

FREQUENTLY ASKED QUESTIONS

1. **Why is there a nation-wide shortage of qualified lawyers to represent individuals under sentence of death?**

There are three primary reasons for the current crisis:

- **Supreme Court case law allows states to deny individuals court-appointed counsel at the state post-conviction level.**

The U.S. Supreme Court has never recognized a constitutional right to counsel for indigent death row inmates seeking post-conviction relief in state or federal court. Through its amicus curiae briefs and resolutions, the ABA has repeatedly urged the Court to acknowledge this constitutional guarantee. (More information about the ABA's policy positions and amicus briefs in support of the right to counsel is available by going to the section of our practice area library where copies of some of our recent amicus briefs are posted. The briefs include references to ABA studies and resolutions regarding capital punishment.)

- **In 1995-96, Congress eliminated all federal funding for the post-conviction defender organizations (known as "resource centers").**

During 1995-96, Congress eliminated all funding for the 20 capital post-conviction defender organizations known as "resource centers." The resource centers served three vital functions. Their trained attorneys provided direct representation to many death-sentenced prisoners. The offices also assisted pro bono firms and appointed counsel in hundreds of cases. Lastly, the centers monitored the progress of cases from conclusion of trial through clemency to ensure that claims were not forfeited by inexperienced counsel and that individuals were not executed without representation or without review of their constitutional claims.

Only a handful of states now directly support a capital post-conviction counsel office and even fewer provide funding at the same level that had been appropriated by Congress. One compelling example is Pennsylvania, which, after losing federal funds for the resource center, refused to spend any money for capital post-conviction attorneys to represent those on death row, but has consistently allocated \$500,000 annually for prosecutors who are assigned the responsibility of opposing death penalty post-conviction and habeas applications.

Almost every state now makes some provision for appointment of counsel once a pro se application for habeas relief is filed by a death row prisoner. However, very few states require that appointed lawyers have sufficient experience and skill to handle this complex and time-consuming litigation, and few compensate lawyers with more than token fee payments or provide reimbursement for the substantial costs that must be incurred to investigate, prepare and litigate state post-conviction claims.

The number of jurisdictions with death-sentenced prisoners who lack adequate legal representation is growing at an alarming rate. There are currently 3300 persons on death row in the United States and 99.5% of them are indigent.

- **The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 set a one-year statute of limitations on the filing of federal habeas petitions.**

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was passed with the goal of speeding up executions and restricting access to federal review of state convictions. For the first time in our history, there is a statute of limitations on the filing of federal habeas corpus actions. For many inmates, the clock is now ticking under the AEDPA, but these unrepresented individuals have no way to stop the federal clock and preserve their federal constitutional claims by filing a petition for post-conviction relief in state court. The

ABA strongly opposed the AEDPA and has, in its resolutions and amicus briefs, argued that provisions of the AEDPA unduly restrict the jurisdiction of Article III judges by requiring deference to a state court on a question of federal constitutional law.

2. What is the ABA Death Penalty Representation Project doing to address the critical shortage of qualified lawyers for individuals facing execution?

The Project's work includes:

- o Working with national and state criminal justice groups, bar associations and other organizations to implement the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) in all death penalty jurisdictions. The Guidelines set forth a national standard of care in death penalty cases in order to ensure that capital defendants receive high quality legal representation at all stages of the process;
- o Underwriting regional and national capital training programs and providing scholarships to prepare pro bono and appointed counsel to handle capital cases at trial, on appeal and in post-conviction proceedings;
- o Educating and soliciting support from members of the judiciary and the bar by speaking at judicial conferences and national criminal justice organization meetings about the ABA Guidelines;
- o Utilizing our confidential web site practice area to make resources readily available to pro bono and appointed counsel who are representing persons facing the death penalty;
- o Meeting with private law firms around the country to discuss the need for pro bono representation of death-sentenced prisoners. To date, the Project has over 200 firms to act as volunteer counsel in capital trial or post-conviction cases;
- o Supporting legislative efforts such as the Innocence Protection Act, which would provide badly needed funds for capital defender systems;
- o Filing systemic litigation challenges in jurisdictions that fail to invest properly in defender systems, fail to enforce standards for defense counsel, or otherwise deny essential resources and expert assistance to the defense; and
- o Assisting in the drafting of *amicus curiae* briefs in death penalty cases at the U.S. Supreme Court.

3. How can civil litigators successfully represent a death-sentenced prisoner?

One reason for the success of civil firms in this area is that those facing death often received inadequate representation from the lawyers appointed to defend them at trial. Frequently, these lawyers were paid only token amounts to handle the cases. Many were inexperienced or incompetent. Some individuals were represented by counsel who were trying their first cases, were senile or intoxicated, were ignorant of governing law, used racial slurs to refer to their clients, slept or were absent during crucial parts of the trial, and were denied or never requested any investigative or expert assistance. One of the most rewarding aspects of handling a habeas case is the opportunity to unearth and present meritorious defenses and mitigating evidence that were not developed at trial, and afford a client the vigorous advocacy he or she never received.

As we discuss below, death penalty cases are challenging, complex and time-consuming. They require litigation with the level of skill and resources to which mid- and large-size firms are accustomed. The substantive criminal law will be new to civil litigators, as will many aspects of investigating, preparing and presenting capital post-conviction claims. However, though considered a criminal or quasi-criminal proceeding in some jurisdictions, habeas corpus is essentially a civil action. In federal court, in particular, the rules affecting pleadings, discovery and proof will be quite familiar. There

are arcane and ever-evolving aspects of federal habeas procedure that are difficult for everyone who takes a case, including experienced criminal defense lawyers. Nonetheless, this is a challenge civil law firms routinely overcome.

4. At what stage of the proceedings should my firm become involved?

In some jurisdictions, such as Texas, the post-conviction process runs concurrently with the direct appeal. In those circumstances, we urge firms to become involved shortly after the conclusion of trial. In most states, however, post-conviction proceedings commence after the conclusion of the direct appeal. In these states, law firms are encouraged to take a case as soon as possible after the direct appeal has been denied.

When state habeas relief is denied by the state court—and you must assume it will be—your firm will be expected to follow the case through proceedings in federal court and through clemency, if all habeas efforts fail. Given the time limits that apply in some state and all federal habeas proceedings, the earlier your firm enters the case, the better. There may even be an advantage to having your firm prepare the petition for writ of certiorari. This will depend upon the case you take and the advice you receive from the capital representation office to which we refer you.

In years past, volunteer counsel often waited to take a case until it reached the federal habeas stage. A number of developments, most significantly, passage of the AEDPA make it imperative that, if the option is available, your firm handle the state post-conviction proceedings. The AEDPA provides a one-year statute of limitations for the filing of federal habeas corpus actions from the conclusion of the direct appeal. This period is tolled during the pendency of the state post-conviction proceeding. However, depending upon when the state petition was filed, the time in which to apply for federal habeas relief may be considerably shorter than a year. The strategic choices involved in coping with the changes in case and statutory law are more complicated than can be covered here. There is no doubt, however, that the earlier your firm enters the case, the greater the client's chances of success. There is another reason to become involved at the state habeas stage. It is critical that a thorough and detailed record be developed in state court. Too often, an incomplete and undeveloped record during state proceedings leaves the federal court without any basis to grant relief. This task is ideally suited to law firms that can invest the necessary resources and personnel in this effort.

5. What claims are most often raised in capital habeas petitions?

Because of limitations imposed by statute and case law, not all legal issues raised on appeal are cognizable in habeas corpus proceedings. Complete familiarity with the trial and appellate record is essential, but this is only a starting point. The purpose of a petition for writ of habeas corpus is to permit an extra-record examination of the case to develop evidence that the defendant was denied basic due process at the guilt and/or penalty phase of the trial and/or on direct appeal.

In evaluating the government's case, you will be searching for exculpatory evidence that might have been suppressed or was not discovered by the trial attorney. For example, did any of the state's witnesses—especially informants—commit perjury? Were informants given compensation or deals in pending cases that were not revealed to the defense? Did the prosecution conceal evidence that an eyewitness had changed his or her mind about an identification? Was there a failure to conduct scientific testing of physical evidence or is there reason to believe the testing was unreliable?

Your firm will be investigating both the underlying charge and the client's life history to ascertain what evidence counsel failed to present at trial that might reasonably have resulted in an acquittal, conviction of an offense less than capital murder, or most important, what evidence in mitigation was not presented that might have led to a sentence other than death? When, as too often occurs, trial counsel has conducted virtually no investigation, the defense team will be

interviewing witnesses to the underlying offense and examining the client's family, medical and education history, and records of previous convictions and incarceration that might disclose evidence of mental illness, neurological impairment, mental retardation, and sexual and physical abuse. These social history investigations are unquestionably time-consuming, but properly supervised by an experienced capital case investigator or mental health professional, student interns can do much of the leg work such as locating, gathering and summarizing records. Given the likelihood that trial counsel did not undertake the necessary exploration of your client's background, these investigations yield a wealth of compelling information.

In many states, there are statutory time limits in which to file your initial petition and the AEDPA severely restricts the period in which the federal petition must be filed. Changes in state and federal law mean that the first round of habeas litigation is probably the only round. The availability of discovery proceedings varies from state to state. The importance of thorough investigation and presentation of claims in the state petition cannot be overemphasized. Evolving procedural rules in federal court may well preclude consideration of any other claims. Depending upon the particular claims you raise, there may be an evidentiary hearing in state court. Because of limitations imposed by the AEDPA—many of which are still the subject of litigation—you must anticipate the government will take the position, once you are in federal court, that the client is not entitled to another hearing.

6. How should my firm select a case?

In some states there is a particularly urgent need to enlist firms. We recognize that a number of factors, including geography, timing, staffing and possible legal issues will affect a firm's decision. What the Project cannot do is identify the "winning case." Every time a firm agrees to represent a death row prisoner, it takes an important step in winning the battle for due process and equal justice for that individual.

Because these cases have often been so poorly handled at trial and on appeal, neither the brief summaries we can send you nor a review of the opinion on direct appeal are complete or reliable predictors of the potentially meritorious claims. The most compelling issues and evidence will not be discovered until you begin your investigation. Once you have decided to accept a case, but before you select a client, the resource counsel can provide you with more information than is provided with the summary case.

7. Can the firm expect payment for any attorney hours or out-of-pocket expenses?

Particularly because we are asking you to take a case in a state that pays no attorney fees or only token amounts, you must assume that there will be little or no compensation for billable hours or costs incurred at the state post-conviction stage. Georgia, for instance, provides no fees or reimbursement at the state post-conviction stage. If appointment and compensation are possible, one of our resource counsel with whom you are working will advise your firm how to proceed. Even if appointment at the state level is possible, the fees and money available for out-of-pocket expense reimbursement will usually be nominal. Although non-payment may be the norm, your firm may decide to challenge local or statewide practice. This is a strategic decision that should be discussed with the resource counsel. Ultimately, however, the firm is undertaking a substantial pro bono commitment, especially in state court.

By statute, lawyers who are appointed in federal court are paid, at a maximum, an hourly rate of \$175.00. The federal statute also authorizes reimbursement for necessary expenses such as investigators and expert witnesses. The firm cannot, however, postpone any necessary state post-conviction investigation or expert evaluations with the expectation of being compensated later in federal court. The doctrine of exhaustion requires you to develop and raise all federal constitutional claims and supporting evidence in state court. If you fail to do so, it is likely those claims will be barred from consideration by the federal court.

8. **How many hours will the case take and how much will it cost the firm?**

As much depends upon the case you accept, its procedural posture and the jurisdiction in which the case is pending, it is impossible to predict the number of hours and the costs to the firm with any precision. There are differences in post-conviction practice and procedure in each state that will affect matters such as statutory deadlines and costs. Like any litigation, post-conviction practice involves periods of intense activity interspersed with what may be months during which the demands on the firm's resources will be minimal.

There is no question, however, that capital post-conviction cases are time-consuming. Over a period of years, in state and federal court and, if necessary, in clemency, your firm may well devote thousands of hours. The lawyers that the Project has recruited in the past would be pleased to talk with you about how they have staffed and managed their cases. The Project can also refer you to lawyers at firms in your own community to answer these questions.

9. **Do members of the firm need training in capital post-conviction representation and, if so, what types of programs are available?**

There are excellent opportunities for you to learn the skills needed to successfully handle a capital post-conviction case. Each year there are several national, and nearly a dozen regional CLE programs presented by criminal defense organizations and capital defender offices. The Project contributes financially to many of these seminars and can help find the right training program to assist you.

The Project has a goal of ensuring that pro bono firms receive guidance from experienced lawyers in the field. If you accept a case, experienced capital defenders will assist you in any number of ways so that the firm's resources—both attorney time and out-of-pocket expenses—are used appropriately. They can help locate experienced investigators, mitigation specialists and mental health experts, and assist you in making important strategic decisions. The Project's Director is also available to confer with you and members of your firm about any of these issues.

The intricacies of federal habeas practice are detailed in several outstanding texts, including *Habeas Corpus Practice and Procedure* by Profs. James Liebman and Randy Hertz (Lexis), and *Habeas Corpus Checklists* by Prof. Ira Robbins (West), which should be added to your library.

The goal of our state-by-state library is to make manuals and sample pleadings relevant to state post-conviction litigation available to you as quickly as possible. If you agree to represent a client, you will be given access to probono.net's confidential web site, <http://www.probono.net/deathpenalty>. The practice area contains a link to the Capital Defense Network where you will find a Habeas Assistance Training Project (HAT) component that includes case law summaries, on-line litigation guides, and important updates for federal habeas practice. HAT is a program of the Defender Division of the Administrative Office of the U.S. Courts that is specifically designed to support lawyers handling federal capital habeas cases.

For more information, contact the Project:

740 15th St. NW
Washington, DC 20005
202-662-1738

deathpenaltyproject@americanbar.org
<http://www.americanbar.org/deathpenalty>