

STATE PUBLIC DEFENDER[493]

Notice of Intended Action

**Proposing rule making related to waivers and indigent defense attorney contracts
and providing an opportunity for public comment**

The State Public Defender hereby proposes to amend Chapter 6, “Uniform Waiver and Variance Rules,” and Chapter 11, “Attorney Fee Contracts,” Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is proposed under the authority provided in Iowa Code section 13B.4(8).

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code chapters 13B and 815.

Purpose and Summary

The purpose of the proposed amendments to Chapter 6 is to remove references to the term “variances” in places where the existing rule makes references to “waivers or variances.” The intent of the amendments is to be consistent with current Iowa Code terminology, which uses the term “waivers” to encompass both “waivers and variances.”

The purpose of the proposed amendments to the attorney minimum qualification requirements in rule 493—11.3(13B) is to expand the pool of qualified contract attorneys available to accept court appointments to represent indigent persons.

Fiscal Impact

This rule making has no fiscal impact to the State of Iowa.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found.

Waivers

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Office of the State Public Defender for a waiver of the discretionary provisions, if any, pursuant to 493—Chapter 6.

Public Comment

Any interested person may submit written comments concerning this proposed rule making. Written comments in response to this rule making must be received by the Office no later than 4:30 p.m. on January 19, 2021. Comments should be directed to:

Kurt Swaim
Office of the State Public Defender
Lucas State Office Building
321 East 12th Street
Des Moines, Iowa 50319
Email: kswaim@spd.state.ia.us

Public Hearing

No public hearing is scheduled at this time. As provided in Iowa Code section 17A.4(1)“b,” an oral presentation regarding this rule making may be demanded by 25 interested persons, a governmental subdivision, the Administrative Rules Review Committee, an agency, or an association having 25 or more members.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee’s meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

The following rule-making actions are proposed:

ITEM 1. Amend **493—Chapter 6**, title, as follows:

UNIFORM WAIVER AND VARIANCE RULES

ITEM 2. Amend rule 493—6.1(13B,17A) as follows:

493—6.1(13B,17A) Applicability. This chapter outlines a uniform process for the granting of waivers ~~or variances~~ from rules adopted by the state public defender. The intent of this chapter is to allow persons to seek exceptions to the application of rules issued by the state public defender.

ITEM 3. Amend rules 493—6.3(13B,17A) to 493—6.7(13B,17A) as follows:

493—6.3(13B,17A) Compliance with statute. The state public defender shall not grant a petition for waiver ~~or variance~~ from a rule unless a statute or other provision of law has delegated authority to the state public defender sufficient to justify that action and the waiver ~~or variance~~ is consistent with the statute or other provision of law. No waiver ~~or variance~~ may be granted from a requirement that is imposed by statute, unless the statute itself specifically authorizes that action. Any waiver ~~or variance~~ must be consistent with statute.

493—6.4(13B,17A) Criteria for waiver ~~or variance~~. At the sole discretion of the state public defender, the state public defender may issue an order, in response to a completed petition or on the state public defender’s own motion, granting a waiver ~~or variance~~ from a rule adopted by the state public defender, in whole or in part, as applied to the circumstances of a specified person or a specific and narrowly drawn class of persons if the state public defender finds based on clear and convincing evidence that:

1. The application of the rule to the petitioner would pose an undue hardship on the person or class of persons for whom the waiver ~~or variance~~ is requested;
2. The waiver ~~or variance~~ from the requirements of a rule in the specific case would not prejudice the substantial legal rights of any person;
3. The provisions of a rule subject to a petition for a waiver ~~or variance~~ are not specifically mandated by statute or another provision of law; and
4. Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.

493—6.5(13B,17A) Filing of petition. A petition for a waiver ~~or variance~~ must be submitted in writing to the State Public Defender, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0087. If the petition relates to a pending contested case, the petition shall also be filed in the contested case proceeding.

493—6.6(13B,17A) Content of petition. A petition for waiver ~~or variance~~ shall include the following information where applicable and known to the requester:

1. The name, address, and telephone number of the entity or person for whom a waiver ~~or variance~~ is being requested and the case number of any related contested case.
2. A description and citation of the specific rule from which a waiver ~~or variance~~ is requested.
3. The specific waiver ~~or variance~~ requested, including the precise scope and operative period that the waiver ~~or variance~~ will extend.
4. The relevant facts that the petitioner believes would justify a waiver ~~or variance~~. This statement shall include a signed statement from the petitioner attesting to the accuracy of the facts provided in the petition and a statement of reasons that the petitioner believes will justify a waiver ~~or variance~~.
5. A history of any prior contacts between the state public defender and the petitioner relating to the regulated activity, representation or other assigned function of the state public defender that would be affected by the proposed waiver ~~or variance~~, including a description of each regulated activity, representation or other assigned function of the state public defender, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity, representation or other assigned function of the state public defender within the last five years.
6. Any information known to the requester regarding the state public defender's treatment of similar cases.
7. The name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question or which might be affected by the granting of a waiver ~~or variance~~.
8. The name, address, and telephone number of any person or entity that would be adversely affected by the granting of a petition.
9. The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver ~~or variance~~.
10. Signed releases of information authorizing persons with knowledge regarding the request to furnish the state public defender with information relevant to the waiver ~~or variance~~.

493—6.7(13B,17A) Additional information. Prior to issuing an order granting or denying a waiver ~~or variance~~, the state public defender may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in a contested case, the state public defender may, on its own motion or at the petitioner's request, schedule a telephonic or in-person meeting between the petitioner and the state public defender or state public defender's designee.

ITEM 4. Amend rules 493—6.9(13B,17A) to 493—6.16(13B,17A) as follows:

493—6.9(13B,17A) Hearing procedures. The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply to any petition for a waiver ~~or variance~~ of a rule filed within a contested case and shall otherwise apply to agency proceedings for a waiver ~~or variance~~ only when the state public defender so provides by rule or order or is required to do so by statute.

493—6.10(13B,17A) Ruling. An order granting or denying a waiver ~~or variance~~ shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope and operative period of the waiver if one is issued.

6.10(1) State public defender discretion. The decision on whether the circumstances justify the granting of a waiver ~~or variance~~ shall be made at the discretion of the state public defender upon consideration of all relevant factors.

6.10(2) Burden of persuasion. The petitioner has the burden of persuasion when a petition is filed for a waiver ~~or variance~~ from a state public defender rule. The standard of proof is clear and convincing evidence.

6.10(3) Special waiver ~~or variance~~ rules not precluded. This chapter shall not preclude the state public defender from granting waivers ~~or variances~~ in other contexts or on the basis of other standards if a statute authorizes the state public defender to do so and the state public defender deems it appropriate to do so.

6.10(4) Administrative deadlines. When the rule from which a waiver ~~or variance~~ is sought establishes administrative deadlines, the state public defender shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all persons similarly situated.

6.10(5) Conditions. The state public defender may condition the granting of the waiver ~~or variance~~ on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question through alternative means and in compliance with the following provisions:

a. Each petition for a waiver ~~or variance~~ shall be evaluated by the state public defender based on the unique, individual circumstances set out in the petition;

b. A waiver ~~or variance~~, if granted, shall be drafted by the state public defender so as to provide the narrowest exception possible to the provisions of the rule;

c. The state public defender may place on a waiver ~~or variance~~ a condition that the state public defender finds desirable to protect the public health, safety, and welfare;

d. A waiver ~~or variance~~ shall not be permanent, unless the petitioner can show that a temporary waiver ~~or variance~~ would be impracticable; and

e. If a temporary waiver ~~or variance~~ is granted, there is no automatic right to renewal. At the sole discretion of the state public defender, a waiver ~~or variance~~ may be renewed if the state public defender finds that all of the factors set out in rule ~~493—~~6.4(13B,17A) remain valid.

6.10(6) Time for ruling. The state public defender shall grant or deny a petition for a waiver ~~or variance~~ as soon as practicable but, in any event, shall do so within 120 days of its receipt, unless the petitioner agrees to a later date. However, if a petition is filed in a contested case, the state public defender has the discretion to wait until the contested case is resolved before entering an order on the petition for waiver ~~or variance~~.

6.10(7) When deemed denied. Failure of the state public defender to grant or deny a petition within the required time period shall be deemed a denial of that petition by the state public defender.

6.10(8) Service of order. Within seven days of its issuance, any order issued under this chapter shall be transmitted to the petitioner or the person to whom the order pertains and to any other person entitled to such notice by any provision of law.

493—6.11(13B,17A) Public availability. Subject to the provisions of Iowa Code section 17A.3(1) “e,” the state public defender shall maintain a record of all orders granting or denying waivers ~~and variances~~ under this chapter. All final rulings in response to requests for waivers ~~or variances~~ shall be indexed and available to members of the public at the state public defender’s office.

~~Twice each year the state public defender must prepare a report that:~~

- ~~1. Identifies the rules for which a waiver or variance has been granted or denied;~~
- ~~2. Identifies the number of times a waiver or variance was granted or denied for each rule;~~
- ~~3. Includes a citation to the statutory provisions implemented by these rules; and~~
- ~~4. Includes a general summary of the reasons justifying the state public defender’s actions.~~

493—6.12(13B,17A) Voiding or cancellation. A waiver ~~or variance~~ is void if the material facts upon which the request is based are not true or if material facts have been withheld. The state public defender may at any time cancel a waiver ~~or variance~~ upon appropriate notice and hearing if the state public defender finds that the facts as stated in the request are not true, material facts have been withheld, the alternative means of compliance provided in the waiver ~~or variance~~ have failed to achieve the objectives of the statute, or the requester has failed to comply with the conditions of the order.

493—6.13(13B,17A) Violations. Violation of conditions in the waiver ~~or variance~~ approval is the equivalent of violation of the particular rule for which the waiver ~~or variance~~ is granted and is subject to the same remedies or penalties.

493—6.14(13B,17A) Defense. After the state public defender issues an order granting a waiver ~~or variance~~, the order is a defense within its terms and the specific facts indicated therein for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked.

493—6.15(13B,17A) Appeals. Any request for an appeal from a decision granting or denying a waiver ~~or variance~~ shall be in accordance with the procedures provided in Iowa Code chapter 17A and state public defender rules. An appeal shall be taken within 30 days of the issuance of the ruling in response to the request unless a contrary time is provided by rule or statute.

493—6.16(13B,17A) Sample petition for waiver ~~or variance~~.

BEFORE THE STATE PUBLIC DEFENDER	
Petition by (insert name of petitioner) for the waiver of (insert rule citation) relating to (insert the subject matter).	No. _____
}	PETITION FOR WAIVER

Include the following information in the petition for waiver where applicable and known:

1. Provide the petitioner's (the person who is asking for the waiver ~~or variance~~) name, address and telephone number.
2. Describe and cite the specific rule from which a waiver ~~or variance~~ is requested.
3. Describe the specific waiver ~~or variance~~ requested; include the exact scope and time period that the waiver ~~or variance~~ will extend.
4. Explain the important facts that the petitioner believes justify the waiver ~~or variance~~. Include in your explanation (a) why application of the rule would pose an undue hardship to the petitioner; (b) why granting the waiver ~~or variance~~ would not prejudice the substantial legal rights of any person; (c) state whether the provisions of a rule subject to this petition are specifically mandated by statute or another provision of law; and (d) state whether public health, safety or welfare will be affected if the requested waiver ~~or variance~~ is granted.
5. Provide history of prior contacts between the state public defender and the petitioner relating to the regulated activity, license, audit, investigation, inspection or representation that would be affected by the waiver ~~or variance~~. In that history, include a description of each affected regulated activity, license, appeal, hearing, audit, investigation, inspection, representation or other assigned function of the state public defender, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity, license, appeal, hearing, audit, investigation, inspection, representation or other assigned function of the state public defender within the last five years.
6. Provide information known to the petitioner regarding the state public defender's treatment of similar cases.
7. Provide the name, address and telephone number of any public agency or political subdivision which also regulates the activity in question or which might be affected by the granting of a waiver ~~or variance~~.
8. Provide the name, address and telephone number of any person or entity that would be adversely affected or disadvantaged by the granting of the waiver ~~or variance~~.
9. Provide signed releases of information authorizing persons with knowledge regarding the request to furnish the state public defender with information relevant to the waiver ~~or variance~~.

I hereby attest to the accuracy and truthfulness of the above information.

Petitioner's signature

Date

ITEM 5. Amend subrule 11.3(1) as follows:

11.3(1) Juvenile cases. To be eligible to contract to represent indigent persons in juvenile cases, including juvenile petitions on appeal, an attorney must be in compliance with Rule 8.36 of the Iowa Rules of Juvenile Procedure, regardless of whether the attorney seeks to represent parents or children or serve as guardian ad litem in juvenile court. An attorney contracting to represent indigent persons in juvenile cases must:

a. and *b.* No change.

The state public defender shall review juvenile contract renewals and may apply juvenile-related continuing legal education hours in the same manner as criminal-related continuing legal education hours.

ITEM 6. Amend subrule 11.3(2), introductory paragraph, as follows:

11.3(2) Appellate cases. To be eligible to contract to represent indigent persons in appellate cases, including direct appeals of criminal cases, appeals from postconviction relief proceedings, and appeals from any other case for which counsel is statutorily authorized to be paid from the indigent defense fund at the trial level except in cases where the attorney is statutorily appointed for purposes of the appeal, an attorney must:

ITEM 7. Amend subrules 11.3(3) and 11.3(4) as follows:

11.3(3) Postconviction relief cases. To be eligible to contract to represent indigent persons in postconviction relief cases at the trial level, an attorney must:

a. Have practiced criminal law or served as a judicial law clerk for two years or more in any state or federal court;

b. Participate in five hours of continuing legal education related to criminal law each calendar year in which the attorney has an active indigent defense contract and in the year prior to entering into the contract;

c. Participate in a postconviction relief basic training sponsored by the state public defender prior to entering into the contract, unless the attorney has previously handled at least three postconviction relief proceedings to completion; and

d. Provide the names of at least three judges or magistrates who can discuss the qualifications and effectiveness of the attorney to represent indigent persons in postconviction relief cases.

An attorney who has not met all the requirements may provide the state public defender additional detail regarding the attorney's experience and qualifications and the circumstances preventing the attorney from meeting all the requirements, and may be approved for contracting by the state public defender at the state public defender's sole discretion.

11.3(4) Class A ~~and B~~ felonies. To be eligible to contract to represent indigent persons in Class A ~~and Class B~~ felony cases at the trial level, an attorney must:

a. Have practiced criminal law for four years or more in any state or federal court;

b. Have tried at least five criminal jury trials involving indictable offenses to completion either as lead counsel or as a pro bono second attorney in a criminal jury trial if the service as pro bono second attorney is approved in advance for credit under this rule by the state public defender;

c. Participate in five hours of continuing legal education related to criminal law each calendar year in which the attorney has an active indigent defense contract and in the year prior to entering into the contract; and

d. Provide the names of at least three judges or magistrates who can discuss the qualifications and effectiveness of the attorney to represent indigent persons in Class A ~~and Class B~~ felony cases.

If an attorney satisfies the requirements for Class B felonies or Class C and Class D felonies, the attorney may contract to serve as the second attorney representing an indigent person in a Class A felony in a case where the first appointed attorney meets these requirements. An attorney who does not meet all the requirements of this subrule may provide the state public defender additional detail regarding the attorney's experience and qualifications and the circumstances preventing the attorney from meeting all the requirements and may be approved for contracting by the state public defender at the state public defender's sole discretion.

ITEM 8. Renumber subrules **11.3(5)** to **11.3(7)** as **11.3(6)** to **11.3(8)**.

ITEM 9. Adopt the following **new** subrule 11.3(5):

11.3(5) Class B felonies. To be eligible to contract to represent indigent persons in Class B felony cases at the trial level, an attorney must:

- a. Have practiced criminal law for three years or more in any state or federal court;
- b. Have tried at least three criminal jury trials involving indictable offenses to completion either as lead counsel or as a pro bono second attorney in a criminal jury trial if the service as pro bono second attorney is approved in advance for credit under this rule by the state public defender;
- c. Participate in five hours of continuing legal education related to criminal law each calendar year in which the attorney has an active indigent defense contract and in the year prior to entering into the contract; and
- d. Provide the names of at least three judges or magistrates who can discuss the qualifications and effectiveness of the attorney to represent indigent persons in Class B felony cases.

An attorney who has not met all requirements may provide the state public defender additional detail regarding the attorney's experience and qualifications and the circumstances preventing the attorney from meeting all the requirements and may be approved for contracting by the state public defender at the state public defender's sole discretion.

ITEM 10. Amend renumbered subrules 11.3(6) and 11.3(7) as follows:

11.3(6) Class C and D felonies. To be eligible to contract to represent indigent persons in Class C and Class D felony cases at the trial level, an attorney must:

- a. Have practiced criminal law for two years or more in any state or federal court;
- b. Have tried at least one criminal jury trial to completion either as lead counsel or as a pro bono second attorney in a criminal jury trial if the service as pro bono second attorney is approved in advance for credit under this rule by the state public defender;
- c. Participate in five hours of continuing legal education related to criminal law each calendar year in which the attorney has an active indigent defense contract and in the year prior to entering into the contract; and
- d. Provide the names of at least three judges or magistrates who can discuss the qualifications and effectiveness of the attorney to represent indigent persons in Class C and Class D felony cases.

An attorney who has not met all requirements may provide the state public defender additional detail regarding the attorney's experience and qualifications and the circumstances preventing the attorney from meeting all the requirements and may be approved for contracting by the state public defender at the state public defender's sole discretion.

11.3(7) Misdemeanor and other cases. To be eligible to contract to represent indigent persons in misdemeanor cases, probation and parole revocation cases, contempt proceedings, and any other adult criminal or civil cases for which counsel is statutorily authorized to be paid from the indigent defense fund at the trial level, an attorney must:

- a. Participate in the basic criminal defense training sponsored by the state public defender within one year of entering into the contract, unless the attorney already has an active indigent defense contract or has practiced criminal law for more than two years; and
- b. Participate in three hours of continuing legal education related to criminal law each calendar year in which the attorney has an active indigent defense contract.

However, an attorney who has a contract to handle any felony offense may accept appointments in misdemeanor cases, probation and parole revocation cases, and contempt cases for which counsel is statutorily authorized to be paid from the indigent defense fund at the trial level, but the attorney with the contract to handle the felony offense will not be added to the list disseminated to the clerks of court to handle misdemeanor cases, probation and parole cases, or contempt cases unless the attorney has secured an amendment to the attorney's contract to handle those types of cases.