

* The proposed amendment to Criminal Rule 6.1 would update language on appointments, qualifications, compensation, contract and salaried status, and related requirements for counsel in capital cases. The proposed amendment would also add requirements for counsel in post-conviction relief proceedings for capital cases.

Rule 6.1. Capital Cases

(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 Office of Judicial Administration (OJA) Supreme Court Services, Indiana Supreme Court, 315 State House, Indianapolis, Indiana 46204. Upon receipt of same, OJA Supreme Court Services must open a case number in the Supreme Court and notify counsel, the Indiana Prosecuting Attorneys Council (IPAC), the Indiana Public Defender Council (IPDC), and the Commission on Court Appointed Attorneys (CCAA).

(B) Appointment of Qualified Trial Counsel.

Upon a finding of indigence by and request for appointed counsel, it is the duty of either the chief public defender, or in a county with no chief public defender, the Executive Director of the Indiana Public Defender Council, to name no fewer than the judge presiding in a capital case to enter a written order specifically naming two qualified attorneys to represent an individual in a trial proceeding where a death sentence is sought. The judge presiding over a capital case must enter a written order appointing the attorneys selected by either the chief public defender, or in a county with no chief public defender, the Executive Director of the Indiana Public Defender Council. The appointment of qualified counsel must be made within three business days of the filing of the request for a death sentence. 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. As used in this section, “prior experience” is defined as continued representation from appointment through conclusion of the case, or an attorney of record with substantial participation in preparing the case for trial and sentencing.

(1) Qualifications of Counsel, Generally.

Counsel appointed to a capital case under this rule must provide each client with quality representation in accordance with constitutional and professional standards. Counsel must be proficient in, familiar with, and guided by the performance standards found within the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.

(+2) Lead Counsel; Qualifications.

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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 or co-counsel in no fewer than five felony jury trials which were tried to completion; two cases in which the death penalty was sought;

(ii) as lead or co-counsel in no fewer than five felony jury trials where:

(1) the highest charge was a Level 5 felony or higher;

(2) at least one charge was a serious violent felony (as defined by Ind. Code § 35-47-4-5); and

(3) was tried to completion within ten years of the appointment; or

~~(c)(iii) have prior experience~~ as lead or co-counsel in at least one case in which the death penalty was sought; ~~and~~

~~(dc)~~ have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases in at least one course approved by the ~~Indiana Public Defender Commission~~ CCAA. Counsel must also complete the above-referenced hours at least every two years during the pendency of the case in the trial court. Counsel 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 counsel will complete and must certify to the Supreme Court that the education was completed.

~~(23)~~ 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 ~~n experienced and active~~ trial practitioner with at least three years of criminal litigation experience;

(b) have prior experience either:

(i) as lead or co-counsel in at least one case in which the death penalty was sought;
or

(ii) as lead or co-counsel in no fewer than three felony jury trials:

(1) where the highest charge was a Level 5 felony or higher;

(2) at least one of which was a serious violent felony (as defined by Ind. Code § 35-47-4-5); and

(3) at least one of which were tried to completion within ten years of the appointment; and

(c) have completed within two years prior to appointment at least ~~twelve~~ eighteen hours of training in the defense of capital cases in at least one course approved by the ~~Indiana Public Defender Commission~~ CCAA of which at least twelve hours must be subject-matter training and six hours must be skills-based training. If co-counsel meets the qualifications to be lead counsel as specified above, the six hours of skills-based training is not required. Counsel must also complete the above-referenced hours at least every two years during the pendency of the case in the trial court. Counsel 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 counsel 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 that 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 high quality representation.

(35) Workload of ~~Appointed and Salaried Capital~~ Counsel.

In ~~appointing or assigning the appointment of~~ counsel, the nature and volume of ~~the workload of appointed~~ counsel's workload must be considered to assure that counsel can direct sufficient attention to ~~the defense of~~ defending a capital case.

(a) Attorneys accepting appointments pursuant to this rule must provide each client with quality representation in accordance with constitutional and professional standards. Appointed ~~c~~Counsel must not accept workloads which, by reason of their excessive size, interfere with ~~the rendering of~~ providing quality representation or lead to the breach of professional obligations.

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(b) ~~A judge must not make an a~~Appointment or assignment of counsel in a capital case ~~without must include an assessing 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 take hourly public defense appointment or are s~~Salaried or contractual public defenders ~~in any 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) the appointment or assignment would be counsel's second capital case pending in a trial court, counsel will not have any other open felony public defense cases while the capital cases are pending in the trial court;~~

~~(iii) the assignment or appointment would be the attorney's only pending capital case and counsel's public defense~~(i) ~~the public defender's~~ caseload ~~across all counties~~ will not exceed twenty open felony cases while the capital case is pending in the trial court;

~~(iv) no new cases will be assigned to the public defender~~Counsel will receive no ~~new public defense appointments~~ within thirty days of the trial setting in the capital case;

~~(viii) none of the public defender's~~counsel's ~~public or private~~ cases will be set for trial within ~~fifteen thirty~~ days of the trial setting in the capital case; and

~~(vi) compensation is provided as specified in paragraph~~section (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 ex parte billings, not less than once every thirty days, after the date of appointment ~~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 for which compensation is sought.~~

(1) Hours and Hourly Rate.

~~Defense c~~Counsel appointed at an hourly rate in capital cases ~~filed or remanded after appeal on or after January 1, 2001,~~ must be compensated for the 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~~ must review and approve counsel's billing 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.~~

Attorneys appointed at an hourly rate must be compensated for services performed at the hourly rate set forth by the Chief Administrative Officer (CAO) of the Office of Judicial Administration (OJA). The hourly rate set forth in this rule is subject to review and adjustment on a biennial basis by the Chief Administrative Officer (CAO) of the Indiana Office of Judicial Administration (IOJA). Beginning July 1, 20022026, and on July 1st of each even year thereafter, the CAO will announce the hourly rate for defense counsel appointed in capital cases filed or remanded after appeals services performed on or after January 1, of the years following the announcement. The hourly rate will be calculated 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 calculation by the CAO must be rounded to the next closest whole dollar. of \$151 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 must be rounded to the next closest whole dollar.

~~In the event the appointing~~If the trial judge determines that the rate of compensation is ~~not below that which is~~ representative of practice in the community, the ~~appointing trial~~ judge may request the CAO of the ~~IOJA~~ to authorize payment of an ~~different 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 mitigation efforts, such as victim outreach, 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 ~~capital~~ 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, such as victim outreach, 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 ~~Employees~~Public Defenders.

~~If counsel is appointed to a capital case in the county where 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 to account for counsel's~~ In the event 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 case to reflect the limitations of case assignment workload limitations during the pendency of the capital case~~established by this rule.~~

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

In ~~a county~~those counties having adopted with a Comprehensive Plan~~as set forth in Ind. Code § 33-9-15 et. seq., which has been~~ approved by the ~~Indiana Public Defender Commission~~CCAA or its predecessor; and ~~that is~~who are in compliance with Commission standards~~authorized by Ind. Code § 33-9-13-3(2)~~, a full-time, salaried ~~capital~~ public

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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 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 full-time~~ Within forty-five days of appointment to a capital case, a county appointing full-time, salaried ~~capital~~ public defenders ~~for capital cases~~ must submit to the CAO of the ~~IOJA~~ the salary and benefits ~~proposed to be paid to the capital-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 ~~Indiana Public Defender Commission~~ CCAA and the requesting county that the proposed salary and benefits are in compliance with this rule. ~~In the event~~ If the trial judge ~~a county~~ determines that the rate of compensation set forth herein is not representative of practice in the community, the ~~trial judge~~ county may request the CAO to authorize a different salary ~~and would need to renew that request by July 1 each for a specific 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.

...

~~(H) Post-Conviction Relief—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.~~

(H) Initiation of Appeal.

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

(J) Appointment of Appellate Counsel.

Upon a finding of ~~indigence~~indigency, 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~~ be appointed as ~~sole or~~ co-counsel for appeal.

(1) ~~Qualifications of Lead~~ Appellate Counsel; Qualifications

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

- (a) be an active, experienced ~~and active~~ trial or appellate practitioner with at least ~~three five~~ years of ~~experience in~~ criminal litigation experience;
- (b) have prior experience as appellate counsel in no fewer than:
 - (i) within the last five years as appellate counsel in no fewer than three (3) felony convictions in federal or state court; and one appeal where the death penalty was imposed;
 - (ii) two appeals where life without parole was imposed; or
 - (iii) ten felony appeals in federal or state court, including at least one serious violent felony as defined in Ind. Code § 35-47-4-5 within the last five years; and

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(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 a courses approved by the ~~Indiana Public Defender Commission~~ CCAA.

(2) Co-Counsel Appellate Counsel; Qualifications.

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

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

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

(c) within two years of appointment, have completed at least twelve hours of training in the defense of capital cases and within five years before appointment, have completed at least six hours of training in appellate practice, both in courses approved by the CCAA.

(23) Workload of Appointed Appellate Counsel.

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~~ may be assigned to such counsel until the Appellant's Brief in the death penalty case is filed.

(KJ) Compensation of Appellate Counsel.

All hourly rate appellate defense counsel appointed in a capital case must be compensated under subsection (1) of this provision. Hourly rate counsel must submit periodic ex parte billings, not less than quarterly, after the date of appointment detailing the date, activity, and time duration for which compensation is sought.

~~Appellate counsel appointed to represent an individual sentenced to die must be compensated under this provision upon presentment and approval of a claim for services detailing the date, activity, and time duration for which compensation is sought. Counsel must submit periodic billings not less than once every thirty days after the date of appointment. Attorneys employed by appellate counsel for consultation must be compensated at the same rate as appellate counsel.~~

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(1) Hours and Hourly rate.

Appellate ~~defense~~ counsel appointed ~~on or after January 1, 2001,~~ to represent an individual sentenced to die must be compensated 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~~If the appointing judge determines that ~~this the~~ rate of compensation is ~~not below that which is~~ representative 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 ~~Employees~~Public Defenders.

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

~~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.~~

(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 certification of the opinion on direct appeal, 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 OJA. 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 OJA 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 must 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 that exemplify the quality of representation appropriate to capital cases.

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In extraordinary circumstances, the State Public Defender may appoint persons with extensive criminal trial, appellate, and post-conviction experience if it is clearly demonstrated to the appointing authority that competent representation will be provided.

(3) Lead Counsel, Qualifications.

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

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

(4) Workload of Appointed Post-Conviction Counsel.

In appointing 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.