



## Idaho

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### Re: ACLU formal comments on draft proposed PDC Rules for 2018

Kimberly and members of the Public Defense Commission:

The American Civil Liberties Union and the American Civil Liberties Union of Idaho asks the Idaho Public Defense Commission (PDC) to consider the following comments on several of the proposed rules published online in August 2017:

1. 61.01.06 – Rules Governing Procedures for the Oversight, Implementation, Enforcement and Modification of Indigent Defense Standards
2. 61.01.07 – Rules Governing the Standards for Defending Attorneys that Utilize Idaho’s Principles of an Indigent Defense Delivery System
3. 61.01.08 – Rules Governing the Administration of the Idaho Indigent Delivery Systems – Rule Definitions
4. Performance Standards utilizing Idaho’s Principles of an Indigent Defense Delivery System

After reviewing the proposed rules, we believe they require further edits and revisions to ensure that Idaho’s indigent defense system is constitutionally sound. Please see below for specific recommendations and/or questions for clarification for each rule listed above.

#### **61.01.06 – Rules Governing Procedures for the Oversight, Implementation, Enforcement and Modification of Indigent Defense Standards**

- *021.03. Indigent Defense Providers and Defending Attorneys:* What will meaningful cooperation and participation look like for indigent defense providers and defending attorneys, particularly in the PDC review process (subsection a), and how will it be monitored by the PDC and its staff?
  - We recommend amending 021.03.b. to state, “Report to the PDC all deficiencies with compliance within 30 days of determining that such deficiencies exist.”
  - We also recommend amending 021.04.b. to state, “Report to the PDC all deficiencies with compliance within 30 days of determining that such deficiencies exist.”
- *023.01. Applicability of Oversight Program:* What appears to be missing from this list of monitoring techniques is any communication with the individuals who hold the Sixth Amendment right itself—the clients. We recommend that their constitutional rights be at the very center of any monitoring program created by the PDC. In doing so, the PDC should ensure that indigent clients know what is happening in their case, ensure that clients feel like they have enough information to make decisions about their cases and are able to speak with their attorney privately and promptly to get their questions answered. In centering this oversight program around the unique needs of indigent clients, the PDC should evaluate, track, and record the client’s level of participation and their trust and rapport with their defending attorney(s), which is essential to a functional client-lawyer relationship.

- *023.03. PDC Staff Reporting to PDC:* We recommend more clearly defining what the term “regular reports” means and what information would be required to be provided in such a report - caseload, outcomes (pleas v. trials, etc.), hours spent per case, etc.
  - We also recommend defining “policy change” so that public defense stakeholders are clear as to what triggers a new initial review.
  - Under 021.03.a.ii., we are unsure who would be providing the “notice of deficiency.” If indigent defense providers or defending attorneys would be required to provide notice themselves, this raises substantial concerns about self-policing among defense providers and the likely outcome that such deficiencies would not be reported to the PDC and its staff for fear of adverse outcomes.
- *023.07. Indigent Defense Providers and Defending Attorneys Reporting to PDC Staff:* This provision presents significant independence issues — without additional protections to promote candor, any indigent defense provider or defending attorney who reports non-compliance risks their incumbency, whether through contract non-renewal or removal from an institutional office. Instead, we suggest that various Board of Commissioners’ actions (contract non-renewal, chief defender removal, budget reduction, probationary status, etc.), taken after a report of non-compliance by an indigent defense provider or defending attorney automatically trigger additional review and other scrutiny by the PDC. Additionally, individual defending attorneys in multi-attorney offices who report compliance issues to the PDC are risking termination or other adverse employment actions. For these scenarios, we again suggest that if a defending attorney reports to the PDC any adverse employment action taken against them after previously reporting a compliance issue to the PDC that too should trigger additional review and other PDC scrutiny.
- *023.09. Other Stakeholders Reporting to PDC Staff:* How will the PDC facilitate the complaint process for indigent defendants – including creating a process for collecting such reports and informing indigent clients that such a process exists? The rule should set out a clear procedure for investigating and remedying deficiencies reported by the central stakeholders: the individuals whose constitutional rights (and personal liberty) are at stake.
- *024.04. Items Subject to Review:* The items subject to review in this paragraph will not reveal much about the quality of representation and should instead include additional materials for review. We recommend including, at the very least: caseloads, extent of investigations, rates of cases taken to trial, motions filed, pretrial release efforts, and information from supervisors, among other things.
- *024.06. Persons Subject to Interview:* This should explicitly include and require interviews with public defender clients to ensure the PDC continues to center its work on those whose Sixth Amendment rights continue to be jeopardized under Idaho’s current indigent defense delivery system.
- *025.01. Corrective Action Plans:* For subsection (a) – County Response, we strongly urge the PDC to adopt a shorter response timeframe of 30 days. The current timeframe outlined in the draft standards will only further perpetuate the harm suffered by indigent defendants every day as they navigate Idaho’s public defense system. Given the option of a request for an extension in filing the report – which we also recommend only be for good cause – we firmly believe the 30-day timeframe provides a

reasonable period for counties to respond while helping to diminish the ongoing harm indigent defendants may face in light of non-compliance. Although we acknowledge that government systems can be slow to correct themselves, the stakes are extremely high—with many individuals’ jobs, futures, families, liberty, and life at stake anytime a deficiency is identified in this system.

- *026.04. Defending Attorney Non-Compliance:* Subsection (b) states that non-compliant defending attorneys will be removed from the public defense roster while deficiencies in representation are corrected, yet they are still allowed to provide indigent defense services during this time period. Based on the language of this section, there appears to be no penalty for attorney non-compliance with PDC directives and rules, which in turn will continue to perpetuate many of the existing problems with Idaho’s public defense system.

### **61.01.07 – Rules Governing the Standards for Defending Attorneys that Utilize Idaho’s Principles of an Indigent Defense Delivery System**

- *020.01. Public Defense Rosters:* For subsection (c), we recommend publishing appropriate contact information for each county on the PDC website to facilitate indigent defendants reaching indigent defense providers and defending attorneys.

### **61.01.08 – Rules Governing the Administration of the Idaho Indigent Delivery Systems – Rule Definitions**

- *010.03. Case:* Based on the provided definition of a case, it is not clear what happens when multiple defending attorneys work on the same charges. As such, this definition should be more clearly defined as to how cases are counted when multiple attorneys are involved, especially in non-vertical representation cases.
  - For subsection (d), we recommend replacing “significant representation” with “0.2 hours or less of defending attorney work.”
- *010. Indigent Defense Stakeholders (“stakeholders”):* To ensure that the PDC’s work continues to be centered on those whose Sixth Amendment rights need defending, we recommend adding “indigent defendants” as an explicit stakeholder.

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

- *V. Training and Experience:* The current language provided in subsection (H) appears to indicate that, aside from capital cases, defending attorneys will be allowed to continue with representation even if they have not yet received training in the specialized area in question. To ensure that defending attorneys have the training and guidance that specialized cases require, we recommend that attorneys without the requisite training only be assigned to specialized cases with direct supervision by a more experienced attorney with the required training and expertise related to the specialized case at hand.
- *VII. Equity Between Defending Attorneys and Prosecutors:* For subsection (A), we agree, “defending attorneys shall have equal access to investigators and experts as a prosecuting attorney.” However, we suggest that a clearer definition for “access” would be beneficial to the standards and should include that defending attorneys shall be able to hire investigators and experts of their own, to the same extent that prosecuting attorneys are able to use law enforcement investigators and experts.

- In an effort to more clearly define what qualifies as a “reasonable” request, we offer the following language suggestion: “Requests for funds by a defending attorney or Indigent Defense Provider to pay for investigators, experts, or forensic testing must be funded, unless the entity receiving the request can establish by clear and convincing evidence that the services will not assist in the defense for which they are sought.”
- We also recommend that the standards require that defending attorneys and indigent defense providers can access funds for investigators, experts, and forensic testing confidentially and ex parte.
  
- *Performance Standard – Investigation and Experts:* For the following set of standards, we recommend the following additions:
  - Subsection (A) does not define what is entailed in an “investigation.” To ensure a clear understanding among indigent defense providers and defending attorneys, we suggest integrating the NLADA’s 2006 “Performance Guidelines for Criminal Defense Representation,” particularly guidelines 4.1 through 4.3.<sup>1</sup>
  - In addition, we recommend including the ABA’s Defense Function Standard on Investigation, Std. 4-4.1., specifically subsection (d) which reads as follows: “Defense counsel should determine whether the client’s interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.”
  - For Subsection (B) we recommend the following language changes: “Except in exceptional cases that may not lend themselves to investigation, a defending attorney shall request funds to retain an investigator, or, for defending attorneys working for an institutional public defender office with investigators on staff, shall submit a request for investigative support, to assist with the client’s case.”
  
- *Performance Standard – Capital Counsel Qualifications and Roster:* For the following set of standards, we recommend the following additions:
  - For subsection (B) regarding the defense team, we recommend including an additional provision regarding regular defense team meetings. We propose the following language addition: “5. Lead counsel will be responsible for ensuring regular defense team meetings and frequent communication among team members regarding the investigation and litigation.”
  - To clearly emphasize the importance of being familiar with the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, we recommend making that the second requirement (ii) listed under section (D)(1)(a).
  - Under section (2) regarding appellate/post-conviction counsel, we believe that a minimum of five years of criminal defense experience combined with the additional skill requirements provided in the standard are sufficient to serve as adequate counsel.

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<sup>1</sup> <http://www.nlada.org/defender-standards/performance-guidelines/black-letter>



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- While skills in investigation and evidence are critical requirements to serve as trial counsel, we don't believe they are necessary requirements to serve as appellate or post-conviction counsel.
- For subsection (E)(3) regarding term of eligibility, we feel that annual or biannual certification of compliance with capital training and adherence to ABA guidelines is sufficient to maintain one's position on the capital defense roster.

We appreciate the ongoing opportunities to provide comments on the various public defense rules currently drafted as a part of negotiated rule-making before the 2018 legislative session. We look forward to continuing to work with the Idaho Public Defense Commission to collaboratively reform Idaho's indigent defense delivery system. Upon release of a formal draft, we will provide further, formal comment before the late October 2017 official deadline.

A handwritten signature in black ink, appearing to read "Kathy Griesmyer".

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