

**Stephen N. Zack**  
President

**AMERICAN BAR ASSOCIATION**

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Honorable Eric H. Holder, Jr  
Attorney General  
United States Department of Justice  
Robert F. Kennedy Building  
950 Pennsylvania Avenue, NW  
Washington, DC 20510

Dear Attorney General Holder:

On behalf of the American Bar Association, I write to offer the accompanying comments filed today for your consideration as you undertake the Department of Justice's review of the Proposed Rule to implement the Certification Process for State Capital Counsel Systems.

As set out more fully in the Association's comments, the Proposed Rule raises serious concerns about the quality of representation for capital defendants, the fairness of death penalty proceedings, and the relationship between the federal and state courts in *habeas corpus* proceedings – issues that long have been and are today of vital concern to the ABA.

The ABA previously submitted comments regarding prior versions of the proposed regulations on August 25, 2007 and April 6, 2009. Like its predecessors, the Proposed Rule fails to ensure that applicant states have mechanisms in place to ensure for the appointment of "competent counsel," as required by Section 507 of the USA PATRIOT Improvement and Reauthorization Act of 2005, which amended Chapter 154 of Title 28 of the United States Code, as well as case law interpreting Chapter 154. Accordingly, the Proposed Rule will result in the Attorney General's improperly certifying state programs that fail to provide competent post-conviction counsel or otherwise to meet the statutory requirements of Section 507. Such an error would have devastating and detrimental consequences affecting the fairness and accuracy of post-conviction proceeding for death-sentence prisoners.

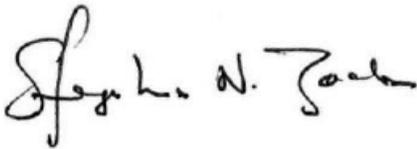
While the ABA does not take a position on whether Section 507 is good policy, the approach taken by the Department of Justice in implementing Section 507 fails to effectuate and otherwise ignores key aspects of the compromise inherent in the legislation. That compromise required states to make significant and meaningful improvements to the counsel systems that provide legal representation to indigent death-sentenced prisoners (including ensuring the quality of appointed counsel) in order to be entitled to the benefits of streamlined review in *habeas corpus* proceedings. At its core, the Proposed Rule fails to abide by this compromise and would allow states to obtain streamlined review without ensuring that capital defendants receive competent counsel in post-conviction proceedings.

Most problematically, the Proposed Rule fails to provide substantive, meaningful criteria for evaluating whether a state's mechanism will actually lead to the appointment of *competent* counsel.

For these reasons, we respectfully urge you to reject the Proposed Rule and to revise the proposed Certification criteria to require compliance with the applicable standards articulated in the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* as set out in full in our comments.

Thank you for consideration of our views,

Sincerely,

A handwritten signature in black ink that reads "Stephen N. Zack". The signature is written in a cursive, flowing style.

Stephen N. Zack  
President