

**AMERICAN BAR ASSOCIATION**

**STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS**

**SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION**

**CRIMINAL JUSTICE SECTION**

**SECTION OF LITIGATION**

**SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**

**SENIOR LAWYERS DIVISION**

**ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

**RESOLVED**, That the American Bar Association adopts the black letter ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, dated February 2003; and

**FURTHER RESOLVED**, That the American Bar Association recommends adoption by death penalty jurisdictions of the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, dated February 2003.

**American Bar Association**

**Guidelines for the Appointment and Performance of  
Defense Counsel in Death Penalty Cases  
(Black Letter)**

**Revised Edition  
February 2003**

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## **Definitional Notes**

Throughout these Guidelines:

1. As in the first edition, “should” is used as a mandatory term.
2. By “jurisdiction” is meant the government under whose legal authority the death sentence is to be imposed. Most commonly, this will be a state (as opposed to, *e.g.*, a county) or the federal government as a whole. The term also includes the military and any other relevant unit of government (*e.g.*, Commonwealth, Territory). Where a federal judicial district or circuit is meant, the Commentary will so state.
3. The terms “counsel,” “attorney,” and “lawyer” apply to all attorneys, whether appointed, retained, acting *pro bono*, or employed by any defender organization (*e.g.*, federal or state public defenders offices, resource centers), who act on behalf of the defendant in a capital case. When modified by “private,” these terms apply to both *pro bono* and retained attorneys.
4. The term “custody” is used in the inclusive sense of *Hensley v. Municipal Court*, 411 U.S. 345, 350-51 (1973).
5. The term “post-conviction” is a general one, including (a) all stages of direct appeal within the jurisdiction and certiorari (b) all stages of state collateral review proceedings (however denominated under state law) and certiorari, (c) all stages of federal collateral review proceedings, however denominated (ordinarily petitions for writs of habeas corpus or motions pursuant to 28 U.S.C. § 255, but including all applications of similar purport, *e.g.*, for writ of error coram nobis), and including all applications for action by the Courts of Appeals or the United States Supreme Court (commonly certiorari, but also, *e.g.*, applications for original writs of habeas corpus, applications for certificates of probable cause), all applications for interlocutory relief (*e.g.*, stay of execution, appointment of counsel) in connection with any of the foregoing. If a particular subcategory of post-conviction proceeding is meant, the language of the relevant Guideline or Commentary will so state.
6. The terms “defendant,” “petitioner,” “inmate,” “accused” and “client” are used interchangeably.
7. The terms “capital case” and “death penalty case” are used interchangeably.
8. The terms “defender organization,” “Independent Authority,” and “Responsible Agency” are defined in Guideline 3.1 and accompanying Commentary
9. The term "Legal Representation Plan" is defined in Guideline 2.1.

#### GUIDELINE 1.1 – OBJECTIVE AND SCOPE OF GUIDELINES

- A. The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.
- B. These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings, and any connected litigation.

#### GUIDELINE 2.1 – ADOPTION AND IMPLEMENTATION OF A PLAN TO PROVIDE HIGH QUALITY LEGAL REPRESENTATION IN DEATH PENALTY CASES

- A. Each jurisdiction should adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines (the “Legal Representation Plan”).
- B. The Legal Representation Plan should set forth how the jurisdiction will conform to each of these Guidelines.
- C. All elements of the Legal Representation Plan should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards.

### GUIDELINE 3.1 – DESIGNATION OF A RESPONSIBLE AGENCY

- A. The Legal Representation Plan should designate one or more agencies to be responsible, in accordance with the standards provided in these Guidelines (the “Responsible Agency”) for:
  - 1. ensuring that each capital defendant in the jurisdiction receives high quality legal representation, and
  - 2. performing all the duties listed in Subsection E.
- B. The Responsible Agency should be independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases.
- C. The Responsible Agency for each stage of the proceeding in a particular case should be one of the following:

#### Defender Organization

- 1. A “defender organization,” that is, either:
  - a. a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or
  - b. a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

#### Independent Authority

- 2. An “Independent Authority,” that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

D. Conflict of Interest:

1. In any circumstance in which the performance by a defender organization of a duty listed in Subsection E would result in a conflict of interest, the relevant duty should be performed by the Independent Authority. The jurisdiction should implement an effectual system to identify and resolve such conflicts.
2. When the Independent Authority is the Responsible Agency, attorneys who hold formal roles in the Independent Authority should be ineligible to represent defendants in capital cases within the jurisdiction during their term of service.

E. The Responsible Agency should, in accordance with the provisions of these Guidelines, perform the following duties:

1. recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;
2. draft and periodically publish rosters of certified attorneys;
3. draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;
4. assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;
5. monitor the performance of all attorneys providing representation in capital proceedings;
6. periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;
7. conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and
8. investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

#### GUIDELINE 4.1 – THE DEFENSE TEAM AND SUPPORTING SERVICES

- A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.
  - 1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.
  - 2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.
  
- B. The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.
  - 1. Counsel should have the right to have such services provided by persons independent of the government.
  - 2. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

#### GUIDELINE 5.1 – QUALIFICATIONS OF DEFENSE COUNSEL

- A. The Responsible Agency should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.
  
- B. In formulating qualification standards, the Responsible Agency should insure:
  - 1. That every attorney representing a capital defendant has:
    - a. obtained a license or permission to practice in the jurisdiction;

- b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and
  - c. satisfied the training requirements set forth in Guideline 8.1.
2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:
- a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
  - b. skill in the management and conduct of complex negotiations and litigation;
  - c. skill in legal research, analysis, and the drafting of litigation documents;
  - d. skill in oral advocacy;
  - e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
  - f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
  - g. skill in the investigation, preparation, and presentation of mitigating evidence; and
  - h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

#### GUIDELINE 6.1 – WORKLOAD

The Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.

#### GUIDELINE 7.1 – MONITORING; REMOVAL

- A. The Responsible Agency should monitor the performance of all defense counsel to ensure that the client is receiving high quality legal representation. Where there is evidence that an attorney is not providing high quality legal representation, the Responsible Agency should take appropriate action to protect the interests of the attorney's current and potential clients.
- B. The Responsible Agency should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high quality legal representation.
- C. The Responsible Agency should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing high quality legal representation. Where there is evidence that an attorney has failed to provide high quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high quality legal representation, the office should not receive additional appointments.
- D. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the Responsible Agency should provide written notice that such action is being contemplated, and give the attorney or defender office opportunity to respond in writing.
- E. An attorney or defender office sanctioned pursuant to this Guideline should be restored to the roster only in exceptional circumstances.

- F. The Responsible Agency should ensure that this Guideline is implemented consistently with Guideline 2.1(C), so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this Guideline.

GUIDELINE 8.1 – TRAINING

- A. The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team.
- B. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:
  - 1. relevant state, federal, and international law;
  - 2. pleading and motion practice;
  - 3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
  - 4. jury selection;
  - 5. trial preparation and presentation, including the use of experts;
  - 6. ethical considerations particular to capital defense representation;
  - 7. preservation of the record and of issues for post-conviction review;
  - 8. counsel's relationship with the client and his family;
  - 9. post-conviction litigation in state and federal courts;
  - 10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;

11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.
- C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.
- D. The Legal Representation Plan should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

#### GUIDELINE 9.1 – FUNDING AND COMPENSATION

- A. The Legal Representation Plan must ensure funding for the full cost of high quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel.
- B. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.
  1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.
  2. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
  3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.
- C. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

1. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
  2. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.
  3. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.
- D. Additional compensation should be provided in unusually protracted or extraordinary cases.
- E. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

#### GUIDELINE 10.1 – ESTABLISHMENT OF PERFORMANCE STANDARDS

- A. The Responsible Agency should establish standards of performance for all counsel in death penalty cases.
- B. The standards of performance should be formulated so as to insure that all counsel provide high quality legal representation in capital cases in accordance with these Guidelines. The Responsible Agency should refer to the standards when assessing the qualifications or performance of counsel.
- C. The standards of performance should include, but not be limited to, the specific standards set out in these Guidelines.

#### GUIDELINE 10.2 – APPLICABILITY OF PERFORMANCE STANDARDS

Counsel should provide high quality legal representation in accordance with these Guidelines for so long as the jurisdiction is legally entitled to seek the death penalty.

#### GUIDELINE 10.3 – OBLIGATIONS OF COUNSEL RESPECTING WORKLOAD

Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation in accordance with these Guidelines.

#### GUIDELINE 10.4 – THE DEFENSE TEAM

- A. When it is responsible for designating counsel to defend a capital case, the Responsible Agency should designate a lead counsel and one or more associate counsel. The Responsible Agency should ordinarily solicit the views of lead counsel before designating associate counsel.
- B. Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.
  - 1. Subject to the foregoing, lead counsel may delegate to other members of the defense team duties imposed by these Guidelines, unless:
    - a. The Guideline specifically imposes the duty on “lead counsel,” or
    - b. The Guideline specifically imposes the duty on “all counsel” or “all members of the defense team.”
- C. As soon as possible after designation, lead counsel should assemble a defense team by:
  - 1. Consulting with the Responsible Agency regarding the number and identity of the associate counsel;

2. Subject to standards of the Responsible Agency that are in accord with these Guidelines and in consultation with associate counsel to the extent practicable, selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:
  - a. at least one mitigation specialist and one fact investigator;
  - b. at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments;
  - c. any other members needed to provide high quality legal representation.
- D. Counsel should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for post-conviction review.

## GUIDELINE 10.5 – RELATIONSHIP WITH THE CLIENT

- A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.
- B.
  - 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel’s entry into the case.
  - 2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client’s rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.
  - 3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.
- C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:
  - 1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;
  - 2. current or potential legal issues;
  - 3. the development of a defense theory;
  - 4. presentation of the defense case;
  - 5. potential agreed-upon dispositions of the case;
  - 6. litigation deadlines and the projected schedule of case-related events; and
  - 7. relevant aspects of the client’s relationship with correctional, parole, or other governmental agents (*e.g.*, prison medical providers or state psychiatrists).

**GUIDELINE 10.6 – ADDITIONAL OBLIGATIONS OF COUNSEL REPRESENTING A FOREIGN NATIONAL**

- A. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.
- B. Unless predecessor counsel has already done so, counsel representing a foreign national should:
  - 1. immediately advise the client of his or her right to communicate with the relevant consular office; and
  - 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.
    - a. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.

**GUIDELINE 10.7 – INVESTIGATION**

- A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.
  - 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
  - 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

- B.
  - 1. All post-conviction counsel have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.
  - 2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

GUIDELINE 10.8 – THE DUTY TO ASSERT LEGAL CLAIMS

- A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:
  - 1. consider all legal claims potentially available; and
  - 2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
  - 3. evaluate each potential claim in light of:
    - a. the unique characteristics of death penalty law and practice; and
    - b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and
    - c. the importance of protecting the client’s rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and
    - d. any other professionally appropriate costs and benefits to the assertion of the claim.
- B. Counsel who decide to assert a particular legal claim should:
  - 1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client’s case and the applicable law in the particular jurisdiction; and

2. ensure that a full record is made of all legal proceedings in connection with the claim.
- C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:
1. asserting legal claims whose basis has only recently become known or available to counsel; and
  2. supplementing claims previously made with additional factual or legal information.

GUIDELINE 10.9.1 – THE DUTY TO SEEK AN AGREED-UPON DISPOSITION

- A. Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.
- B. Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:
1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;
  2. any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;
  3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing Guidelines or mandatory sentencing requirements;

4. the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer;
5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;
6. whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;
7. the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations;
8. concessions that the client might offer, such as:
  - a. an agreement to proceed waive trial and to plead guilty to particular charges;
  - b. an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;
  - c. an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;
  - d. an agreement to forego in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;
  - e. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;
  - f. an agreement to engage in or refrain from any particular conduct, as appropriate to the case;

- g. an agreement with the victim's family, which may include matters such as: a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution;
  - h. agreements such as those described in Subsections 8 (a)-(h) respecting actual or potential charges in another jurisdiction;
9. benefits the client might obtain from a negotiated settlement, including:
- a. a guarantee that the death penalty will not be imposed;
  - b. an agreement that the defendant will receive a specified sentence;
  - c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;
  - d. an agreement that one or more of multiple charges will be reduced or dismissed;
  - e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
  - f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;
  - g. an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement;
  - h. agreements such as those described in Subsections 9(a)-(h) respecting actual or potential charges in another jurisdiction.
- C. Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.

- D. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.
- E. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.
- F. Counsel should not accept any agreed-upon disposition without the client's express authorization.
- G. The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

GUIDELINE 10.9.2 – ENTRY OF A PLEA OF GUILTY

- A. The informed decision whether to enter a plea of guilty lies with the client.
- B. In the event the client determines to enter a plea of guilty:
  - 1. Prior to the entry of the plea, counsel should:
    - a. make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;
    - b. ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which he or she will be exposed by entering the plea;
    - c. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions in court and providing a statement concerning the offense.

2. During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

#### GUIDELINE 10.10.1 – TRIAL PREPARATION OVERALL

- A. As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

#### GUIDELINE 10.10.2 – VOIR DIRE AND JURY SELECTION

- A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.
- B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding “death qualification” concerning any potential juror’s beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.
- C. Counsel should consider seeking expert assistance in the jury selection process.

#### GUIDELINE 10.11 – THE DEFENSE CASE CONCERNING PENALTY

- A. As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution’s case in aggravation.
- B. Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.
- C. Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.
- D. Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution’s case in aggravation.
- E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.
- F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:
  - 1. Witnesses familiar with and evidence relating to the client’s life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client’s life, or would otherwise support a sentence less than death;
  - 2. Expert and lay witnesses along with supporting documentation (*e.g.* school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client’s mental and/or emotional state and life history that may explain or lessen the client’s culpability for the underlying offense(s); to give a favorable opinion as to the client’s capacity for rehabilitation, or adaptation to prison; to explain

- possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;
3. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;
  4. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.
  5. Demonstrative evidence, such as photos, videos, and physical objects (*e.g.*, trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.
- G. In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (*e.g.*, motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.
- H. Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.
- I. Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.
- J. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:
1. carefully consider
    - a. what legal challenges may appropriately be made to the interview or the conditions surrounding it, and

- b. the legal and strategic issues implicated by the client's co-operation or non-cooperation;
  2. insure that the client understands the significance of any statements made during such an interview ; and
  3. attend the interview.
- K. Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.
- L. Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

#### GUIDELINE 10.12 – THE OFFICIAL PRESENTENCE REPORT

- A. If an official presentence report or similar document may or will be presented to the court at any time, counsel should become familiar with the procedures governing preparation, submission, and verification of the report. In addition, counsel should:
  1. where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;
  2. provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it.
  3. review the completed report;
  4. take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report;

5. take steps to preserve and protect the client's interests where the defense considers information in the presentence report to be improper, inaccurate or misleading.

#### GUIDELINE 10.13 – THE DUTY TO FACILITATE THE WORK OF SUCCESSOR COUNSEL

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

- A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;
- B. providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;
- C. sharing potential further areas of legal and factual research with successor counsel; and
- D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

#### GUIDELINE 10.14 – DUTIES OF TRIAL COUNSEL AFTER CONVICTION

- A. Trial counsel should be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence.
- B. Trial counsel should take whatever action(s), such as filing a notice of appeal, and/or motion for a new trial, will maximize the client's ability to obtain post-conviction relief.
- C. Trial counsel should not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated. Until that time, Guideline 10.15 applies in its entirety.

- D. Trial counsel should take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

GUIDELINE 10.15.1 – DUTIES OF POST-CONVICTION COUNSEL

- A. Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction’s procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.
- B. If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.
- C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.
- D. The duties of the counsel representing the client on direct appeal should include filing a petition for *certiorari* in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency.
- E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:
  - 1. maintain close contact with the client regarding litigation developments; and
  - 2. continually monitor the client’s mental, physical and emotional condition for effects on the client’s legal position;
  - 3. keep under continuing review the desirability of modifying prior counsel’s theory of the case in light of subsequent developments; and
  - 4. continue an aggressive investigation of all aspects of the case.

GUIDELINE 10.15.2 – DUTIES OF CLEMENCY COUNSEL

- A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.
- B. Clemency counsel should conduct an investigation in accordance with Guideline 10.7.
- C. Clemency counsel should ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction.
- D. Clemency counsel should ensure that the process governing consideration of the client’s application is substantively and procedurally just, and, if not should seek appropriate redress.

[\(“ABA House of Delegates Members - please click here to link to the complete text \(including History of the Guidelines, Related Standards, and Commentary\) of the revised ABA Guidelines For the Appointment and Performance of Defense Counsel in Death Penalty Cases.”\)](#)

## REPORT TO HOUSE OF DELEGATES<sup>1</sup>

### Overview of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

The ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (hereinafter the “Guidelines”) were originally approved by the House of Delegates in 1989. Since that time, the Guidelines have been adopted by numerous death penalty jurisdictions and are widely relied upon by the bench and bar as setting forth the minimal requirements for defense counsel in capital cases. The Guidelines are the preeminent nationally recognized standards on this important subject. Countless examples illustrating the failures of defense counsel in death penalty cases have led bar associations, courts, legislators and state officials to speak publicly about the need for the adoption of capital counsel standards (“Maybe it is now time to contemplate defense standards for capital counsel.” U.S. Supreme Court Justice Sandra Day O’Connor, July 2001).

In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act, which dramatically limited the scope of death penalty appeals. For the first time in history, a one-year statute of limitations was imposed for filing federal appeals. Caselaw that followed proved confusing and contradictory, highlighting the complicated provisions of the Act. The 1989 version of the Guidelines does not reflect the numerous judicial and legislative developments that have occurred in the intervening years.

In April 2001, the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) and the ABA Special Committee on Death Penalty Representation jointly embarked on a project to revise the 1989 Guidelines. An Advisory Committee of experts was recruited to review and identify necessary revisions, and consultants were retained to incorporate the decisions of the Advisory Committee. The Advisory Committee is comprised of representatives from the following ABA and outside entities: ABA Criminal Justice Section; ABA Section of Litigation; ABA Section on Individual Rights and Responsibilities; ABA Standing Committee on Legal Aid and Indigent Defendants; ABA Special Committee on Death Penalty Representation; National Association of Criminal Defense Lawyers; National Legal Aid and Defender Association; Federal Death Penalty Resource Counsel; Habeas Assistance and Training Counsel; and State Capital Defenders Association. The expert consultants provided drafts of the revisions to the Advisory Committee members for discussion and comment at several daylong meetings and follow-up discussions. The attached revised ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* are the result of these efforts.

Establishing minimum standards for defense counsel in death penalty jurisdictions is essential to ensure effective assistance of counsel for all those charged with or convicted of capital crimes. The revised Guidelines will provide capital litigators and other professionals who

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<sup>1</sup> As of December 13, 2002, the following entities have indicated their intention to co-sponsor the revised ABA Guidelines: the Criminal Justice Section, the Section of Litigation, the Section of Individual Rights and Responsibilities, the Senior Lawyers Division, and the Association of the Bar of the City of New York.

work in this field with comprehensive up-to-date guidance that is consistent with the demands of this specialized field of litigation.

The following is a summary of the substantive and organizational changes made to the 1989 Guidelines. Changes that are solely stylistic in nature are not noted.

### Guideline 1.1: Objective and Scope of Guidelines

The commentary to the original edition of this Guideline stated that it was designed to express existing “practice norms and constitutional requirements.” The statement that the purpose of this document is “to set forth a national standard of practice” has been moved to the black letter in order to emphasize that the Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.

The original edition of this Guideline stated that the objective in providing counsel in death penalty cases should be to ensure the provision of “quality legal representation.” The language has been amended to call for “high quality legal representation” to emphasize that, because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in noncapital cases.

The Guidelines formerly covered only “defendants eligible for appointment of counsel.” Their scope has been revised for this edition to cover “all persons facing the possible imposition or execution of a death sentence.” The purpose of the change is to make clear that the obligations of the revised Guidelines are applicable in all capital cases, including those in which counsel is retained or is providing representation on a pro bono basis.

The use of the term “jurisdiction” as now defined in the revised Guideline has the effect of broadening the range of proceedings covered to include, for example, federal criminal prosecutions. In accordance with current ABA policy, the revised Guidelines now apply to military proceedings, whether by way of court martial, military commission or tribunal, or otherwise.

In accordance with the same policy, the words “from the moment the client is taken into custody” have been added to make explicit that these revised Guidelines also apply to circumstances in which an uncharged prisoner who might face the death penalty is denied access to counsel seeking to act on his or her behalf (e.g., by the federal government invoking national security, or by state authorities seeking to evade constitutional mandates). This language replaces phraseology in the original Guidelines that made them applicable to “cases in which the death penalty is sought.” The period between an arrest or detention and the prosecutor's declaration of intent to seek the death penalty is often critically important. In addition to enabling an attorney to counsel his or her client and to obtain information through investigation regarding guilt that may later become unavailable, effective advocacy by defense counsel during this period may persuade the prosecution not to seek the death penalty. Thus it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as

possible – well before the prosecution has actually determined that the death penalty will be sought.

The revised Guidelines, therefore, apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be sought; the case remains subject to these revised Guidelines until the imposition of the death penalty is no longer a legal possibility. In addition, as more fully described in the Guideline commentary, these revised Guidelines also recognize that capital defense counsel may be required to pursue related litigation on the client’s behalf outside the confines of the criminal prosecution itself.

#### Guideline 2.1: Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases

In the original edition of the Guidelines, the obligation of jurisdictions to develop a formal “Legal Representation Plan” to provide representation in death penalty cases appears as Guideline 3.1. In the revised edition, this topic appears earlier as Guideline 2.1 in order to lay a proper foundation for subsequent Guidelines which detail the content of such a plan. Revised Guideline 2.1 contains overall guidance to jurisdictions in the formulation of a Plan, which should be judicially enforceable in the jurisdiction to be effective.

#### Guideline 3.1: Designation of a Responsible Agency

Revised Guideline 3.1 is based on portions of Guidelines 2.1 and 3.1 of the original edition. The revised Guideline makes it clear that an independent entity, not the judiciary nor elected officials, should appoint counsel in death penalty cases. In addition, the revised Guideline contains new subsections describing the acceptable kinds of independent appointing authorities and the duties of the independent appointing authority, including its obligations in the event of a conflict of interest. The revised Guideline emphasizes that the independent appointing authority has the responsibility of ensuring that qualified attorneys are available to represent defendants in death penalty cases. Therefore, it must also promptly investigate complaints about the performance of attorneys and take corrective action without delay so that an attorney who fails to provide high quality legal representation will not be appointed in the future.

#### Guideline 4.1: The Defense Team and Supporting Services

Revised Guideline 4.1 is based on Guideline 8.1 of the original edition. The revised Guideline provides for the assembly of a “defense team” in capital trial and post-conviction proceedings consisting of at least two qualified attorneys, one investigator, and one mitigation specialist. In light of the Supreme Court decision in Atkins v. Virginia, the revised Guideline also requires that at least one team member is qualified to screen for mental or psychological disorders or impairments. The revised Guideline emphasizes that the purpose of providing adequate support services (in the nature of investigators and mitigation specialists) is to further the overall goal of providing high quality legal representation, as opposed to merely an adequate defense. The commentary discusses the important role each team member plays in achieving

this goal. Finally, the revised Guideline includes a requirement that jurisdictions provide expert and investigative services to defendants with retained or *pro bono* counsel who cannot afford to retain such services.

#### Guideline 5.1: Qualifications of Defense Counsel

Guideline 5.1 of the original edition is substantially reorganized in the revised edition. In an attempt to focus the inquiry on counsel's ability to provide high quality legal representation, the revised Guideline places a greater emphasis on qualitative indicia of attorney ability, expertise, and skill, as opposed to quantitative measures such as years of litigation experience and number of jury trials. The revised Guideline also emphasizes that the defense team as a whole must have the necessary qualifications to ensure that the defendant receives high quality legal representation and, to that end, requires each jurisdiction to develop a pool of qualified defense counsel from which such teams may be drawn.

#### Guideline 6.1: Workload

Revised Guideline 6.1 places an obligation on the responsible appointing authority to ensure that the workload of attorneys representing defendants in death penalty cases does not interfere with the provision of high quality legal representation. The original Guideline stated that attorneys should not accept appointment if their workload would interfere with the provision of "quality representation or lead to the breach of professional obligations." That admonition has been substantially retained in revised Guideline 10.3.

#### Guideline 7.1: Monitoring; Removal

Revised Guideline 7.1 provides a stricter standard than in the original edition for when an attorney should not receive additional capital assignments. The original edition provided that counsel should no longer receive additional capital appointments if counsel had "inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case." The standard is changed in the revised Guideline to apply whenever counsel "has failed to provide high quality legal representation". The revised Guideline also contains a new subsection dealing with the appointing authority's responsibility to investigate and maintain records of complaints of counsel performance. Lastly, the revised Guideline clearly indicates that zealous advocacy can never be the cause for an attorney's removal from either a specific case or a jurisdiction's list of qualified counsel for appointment.

#### Guideline 8.1: Training

"Training" was Guideline 9.1 in the original edition. Revised Guideline 8.1 adds a new subsection that emphasizes that the Legal Representation Plan must provide for comprehensive, specialized training of all members of the defense team in order to keep current regarding new developments in the law. This revised Guideline also includes a new list of eleven broad topic areas that must be covered by the comprehensive training programs, these are as follows: (1) an overview of current developments in relevant state and federal caselaw; (2) pleading and motion practice; (3) pretrial investigation, preparation and theory regarding guilt/innocence and penalty;

(4) jury selection; (5) trial preparation and presentation, including the use of experts; (6) ethical considerations; (7) preservation of the record and of issues for post-conviction review; (8) counsel's relationship with the client and his or her family; (9) post-conviction litigation in state and federal courts; (10) the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic science; and (11) the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18. Attorneys eligible for appointment are required to attend and complete, at least once every two years, an approved, specialized training program focusing on the defense of death penalty cases. All non-attorney team members should also receive continuing professional education.

#### Guideline 9.1: Funding and Compensation

Revised Guideline 9.1 is based on Guideline 10.1 of the original edition. Changes include an express disapproval of flat or fixed fee compensation schemes and statutory fee minimums for representation in death penalty cases. The revised Guideline governs "full" compensation of attorneys and the other members of the defense team. The revised Guideline also states that there should be no distinction between the hourly rates of compensation for in-court versus out-of-court services. Lastly, the revised Guideline provides for additional compensation in unusually protracted or extraordinary cases.

#### General Comment, Guideline 10

All of Guideline 11 in the original edition is renumbered as Guideline 10 in the revised edition, as the content of the original Guideline 8.1 was incorporated into other Guidelines (chiefly those pertaining to the Defense Team in revised Guideline 4.1). The content of the original edition's Guideline 8.1 was deleted as a separate Guideline in the revised edition. Additionally, several Guidelines have been combined and reorganized in the revised edition.

#### Guideline 10.1: Establishment of Performance Standards

There are no substantive changes in revised Guideline 10.1, only stylistic changes.

#### Guideline 10.2: Applicability of Performance Standards

Revised Guideline 10.2 clarifies that counsel's obligation to provide high quality legal representation continues for so long as the jurisdiction is legally entitled to seek the death penalty.

#### Guideline 10.3: Obligations of Counsel Respecting Workload

Revised Guideline 10.3 echoes the obligations stated in revised Guideline 6.1 regarding workload, here with respect to counsel's obligations to limit their caseloads such that each client receives high quality legal representation. This obligation was previously contained in Guideline 6.1 of the original edition.

#### Guideline 10.4: The Defense Team

This Guideline is new to this revised edition of the Guidelines. This revised Guideline parallels revised Guideline 4.1 but also clearly establishes that it is counsel's duty to assemble the defense team, demand all resources necessary to provide high quality legal representation, and direct and supervise the work of other members of the defense team.

#### Guideline 10.5: Relationship with the Client

Revised Guideline 10.5 expressly states that regular client contact is essential throughout *all* stages of a capital case (not just "preparation," as Guideline 11.4.2 stated in the original edition). The revised Guideline also expressly notes counsel's obligation to discuss all matters that might reasonably be expected to have a "material impact" on the case with the client.

#### Guideline 10.6: Additional Obligations of Counsel Representing a Foreign National

This Guideline is new. It identifies the special obligation of defense counsel to determine whether the client is a foreign national and if so, to advise the client of his or her right to communicate with his or her consular office. This revised Guideline reflects caselaw concerning foreign nationals charged with capital crimes.

#### Guideline 10.7: Investigation

Revised Guideline 10.7 is based on portions of Guideline 11.4.1 of the original edition. The revised Guideline emphasizes at the outset the scope of investigation that defense counsel should conduct and the critical role of proper and thorough investigation in trial preparation. The revised Guideline notes that the investigation should be conducted regardless of the facts, evidence, or statements by the client. Finally, the revised Guideline indicates that counsel must examine the defense provided to the client at all prior phases of the case, and satisfy himself or herself that the official record of the proceedings is complete.

#### Guideline 10.8: The Duty to Assert Legal Claims

The title of revised Guideline 10.8 has been changed from "The Decision to File Pretrial Motions" (Guideline 11.5.1 in the original edition) to emphasize that these duties exist at every stage of the proceedings, not just the pretrial phase. In addition, the revised Guideline states that counsel should evaluate each motion in light of the "near certainty" that all available avenues of appellate and post-conviction relief will be sought in the event of conviction and imposition of a death sentence. Further, two new subsections appear in the revised Guideline that deal with: (1) the method of presentation of legal issues; and (2) newly discovered issues and supplementing previously raised issues with new information.

#### Guideline 10.9.1: The Duty to Seek an Agreed-Upon Disposition

Revised Guideline 10.9.1 is newly titled (changed from "The Plea Negotiation Process", Guideline 11.6.1 in the original edition) and contains new text to clarify the importance of

pursuing an agreed-upon disposition at every phase of the case, and not just as a substitute for proceeding to trial. The revised Guideline also omits the requirement (which appears in the original edition's Guideline 11.6.1) of client consent to initiate plea discussions, in recognition of the possible unintended consequence of premature rejection of plea options by a suicidal or depressed client. The revised Guideline does require counsel to obtain the client's consent before accepting any agreed-upon disposition, however. The revised Guideline also includes the requirement (which appears in Guideline 11.6.3 of the original edition) that counsel enter into a continuing dialogue with the client about the content of any such agreement, including advantages, disadvantages, and potential consequences of the agreement. Aspects of Guideline 11.6.2 in the original edition have been incorporated in this revised Guideline.

#### Guideline 10.9.2: Entry of a Plea of Guilty

Guideline 11.6.4 in the original edition is revised as Guideline 10.9.2 to clarify that the decision to enter or not enter a plea of guilty must be informed and counseled, yet ultimately lies with the client.

#### Guideline 10.10.1: Trial Preparation Overall

Guideline 11.7.1 in the original edition is revised as Guideline 10.10.1. There are no substantive changes, only stylistic changes. This Guideline emphasizes counsel's obligation to develop a defense theory that will be effective in both guilt and penalty phases, with minimal inconsistencies.

#### Guideline 10.10.2: Voir Dire and Jury Selection

Formerly Guideline 11.7.2, revised Guideline 10.10.2 clarifies that jury composition challenges should not be limited to the petit jury but should also include the selection of the grand jury and grand jury forepersons. In addition, the original Guideline is amended to reflect recent scholarship demonstrating that the starkest failures of capital *voir dire* are: (1) the failure to uncover jurors who will automatically impose the death penalty following a conviction or finding of the circumstances making the defendant eligible for the death penalty; and (2) the failure to uncover jurors who are unable to consider particular mitigating circumstances. Lastly, the revised Guideline provides that counsel should consider seeking expert assistance in the jury selection process.

#### Guideline 10.11: The Defense Case Concerning Penalty

Former Guideline 11.8.3 ("Preparation for the Sentencing Phase") is now revised Guideline 10.11. It contains much of the text of the original edition's Guideline text. The revised Guideline places greater emphasis on the range and importance of expert testimony and the breadth of mitigation evidence in all phases of a capital case. Further, the revised Guideline updates the references to mitigating evidence and arguments that counsel should consider presenting at the sentencing phase.

### Guideline 10.12: The Official Presentence Report

The title and subject matter of revised Guideline 10.12 appears in Guideline 11.8.4 of the original edition. The revised Guideline is reorganized and contains a few additional requirements, including the following: (1) counsel should become familiar with procedures governing preparation, submission, and verification of official presentence reports where there is a chance that such a report will be presented to the court at any time; (2) counsel should provide information to the person preparing the report that is favorable to the client; and (3) if counsel deems it appropriate for the client to speak with the person preparing the report, counsel should prepare the client for and attend the interview.

### Guideline 10.13: The Duty to Facilitate the Work of Successor Counsel

This Guideline is new. It has been added to emphasize the importance of post-conviction proceedings and the critical role of trial counsel in those proceedings. Specific obligations include: (1) maintaining proper records of the case; (2) providing the client's files and all other information about the representation to successor counsel; and (3) sharing potential further areas of legal and factual research with successor counsel and cooperating with appropriate legal strategies chosen by successor counsel.

### Guideline 10.14: Duties of Trial Counsel After Conviction

Former Guideline 11.9.1 in the original edition is now revised Guideline 10.14. It stresses that trial counsel should take whatever action(s) will maximize the client's "ability to obtain" appellate and post-conviction review, rather than simply maximizing the client's "opportunity to seek" such review. Also, the revised Guideline is modified to emphasize that trial counsel should take appropriate action to ensure that the client obtains successor counsel as soon as possible.

### Guideline 10.15.1: Duties of Post-Conviction Counsel

This revised Guideline was Guideline 11.9.3 in the original edition. It has been revised to identify additional actions that should be taken by post-conviction counsel, including filing a stay of execution for those with execution dates and litigating all arguably meritorious issues.

### Guideline 10.15.2: Duties of Clemency Counsel

The only change made to Guideline 11.9.4 from the original edition as revised Guideline 10.15.2 is the addition of a requirement that counsel take appropriate steps to ensure that the procedural safeguards applicable in clemency proceedings are in place in the jurisdiction and are applied in the client's case. If they are not in place, counsel must seek judicial review of the clemency process. This addition was made in light of the Supreme Court decision on the duties of clemency counsel, *Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272 (1998).

## Conclusion

The revised Guidelines represent the careful and considerable efforts of highly qualified and experienced capital litigators and constitute the most comprehensive and up-to-date guidance for lawyers, judges, and other experts who work in the field of death penalty litigation. We urge that the ABA confer its imprimatur on these revised Guidelines and make them available to the field as soon as possible.

Respectfully Submitted,

L. Jonathan Ross, Chair  
Standing Committee on Legal Aid and Indigent Defendants  
February 2003

Lawrence J. Fox, Chair  
Special Committee on Death Penalty Representation  
February 2003

## GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants  
Special Committee on Death Penalty Representation

Submitted By: L. Jonathan Ross, Chair  
Lawrence J. Fox, Chair

1. Summary of Recommendation(s).

The American Bar Association adopts the revised ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, dated February 2003. Further, the American Bar Association recommends that death penalty jurisdictions adopt the revised ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, dated February 2003.

2. Approval by Submitting Entity.

The Standing Committee on Legal Aid and Indigent Defendants approved this recommendation on June 21, 2002.

The Special Committee on Death Penalty Representation approved this recommendation on May 6, 2002.

3. Has this or a similar recommendation been submitted to the House or Board previously?

Yes. The original edition of the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* was adopted by the House of Delegates in August 1989.

4. What existing Association policies are relevant to this Recommendation and how would they be affected by its adoption?

ABA policy, as evidenced by House of Delegates resolutions, practice standards and guidelines, has frequently and consistently supported the provision of competent and adequately funded counsel in capital cases. They include, *inter alia*:

ABA House of Delegates Resolutions:

- Resolution adopted in February 1979: recommending “that the United States Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate postconviction or clemency petitions if necessary, in death penalty cases where the defendant cannot afford to hire counsel” and further recommending to Congress that the Criminal Justice Act be amended to “provide for the payment of adequate compensation” to counsel in such cases.

- Resolution adopted in February 1985: recommending that two attorneys be appointed as trial counsel to represent the defendant in a death penalty case, and the primary attorney shall have substantial trial experience which includes the trial of serious felony cases.
- Resolution adopted in Feb. 1988: urging each federal district and circuit court to adopt and each federal circuit judicial council to approve a plan for providing representation in federal habeas corpus capital proceedings which includes, among other things: (1) appointment and compensation of counsel, and of expert legal consultants if requested by counsel, in every federal habeas corpus death penalty case whether or not the petition was prepared, or counsel previously appeared, pro bono; (2) the appointment for federal habeas corpus proceedings of eligible attorneys who provided representation in the state post-conviction proceedings for the same case, unless the petitioner objects for cogent reasons, there is evidence of a conflict, or other good cause appears for appointing new counsel; (3) the appointment of two attorneys in every federal habeas corpus death penalty case as counsel of record; (4) pre-assignment screening of attorneys considered for appointment to such cases to assure that only trained and experienced attorneys are appointed; and (5) support for creation of state and regional centers to provide expert advice and assistance to appointed counsel in federal habeas corpus capital litigation. The ABA also urged the federal courts to ensure the maximum extent of coordination and consistency concerning the standards and procedures governing appointment of counsel in state and federal post-conviction proceedings involving death penalty cases.
- Resolution adopted in February 1989: adopting the “*ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*” and urging adoption of the Guidelines by any entity providing counsel in capital cases.
- Resolution adopted in February 1990: urging that “[b]ecause many of the defects and delays in habeas corpus procedure are due to the fact that the accused was not represented by competent counsel, particularly at the trial level, the state and federal governments should be obligated to provide competent and adequately compensated counsel . . . as well as to provide sufficient resources for investigation, expert witnesses, and other services, at all stages of capital punishment litigation. The American Bar Association *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* should govern the appointment and compensation of counsel.” To implement that basic recommendation, the ABA said that death penalty jurisdictions should “establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases.”
- Resolution adopted in August 1996: urging the amendment of federal law to provide military capital prisoners the same opportunity for the assistance of counsel in seeking federal post-conviction habeas corpus relief as is provided by federal law for persons sentenced to death in civilian courts.
- Resolution adopted in February 1997: calling for each jurisdiction that imposes the death penalty to impose a moratorium on executions until the jurisdiction implemented policies and procedures – including, *inter alia*, implementation of the *ABA Guidelines for the*

*Appointment and Performance of Counsel in Death Penalty Cases* and Association policies intended to encourage competency of counsel in capital cases – to ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and to minimize the risk that innocent persons may be executed.

- Resolution adopted in August 1998: calling upon each state, territorial and local jurisdiction to adopt minimum standards for the creation and operation of its indigent defense delivery systems based on, among other things, the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* and other ABA policies intended to encourage competency of counsel in capital cases.

#### ABA Standards for Criminal Justice:

- Defense Function Standard 4-1.2: “. . . The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation. Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* . . . Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program . . . .”
- Providing Defense Services Standard 5-1.2: “. . . Where capital punishment is permitted in the jurisdiction, the [legal representation] plan should take into the account the unique and time-consuming demands of appointed representation in capital cases. The plan should comply with the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.”
- Providing Defense Services Standard 5-5.3: “Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.”
- Providing Defense Services Standard 5-6.2: “Counsel should be provided at every stage of the proceedings, including sentencing, appeal, certiorari and postconviction review. In capital cases, counsel also should be provided in clemency proceedings . . . .”

#### ABA Amicus Briefs:

- In several cases before the United States Supreme Court, the ABA has advanced the position that governments must provide effective representation to individuals under sentence of death in pursuing state post-conviction review. *See, e.g., Amicus Curiae Brief of the American Bar Association in Murray v. Giarratano*, No. 88-411, 492 U.S. 1 (1989); *Amicus Curiae Brief of the American Bar Association in Mackall v. Angelone*, No. 97-7747, *cert.*

*denied*, 522 U.S. 1100 (1998); *Amicus Curiae* Brief of the American Bar Association in *Gibson v. Turpin*, No. 99-77, *cert. denied*, 528 U.S. 946 (1999).

- See also the Report accompanying the Resolution.

5. What urgency exists which requires action at this meeting of the House?

Since adoption in 1989, the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* have been widely relied upon by the bench and bar as setting forth the minimum requirements for counsel in capital cases. For the first time since the reinstatement of the death penalty in 1976, courts, legislatures, government commissions, bar associations and state officials are re-examining the administration of the death penalty and demonstrating a willingness to make meaningful improvements in the representation of individuals facing the death penalty. The Guidelines have played a critical role in those efforts. However, because of numerous judicial and legislative developments since their adoption, including the 1996 enactment of the Anti-terrorism and Effective Death Penalty Act, the growing demands on capital counsel and increased complexity of capital litigation, the Guidelines as presently constituted are substantially out-of-date. Capital litigators and other professionals who work in the high-stakes field of death penalty litigation need comprehensive, reliable, up-to-date guidance that is consistent with the demands of this specialized field of litigation as soon as possible. It is imperative that the ABA approves these updated, revised ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, dated February 2003, and provides them to members of the bar without delay.

Legislation was introduced in the 107<sup>th</sup> Congress that addresses the issue of adequate capital counsel. Although the legislation enjoyed strong bi-partisan support in both chambers, it was never brought to the floor for a vote. We are hopeful that this legislation will be reintroduced in the next Congress. It is important to ensure that the Association participates in the congressional debate and we anticipate that the revised ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, dated February 2003, will be helpful in this regard.

6. Status of Legislation. (If applicable.)

None that we are aware of.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals.

On August 6<sup>th</sup> through 8<sup>th</sup>, 2002, the revised ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, dated February 2003, were referred to the Criminal Justice Section, the Section of Litigation, the Section of Individual Rights and Responsibilities, the Judicial Division, the Senior Lawyers Division, the Association of the Bar of the City of New York, and the New Jersey Bar Association. Thus far, the Section of Litigation, the Criminal Justice Section, the Senior Lawyers Division, the Section of Individual Rights and Responsibilities, and the Association of the Bar of the City of New York have agreed to co-sponsor the revised ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, dated February 2003.

10. Contact Persons. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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Larry Fox will present the report to the House.

