

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
SECTION OF CRIMINAL JUSTICE
SECTION OF LITIGATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED: That the American Bar Association adopts "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases", dated December, 1988 and

BE IT FURTHER RESOLVED: That the American Bar Association recommends adoption of these Guidelines by entities providing counsel in death penalty case.

REPORT

Background

In recent years the number of capital cases entering trial and appellate courts has increased dramatically. This Association has recognized that these cases are extremely complex and time-consuming; however, all too often inexperienced counsel are appointed to represent indigent defendants facing the ultimate penalty - death. In addition, these appointed attorneys who do have adequate experience and skills are frequently not provided adequate compensation or the resources to adequately assist their clients. The proposed Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases provide a framework for the selection of attorneys with appropriate experience and training levels to accept appointments to represent defendants in capital cases. In addition, they explain the resources and practices involved in providing effective assistance of counsel.

The Guidelines amplify previously adopted Association position on effective assistance of counsel in capital cases and the need for adequate compensation and support. Most recently, the House of Delegates, at the 1987 midyear meeting, adopted a resolution cosponsored by the Section of Criminal Justice and the Standing Committee on Legal Aid and Indigent Defendants, which addressed the implementation of the Criminal Justice Act Guidelines regarding Federal habeas corpus death penalty representation. That resolution urged, among other reforms, the payment of reasonable fees and expenses to the private bar, the creation of resource centers for the private bar handling these cases and that:

"... each federal district and circuit court to adopt and each federal circuit court judicial council to approve a plan for providing representation in federal habeas corpus death penalty proceedings which includes: ...

7) pre-assignment screening of attorneys considered for appointment to such cases to assure that only trained and experienced attorneys are appointed; ..."

Finally, we again referenced appointment of counsel in our closing, resolved clause:

"And be it further resolved that the American Bar Association further encourages the federal courts developing and carrying out such Criminal Justice Act implementation plans to consult extensively with appropriate state criminal justice leaders 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. " (emphasis added)

Since the resolution's adoption, appointment "plans" have begun to be developed and thirteen state resource centers have been approved by Congress for federal funding. In addition, Ohio and Philadelphia have adopted guidelines similar to those being proposed and several other states are currently considering the adoption of guidelines for the selection and performance of counsel. This Association's adoption of guidelines on the subject is the logical next step in providing leadership to inform the decisionmaking in the development and implementation of appointment plans and resource centers. The description in the Guidelines of what constitutes reasonable and necessary conduct of death penalty representation will also be helpful in establishing fee schedules and in supporting fee petitions by counsel in all jurisdictions where such appointments occur.

History

In 1987, the National Legal Aid and Defender Association (NLADA) adopted Standards for the Appointment and Performance of Counsel in Death Penalty Cases. These Standards had been developed over the course of several years by NLADA's Defender Division, with initial support from this Association's Standing Committee on Legal Aid and Indigent Defendants (SCLAID).

In February 1988, NLADA referred its Standards to SCLAID and requested that the Committee review them and initiate appropriate Association action. Shortly thereafter, then-SCLAID chairman John J. Curtin, Jr. wrote a number of section chairs advising them of the Standards and requesting their reactions. Three sections responded, although only one, the Section of Criminal Justice, expressed substantive concerns.

The Section objected particularly to the standards on attorney eligibility, pointing out that they would have excluded from appointment many of the dedicated and experienced civil lawyers currently providing very effective pro bono representation in capital appeals. In response, the NLADA draft was amended to provide alternative appointment procedures, allowing for the appointment of attorneys with different levels and types of training and experience. It was also agreed that guidelines would be a more appropriate nomenclature for the document than standards.

The Guidelines

The Guidelines address such subjects as eligibility, training, support services, trial preparation, the sentencing phase and appeals. Each, black letter guideline is explained by a Commentary, with reference to supporting authorities.

"Should" is used throughout as a mandatory term. It refers to activities which are minimum requirements.

Conclusion

Experience has demonstrated that capital trials and appeals are extremely specialized and demanding and that the appointment of unqualified, inexperienced counsel can be very costly in terms of delay and expense. Unfortunately, however, appointments of unqualified counsel are still often made, as evidenced by a recent suit in Georgia concerning the appointment of attorneys in capital cases on a low bid basis. These Guidelines will greatly assist jurisdictions planning how to handle capital cases in a manner that does not clog their courts and assures effective assistance of counsel.

Respectfully submitted,

Joanne Garvey, Chairperson
Standing Committee on Legal Aid
and Indigent Defendants

Juda Best, Chairman
Section of Litigation

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