

## Section 7: Standards for Defending Attorneys

*The provisions of this section establish the standards for defending attorneys utilizing Idaho's Principles of an Indigent Defense Delivery System (IPIDDS) as outlined in Section 19-850(1)(a)(vii), Idaho Code. IPIDDS, in blue, were adopted by the Idaho Legislature as a guide for defending attorneys and the development of standards. The standards take into consideration case complexity, support services, and travel while striving to meet the constitutional requirements of the Sixth Amendment to the U.S. Constitution. These standards are intended to be used as a model for professional conduct and performance. They may or may not be relevant in the judicial evaluation of effective representation, depending upon the circumstances.*

### Performance Standards utilizing Idaho's Principles of an Indigent Defense Delivery System

- I. The delivery of indigent defense services should be independent of political and judicial influence, though the judiciary is encouraged to contribute information and advice concerning the delivery of indigent defense services.**
- II. Defending attorneys should have sufficient time and private physical space so that attorney-client confidentiality is safeguarded during meetings with clients.**
- III. Defending attorneys' workloads should permit effective representation.**
  - A. The caseload of a defending attorney shall allow the attorney to give each client the time and effort necessary to ensure effective representation. Neither indigent defense providers nor defending attorneys should accept caseloads that, by reason of their excessive size, interfere with the rendering of constitutional representation.
  - B. The Commission has chosen not to set a specific caseload standard at this time until an Idaho workload study can be completed. Counties should encourage defending attorneys not to exceed caseloads that would compromise the effective representation of their clients.
  - C. If a defending attorney is assigned to represent a group of clients in problem solving courts in addition to individual case assignments, consideration should be given to adjusting the caseload appropriately, recognizing that preparing for and appearing at such calendars requires additional attorney time.
  - D. Effective supervision is critical to the proper functioning of an indigent defense system. Those attorneys with supervisory responsibilities should carry a reduced caseload in recognition of the additional workload involved in providing meaningful supervision.
  - E. The increased complexity of practice will require a lower caseload. A caseload should be adjusted downward when the mix of case assignments is weighted toward capital cases, more serious offenses or case types that demand more investigation, legal research and writing, motion practice, use of experts and/or social workers, or other expenditure of time and resources.

**IV. Economic disincentives or incentives that impair defending attorneys' ability to provide effective representation should be avoided.**

**V. Defending attorneys' abilities, training and experience should match the nature and complexity of the cases in which they provide services including, but not limited to, cases involving complex felonies, juveniles and child protection.**

- A. A defending attorney shall minimally meet the requirements of Idaho Code §19-855 before representing indigent persons or other individuals who are entitled to be represented by an attorney at public expense.
- B. A defending attorney shall be familiar with substantive Idaho law, constitutional law, criminal law, ethical rules, criminal procedure, rules of evidence, and local rules and practices. Defending attorneys have a continuing obligation to know the changes and developments in the law and have the ability to recognize collateral consequences.
- C. Defending attorneys shall be familiar with current forensic and scientific issues that can arise in a case, including current technology used by law enforcement and other investigative officers, and the legal issues concerning defenses that can be raised. Defending attorneys shall be able to effectively litigate those issues.
- D. Defending attorneys shall be familiar with mental health, substance abuse, poverty, education and other psychological, medical and social issues that affect and impact the lives of their indigent clients.
- E. Defending attorneys shall be familiar with office technology commonly used in the legal community, and technology used within the applicable court system. Defending attorneys shall be able to thoroughly review materials that are provided in an electronic format.
- F. Prior to undertaking the defense of an indigent defendant or other person entitled to an attorney at public expense, counsel should have sufficient experience to provide competent representation for the case. A defending attorney should accept more serious and complex cases only after having had experience and/or training in less complex matters. As such, supervising attorneys should take the experience of a defending attorney into consideration when assigning cases. At a minimum, defending attorneys without adequate experience shall consult with a more experienced defending attorney before handling more complex cases.
- G. Defending attorneys should, when possible, consult with more experienced attorneys to acquire knowledge and familiarity with all facets of indigent defense representation, including serving as co-counsel to more experienced attorneys.
- H. Upon assignment to a case that requires specialized knowledge (with the exclusion of capital cases), a defending attorney shall acquire at least three (3) continuing legal education hours in the specialized area as soon as reasonably practicable if such training has not been acquired within the last three (3) years. If a training course is not readily available, a defending attorney shall consult with a more experienced defending attorney with such specialized training until a course is available. Specialized areas include, but are not limited to the following:

- a. Juvenile cases;
- b. Child protection cases;
- c. Termination of parental rights and guardianship cases;
- d. Civil contempt;
- e. Mental health commitment cases;
- f. Immigration law; and
- g. Cases involving significant mental health and/or competency issues.

I. A defending attorney shall not be assigned to a capital case unless such attorney has met the qualifications in and is a member of Performance Standard – Capital Counsel Qualifications and Roster, *infra*.

I.J. Defending attorneys shall engage in continuing legal education as required in Principle VIII, *infra*.

**VI. The defending attorney assigned to a particular case should, to the extent reasonably practicable, continuously oversee the representation of that case and personally appear at every substantive court hearing.**

A. A defending attorney should be appointed at the initial appearance and shall be immediately available in-person or through technology to an indigent defendant upon such appointment. At the initial appearance, the defending attorney should make efforts to preserve all of the defendant's constitutional and statutory rights, and seek pre-trial release at the initial appearance under conditions that serve the best interests of the defendant. Further, the defending attorney should encourage the entry of a not guilty plea in all but the most extraordinary of circumstances where a disposition at initial appearance is constitutionally appropriate.

B. In order to successfully advocate on a defendant's behalf at an initial appearance, a defending attorney should obtain information relevant to pre-trial release pursuant to Idaho Criminal Rule 46, and if possible, discuss the charges and possible consequences with the defendant.

C. Once assigned to a defendant's case, to the extent reasonably practicable, a defending attorney shall be present at all critical stages for that defendant. This is sometimes referred to as vertical representation.

C.D. A defending attorney has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance. See *infra* Performance Standard – Investigations and Experts. Decisions to limit investigation must take into consideration the client's wishes and the client's version of the facts, except in capital cases where constitutional protections require investigation and/or mitigation without regard to the client's wishes.

**VII. There should be reasonable equity between defending attorneys and prosecuting attorneys with respect to resources, staff and facilities.**

A. A defending attorney shall have equal access to investigators and experts as a prosecuting attorney. Reasonable requests for funds to retain an investigator or an expert must be funded as required by law.

**VIII. Defending attorneys should obtain continuing legal education relevant to their indigent defense cases.**

- A. Defending attorneys shall annually complete seven (7) hours of continuing legal education courses relevant to the representation of indigent defendants or other individuals who are entitled to be represented by an attorney at public expense. Courses shall include skills training and educational programs in order to maintain and enhance overall preparation, oral and written advocacy, and litigation and negotiation skills. This may include CLE courses in specialized areas as listed in Principle V, *supra*.
- B. Defending attorneys shall handle cases that reflect their abilities, training and experience as required in Principle V, *supra*.

**IX. Defending attorneys should be regularly reviewed and supervised for compliance with indigent defense standards and, if applicable, compliance with indigent defense standards as set forth in contractual provisions.**

- A. A defending attorney shall provide relevant information to a PDC Regional Coordinator or PDC Staff member as requested.
- B. Pursuant to Idaho Code §19-864, a defending attorney shall submit a completed annual report to the PDC each year by November 1.
- C. PDC Regional Coordinators shall report to the PDC regarding compliance issues with defending attorneys in their respective regions as described in IDAPA 61.01.06.

**X. Defending attorneys should identify and resolve conflicts of interest in conformance with the Idaho rules of professional conduct and other applicable constitutional standards.**

**Additional Performance Standards for Defending Attorneys**

Performance Standard – Investigation and Experts

- A. Defending Attorneys shall conduct an independent investigation of the charges and offense as promptly as practicable.
- B. When appropriate, a defending attorney shall request funds to retain an investigator to assist with the client’s case.
- C. A defending attorney shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution’s case.

Performance Standard – Capital Counsel Qualifications and Roster

**A. Applicability**

So long as the state is legally entitled to seek the death penalty, these standards shall apply.

**B. The Defense Team**

1. The defense team shall consist of no fewer than two attorneys qualified in accordance with these standards, an investigator and a mitigation specialist.
2. The defense team shall contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.
3. In a case in which the death penalty may be imposed:
  - a. At the first court appearance after a crime in which a death notice could be filed is charged, two qualified defending attorneys shall be appointed to represent an indigent defendant.
  - b. One counsel shall be designated as “lead counsel” and the second as “co-counsel.”
4. As soon as possible after counsel has been assigned to a capital case, lead counsel shall assemble a defense team, in consultation with co-counsel to the extent practicable, selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:
  - a. At least one mitigation specialist and one fact investigator;
  - b. At least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and
  - c. Any other members needed to provide zealous and effective representation.

**C. Requisite Training and Skills required**

1. Defending attorneys seeking to qualify to receive appointments as capital counsel shall complete a comprehensive training program, approved by the PDC, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in capital cases in the following areas:
  - a. Relevant state, federal, and international law and court rules;
  - b. Pleading and motion practice;
  - c. Pretrial investigation preparation and theory development regarding guilt/innocence and penalty;
  - d. Jury selection focused on methods that have proven successful in capital cases, such as the Colorado method;
  - e. Trial preparation and presentation, including the use of experts;
  - f. Ethical considerations particular to capital defense representation;
  - g. Preservation of the record and of issues for direct appeal and post-conviction review;
  - h. Counsel’s relationship with the client and his family;
  - i. Post-conviction litigation in state and federal courts;
  - j. The presentation and rebuttal of scientific evidence and developments in mental health fields and other relevant areas of forensic and biological science; and
2. Defending attorneys seeking to remain on the roster shall attend and successfully complete, at least once every two years, a specialized training program approved by the PDC that focuses on the defense of capital cases. This program shall consist of at least 12 CLE hours.

3. Non-Attorneys wishing to be eligible to participate on the defense teams shall receive continuing professional education appropriate to their areas of expertise.

**D. Attorney Qualifications**

**1. Trial**

**a. Lead trial counsel assignments shall be made to attorneys who:**

i. Are experienced and active trial practitioners with at least ten (10) years litigation experience in criminal defense; and

ii. Have served as lead counsel in no fewer than ten (10) felony jury trials of cases which were tried to verdict; and have served either as lead or co-counsel in one case in which the death penalty might have been imposed and which was tried through to verdict, or served as lead counsel in the sentencing phase of a capital case; and

iii. Are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

iv. Have attended and successfully completed at least twelve (12) hours of PDC-approved capital training or educational programs which focus on capital cases, within the last two (2) years; and

v. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases; and

vi. Have substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases; and

vii. Have skill in the management and conduct of complex negotiations and litigation; and

viii. Have skill in legal research, analysis, and the drafting of litigation documents; and

ix. Have skill in oral advocacy; and

x. Have skill in the use of expert witnesses and familiarity with the common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence; and

xi. Have skill in the investigation, preparation, and presentation of evidence bearing upon mental status; and

xii. Have skill in the investigation, preparation, and presentation of mitigating evidence; and

xiii. Have skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and

xiv. Have skill in jury selection focused on methods that have proven successful in capital cases, such as the Colorado method.

vi. Are familiar with and agree to abide by the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty cases.

b. Co-counsel assignments shall be assigned to attorneys who qualify as lead counsel under paragraph D.1 of this Performance Standard or meet the following requirements:

- i. Are experienced and active trial practitioners with at least five (5) years litigation experience in criminal defense; and
- ii. Have prior experience as lead counsel in no fewer than five (5) felony jury trials of cases which were tried to verdict; and
- iii. Have attended and successfully completed at least ten (10) hours of PDC-approved capital training, within the last two years; and
- iv. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases; and
- v. Have substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases; and
- vi. Have skill in the management and conduct of complex negotiations and litigation; and
- vii. Have skill in legal research, analysis, and the drafting of litigation documents; and
- viii. Have skill in oral advocacy; and
- ix. Have skill in the use of expert witnesses and familiarity with the common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence; and
- x. Have skill in the investigation, preparation, and presentation of evidence bearing upon mental status; and
- xi. Have skill in the investigation, preparation, and presentation of mitigating evidence; and
- xii. Have skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and
- xiii. Have skill in jury selection focused on methods that have proven successful in capital cases, such as the Colorado method.
- xiv. Are familiar with and agree to abide by the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty cases.

c. Alternate Procedures.

Attorneys who do not meet the qualifications in paragraphs D.1.a or D1.b, may still apply for inclusion on the Capital Counsel Roster. Such attorneys must be in compliance with Indigent Defense Standards, have extensive criminal trial defense counsel experience and demonstrate to the PDC that competent representation will be provided in a capital case. Attorneys under this paragraph shall also meet the following qualifications:

- i. Demonstrated familiarity with and agree to abide by the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and Performance of Defense

Counsel in Death Penalty Cases and Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty cases; and

ii. Experience in some stage of death penalty litigation, whether or not the death penalty was imposed, which does not meet the levels required in paragraphs D.1.a or D.1.b above; or

iii. Attendance within one (1) year of application to a PDC-approved intensive capital training program.

## 2. Appellate/Post-Conviction Counsel

a. Lead Appellate or post-conviction counsel must qualify as "lead trial counsel" under paragraph D.1.a, second chair must qualify as "co-counsel" under paragraph D.1.b, or meet the following requirements:

i. Be experienced and active post-conviction and appellate practitioners with at least ten (10) years' experience in criminal defense.

ii. Have served as court appointed or retained counsel in the appeal or the post-conviction review of a case in which the death penalty was imposed, or have served as counsel in a habeas corpus death penalty case in Federal Court.

iii. Have attended and successfully completed at least twelve (12) hours of PDC-approved capital training, within the last two (2) years.

iv. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases; and

v. Have substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases; and

vi. Have skill in the management and conduct of complex negotiations and litigation; and

vii. Have skill in legal research, analysis, and the drafting of litigation documents; and

viii. Have skill in oral advocacy; and

ix. Have skill in the use of expert witnesses and familiarity with the common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence; and

x. Have skill in the investigation, preparation, and presentation of evidence bearing upon mental status; and

xi. Have skill in the investigation, preparation, and presentation of mitigating evidence; and

xii. Have skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and

xiii. Have skill in jury selection focused on methods that have proven successful in capital cases, such as the Colorado method.

xiv. Are familiar with and agree to abide by the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of



Defense Counsel in Death Penalty Cases and Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty cases.

b. Alternate Procedures.

Attorneys who do not meet the qualifications in paragraph 2.a, may still apply for inclusion on the Capital Counsel Roster. Such attorneys must be in compliance with Indigent Defense Standards, have extensive criminal trial defense counsel experience or extensive civil litigation experience, and demonstrate to the PDC that competent representation will be provided in a capital case. Attorneys under this paragraph shall also meet the following qualifications:

i. Demonstrated familiarity with and agree to abide by the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases; and

ii. Experience with the appeal and/or post-conviction litigation of death penalty cases or cases where the death penalty was sought but not imposed which does not meet the levels detailed in paragraph D.2.a above; or

iii. Attendance within one (1) year of application to a PDC-approved intensive capital training program.

**E. Procedures for Maintaining the Capital Counsel Roster**

The PDC will maintain a roster of defending attorneys who are competent and eligible to represent capital defendants. The roster shall contain the names of attorneys eligible for appointment as lead counsel for trial and appeal/post-conviction cases, pursuant to the qualification requirements specified in these Standards. The roster shall also contain the names of attorneys eligible for appointment as co-counsel for trial and appeal/post-conviction cases, pursuant to the qualification requirements specified in these Standards.

1. Application

a. Attorneys may obtain an application form from the PDC.

b. Completed applications shall be submitted to the PDC. The PDC staff shall review the application for completeness. If the application is incomplete, it shall be returned to the applicant, explaining what further information is required.

2. Review and Recommendation

a. A standing Capital Counsel Review and Recommendation Committee shall be established with membership appointed by the PDC. Members shall be attorneys in good standing with the Idaho State Bar.

b. The PDC staff shall forward completed applications to the Capital Counsel Review and Recommendation Committee. Upon receipt, a thorough investigation of the applicant's background, experience, training and an assessment of whether the applicant is competent to provide adequate legal counsel to a capital defendant shall be completed.

c. The application and recommendation will then be forwarded to the PDC who will determine whether or not to include the applicant on a roster.

3. Term of Eligibility

Once approved for inclusion on the capital counsel roster, an attorney may remain on the roster for a period of two (2) years, without the need to reapply, so long as the attorney continues to comply with

the requirements of these standards, Indigent Defense Standards, and all applicable professional and ethical responsibility standards. An attorney who fails to meet these standards can be removed from the roster at any time.

#### 4. Idaho Supreme Court Capital Counsel Roster Members

Defending Attorneys serving on the Idaho Supreme Court's Capital Counsel Roster as of May 1, 2018, may apply for immediate inclusion on the PDC Capital Counsel Roster at the same level at which they are currently listed. Attorneys must demonstrate they are actively handling criminal defense cases of some complexity and show proof of attendance at the required level of capital training as approved by the PDC within the last two (2) years for the level of service they will be providing. Such application must be made on or before November 1, 2018. Upon the expiration of the term of eligibility, grandfathered attorneys must show compliance with the requirements of these standards, Indigent Defense Standards, and all applicable professional and ethical responsibility standards. A defending attorney who fails to meet these standards at that time, will be removed from the Capital Counsel Roster.

#### 5. Capital Counsel Roster Availability

The PDC shall distribute the Capital Counsel Roster to counties and Administrative District Judges at least annually. The roster shall also be available on the PDC website: <https://pdc.idaho.gov>.