

PDC Current and Pending Rules

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PDC Current and Pending Rules

Comments and Overview

Words, Chapters & Incorporated Documents				
	Total Words	Total Restrictive Words	Rules Chapters	Documents Incorporated by Reference
Current Rules	21,012	242	7	3
Pending Rules	7,980	40	4	0

Comment: Process

- Rulemaking process was inadequate

2020 Rulemaking Timeline	<p>July 2019 – Negotiated Rulemaking Meetings</p> <ul style="list-style-type: none"> ○ Equity and Independence <p>July 1, 2020 – Negotiated Rulemaking Notice Published</p> <ul style="list-style-type: none"> ○ 2019 Rulemaking Carried Over and ○ 2020 Rulemaking to Simplify and Clarify per Red Tape Reduction <p>July 16, 2020 – Negotiated Rules Outline Approved at PDC Meeting</p> <p>July 17, 2020 – Negotiated Rules Outline and Meeting Notice</p> <ul style="list-style-type: none"> ○ Outline and Notice Link Posted and ○ Outline and Notice Link Emailed to Stakeholders <p>July 23, 2020 – Statewide Negotiated Rulemaking Meeting</p> <p>July 27, 2020 – Written Comment on Negotiated Rulemaking Concluded</p> <p>Sept 14, 2020 – Draft Proposed Rules and Public Hearing Notice</p> <ul style="list-style-type: none"> ○ Draft Rules and Notice Link Posted and ○ Draft Rules and Notice Emailed to Stakeholders <p>Oct 8, 2020 – Proposed Rules and Public Hearing Notice Published</p> <ul style="list-style-type: none"> ○ Proposed Rules and Public Hearing Notice Posted and ○ Proposed Rules and Public Hearing Link Emailed to Stakeholders <p>Oct 14, 2020 – Statewide Public Hearing</p> <p>Oct 28, 2020 – Written Comment on Proposed Rules Concluded</p> <p>Oct 30, 2020 – Pending Rules Adopted at PDC Meeting</p>
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Comments: Vertical Representation	
<ul style="list-style-type: none"> ○ Definition of Vertical Representation in the proposed rule exceeds statute and current rule and leaves no room for scheduling conflicts ○ Vertical representation is essential to constitutional representation and proposed rule represents this and legislative directive to PDC 	
Idaho Code	<ul style="list-style-type: none"> ● IC 19-850(1)(a)(vii) requires the PDC to promulgate rules establishing standards based on certain principles including <ul style="list-style-type: none"> ▪ 6. Attorney assigned to a particular case should, to the extent reasonably practicable, continuously oversee representation of that case and personally appear at every substantive court hearing
Current Rule	<p>2018 Standard VI includes this principle and provides that</p> <ul style="list-style-type: none"> ● A. an attorney should be appointed at initial appearance and shall be immediately available to a client in-person or via technology ● 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”
Pending Rule	<p>IDAPA 61.01.01.22 further defines Vertical Representation including what is meant by reasonably practicable:</p> <p>A Defending Attorney appointed to represent an Indigent Person shall, to the extent reasonably practicable, continuously and personally oversee the representation of the client’s case through trial proceedings and preservation of right to appeal. For purposes of this definition reasonably practicable means a Defending Attorney will make all efforts to personally represent the client during all substantive proceedings where the facts of the case are discussed by counsel or the Court, including but not limited to advising the Court of any conflict at the time of setting, providing accurate unavailable dates and in the case of unforeseen absences, filing a motion or stipulation to continue.</p>

Comment: Caseloads	
<ul style="list-style-type: none"> ○ Caseload/workload standards are insufficient 	
Current and Pending Rule	<p>Did not change caseload maximums, clarified existing rules and extended the caseload maximums for one additional year due to the impact of COVID-19 on caseload data. Under the current rules, the caseload maximums will expire on April 30, 2022 and default to the NAS caseload standards</p>

Comments: Funding Requirements	
<ul style="list-style-type: none"> ○ PDC is usurping county BOCC budgeting authority and imposing budget requirements on the county greater than those in statute ○ Pending rules regarding Supported Defense Model and Defending Attorney Resources outline what is necessary to prepare defending attorneys with resources for representation 	
Idaho Code	<ul style="list-style-type: none"> • IC 19-860(2) requires the county to provide for the maintenance and support the office of public defender (if that is the model the county has chosen) • IC 19-861(2) requires the county to provide appropriate facilities and supplies necessary for carrying out the public defender’s responsibilities • IC 19-862(1) requires the county to appropriate enough money to fund its indigent defense model and no less than its local share. • IC 19-862(2) does not require a county to expend its full local share if it can comply with indigent defense standards for less than that share • IC 19-862A(6)(c) requires county to cure any material breach of the terms of previously approved financial assistance to be eligible for subsequent assistance • Under IC 19-862A(8) a county may be required to spend more than its local share if the cost to achieve its compliance plan costs more than the amount of the county’s local share and awarded financial assistance. • IC 19-850(1)(c) requires the PDC to review indigent defense providers and defending attorneys to evaluate compliance with standards and the terms of financial assistance • IC 19-851(8) (local share) requires the PDC to calculate the minimum amount the county must budget for public defense, and for the determination of eligibility for financial assistance, based on information provided and certified by the county clerk
Current Rule	IDAPA 61.01.04.026.06 permits the PDC to review the use, misuse or non-use of financial assistance, and consider this information when determining eligibility. See also 61.01.04.027 (unused funds) and 029 (fraudulent information)
Pending Rule	IDAPA 61.01.03.020 (Defending Attorneys) and 030. (counties) defines information for recordkeeping and reporting of information related to public defense or financial assistance and consolidates these into a single chapter. Pending Rules direct counties/defending attorneys to not provide access to confidential information except when necessary (ie when applying for ELF)

<p>Comments: Deficiencies</p> <ul style="list-style-type: none"> ○ PDC is not authorized to remedy deficiencies at the county's cost and doing so undermines the county's authority to budget and select its own defending attorneys ○ Deficiency standard is too high; PDC is not doing enough and should be doing more monitoring and evaluating of public defender operation, including gathering information from indigent defendants 	
<p>Idaho Code</p>	<ul style="list-style-type: none"> ● IC 19-862A(1) requires all counties, indigent defense providers and defending attorneys to cooperate and participate with the PDC in the review of their indigent defense services ● IC 19-862A(11) requires the PDC to take the following actions if the PDC determines any county has failed to materially comply with indigent defense standards: <ul style="list-style-type: none"> ▪ (a) require the county's upcoming compliance proposal to specifically address cure of material noncompliance ▪ (b) if willful and material noncompliance, notify county of intent to remedy specific deficiencies at the county's expense, and provides for meeting, mediation and administrative review. If the county does not timely appeal or if review affirms the PDC Commission's decision, the PDC shall remedy at the expense of the county. ▪ IC 19-851(5) defines Indigent Defense Provider to include any designee of the PDC to remedy a deficiency under IC 19-862A(11) ▪ IC 19-851(6) defines Indigent Defense Standard as any rule promulgated by the PDC under IC 19-850(1)(a) ● Under IC 19-862A(12) <ul style="list-style-type: none"> ▪ the county shall pay the PDC for amount incurred by the PDC to remedy ▪ If the county does not, the state treasurer shall intercept sales tax payments to the county to reimburse the PDC ● IC 19-850(1) requires the PDC to: <ul style="list-style-type: none"> ▪ (a)(vi) promulgate rules establishing procedures for the oversight, implementation and enforcement of indigent defense standards so the right to counsel is constitutionally delivered ▪ (c) review indigent defense providers and defending attorneys to evaluate compliance with standards and the terms of financial assistance
<p>Current Rule</p>	<ul style="list-style-type: none"> ● Under 2018 Standards IX PDC Regional Coordinators shall report compliance issues to the PDC ● Under IDAPA 61.01.06 <ul style="list-style-type: none"> ▪ .021. the PDC is responsible for overseeing compliance and do things like assess county and attorney compliance, file compliance reports with the state, identify and investigate non-compliance ▪ 021.03.a indigent defense providers and defending attorneys will report compliance issues as soon as reasonably practicable

	<ul style="list-style-type: none"> ▪ .023.07 (defending attorneys) and .08 (counties) must report compliance issues ▪ .026.05 if the PDC finds a deficiency is material and willful, it will take action under IC 19-862A(11), “which may include withholding grant funds or the PDC takeover of an indigent defense delivery system” ▪ .026.06 “the violation of an established rule is material noncompliance” ▪ .026.07 “the violation of an established standard that is done voluntarily with either intentional disregard of, or indifference to, the requirements of these rules will be deemed willful noncompliance.” • IDAPA 61.01.08 <ul style="list-style-type: none"> ▪ .18 defines Deficiency as “violation of established standard for which the timeline for compliance has passed pursuant to IC 19-862A(9) [March 31 for rules in effect as of May 1 the prior year]” ▪ .19 defines Finding of Non-Compliance as “an instance where a county or defending attorney is not in compliance with applicable indigent defense standards and may be related to a deficiency in the provision of indigent defense services.” It also says this finding may not be a Deficiency and “still requires a finding of material and willful non-compliance before the take-over provisions of Section 19-862A, Idaho Code, are invoked.”
<p>Pending Rule</p>	<ul style="list-style-type: none"> • IDAPA 61.01.01.010.12 defines Deficiency as “noncompliance with any Public Defense Rule by a county, Defending Attorney or their employee, contractor, representative or other agent” • IDAPA 61.01.01.010.18 defines Material as “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.” • IDAPA 61.01.01.010.23 defines Willful as “an action or failure to act that is deliberate and with knowledge” • IDAPA 61.01.03.050 provides for a collaborative and less formal process for dealing with Deficiencies at any stage so these can get resolved at the staff level, and a higher threshold for material noncompliance/deficiency. “Taking over” an indigent defense delivery system is not authorized under the pending rules

<p>Comments: Minimum Qualifications</p> <ul style="list-style-type: none"> ○ If Defending Attorneys must be on the PDC Roster, then the PDC is telling counties who they must hire/fire ○ Attorney licensing and competency are in the purview of the ID Supreme Court and Idaho State Bar, not the PDC's ○ PDC minimum qualifications for attorneys are not, and should be, quantifiable 	
<p>Idaho Code</p>	<ul style="list-style-type: none"> ● Under IC 19-855 no person may be given the primary responsibility to represent an indigent person “unless he is licensed to practice law in [Idaho] and is otherwise competent to counsel and defend a person charged with a crime” ● IC 19-860(2) requires that a candidate for public defender be licensed in Idaho “and competent to counsel and defend a person charged with a crime” ● 19-850(1) requires the PDC to: <ul style="list-style-type: none"> ▪ (a)(vi) promulgate rules establishing procedures for the oversight, implementation and enforcement of indigent defense standards so the right to counsel is constitutionally delivered ▪ (a)(vii) promulgate rules establishing standards based on certain principles including defending attorney’s <ul style="list-style-type: none"> ○ 5. abilities, training and experience matching nature and complexity of case ○ 8. continuing legal education relevant to their indigent defense cases ▪ (c) review indigent defense providers and defending attorneys to evaluate compliance with standards and the terms of financial assistance
<p>Current Rule</p>	<ul style="list-style-type: none"> ● 2018 Standards provide minimum standards defending attorneys must meet to represent indigent persons, including <ul style="list-style-type: none"> ▪ V.A the Idaho license and competency requirements in 19-855 ▪ V.B-E familiarity with laws, procedures, evidence and investigations, medical, mental and social issues, and technology ▪ V.F-G appropriate experience for cases and encourage mentoring with more experienced attorneys ▪ V.H requires at least 3 CLE hours of specialized training for certain case assignments ▪ VIII requires at least 7 CLE hours relevant to the representation of indigent defendants ▪ Capital Counsel requirements ● Under IDAPA 61.01.07.020.01.a the PDC will maintain a roster of attorneys/staff who are compliant with current standards ● Under IDAPA 61.01.07.020.01.c the PDC will maintain a roster of non-compliant attorneys/staff, which must include the reason for noncompliance and the date the attorney was removed from the roster for noncompliance. ● Under IDAPA 61.01.02.025 an attorney may be removed from the roster for failing to submit an annual report (and refers to 61.01.06.026) ● Under IDAPA 61.01.06.026.04

	<ul style="list-style-type: none"> ▪ b. a defending attorney who fails to take steps toward correcting a finding of noncompliance will be removed from the roster but may still provide indigent defense services. ▪ c. a defending attorney who is noncompliant after 6 months is prohibited from accepting additional indigent defense cases in the county in which the attorney is not compliant. ▪ Current rules do not provide a process for removal or review, only for PDC authorization to resume work on indigent defense cases on finding of compliance
<p>Pending Rule</p>	<ul style="list-style-type: none"> • IDAPA 61.01.02 subsections 050. (Court Appointment of Competent Attorneys), 060. (Defending Attorney Minimum Requirements) and 070. (Roster Requirements and Procedures) further define the requirements and process for ensuring competent and constitutional representation as follows: <ul style="list-style-type: none"> • 050. Appointment of Competent Defending Attorneys Requires court to appoint attorneys from the Roster except in limited circumstances upon findings by the court • 060. Minimum Qualifications for attorneys representing indigent persons <ul style="list-style-type: none"> • 03.a-n detailed list of minimum qualifications for defending attorneys • 04.a-h detailed list of additional minimum qualifications for capital defending attorneys • 070. Roster: <ul style="list-style-type: none"> ▪ 01. Defending Attorney Roster requirements: <ul style="list-style-type: none"> • Idaho license • Attest in compliance or will be in compliance with rules when representing indigent persons, • Have completed 7 CLEs within previous 1 year or will complete in 60 days, and no longer requires 3 specialized CLE hours • Application • Attorneys must be on roster to represent indigent persons at public expense, unless court appointment with good cause/competency. • Under IDAPA 61.01.02.020.01.a counties may employ or contract attorneys not on the Roster and require them to apply • Ongoing eligibility: <ul style="list-style-type: none"> ▪ 7 CLEs annually ▪ Annual Report required by 19-864 • 02. Capital Roster requirements: <ul style="list-style-type: none"> • Meet minimum requirements in 060.04 • 12 CLEs within previous 2 years • Application • Investigation/Committee/Commission review/decision

	<ul style="list-style-type: none"> • Ongoing eligibility: <ul style="list-style-type: none"> ▪ 12 CLEs every other year ▪ Capital Case reporting and authorization form every other year • 080. Process for reviewing denial/removal from Roster <ul style="list-style-type: none"> • Emergency review • Non-emergency review • Current and Pending Rules contain same competency requirement: <ul style="list-style-type: none"> ▪ Under 2018 Standard V “a defending attorney shall minimally meet the requirements in IC 19-855 [Idaho license and competent to represent indigent persons] before representing indigent persons ▪ Under pending 61.01.02.060.01 and .02 attorneys need to “be licensed to practice law in Idaho and comply with Bar rules” and” be competent to counsel and represent Indigent Persons” • Current and Pending Rules contain same minimum qualifications and Pending Rules provide more detail about each • Current and Pending Rules give specific direction for meeting some requirements (ie minimum # of CLE credits and minimum # of attorneys appointed to a capital case) and flexible direction for other requirements, thereby giving the counties/defending attorneys discretion to decide how best to meet them in their particular county/office
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<p>Comments: Independence</p> <ul style="list-style-type: none"> ○ PDC's encouragement of the use of independent counsel to review and negotiate public defender contracts is unnecessary and an unreasonable additional expense on the county ○ County prosecutor is statutorily mandated to advise the county and proposed rules interfere with BOCC attorney-client relationship ○ Proposed independence and equity rules are appreciated and needed ○ Proposed independence rule does not go far enough 	
Idaho Code	<ul style="list-style-type: none"> ● IC 19-850(1)(a)(vii) requires the PDC to promulgate rules establishing standards based on certain principles including <ul style="list-style-type: none"> ▪ 1. Delivery of public defense services should be independent of political and judicial influence though judiciary encouraged to contribute info and advice
Current Rule	2018 Standard I contains this principle
Pending Rule	<ul style="list-style-type: none"> ● IDAPA 61.01.02.030 provides rules ensuring public defense is independent of political and judicial influence, these include: <ul style="list-style-type: none"> ▪ 01. Making sure selection of defending attorneys does not involve conflicts of interest ▪ 02. Using an independent committee to select the main providers of public defense, building on requirement in IC 19-860(2); and providing for an independent regional committee to address independence issues ▪ 03. Making sure defending attorneys are not penalized for advocating for indigent persons ▪ 04. Limiting prosecutor involvement in public defense matters that may jeopardize independence of any defending attorney or undermine delivery of public defense ▪ 05. Encouraging counties to use independent legal counsel to negotiate defending attorney contracts ● IDAPA 61.01.04.020.07 limits prosecutor involvement in financial assistance process if the involvement may jeopardize the independence of any defending attorney or undermine the delivery of public defense

Comment	<p>Resource Equity</p> <ul style="list-style-type: none"> ○ Proposed resource equity rule should be conditioned on the state providing financial assistance to the counties to meet it ○ It is not clear how resource equity is reviewed and assessed ○ Proposed independence and equity rules are appreciated and needed ○ Proposed rule may encourage hiring defenders with minimal experience
Idaho Code	<ul style="list-style-type: none"> ● IC 19-860(1) requires that compensation paid to the public defender must not be less than that paid to the county prosecutor for that portion of his practice devoted to criminal law ● IC 19-861(3) entitles a defending attorney to use the same state facilities for the evaluation of evidence as are available to the prosecutor; and if he considers their use impractical the court may authorize the use of private facilities paid for by the county ● IC 19-850(1)(a)(vii) requires the PDC to promulgate rules establishing standards based on certain principles including <ul style="list-style-type: none"> ▪ 7. Reasonable equity between attorneys and prosecuting attorneys with respect to resources, staff and facilities
Current Rule	<p>2018 Standards VII.A requires that a defending attorney have equal access to investigators and experts as prosecuting attorney, and reasonable requests for funds to retain such must be funded as required by law</p>
Pending Rule	<p>IDAPA 61.01.02.040 further defines equitable resourcing and county review of the resource needs of defending and prosecuting attorneys to budget for and equitably meet their needs, including</p> <ul style="list-style-type: none"> ● 01. Equal access to staff and facilities ● 02. Similar compensation as properly funded prosecutor and staff with similar experience ● 03. Equal access to resources necessary to legal representation, including for investigation and evaluation of evidence ● 04. – 05. Makes sure the county frequently reviews equity [the items described in 01-03]. The Rules do not impose specific resource or funding requirements, or a review schedule, on the counties, it's up to the county to remain engaged and informed on defending and prosecuting attorney needs and make sure they are equitably met

Comments: Continuing Legal Education	
<ul style="list-style-type: none"> ○ CLEs are in the purview of the Idaho State Bar ○ PDC is not authorized to require that CLEs meet PDC requirements ○ PDC training requirements are an unreasonable additional expense on the county ○ Proposed rules should include requirement for specialized training 	
Idaho Code	<ul style="list-style-type: none"> ● IC 19-850(1) requires the PDC to promulgate rules establishing: <ul style="list-style-type: none"> ▪ (a)(i) training and CLE requirements, which shall promote competency and consistency in public defense case types ▪ (a)(vii) standards based on certain principles including ▪ 5. Defending attorney’s abilities, training and experience match nature and complexity of case ▪ 8. Defending attorneys obtain continuing legal education relevant to their indigent defense cases
Current Rule	<ul style="list-style-type: none"> ● Current Rules require attorneys to complete CLEs meeting certain requirements, which means the CLEs are reviewed by the PDC to confirm they qualify. <ul style="list-style-type: none"> ▪ Standard V.H requires attorneys to complete at least 3 CLEs when assigned to a case requiring specialized knowledge, if such training has not been completed in the prior 3 years; and V.J says attorneys must comply with VIII ▪ Standard VIII requires attorneys to complete at least 7 CLEs annually, relevant to the representation of indigent persons (this can include the 3 above) ▪ Standards for Capital Counsel require capital attorneys to complete at least 12 CLEs meeting certain requirements every 2 years
Pending Rule	<ul style="list-style-type: none"> ● IDAPA 61.01.02.090 <ul style="list-style-type: none"> ▪ Consolidates CLE requirements ▪ Includes information about review and approval ▪ No longer includes the requirement for 3 specialized CLE hours ● Notably, CLEs for the PDC do not have to be approved by the ISB

Comments: Protecting Client Confidential Information	
<ul style="list-style-type: none"> ○ Confidentiality requirements imply that a county is required to have separate server and system only for public defense records, a separate IT team and/or a separate human resources department, and these are unreasonable financial obligations 	
Idaho Code	Protecting client confidential information <ul style="list-style-type: none"> • IC 19-850(1)(a)(vii) requires the PDC to promulgate rules establishing standards based on certain principles including <ul style="list-style-type: none"> ▪ Having sufficient time and private space so that attorney-client confidentiality is maintained when meeting with clients
Current Rule	2018 Standard II contains this principle
Pending Rule	<ul style="list-style-type: none"> • IDAPA 61.01.02. provides rules ensuring protection of client confidential information, these include: <ul style="list-style-type: none"> ▪ 020.02 making sure counties provide defending attorneys adequate resources for carrying out their responsibilities, including: <ul style="list-style-type: none"> ▪ a. confidential meeting spaces to protect client confidentiality ▪ b. confidential servers and systems to protect client confidentiality ▪ d. other resources to provide constitutional representation • 020.03.f contract provisions requiring contracting attorneys to safeguard and retain case files as necessary to protect indigent persons ▪ 060.03 <ul style="list-style-type: none"> ▪ b. Protection of client confidentiality, and if breached, notice to client and others when necessary to preserve clients constitutional and statutory rights ▪ k. Sufficient time and private space to meet with clients ▪ l. Confidential and secure information systems to confidentially access and store Indigent Person confidential information • Pending rules do not impose specific administrative, physical or technical controls for safeguarding confidential information, it's up to the county/office to determine the appropriate controls to implement to ensure these requirements are met