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REQUEST FOR PUBLIC COMMENT: RECOMMENDATIONS TO SUPREME COURT FOR CHANGES TO CRIMINAL RULE 6.1

The Commission on Court Appointed Attorneys (formerly known as the Indiana Public Defender Commission and hereinafter “Commission”) is requesting public comment on recommendations to update Criminal Rule 6.1, the state’s capital (death penalty) rule. The Commission anticipates submitting its final recommendations to the Supreme Court for consideration after its next quarterly meeting to be held on September 18, 2024.

We ask that you submit your comments to information@pdcom.in.gov by August 9, 2024.

The following recommended changes were transmitted to the Commission by the Indiana Public Defender Council, including recommendations by the State Public Defender’s Office on changes to the post-conviction rules.

Key changes include the following, in the approximate order in which they appear.

General Rule Change

- Updates the state agencies notified when the Supreme Court is notified of a death penalty request filing

Trial Counsel Rule Changes

- Increases the number of attorneys to be appointed on a capital case from two to “no fewer than two”
- The Commission requested two versions for comment be submitted on the following:
 - Requiring the chief public defender, should a county have one, to make the “no fewer” than two public defender appointments, and if there is no chief public defender, that the Indiana Public Defender Council make the appointments, or
 - Make no change from the current practice of allowing the trial court to make the appointment

- Makes numerous qualification changes, including: 1) a newly created general qualifications section, 2) more specific jury experience requirements with a new recency component, 3) a definition of “prior experience,” and 4) an expansion of the CLE requirements
- Provides minimum, specific requirements for the non-attorney defense team
- Requires that the private caseload of an attorney must be considered when making an appointment, updates limitations on the number of open cases attorneys may have, and changes timeline restrictions for the setting of other trial dates.
- Allows for the hourly rate on a capital case to adjust during the life of the case
- Clarifies when an existing public defender contract may be adjusted by the trial court to account for the assignment of a death penalty case
- Updates the methodology for certifying a salaried public defender’s compensation compliance to the Supreme Court

Appellate Counsel Changes

- Requires two appellate attorneys, lead and co-counsel, and only allows original trial counsel to be co-counsel on an appeal
- Creates new qualifications requirements which are different for lead and co-counsel and includes numerous other changes, including years of experience, and previous appellate case experience
- Expands the CLE requirements and adds a recency component
- Updates the compensation component to better mirror the changes made in the trial counsel section

Post-Conviction Relief Change

- Creates an entirely new qualifications section for post-conviction relief

The Commission has done its best to illustrate the changes made below by showing the new language in blue. Given the significant changes, some stricken language is present. However, for the full comparison you will need to consult the current rule which can be found by clicking [HERE](#).

Rule 6.1. Capital Cases – Proposed revisions

(A) Supreme Court Case Number.

Whenever a prosecuting attorney seeks the death sentence by filing a request pursuant to Ind. Code § 35-50-2-9, the prosecuting attorney must file that request with the trial court and with [the Indiana Office of Court Services](#) ~~Supreme Court Services. Indiana Supreme Court, 315 State House, Indianapolis, Indiana 46204.~~ Upon receipt of same, Supreme Court Services must open a case number in the Supreme Court and notify counsel, [the Indiana Prosecuting Attorneys Council, the Indiana Public Defender Council, and the Commission on Court Appointed Attorneys.](#)

(B) Appointment of Qualified Trial Counsel.

TWO VERSIONS FOR CONSIDERATION:

Upon a finding of indigence, ~~and request for appointed counsel~~, it is the duty of ~~the judge—either the chief public defender, or in a county with no chief public defender, the Indiana Public Defender Council, to name no fewer~~ than two qualified attorneys to represent an individual in a trial proceeding where a death sentence is sought. ~~The judge presiding in a capital case shall enter a written order appointing the attorneys selected by either the chief public defender, or in a county with no chief public defender, the Indiana Public Defender Council, specifically named.~~ The provisions for the appointment of counsel set forth in this section do not apply in cases wherein counsel is employed at the expense of the defendant ~~or represents the defendant pro bono.~~

OR KEEP THE APPOINTING AUTHORITY THE SAME

Upon a finding of indigence, it is the duty of the judge presiding in a capital case to enter a written order specifically naming ~~no fewer than~~ two qualified attorneys to represent an individual in a trial proceeding where a death sentence is sought. The provisions for the appointment of counsel set forth in this section do not apply in cases wherein counsel is employed at the expense of the defendant ~~or represents the defendant pro bono.~~

(1) Qualifications, Generally.

~~Attorneys assigned to a capital case or accepting appointments pursuant to this rule must provide each client with quality representation in accordance with constitutional and professional standards. Counsel must be familiar with, and guided by, the performance standards found within the most recent American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases as well as the most recent Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.~~

(2) Lead Counsel; Qualifications.

~~One of the attorneys appointed by the court~~ must be designated as lead counsel. To be eligible to serve as lead counsel, an attorney must:

- (a) be an experienced and active trial practitioner with at least five years of criminal litigation experience;
- (b) have prior experience either:
 - (i) ~~as lead counsel in no fewer than two cases where the death penalty was sought; or~~
 - (ii) ~~lead or co-counsel in no fewer than five felony jury trials:~~
 - (1) ~~where the highest charge is a level 5 felony or greater;~~
 - (2) ~~at least one of which is a serious violent felony as defined by Ind. Code § 35-47-4-5;~~
 - (3) ~~which were tried to completion within the previous ten years of the appointment; and~~
 - (4) ~~have prior experience as lead or co-counsel in at least one case in which the death penalty was sought;~~

“Prior experience” is defined as continued representation from appointment through the conclusion of the case; or substantial participation in the preparation of the case for trial and sentencing, including performance of a fact and mitigation investigation;

(d) have completed within two years prior to appointment at least ~~eighteen~~ ~~twelve~~ hours of training in the defense of capital cases in at least one course approved by the Commission on Court Appointed Attorneys of which at least twelve hours must be subject-matter training and six hours must be skills-based training. The attorney must also complete the above-referenced hours at least every two years during the pendency of the case in the trial court. An attorney not meeting the training requirements at the time of appointment may petition the Supreme Court for temporary waiver of the training requirements. The petition must contain the name, location, and date of the training that the attorney will complete and must certify to the Supreme Court that the education was completed.

(3) Co-Counsel, Qualifications.

The remaining attorney(s) must be designated as co-counsel. To be eligible to serve as co-counsel, an attorney must:

- (a) be an experienced and active trial practitioner with at least three years of criminal litigation experience;
- (b) have prior experience ~~either: as lead or co-counsel in no fewer than three felony jury trials:~~
 - (i) as lead or co-counsel in at least one case where the death penalty was sought; or
 - (ii) in no fewer than three felony jury trials:
 1. where the highest charge is a level 5 felony or greater;
 2. in at least one of which, counsel served as lead counsel;
 3. which were tried to completion within five years of the appointment;

(c) have completed within two years prior to appointment at least ~~eighteen~~ ~~twelve~~ hours of training in the defense of capital cases in at least one course approved by the Commission on Court Appointed Attorneys of which at least twelve hours must be subject-matter training and six hours must be skills-based training. The attorney must also complete the above-referenced hours at least every two years during the pendency of the case in the trial court. An attorney not meeting the training requirements at the time of appointment may petition the Supreme Court for temporary waiver of the training requirements. The petition must contain the name, location, and date of the training that the attorney will complete and must certify to the Supreme Court that the education was completed.

(4) Defense Team

As soon as possible after counsel has been assigned to a capital case, counsel shall assemble a defense team with non-attorney team members such that the team includes:

- (a) At least one member qualified to be a fact investigator;
- (b) At least one member qualified to be a mitigation specialist;

(c) At least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and

(d) Any other members needed to provide zealous and effective representation.

(5) Workload of Appointed Counsel.

In the appointment of counsel, the nature and volume of the workload of appointed counsel must be considered to assure that counsel can direct sufficient attention to the defense of a capital case.

(a) Appointed counsel must not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

(b) An appointment or assignment of counsel in a capital case must include an assessment of the impact of the appointment on the entirety of the attorney's public and private workload, including the administrative duties of a chief or managing public defender.

(c) Attorneys who are salaried or contractual public defenders in a county may be appointed as trial counsel in a capital case, if:

(i) they are not counsel on more than one other capital case pending in a trial court;

(ii) if the assignment or appointment would be the attorney's second capital case pending in a trial court, the attorney will not have any other open felony public defense cases while the capital cases are pending in the trial court; if the assignment or appointment would be the attorney's only capital case pending in a trial court, the attorney's public defense caseload, across all counties, will not exceed twenty open felony cases while the capital case is pending in the trial court;

(iii) the attorney will receive no new public defense appointments within thirty days of a trial setting in the capital case;

(iv) none of the attorney's cases, public or private, will be set for trial within fifteen thirty days of the trial setting in the capital case; and

(v) compensation is provided as specified in paragraph (C).

~~(d) The workload of full-time salaried capital public defenders will be limited consistent with subsection (B)(3)(a). The head of the local public defender agency or office, or in the event there is no agency or office, the trial judge, must not make an appointment of a full-time capital public defender in a capital case without assessing the impact of the appointment on the attorney's workload, including the administrative duties of a chief or managing public defender. In assessing an attorney's workload, the head of the local public defender agency or office, or in the event there is no agency or office, the trial judge must be guided by Standard J of the Standards for Indigent Defense Services in Non-Capital cases as adopted by the Indiana Public Defender Commission, effective January 1, 1995, and must treat each capital case as the equivalent of forty felonies under the Commission's "all felonies" category. Appointment of counsel is also subject to subsections (B)(3)(c)(ii), (iii) and (iv).~~

(C) Compensation of Appointed Trial Counsel.

All hourly rate trial defense counsel appointed in a capital case must be compensated under subsection (1) of this provision. ~~upon presentment and approval of a claim for services detailing the date, activity, and time duration for which compensation is sought.~~ Hourly rate counsel must submit periodic billings not less than once every thirty days after the date of appointment, ~~detailing the date, activity, and time duration for which compensation is sought.~~ by the trial court. All salaried capital public defenders compensated under subsection (4) of this provision ~~must present a monthly report detailing the date, activity, and time duration of services rendered after the date of appointment.~~ Periodic payment during the course of counsel's representation must be made.

(1) Hours and Hourly Rate.

Defense counsel appointed at an hourly rate in capital cases must be compensated ~~only~~ for the time and services ~~performed that are reasonable and necessary.~~ The trial judge must ~~review and approve counsel's billing within thirty days after submission of billings by counsel.~~

Attorneys appointed at an hourly rate shall be compensated for services performed at the hourly rate set forth by the Chief Administrative Officer (CAO) of the Indiana Office of Judicial Administration (IOJA). Beginning July 1, 2024, and July 1st of each even year thereafter, the CAO will announce the hourly ~~rate for defense services performed~~ on or after January 1, of the years following the announcement. The hourly ~~rate of one hundred thirty-six (\$136) dollars an hour will be increased using the Gross Domestic Product Implicit Price Deflator, as announced by the United States Department of Commerce, for the last two years ending December 31st preceding the announcement.~~ The increase by the CAO must be rounded to the next closest whole dollar.

In the event the ~~trial~~ judge determines that the rate of compensation is ~~below that which~~ is representative of practice in the community, the ~~trial appointing~~ judge may request the CAO of the IOJA to authorize payment of an ~~increased~~ hourly rate of compensation in a specific case.

(2) Support Services and Incidental Expenses.

Counsel appointed at an hourly rate in a capital case must be provided, upon an ex parte showing to the trial court of reasonableness and necessity, with adequate funds for ~~investigative, expert, and other services~~ ~~the purpose of securing investigative services, mitigation specialists and services related to mitigative efforts, Defense-Initiated Victim Outreach (DIVO) services, expert witnesses, and any other service~~ deemed necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase. In addition to the hourly rate provided in this rule, all counsel must be reimbursed for reasonable and necessary incidental expenses approved by the trial judge. Counsel may seek advance authorization from the trial judge, ex parte, for specific incidental expenses. Full-time salaried public defenders must be provided with adequate funds for ~~investigative, expert, and other services~~ ~~the purpose of securing investigative services, mitigation specialists and services related to mitigative efforts, Defense-Initiated Victim Outreach (DIVO) services, expert witnesses, and any other service~~ deemed necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase, as determined by the head of the local public defender agency or office, or in the event there is no agency or office, by the trial judge as set forth above.

(3) Contract Public Defenders.

If counsel is appointed to a death penalty case in the county in which counsel is also generally contracted to perform other defense services, the county entity that is charged with issuing counsel's contract, may adjust counsel's rate of compensation for those other defense services, during the pendency of the death penalty case, in order to account for counsel's case assignment limitations established by this rule.

(4) Salaried Public Defenders.

In those counties having adopted a Comprehensive Plan as set forth in Ind. Code § 33-9-15 et. Seq., which has been approved by the Commission on Court Appointed Attorneys, and who are in compliance with Commission standards authorized by Ind. Code § 33-9-13-3(2), a full-time 1.0 FTE salaried capital public defender meeting the requirements of this rule may be assigned in a capital case by the head of the local public defender agency or office, or in the event there is no agency or office, by **TWO VERSIONS:** the Indiana Public Defender Council or the trial judge. Salaried capital public defenders may be designated as either lead counsel or co-counsel. Salaried capital lead counsel and co-counsel must be paid salary and benefits equivalent to the average of the salary and benefits paid to lead prosecuting attorneys and prosecuting attorneys serving as co-counsel, respectively, assigned to capital cases in the county.

~~Each year, by July 1, Those counties wishing to utilize~~ appointing 1.0 FTE salaried public defenders to for capital cases must submit within forty-five days of appointment to a capital case to the CAO of the IOJA the salary and benefits proposed to be paid to the salaried public defenders for the upcoming year along with the salaries and benefits paid to lead prosecutors and prosecutors serving as co-counsel assigned to the capital cases. in the county in the thirty-six months prior to July 1, or a certification that no such prosecutor assignments were made. Updated salary information must be provided within forty-five days after there is a change in salary of a prosecutor or public defender assigned on the case. The CAO must verify and confirm to the Commission on Court Appointed Attorneys and the requesting county that the proposed salary and benefits are in compliance with this rule. In the event a county determines that the rate of compensation set forth herein is not representative of practice in the community, the county may request the CAO to authorize a different salary for a specific and the county would need to renew that request by July 1 each year.

(D) Transcription of Capital Cases.

The trial or post-conviction court in which a capital case is pending must provide for real-time stenographic reporting with computer-aided transcription of all phases of trial and sentencing and all evidentiary hearings, including both questions and answers, all rulings of the judge in respect to the admission and rejection of evidence and objections thereto and oral argument. If the parties agree, on the record, the court may permit real-time electronic recording or stenographic reporting without computer-aided transcription of pre-trial attorney conferences and pre-trial or post-trial non-evidentiary hearings and arguments.

(E – G) – NO CHANGES (Imposition of Sentence, Setting of Initial Execution Date, and Stay of Execution Date)

(H)^{*1} – Initiation of Appeal.

When a trial court imposes a death sentence, it must on the same day sentence is imposed order the court reporter and clerk to begin immediate preparation of the record on appeal.

(I) Appointment of Appellate Counsel.

Upon a finding of indigence, the trial court imposing a sentence of death must immediately enter a written order specifically naming ~~counsel~~ **at least two attorneys** under this provision for appeal. If qualified to serve as appellate counsel under this rule, trial counsel ~~must~~ **may only** be appointed as ~~sole~~ or co-counsel for appeal.

(1) Lead Appellate Counsel; Qualifications

An attorney appointed to serve as **lead** appellate counsel for an individual sentenced to die, must:

(a) be an experienced and active trial or appellate practitioner with at least **five** ~~three~~ years of experience in criminal litigation;

(b) have prior experience either:

(i) as appellate counsel in no fewer than two appeals where the death penalty was sought; or

(ii) as appellate counsel in no fewer than **ten (10)** ~~five~~-felony **appeals convictions** in federal or state court, **including at least one serious violent felony as defined by Ind. Code 35-47-4-5** within the last five years; and

(c) have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases and **have completed within five years prior to appointment at least six hours of training in appellate practice, both in** courses approved by the Commission on Court Appointed Attorneys.

(2) Co-Counsel Appellate Counsel; Qualifications.

An attorney appointed to serve as appellate co-counsel for an individual sentenced to die, the attorney must:

(a) be an experienced and active trial or appellate practitioner with at least two years of experience in criminal litigation.

(b) have prior experience within the last three years as appellate counsel in no fewer than three **(3)** felony convictions in federal or state court; and

(c) have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases and **have completed within five years prior to appointment at least six hours of training in appellate practice, both in** courses approved by the Commission on Court Appointed Attorneys.

(3) Workload of Appointed Appellate Counsel.

¹ (H) – Post-conviction relief moved to (K)

In the appointment of appellate counsel, ~~the judge must assess~~ the nature and volume of the **public and private** workload of appointed appellate counsel **must be assessed** to assure that counsel can direct sufficient attention to the appeal of the capital case. In the event the appointed appellate counsel is under a contract to perform other defense or appellate services for the court of appointment, no new cases for appeal must be assigned to such counsel until the Appellant's Brief in the death penalty case is filed.

(J) Compensation of Appellate Counsel.

~~All hourly rate appellate defense counsel appointed in a capital case must be compensated under subsection (1) of this provision. upon presentment and approval of a claim for services~~ Hourly rate counsel must submit periodic billings not less than once every thirty days after the date of appointment detailing the date, activity, and time duration for which compensation is sought.

(1) Hours and Hourly rate.

Appellate defense counsel appointed to represent an individual sentenced to die must be compensated ~~under this provision upon presentment and approval of a claim for services for time and services performed at the hourly rate of ninety dollars only for that time and those services determined by the trial judge to be reasonable and necessary for the defense of the defendant. The trial judge's determination must be made within thirty days after submission of billings by counsel. Counsel may seek advance authorization from the trial judge, ex parte, for specific activities or expenditures of counsel's time.~~ **that are reasonable and necessary at the same hourly rate set forth in section (C)(1). The appointing judge must review and approve counsel's billing within thirty days after submission of billings by counsel.**

~~The hourly rate set forth above must be subject to review and adjustment as set forth in section (C)(1).~~

In the event the appointing judge determines that the rate of compensation is **below that which is not** represe

ntative of practice in the community, the appointing judge may request the CAO of the IOJA to authorize payment of an **increased** ~~different~~ hourly rate of compensation in a specific case.

(2) Contract **Public Defenders.**

~~In the event appointed appellate counsel is generally employed by the court of appointment to perform other defense services, the rate of compensation set for such other defense services may be adjusted during the pendency of the death penalty appeal to reflect the limitations of case assignment established by this rule.~~ If appellate counsel is appointed to a death penalty case in the county in which counsel is also generally contracted to perform other defense services, the county entity that is charged with issuing counsel's contract, may adjust counsel's rate of compensation for those other defense services, during the pendency of the death penalty appeal, in order to account for counsel's case assignment limitations established by this rule.

~~(3) Salaried Capital Public Defenders.~~

~~In the event appointed appellate counsel is a salaried capital public defender, as described in section (C)(4), the county must comply with, and counsel must be compensated according to, the requirements of section (C)(4).~~

~~(4) Incidental Expenses.~~

~~In addition to the hourly rate or salary provided in this rule, appellate counsel must be reimbursed for reasonable incidental expenses as approved by the court of appointment.~~

(K) Post-Conviction Relief

(1) Stay – Duty of Counsel

Within thirty days following completion of rehearing, private counsel retained by the inmate or the State Public Defender (by deputy or by special assistant in the event of a conflict of interest) must enter an appearance in the trial court, advise the trial court of the intent to petition for post-conviction relief, and request the Supreme Court to extend the stay of execution of the death sentence. A copy of said appearance and notice of intent to file a petition for post-conviction relief must be served by counsel on Supreme Court Services. When the request to extend the stay is received, the Supreme Court will direct the trial court to submit a case management schedule consistent with Ind. Code § 35-50-2-9(i) for approval. On the thirtieth day following completion of any appellate review of the decision in the post-conviction proceeding, the Supreme Court must enter an order setting the execution date. It is the duty of counsel of record to provide notice to Supreme Court Services of any action filed with or decision rendered by a federal court that relate to defendants sentenced to death by a court in Indiana.

(2) Appointment of Qualified Post-Conviction Counsel

In cases where appellate proceedings have been completed and the death penalty has been imposed, upon a finding of indigency by the State Public Defender, the State Public Defender shall appoint at least two qualified post-conviction attorneys to represent the defendant.

All attorneys appointed must:

- (a) be an experienced and active post-conviction practitioner;
- (b) have trial, appellate, or post-conviction experience in the use of, and challenges to mental health and forensic expert witnesses and the use of mitigating evidence; and
- (c) be familiar with the practice and procedure of the appropriate courts of the jurisdiction; and
- (d) have attended and successfully completed, within two years prior to their appointment, at least twelve hours of training focused on representation in capital cases; and
- (e) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate, and/or post-conviction experience if it is clearly

demonstrated to the appointing authority that competent representation will be provided to the capital charged indigent defendant. Attorneys appointed under this paragraph shall meet one or more of the following qualifications:

- (a) Experience in trial, appeal, and/or post-conviction representation in death penalty cases which does not meet the levels detailed above;
- (b) Specialized post-graduate training in the defense of persons accused of capital crimes;
- (c) The availability of ongoing consultation support from experienced post-conviction death penalty counsel.

(3) Lead Counsel, Qualifications.

One of the attorneys appointed must be designated as lead counsel. In addition to the qualifications in subsection (2) of this section, to be eligible to serve as lead counsel, an attorney must:

- (a) have prior experience as lead counsel in no fewer than three post-conviction evidentiary hearings or appeals of serious and complex cases in state or federal court.
- (b) have experience in at least two post-conviction cases in which the charge was murder;

(4) Workload of Appointed Post-Conviction Counsel.

In the appointment of post-conviction counsel, the nature and volume of the workload of appointed counsel must be assessed to assure that counsel can direct sufficient attention to the post-conviction action of the capital case. Attorneys may be appointed in no more than two pending capital post-conviction cases at any given time.