Public Defense Rules or will comply with the Rules when appointed and representing an Indigent Person; (7-1-21)T

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; (7-1-21)T

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; (7-1-21)T

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. (7-1-21)T

**b. Continuing Eligibility. (7-1-21)T**

i. To remain on the Defending Attorney Roster attorneys must: (7-1-21)T

(1) Comply with the Public Defense Rules; (7-1-21)T

(2) Have completed the minimum CLE requirements under Subsection 090.03 of these rules; and (7-1-21)T

(3) Have completed an Annual Report. (7-1-21)T

ii. To address Defending Attorney Deficiencies: (7-1-21)T

(1) PDC Staff will review reported Defending Attorney Deficiencies and work directly with the Defending Attorney, and the county when appropriate, to resolve them. (7-1-21)T

(2) 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. (7-1-21)T

(3) 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 county and not the Defending Attorney. County responsibilities are set forth in these rules including without limitation Section 020 of these rules and subject to the county Deficiency process set forth in IDAPA 61.01.03, “Records, Reporting and Review,” Sections 050 through 060. (7-1-21)T

**02. Capital Defending Attorney Roster. (7-1-21)T**

- a. For Inclusion on the Capital Defending Attorney Roster, a Defending Attorney must: (7-1-21)T
  - i. Meet minimum qualifications under Subsection 060.04 of these rules; and (7-1-21)T
  - ii. Have completed minimum CLE requirements under Paragraph 090.03.b. of these rules within two (2) years; (7-1-21)T
  - iii. Have completed Capital Defending Attorney Roster forms. (7-1-21)T

b. PDC Staff or contractor investigates an applicant for initial inclusion on the Capital Defending Attorney Roster. The Commission appointed subcommittee reviews applications and PDC Staff reports and makes recommendations to the Commission. The Commission makes the final decision. (7-1-21)T

c. Continuing Eligibility. To remain on the Capital Defending Attorney Roster Defending Attorneys must comply with the Public Defense Rules and: (7-1-21)T

- i. Have completed the minimum CLE requirements under Subsection 090.03 of these rules; and (7-1-21)T
- ii. Have completed Capital Case reporting and authorization forms by November 1 every other year. (7-1-21)T

d. PDC Staff or contractor investigates continuing eligibility to remain on the Capital Defending Attorney Roster. The Commission appointed subcommittee reviews continuing eligibility and PDC Staff reports and makes recommendations to the Commission. The Commission makes the final decision. The Commission will remove attorneys who do not meet continuing eligibility requirements from the Capital Defense Roster. (7-1-21)T

03. **Confidentiality.** Information about an attorney’s fitness to represent Indigent Persons is confidential and exempt from the Public Records Act under Section 74-105(18)(a), Idaho Code. (7-1-21)T

**071. – 079. (RESERVED)**

**080. REVIEW OF ROSTER DECISIONS.**

**01. Denial of Initial Inclusion on the Defending Attorney Roster.** (7-1-21)T

a. An attorney may appeal a denial of initial inclusion on the Defending Attorney Roster by submitting a notice of appeal within fourteen (14) days of the date of the notice of denial. (7-1-21)T

b. The Commission will review a timely appeal and issue a final agency order affirming or reversing the denial, or take other action deemed appropriate by the Commission. (7-1-21)T

**02. Denial of Initial Inclusion on the Capital Defending Attorney Roster.** (7-1-21)T

a. A Defending Attorney may appeal a denial of initial inclusion on the Capital Defending Attorney Roster by submitting a notice of appeal within fourteen (14) days of the date of the notice of denial. (7-1-21)T

b. A hearing officer appointed by the Commission will review a timely appeal and issue a recommended order to the Commission. (7-1-21)T

c. The Commission will issue a final agency order adopting or rejecting the hearing officer’s recommended order, or take other action deemed appropriate by the Commission. (7-1-21)T

**03. Emergency Removal of an Attorney from the Defending Attorney Roster or Capital**



**Defending Attorney Roster.** (7-1-21)T

**a.** To prevent or avoid immediate danger when: (7-1-21)T

i. An attorney's Idaho license to practice law is suspended; (7-1-21)T

ii. An attorney is disbarred in Idaho; or (7-1-21)T

iii. An attorney's Idaho license status is inactive. (7-1-21)T

**b.** The attorney will be removed by the Executive Director who will notify the attorney and Commission upon issuance of the notice of removal which will include a statement of the immediate danger and is effective immediately. (7-1-21)T

**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; (7-1-21)T

**d.** An attorney may appeal their emergency removal by submitting a notice of appeal and all supporting documentation within fourteen (14) days of the date of the Executive Director's notice of removal. (7-1-21)T

**e.** The Commission will review a timely appeal and issue a decision within twenty-eight (28) days of receipt of timely filed notice and materials. (7-1-21)T

**f.** The Commission may base its decision on a written record or elect to hold a hearing. (7-1-21)T

**04. Removal of an Attorney from the Defending Attorney Roster or Capital Defending Attorney Roster for Other Reasons.** (7-1-21)T

**a.** An attorney removed from a Roster for reasons other than set forth in Subsection 080.03 of these rules, may appeal their removal by submitting a notice of appeal and all supporting documentation within fourteen (14) days of the Executive Director's order of removal. A Defending Attorney will remain on the Roster pending resolution of the appeal. A Defending Attorney who fails to file a notice of appeal within fourteen (14) days will be immediately removed from the Roster. (7-1-21)T

**b.** The Commission will review a timely appeal and issue a final agency order affirming or reversing the Executive Director's decision, or take other action deemed appropriate by the Commission. (7-1-21)T

**05. Confidentiality.** Information about an attorney's fitness to represent Indigent Persons is confidential and exempt from Public Records Act under Section 74-105(18)(a), Idaho Code. (7-1-21)T

**081. – 089. (RESERVED)**

**090. CONTINUING LEGAL EDUCATION.**

Roster members must complete the minimum continuing public defense legal education requirements as provided in Sections 19-850(1)(a)(vii)5 and 8, Idaho Code, as follows. (7-1-21)T

**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 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. (7-1-21)T

**02. Idaho Law.** Legal education must directly relate to Idaho substantive or procedural law and the Defending Attorney's public defense practice to count toward minimum requirements, and will not be approved if not substantially related. (7-1-21)T

**03. Minimum Number and Type of CLEs Required for Each Roster.** (7-1-21)T

**a.** Defending Attorney Roster – Minimum of seven (7) CLE credits each county fiscal year (October 1 – September 30); (7-1-21)T

**b.** Capital Defending Attorney Roster – Minimum of twelve (12) CLE credits with at least ten (10) from a nationally recognized and well-established capital trial training program, every other county fiscal year. Attorneys on both Rosters may count capital CLE credits toward the seven (7) CLE credits. (7-1-21)T

**c.** Defending Attorneys with supervisory or management duties – Minimum of two (2) CLE credits each county fiscal year in leadership skills, attorney management, or mentoring, which count toward the seven (7) CLE credits. (7-1-21)T

**091. – 999. (RESERVED)**