

AMERICAN BAR ASSOCIATION

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

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports full utilization of the provisions pertaining to representation in federal habeas corpus death penalty proceedings contained in the Criminal Justice Act Revision of 1986 and the Criminal Justice Act Guidelines as amended in 1987 by the Judicial Conference of the United States.

BE IT FURTHER RESOLVED, that the American Bar Association urges 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 death penalty proceedings which includes:

- 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) application to the Judicial Conference of the United States for approval of compensation of appointed attorneys at rates of up to \$75 per hour in jurisdictions where such higher rates are necessary to obtain adequate representation;
- 3) routine exercise by federal district judges of their authority to recommend and by appropriate circuit judges to approve waivers of the case compensation maximum of \$750 for attorneys' fees and payment for each hour reasonably spent on the case and waivers of the compensation limit of \$1000 for investigative, expert and other services, including legal consultant services, and payment for all such services reasonably incurred for the case; and routine reimbursement for all expenses reasonably incurred during representation, so as to assure that qualified attorneys will accept such appointment;
- 4) procedures for requesting and authorizing interim payments of fees and expenses for attorneys and experts in protracted or complex cases;
- 5) 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 to the case;
- 6) except in unusual circumstances, the appointment of two attorneys in every federal habeas corpus death penalty case as counsel of record;
- 7) pre-assignment screening of attorneys considered for appointment to such cases to assure that only trained and experienced attorneys are appointed; and
- 8) support for creation of state and regional centers to provide expert advice and assistance to appointed counsel in federal habeas corpus death penalty litigation; advice to appointed counsel of their availability; and encouragement for counsel to avail themselves of such services whenever appropriate.

Be it further resolved that the American Bar Association encourages each federal district and circuit court to adopt and each federal circuit court council to approve such amendments to its local Criminal Justice Act plan as may be necessary to carry out the concepts and policies contained herein.

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.

REPORT

In March 1964, an ad hoc committee of judges was appointed by the federal courts to review and make recommendations for implementation of the Criminal Justice Act, which established procedures for appointment of counsel in federal criminal matters. Later that year, a formal committee entitled the Committee to Implement the Criminal Justice Act was established.

As early as 1985, concern regarding the appointment of counsel in federal habeas corpus death penalty cases pursuant to 18 U.S.C. Sec. 2254 was expressed by the Committee. Although the federal habeas corpus requirements mandate counsel only when an evidentiary hearing is held, the Criminal Justice Act authorizes the discretionary appointment of counsel in habeas corpus cases for financially eligible individuals at earlier stages of the proceedings, whenever the judicial officer determines that "interests of justice so require." (18 U.S.C. Sec. 3006(a)2(B)). Under the Criminal Justice Act, compensation in these matters was increased in 1984 to a maximum hourly rate of \$60 for in-court time and \$40 for out-of-court time. A case compensation maximum had previously been set at \$500 per case in federal habeas corpus cases, subject to a waiver in extended or complex cases when the presiding judicial officer certified that such excess payment was necessary to provide fair compensation and the payment was approved by the chief judge of the circuit.

In early 1986, the Committee to Implement the Criminal Justice Act began gathering information regarding the potential problem in the appointment of counsel in federal habeas corpus death penalty cases throughout the country. The Committee also examined the question of whether the CJA appropriations for fiscal years 1986 and 1987 would be sufficient to meet the needs of counsel in these cases.

Following the completion of the Committee's work in 1986, it was determined that steps needed to be taken in the federal courts to assure that competent counsel would be available in federal habeas corpus death penalty cases when the volume of such cases was likely to increase substantially between 1987 and 1990.

As a result of the Committee's work, a series of amendments to the CJA Guidelines were enacted in 1987 by the United States Judicial Conference relating exclusively to federal habeas corpus death penalty cases. The two major changes are as follows.

Subparagraph B of Section 2.14 of the Guidelines states:

B. Appointment of Counsel in Death Penalty Cases

In the event that counsel is appointed for a person who has been sentenced to death by a state court and is seeking relief pursuant to 28 U.S.C. Sec. 2254, the judicial officer may appoint and compensate under the Criminal Justice Act an attorney furnished by a state or local public defender organization or by a legal aid agency or other private, non-profit organization to represent the person. Such appointments may be in place of, or in addition to, the appointment of a federal defender organization or a CJA panel attorney or an attorney appointed pro hac vice in accordance with paragraph 2.01 D of the CJA Guidelines.

Such appointments should be made when the court determines that they will provide the most effective representation. In making the determination, the court should take into consideration whether the attorney represented the person during prior state court proceedings.

Prior to the adoption of this amendment, these organizations were not appointed to the federal habeas corpus phase of a death penalty case. Many of these

organizations have developed a high level of expertise in the state post-conviction phase of the case and are thoroughly familiar with all aspects of the litigation when it enters the federal courts.

The Committee also recognized the importance of the involvement of expert legal consulting services in federal habeas corpus death penalty cases. Specifically, the Committee noted that organizations such as the Florida Office of the Capital Collateral Representative and the California Appellate Project have gained significant experience and expertise in post-conviction death penalty cases and concluded that such organizations could provide extremely valuable advice to counsel appointed under CJA in a wide variety of areas such as the identification of potential issues, exhaustion of state remedies, and the review of draft pleadings and briefs. It was reported to the Committee that the availability of these services in some states had enhanced efforts to recruit qualified practitioners to accept appointment in state post-conviction death penalty cases. The Committee determined that the same advantage would apply in federal habeas corpus death penalty cases. Thus, paragraph 3.16 was added to the CJA Guidelines, providing:

3.16 Consulting Services in Capital Federal Habeas Corpus Cases. Where necessary for adequate representation, subsection (e) of the Criminal Justice Act authorizes the reasonable employment and compensation of public and private organizations (such as the Florida Capital Collateral Representative and the California Appellate Project) which provide consulting services to appointed and pro bono lawyers in capital federal habeas corpus cases in such areas as records completion, exhaustion of state remedies, identification of issues, review of draft pleadings and briefs, etc.

In addition to these important changes to the CJA Guidelines, the Congress amended the Criminal Justice Act itself in 1986 to authorize increased hourly rates for court appointed counsel in federal habeas corpus cases up to \$75 per hour and increased the case compensation maximum from \$500 to \$750. Each appointing federal district judge has the authority to waive the maximum subject to the approval of the chief judge in the circuit or his designee.

Following these various changes in the Act and the Guidelines, the Criminal Justice Act Division of the Administrative Office of the United States Courts asked the Bar Information Program (BIP) of the Standing Committee on Legal Aid and Indigent Defendants for information on the caseload and fiscal effects of these changes.

In June 1987, BIP requested that The Spangenberg Group conduct the study requested by the CJA Division and their subsequent report was released in September 1987.

The BIP study reinforced the conclusion drawn by the CJA Committee that important steps needed to be taken as soon as possible to assure the availability of competent counsel in federal habeas corpus death penalty cases. The report projected over 300 new cases in the federal system for both fiscal year 88 and fiscal year 89 at an annual cost of over \$13 million in 1988 and over \$15 million in 1989. The figures were based, in part, on a previous study conducted by The Spangenberg Group for the ABA Section on Individual Rights and Responsibilities and SCLAID entitled "Time and Expense Analysis in Post-Conviction Death Penalty Cases." That study documented the fact that private attorneys appointed in federal habeas corpus death penalty cases devote, on average, over 800 hours on each case and have more than \$6,500 in out-of-pocket expenses. These expenses are necessary for expert witnesses, investigators, depositions, travel, transcript and other costs.

Furthermore, because of the length and complexity of these cases, it is critical that appointed counsel be able to submit interim voucher statements and not be required to wait three to four years until the case is finally completed. It is also important to provide some pre-assignment screening method in each jurisdiction to assure that only competent counsel are appointed. Some states have developed competency standards for appointment in post-conviction death penalty cases.

As was stated in the conclusion of The Spangenberg Group report for CJA:

There is no question about the fact that the United States Judicial Conference has recognized the impending problem. The results of our study can only add to that concern. Clearly, the CJA Committee and CJA Division recognize the seriousness of the problem and have responded in a most positive way through the new recommended CJA Guidelines. These Guidelines, along with the 1987 Revision to the CJA, establish an important framework within which substantial progress can be made. However, we emphasize once again that the Guidelines are discretionary and unless they are applied uniformly and consistently among the entire federal judiciary, the crisis can escalate quickly, even within the next federal fiscal year.

Many more private attorneys and law firms must be recruited around the country to handle cases in both a fully compensated and pro bono manner. This recruitment effort will be, in our judgment, substantially benefited in federal districts that are willing to pay qualified private lawyers for the actual hours they devote to cases and who also encourage the establishment of state resource centers. Additionally, pro bono recruitment should become an important element of any coordinated state plan. At the same time, a sense of realism is necessary in terms of the number of qualified pro bono attorneys who can be recruited to accept these cases. The recruitment effort must combine the very best of the pro bono bar and privately compensated bar. In the final analysis, any recruitment campaign is only as effective as the willingness of the judges to appoint these attorneys. This requirement is absolutely essential.

Uniform implementation is essential and requires active participation from state to state and circuit to circuit. The problem will be solved only through the cooperation and participation of the state and local bar, private attorneys, judges, federal public and community defenders, law school leaders, local organizations who have been recruiting attorneys for these cases, and private nonprofit organizations which have accepted the major responsibility for death penalty representation in some states for the past ten years. These individuals and organizations must join together through a state by state effort to assist in the development of a formal plan for the implementation of the CJA Guidelines. These same groups should also address the problem of death penalty representation at the state level in those states in which it is a serious problem.

PRIOR ABA ACTION

The American Bar Association has expressed concern about the provision of competent counsel in post-conviction cases through formal resolutions twice in the last nine years. At the 1979 Midyear Meeting, the House of Delegates approved the following resolution:

BE IT RESOLVED, That the American Bar Association recommend 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 post-conviction or clemency petitions if necessary, in death penalty cases where the defendant cannot afford to hire counsel; and

BE IT FURTHER RESOLVED, That the American Bar Association offer to assist the United States Supreme Court in identifying qualified attorneys who are willing to accept appointment to prepare and file a petition for discretionary review in state death penalty cases, and to urge the Court to begin making appointments in state death penalty cases immediately; and

BE IT FURTHER RESOLVED, That the American Bar Association recommend to Congress that the Criminal Justice Act (18 U.S.C. Sec. 3600A) be amended to provide for the payment of adequate compensation to counsel appointed by the United States Supreme Court to prepare and file petitions for discretionary review in state death penalty cases.

In 1982, the House of Delegates approved a second resolution which stated, in part:

BE IT FURTHER RESOLVED, That the American Bar Association should support the prompt availability of competent counsel for both state and federal court proceedings, essential in many instances to enable the federal courts fairly and expeditiously to evaluate the merits of a claim presented in a habeas corpus petition.

- a. There should be prompt appointment of competent counsel to pursue state appellate process, state post-conviction remedies, or unified review process;
- b. There should be appointment of counsel other than trial counsel should any question of trial counsel's competence be an issue;
- c. Counsel in the state appellate process, post-conviction review process, or unified review procedure should be trained to present in the state courts the facts and legal precedents which form the basic federal constitutional issues raised by the cause;
- d. Counsel should be made available at prisons to permit conference with potential petitioners to determine whether federal constitutional issues are presented by their cases and, where such issues exist, to prepare habeas corpus petitions;
- e. Absent earlier availability of counsel, the federal district judge should appoint counsel under the Criminal Justice Act to prepare complete, factually and legally documented habeas corpus petitions, or to amend petitions filed pro se. Counsel should be assigned if any non-frivolous constitutional issue is presented and unless it is established beyond doubt that there has been no exhaustion;
- f. Compensation of counsel for the representation of habeas corpus petitioners should be made at a fair rate of payment;
- g. A system of monitoring both assigned and retained counsel to assure competency of performance should be instituted.

In August 1986, the ABA Board of Governors created the ABA Post-Conviction Death Penalty Representation Project, co-sponsored by the Section of Individual Rights and Responsibilities and several other sections and committees of the ABA. The purpose of the project has been to assist in recruiting volunteer attorneys to handle post-conviction death penalty cases and to help to preserve the integrity of the criminal justice system by providing assistance of counsel for all death row inmates who wish to challenge, as provided by law, the constitutionality of their conviction.

The project has now been in existence for over a year and has been successful in recruiting a large number of law firms and individual attorneys who have expressed interest in handling these cases.

In December 1987, the National Legal Aid and Defender Association adopted "Standards for the Appointment of Counsel in Death Penalty Cases." These standards are currently under consideration by the ABA and will hopefully be acted on soon.

Finally, it is significant to note that the ABA filed an amicus curiae brief in the United States Court of Appeals for the Fourth Circuit in the case of Giarratano V. Murray. That case addresses the question of whether counsel should be appointed for indigent defendants in post-conviction death penalty cases.

In a section of that brief entitled "The Growing National Crisis in Providing Death Row Inmates with Competent Attorneys," it is stated:

There is an increasing problem in many states throughout the country in finding qualified lawyers to represent persons under sentence of death in certiorari, state post-conviction and federal habeas corpus proceedings. As described in the testimony at trial (Jt. App. 232-33), this is becoming a crisis because the availability of volunteer attorneys has been decreasing even as more and more capital punishment cases are entering their certiorari, state post-conviction and federal habeas corpus phases. As Judge Godbold of the Eleventh Circuit has said, "In the great sweep of state and federal commitments to supply counsel to indigents accused or convicted of serious crime, this group has fallen through the cracks."

Yet as Judge Godbold has also recognized, these are hardly frivolous proceedings. After the Eleventh Circuit was created in 1981, in the first 56 cases in which death sentences survived both certiorari and state post-conviction proceedings, "in exactly half of them, [federal] habeas [relief] was granted at either the trial court or the circuit level because of a constitutional deficiency."

Based on his experience as the Chief Judge of the federal circuit with the most death row inmates, Judge Godbold has summarized several important reasons why volunteers have been increasingly difficult to find in capital cases:

Taking a habeas death case is not something most lawyers want to do. In the first place, it's hard. It is the most complex area of the law I deal with. In the second place, it's often done on an emergency basis. Third, the death penalty just isn't imposed on people for trivial things. The community is often inflamed. The press is often inflamed. The state trial judge is often inflamed if you question what he did. The trial counsel is often inflamed if you must question what he did. Your client seldom appreciates what you do and may end up accusing you of being ineffective counsel. And there isn't any glory in it.

The brief concluded that:

The ABA has strongly advocated the provision of compensated, qualified counsel in all kinds of post-conviction cases. Surely, the need for such counsel is greatest in capital punishment post-conviction litigation. Where the consequence of failing to uncover and argue effectively about serious constitutional violations is the prisoner's death, it is critically important that the government provide the prisoner with a qualified attorney.

The current resolution is consistent with ABA policy as set out in the above resolutions and the work currently being conducted by the IRR Post Conviction

Death Penalty Representation Project. While substantial progress has been made by the federal courts in amending the CJA Guidelines in federal habeas corpus death penalty cases, all of the provisions are discretionary. What is needed is an implementation plan in each federal district and circuit that incorporates each of the new guidelines established by the federal courts. The adoption of these specific recommendations by the ABA will encourage such implementation.

Respectfully submitted,

John J. Curtin, Jr., Chairman
Standing Committee on Legal
Aid and Indigent Defendants

John M. Greason, Chairman
Section of Criminal Justice

December 1987