

# *Arkansas Public Defender Commission*

## **Capital, Conflicts Attorneys**

Jacqueline R. Wright  
Christopher Nebben  
Andrea C. Stokes  
T. Scott Brisendine  
Charlotte A. Bogan  
Jeff Chandler  
Brennan Dunham  
Tina Bowers Lee  
Daniel R. Feild  
Colleen Barnhill Kordsmeier

## **Executive Director**

Gregg Parrish

## **Appellate Attorney**

David R. Raupp



February 20, 2024

## **VIA E-MAIL**

Rebecca Miller-Rice  
Administrative Rules Review Section  
Bureau of Legislative Research

E-Mail: [miller-ricerr@blr.arkansas.gov](mailto:miller-ricerr@blr.arkansas.gov)

Re: Request to Repeal Rule

Ms. Miller-Rice,

The Arkansas Public Defender Commission (APDC) wishes to repeal its Minimum Standards rule through Act 65.

The rule pertains to the internal management of the agency's public defenders and appointed counsel and, therefore, does not meet the definition of a "rule." Further, it appears that the only version ever registered with the Secretary of State is the 1994 version, while records from our agency indicate that the minimum standards for attorney certification were revised in 2008.

Please accept this letter as the APDC's request to repeal the rule and to be placed on the Administrative Rules Review Subcommittee agenda to request said appeal.

Also, if additional steps must be taken on our end, please advise.

Sincerely,

/s/ *Charlotte Bogan*

Staff Attorney

**FILED**  
 AR. REGISTER DIV  
**Arkansas Public Defender Commission**  
**Minimum Standards**

W.J. "BILL" McQUEEN  
 SECRETARY OF STATE  
 LITTLE ROCK, ARKANSAS  
**Attorney Qualifications**  
**Certification criteria:**

- (1) An attorney shall be certified for **D and C felonies, misdemeanor, juvenile, guardianship, mental health cases, traffic cases punishable by incarceration and all contempt proceedings punishable by incarceration**, if the attorney has requested certification and the attorney is admitted and in good standing with the state bar of Arkansas.
- (2) An attorney shall be certified for felony cases involving a **felony offense bearing a maximum penalty of 30 years**, if:
  - a. The attorney has requested certification;
  - b. The attorney is admitted to and in good standing with the state bar of Arkansas; and
  - c. Either, within the past 3 years:
    1. Has served one year as a prosecutor;
    2. Has served one year as a public defender;
    3. Has been trial counsel alone of record in 5 misdemeanor cases which were actually tried to conclusion.
    4. Has been trial counsel alone in 2 felony cases; or
    5. Has been trial counsel alone or with other trial counsel and handled significant portion of the trial in 2 cases, civil, criminal, or juvenile, that have been tried to a jury to final resolution.
  - d. Has continuing legal education of twelve hours in criminal law. There will be a one year grace period for persons who, within the last preceding 12 months, have taken and passed the Arkansas Bar Examination.
- (3) An attorney shall be certified for felony cases involving a **possible punishment of 10 years to 40 years to life imprisonment**, if, in addition to the certification requirements of complex felonies set out in the preceding section:
  - a. Meets one of these standards:
    1. The attorney's primary area of practice for the immediately preceding year has been in criminal litigation; or
    2. The attorney has had significant experience within the three preceding years in criminal litigation.
  - b. Meets all of the following standards and requirements:
    1. The attorney has been lead counsel in at least two class Y or A felonies or on class Y or A felony and one case involving a homicide which was tried to final jury verdict, or has been lead counsel in one such case and served

- as second chair throughout another such trial.
2. The attorney demonstrates compliance with these requirements by submitting, for each case, the case name, date of trial, file number, name of judge, prosecutor, and lead counsel and a short description of the case and its primary issues.
  3. The attorney submits a quality writing sample, acceptable references as requested, and a satisfactory disclosure of any instances of public professional misconduct or criminal convictions.
  4. The attorney receives the recommendation of the Circuit Judges in the Judicial District in which the attorney applies.

### **ATTORNEY ELIGIBILITY Death cases**

**Number of Attorneys per case:** In cases where the death penalty is sought, two qualified attorneys shall be assigned to represent the defendant.

#### **A. Lead trial counsel assignments:**

1. Are members of the bar admitted to practice in the jurisdiction.
2. Are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and
3. Have prior experience as lead counsel in no fewer than five jury trials of serious and complex cases where tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. The attorney should have been lead counsel in at least two cases in which the charge was murder or capital murder; or alternatively, at least one was a murder or capital murder trial and an additional two others were felony jury trials; and
4. Are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
5. Are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and
6. Have attended and successfully completed within one year from the time of the promulgation of these minimum standards six hours of continuing legal education in the defense of capital cases. Further, in order to retain certification to try capital murder cases, the attorney must maintain six hours of continuing legal education in the defense of capital cases annually.

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

**B. Trial co-counsel assignments:**

1. Are members of the bar admitted to practice in the jurisdiction.; and
2. Who qualify as lead counsel under paragraph A of this standard or meet the following requirements:
  - a. are experienced and active trial practitioners with at least two years litigation experience in the field of criminal defense; and
  - b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least one was a murder trial and one was a felony jury trial; and
  - c. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
  - d. have attended and successfully completed within one year from the time of the promulgation of these minimum standards six hours of continuing legal education in the defense of capital cases. Further, in order to retain certification to try capital murder cases, the attorney must maintain six hours of continuing legal education in the defense of capital cases annually.
  - e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

**C. Alternate Procedures;** Appointments for lead and co-counsel assignments may also be distributed to persons with extensive trial or litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

1. Experience in the trial of death penalty cases which does not meet the levels detailed in paragraphs A or B above;
2. Specialized post-graduate training in the defense of persons accused of capital crimes;

3. The availability of ongoing consultation support from experienced death penalty counsel.

### **Appeal of certification decisions.**

- (1) The executive director shall notify each attorney who has submitted a certification application of the counties or county and categories for which the attorney is eligible. Upon request by that attorney, the executive director shall inform the attorney excluded from a particular list of the reasons for the exclusion and the manner by which the attorney may appeal the decision or reapply for certification.
- (2) An attorney may appeal the executive director's certification decision by mailing a letter of appeal to the Arkansas Public Defender Commission within 30 days of the notice of exclusion. The attorney shall state in the letter the certification from which the attorney has been excluded. The letter shall also state the reasons the attorney believes the exclusion was improper and provide any supporting documentation.
- (3) Upon receipt of an appeal letter, the Commission shall place the matter on the agenda of the next Commission meeting, unless the meeting is less than 10 days from the receipt of the appeal letter, in which case the matter may be scheduled for the following meeting. The Commission shall, at least 10 days prior to hearing, inform the attorney of the time and place of the board meeting at which the appeal will be considered.
- (4) The executive director shall transmit to the Commission and the attorney all material relied upon in reaching the certification decision, including the certification application and all written comments received.
- (5) The attorney may request that the executive director reproduce and submit to the board material relevant to the appeal. The hearing before the board is to be conducted in accordance with procedures as set forth in Ark. Code Ann. sec. 25-15-208.
- (6) The Commission may deliberate the matter in executive session. The Commission shall issue a written decision either affirming or reversing, or modifying the certification decision. The written decision shall be mailed to the attorney within 20 days of the meeting and shall be signed by the chairperson of the Commission.
- (7) The Commission's decision shall constitute findings of fact and conclusions of law within the meaning of Ark. Code Ann. sec. 25-15-210.

### **Removal from certification lists for cause.**

- (1) Any interested party, on his or her own motion, may request, in writing, that an attorney, previously certified to accept cases, be removed for cause. Upon receipt of a request, the executive director may suspend the attorney from certification or may refer the attorney to the Commission with a recommendation for removal.

- (2) Upon a recommendation for removal, or following the suspension of any attorney and the attorney's request for review, the Commission shall review the investigation and recommendation. Upon request of the attorney prior to its review, the Commission shall conduct a hearing at which time the attorney in question may be heard and produce evidence in defense thereof. Upon a finding of cause, the commission may remove the attorney or confirm the suspension. The Commission shall render a decision within 60 days of the hearing.
- (3) Any attorney removed for cause may petition a circuit court for review of the decisions of the Commission pursuant to the provisions of Ark. Code Ann. sec. 25-15-212.
- (4) The Commission may, in its discretion, appoint any number of its members to conduct the hearing and to report the findings and recommendations to the entire commission for its decision.

### **Voluntary removal.**

Any attorney may request to be removed from any certified list for a specified period of time, and the executive director shall remove the attorney until notified in writing by the attorney that the attorney wishes to be placed back on the list. If an attorney is inactive for more than 3 years, the attorney shall reapply for certification.

### **Access to files.**

- (1) The executive director may not disclose to any person except the subject, any comments made by any person who has initiated or responded to an inquiry relating to the fitness of an attorney for certification, unless ordered to do so by the Commission or by a court.
- (2) Only certified lists, Commission proceedings and decisions under these rules shall be considered public documents and open to public inspection.

### **Public defender; contract; terms.**

- (1) The contract negotiated between the county and the contracting attorney should specify the categories of cases in which the contracting attorney is to provide services.
- (2) The contract negotiated between the county and the contracting attorney should be awarded for a least a two year term. Removal of the contracting attorney short of the agreed term may be for good cause only.
- (3) The contract should specify a maximum allowable caseload for each full-time or part-time attorney who handles cases under the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation. The following should be maximum allowable caseload recommendation per attorney per year with the first

column representing full-time attorneys and the second column representing part-time attorneys:

Capital Murder	2	1
Murder	10	5
Y Felony	20	10
A Felony	30	15
B & C Felony	60	30
B & C Habitual	50	25
D Felony	120	60
Misdemeanor	200	100
Juvenile	120	60
Probation violation	120	60
Mental Health	120	60

- (4) The contract should provide the contracting attorney be compensated at a minimum rate which reflects the following factors:
  - (a) customary compensation in the community.
  - (b) time and labor required to be spent by the attorney
  - (c) degree of professional ability skill, and experience called for and performance of the services.
- (5) The contract shall provide that the contracting attorney may decline to represent clients at no reduced compensation if the attorney is assigned more cases which require an extraordinary amount of time and preparation.
- (6) The contract shall provide that the contracting attorney, if full-time, receive at least 12 hours of continuing legal education in the area of criminal law annually beginning one year from the date of the promulgation of these rules. Part-time attorneys shall receive 6 hours of continuing legal education in the area of criminal law annually beginning one year from the date of the promulgation of these rules.

# ARKANSAS REGISTER

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Transmittal Sheet

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W.J. "BILL" McCUEN  
SECRETARY OF STATE  
LITTLE ROCK, ARKANSAS

W.J. "Bill" McCuen

Secretary of State

State Capitol Rm. 010

Little Rock, Arkansas 72201-1094

For Office

Use Only:

Effective Date

2/20/94

Code Number

160.00.94--001

Name of Agency Arkansas Public Defender Commission

Department \_\_\_\_\_

Contact Person Rae Millerd

Statutory Authority for Promulgating Rules Act 1193 of 1993

Intended Effective Date

☐ Emergency

☒ 20 Days After Filing

☐ Other

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Reviewed by Legislative Council . . . . . 2-3-94

Adopted by State Agency . . . . . 1-28-94

## CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted  
In Compliance with Act 434 of 1967 As Amended.

Rae Millerd

Signature

Executive Assistant

Title

January 31, 1994

Date



**ARKANSAS PUBLIC DEFENDER COMMISSION  
MINIMUM STANDARDS**

**ATTORNEY QUALIFICATIONS**

Certification criteria

- (1) An attorney shall be certified for D and C felonies, misdemeanor, juvenile, guardianship, mental health cases, traffic cases punishable by incarceration and all contempt proceedings punishable by incarceration, if the attorney has requested certification and the attorney is admitted and in good standing with the state bar of Arkansas.
- (2) An attorney shall be certified for felony cases involving a felony offense bearing a maximum penalty of 30 years, if:
  - a. The attorney has requested certification;
  - b. The attorney is admitted to and in good standing with the state bar of Arkansas; and
  - c. Either, within the past 3 years:
    1. Has served one year as a prosecutor;
    2. Has served one year as a public defender;
    3. Has been trial counsel alone of record in 5 misdemeanor cases which were actually tried to conclusion;
    4. Has been trial counsel alone in 2 felony cases; or
    5. Has been trial counsel alone or with other trial counsel and handled significant portion of the trial in 2 cases, civil, criminal, or juvenile, that have been tried to a jury to final resolution.
  - d. Has continuing legal education of twelve hours in criminal law. There will be a one year grace period for persons who, within the last preceding 12 months, have taken and passed the Arkansas Bar Examination.
- (3) An attorney shall be certified for felony cases involving a Class Y felony, if, in addition to the certification requirements of complex felonies set out in the preceding section:
  - a. Meets one of these standards:
    1. The attorney's primary area of practice for the immediately preceding year has been in criminal litigation; or
    2. The attorney has had significant experience within the three preceding years in criminal litigation.
  - b. Meets all of the following standards and requirements:
    1. The attorney has been lead counsel in at least two class Y or A felonies or one class Y or A felony and one case involving a homicide which was tried to final jury verdict, or has been lead counsel in one such case and served as second chair throughout another such trial.
    2. The attorney demonstrates compliance with these requirements by submitting, for each case, the case name, date of trial, file number, name of judge, prosecutor and lead counsel, and a short description of the case and its primary issues.
    3. The attorney submits a quality writing sample, acceptable references as requested, and a satisfactory disclosure of any instances of public professional misconduct or criminal convictions.

4. The attorney receives the recommendation of the circuit judges in the judicial district in which the attorney applies.

### **ATTORNEY ELIGIBILITY Death cases**

**Number of Attorneys per case:** In cases where the death penalty is sought, including a re-sentencing trial, two qualified attorneys shall be assigned to represent the defendant. Further, the appointment of the two attorneys should be made as soon as possible from the time charges are brought.

- A. Lead trial counsel assignments:
  1. Are members of the bar admitted to practice in the jurisdiction.
  2. Are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and
  3. Have prior experience as lead counsel in no fewer than five jury trials of serious and complex cases where tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. The attorney should have been lead counsel in at least two cases in which the charge was murder or capital murder; or alternatively, at least one was a murder or capital murder trial and an additional two others were felony jury trials; and
  4. Are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
  5. Are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and
  6. Have attended and successfully completed within one year from the time of the promulgation of these minimum standards six hours of continuing legal education in the defense of capital cases. Further, in order to retain certification to try capital murder cases, the attorney must maintain six hours of continuing legal education in the defense of capital cases annually.
  7. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.
- B. Trial co-counsel assignments:
  1. Are members of the bar admitted to practice in the jurisdiction; and
  2. Who qualify as lead counsel under paragraph A of this standard or meet the following requirements:
    - a. are experienced and active trial practitioners with at least two years litigation experience in the field of criminal defense; and
    - b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least one was a murder trial and one was a felony jury trial; and
    - c. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
    - d. have attended and successfully completed within one year from the

time of the promulgation of these minimum standards six hours of continuing legal education in the defense of capital cases. Further, in order to retain certification to try capital murder cases, the attorney must maintain six hours of continuing legal education in the defense of capital cases annually.

- e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

C. Alternate Procedures:

Appointments for lead and co-counsel assignments may also be distributed to persons with extensive trial or litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

1. Experience in the trial of death penalty cases which does not meet the levels detailed in paragraphs A or B above;
2. Specialized post-graduate training in the defense of persons accused of capital crimes;
3. The availability of ongoing consultation support from experienced death penalty counsel.

**APPEAL OF CERTIFICATION DECISIONS**

- (1) The Executive Director shall notify each attorney who has submitted a certification application of the counties or county and categories for which the attorney is eligible. Upon request by that attorney, the Executive Director shall inform the attorney excluded from a particular list of the reasons for the exclusion and the manner by which the attorney may appeal the decision or reapply for certification.
- (2) An attorney may appeal the Executive Director's certification decision by mailing a letter of appeal to the Arkansas Public Defender Commission within 30 days of the notice of exclusion. The attorney shall state in the letter the certification from which the attorney has been excluded. The letter shall also state the reasons the attorney believes the exclusion was improper and provide any supporting documentation.
- (3) Upon receipt of an appeal letter, the Commission shall place the matter on the agenda of the next Commission meeting, unless the meeting is less than 10 days from the receipt of the appeal letter, in which case the matter may be scheduled for the following meeting. The Commission shall, at least 10 days prior to hearing, inform the attorney of the time and place of the board meeting at which the appeal will be considered.
- (4) The Executive Director shall transmit to the Commission and the attorney all material relied upon in reaching the certification decision, including the certification application and all written comments received.
- (5) The attorney may request that the Executive Director reproduce and submit to the board material relevant to the appeal. The hearing before the board is to be conducted in accordance with procedures as set forth in Ark. Code Ann. § 25-15-208.

- (6) The Commission may deliberate the matter in executive session. The Commission shall issue a written decision either affirming or reversing, or modifying the certification decision. The written decision shall be mailed to the attorney within 20 days of the meeting and shall be signed by the chairperson of the Commission.
- (7) The Commission's decision shall constitute findings of fact and conclusions of law within the meaning of Ark. Code Ann. § 25-15-210.

#### **REMOVAL FROM CERTIFICATION LISTS FOR CAUSE**

- (1) Any interested party, on his or her own motion, may request, in writing, that an attorney, previously certified to accept cases, be removed for cause. Upon receipt of a request, the Executive Director may suspend the attorney from certification or may refer the attorney to the Commission with a recommendation for removal.
- (2) Upon a recommendation for removal, or following the suspension of any attorney and the attorney's request for review, the Commission shall review the investigation and recommendation. Upon request of the attorney prior to its review, the Commission shall conduct a hearing at which time the attorney in question may be heard and produce evidence in defense thereof. Upon a finding of cause, the Commission may remove the attorney or confirm the suspension. The Commission shall render a decision within 60 days of the hearing.
- (3) Any attorney removed for cause may petition a circuit court for review of the decisions of the Commission pursuant to the provisions of Ark. Code Ann. § 25-15-212.
- (4) The Commission may, in its discretion, appoint any number of its members to conduct the hearing and to report the findings and recommendations to the entire Commission for its decision.

#### **VOLUNTARY REMOVAL**

Any attorney may request to be removed from any certified list for a specified period of time, and the Executive Director shall remove the attorney until notified in writing by the attorney that the attorney wishes to be placed back on the list. If an attorney is inactive for more than three (3) years, the attorney shall reapply for certification.

#### **ACCESS TO FILES**

- (1) The Executive Director may not disclose to any person except the subject, any comments made by any person who has initiated or responded to an inquiry relating to the fitness of an attorney for certification, unless ordered to do so by the Commission or by a court.
- (2) Only certified lists, Commission proceedings, and decisions under these rules shall be considered public documents and open to public inspection.