STATEMENT

of the

AMERICAN BAR ASSOCIATION

for the

COMMITTEE ON THE JUDICIARY

NEBRASKA UNICAMERAL LEGISLATURE

on

Hearing on LR406: Interim study to examine the feasibility of adopting the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

Submitted for Hearing

on

September 7, 2018
Chairwoman Ebke, Senator Morfeld, and members of the Judiciary Committee:

My name is Emily Olson-Gault. I submit this written testimony on behalf of the American Bar Association, for which I serve as Director of the Death Penalty Representation Project. The American Bar Association is among the world’s largest voluntary professional organizations, with a membership of over 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges, and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I submit this testimony at the request of ABA President Robert M. Carlson to present to the Committee information about the ABA Guidelines for the Appointment & Performance of Counsel in Death Penalty Cases (“ABA Guidelines” or “Guidelines”)¹ to facilitate your study about the feasibility of implementing the Guidelines in Nebraska.

The ABA does not take a position for or against the death penalty itself. Instead, it calls on all jurisdictions that retain the death penalty to ensure that adequate protections are in place to guarantee due process and fairness at every stage of a capital proceeding. No single factor is more essential to safeguarding due process than providing access to qualified, adequately-resourced defense counsel. For more than 30 years, the ABA has engaged in a number of activities designed to promote access to qualified, adequately resourced defense counsel in capital cases. The ABA’s Death Penalty Representation Project, created in 1986, has recruited hundreds of private law firms to provide pro bono representation to indigent individuals facing a death sentence. The ABA also works with local stakeholders in death penalty jurisdictions to effect important reforms of their death penalty systems and to ensure fairness, due process, and effective legal representation. Finally, the ABA engages in educational efforts, addressing bar associations, community groups, and judicial conferences about the problems with the administration of the death penalty and proven strategies to improve counsel performance, which in turn reduce mistakes and wrongful convictions.

I. History of the ABA Guidelines

The ABA has long recognized that the provision of competent counsel to indigent capital defendants at each and every phase of the criminal process is critical to fairness and accuracy in the criminal justice system. As the U.S. Supreme Court observed nearly 40 years ago, “All actors in the system share an interest in the effective performance of [capital defense] counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed.” In 1989, recognizing a need for a set of national standards to guide the provision of capital defense counsel, the ABA first adopted the Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. These guidelines reflected long-standing professional norms in the capital defense community and set forth a baseline for effective representation at every stage of a capital case, from pretrial through clemency, and in any connected litigation.

In 2003, the Guidelines were substantially revised and updated to reflect changes in the law and capital defense practice since they were first published in the 1980s. A broad and diverse group of experts, including judges, prosecutors, public defenders, private attorneys, and academics, participated in drafting the 2003 revision of the Guidelines. Several ABA sections and their members also participated closely in the development of the Guidelines. Among these was the Criminal Justice Section, which is comprised of both prosecutors and defense attorneys and serves as the unified voice of criminal justice in the profession. This diverse group of authors updated the Guidelines in 2003 to reflect their consensus about the most fundamental, well-established norms of capital defense practice.

After a careful and lengthy drafting process, the Guidelines were formally adopted as Association policy at the 2003 Midyear Meeting. The ABA House of Delegates, which is the policy-making body of the ABA, currently consists of over 600 members, including delegates from every U.S. state and state bar association, with dozens of additional representatives of local

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4 See Hamblin v. Mitchell, 354 F.3d 482, 487 (6th Cir. 2003) (“the [ABA Guidelines] merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases.”).
bar associations and other affiliated organizations, including delegates from the Conference of Chief Justices, the National Legal Aid & Defender Association, the National District Attorneys Association, and the National Association of Attorneys General. This diverse group reflects the composition of the Association as a whole, which has more than 400,000 members that include prosecutors, defense attorneys, judges, and government officials. Notably, the members of the House of Delegates voted to adopt the 2003 Guidelines as Association policy with no one speaking against it during the debate and with no votes cast in opposition.

II. Scope, Content, and Structure of the Guidelines

The drafters of the Guidelines carefully and deliberately produced a set of standards that not only embody a broad consensus about the national standard of care in capital defense advocacy, but also establish a baseline for the provision of counsel that applies at all stages of a capital case and in every jurisdiction that utilizes the death penalty. The Guidelines make clear from the outset that, because they focus on the most basic requirements for adequate defense representation, they do not set forth “best practices” or aspirational goals; rather, they reflect the “current consensus about what is minimally required to provide effective defense representation in capital cases.”

The Guidelines have a broad scope, both in their relevance to all stages of a capital case and in their cross-jurisdictional applicability. They are intended to 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, postconviction review, clemency proceedings and any connected litigation.”

The Guidelines were developed as national standards to apply in every U.S. jurisdiction that utilizes the death penalty, including states, the federal government, and the U.S. Military. Each individual Guideline was drafted broadly to allow for the many differences in jurisdictional practice and to be flexible enough to continue to allow counsel to make individualized decisions about strategy.

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5 Guideline 1.1, Commentary.
6 Guideline 1.1(B).
The Guidelines are divided into two sections that, broadly speaking, concern counsel appointment and counsel performance respectively. The first section regarding appointment, which is comprised of Guidelines 2.1 through 10.1, directly addresses the creation and administration of a system of capital defense. These Guidelines provide standards to assist courts, legislatures, and administrative bodies when developing, reforming, and monitoring a capital counsel system. Topics include counsel appointment and qualification requirements, funding needs, monitoring, and workload. As discussed in further detail below, Guidelines 5.1 and 8.1 (qualifications and training) have been adopted directly by numerous jurisdictions to set forth the minimum requirements for appointed counsel. Other Guidelines in this section, such as Guideline 6.1 (Workload), discuss important principles that should be kept in mind when developing and administering a counsel system, but do not provide specific instruction so as to allow for flexibility and adaptability to the unique requirements of each jurisdiction.

The second half of the Guidelines, found in Guidelines 10.2 through 10.15.2, is focused on the performance of counsel in their representation of a client who is facing the death penalty. These Guidelines, like the Guidelines pertaining to defender systems, are based on long-standing, common-sense principles of capital defense, as well as ethical obligations that apply to all attorneys. Some of these apply in every case and at every stage, such as the duties to investigate (Guideline 10.7), develop and maintain a relationship of trust with the client (Guideline 10.5), and assert legal claims (Guideline 10.8). Others apply to specific indicated situations and phases of a case, such as the duties regarding the development of the penalty phase case (Guideline 10.11) or duties in post-conviction and clemency (Guidelines 10.15.1 and 10.15.2, respectively). While each Guideline is tailored to a particular topic, two common themes that run throughout are (1) the necessity of a team approach to capital defense; and (2) the need for extraordinary efforts on behalf of the accused at every stage, due to the irreversible nature of the penalty and the dangers of waiver and default of otherwise meritorious legal claims.

III. Implementation of the Guidelines

During the 15 years since the ABA’s adoption of the 2003 Guidelines, they have been used extensively by both courts and state legislatures to assess counsel qualifications and performance and to establish more effective and efficient systems of indigent capital defense. This broad acceptance of the Guidelines demonstrates both the validity of the underlying principles they
represent and their practical utility as a guide for enacting or reforming indigent defense systems in a variety of jurisdictions.

**Judicial Application of the Guidelines**

The U.S. Supreme Court has set forth a two-pronged test for assessing the constitutional effectiveness of counsel representing a criminal defendant, which is typically used during appellate review to determine whether, as the result of counsel’s alleged errors, that defendant is entitled to a new trial or new penalty-phase proceeding. This test first asks whether counsel’s performance fell below “prevailing professional norms” and, if so, then considers whether the defendant was “prejudiced” by counsel’s deficient performance.7

To assess the first prong of this review, counsel performance, the Court explained:

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is reasonable, but they are only guides.8

In many subsequent cases, the Court, citing to this passage in *Strickland*, acknowledged the relevance of the ABA Guidelines specifically in looking to whether capital defense counsel provided constitutionally adequate representation. The Court has repeatedly held that “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’ We long have recognized that ‘[p]revailing norms of practice as reflected in American Bar Association standards and the like... are guides to determining what is reasonable.’”9 Following the guidance of the U.S. Supreme Court, state and federal courts have looked to the Guidelines to assess capital counsel qualifications and performance in nearly 400 published opinions.10 Those opinions come from courts in every federal circuit and the majority

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8 *Id.* at 688.


10 See ABA Death Penalty Representation Project, *List of Opinions Citing the ABA Guidelines* (last updated Jan. 12, 2017), available at
of state high courts that review capital appeals. Those courts have recognized that the ABA Guidelines establish appropriate professional standards for the appointment and performance of competent defense counsel in death penalty proceedings.

Policy-Based Implementation

In addition to judicial recognition at every level, the Guidelines have also been implemented as formal policy in a number of jurisdictions. This implementation has been accomplished in a variety of ways: some states require compliance with the Guidelines by regulation or statute; in other states, state and local bar associations have adopted the Guidelines; and several state courts have adopted the Guidelines by court rule.

Most recently, in May 2018, the Idaho legislature approved new rules promulgated by the Idaho Public Defense Commission that substantially conform to the ABA Guidelines. Included in those rules are training requirements consistent with Guidelines 5.1 and 8.1, and a requirement that all counsel “be familiar with and agree to abide by the performance standards in the current

https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcites.authcheckdam.pdf.

11 The Nebraska Supreme Court appears to have addressed the Guidelines only once in a capital case, State v. Torres, 295 Neb. 830, 845-846 (2017). While the court merely mentioned the Guidelines in that case and did not affirm (or reject) their relevance, that opinion highlights in the importance of the adoption of clear standards for capital representation. In Mr. Torres’s case, neither his trial counsel nor his post-conviction counsel retained a mitigation specialist to provide assistance with investigating and developing the case regarding penalty. The Guidelines make clear that a mitigation specialist is an indispensable member of the core defense team, along with two qualified attorneys and an investigator, and put the burden on both the counsel system and the defender to ensure that a mitigation specialist is retained. See Guidelines 4.1 and 10.4. Because Torres’s trial team did not include a mitigation specialist, his attorneys at trial did not have the information to present a complete picture of his personal and family history. And because his post-conviction counsel also did not retain a mitigation specialist, he was unable to show the court how he was prejudiced by trial counsel, thereby dooming his ineffective assistance claim on the second prong of the Strickland test. Implementation and enforcement of the Guidelines would help prevent such fundamental mistakes from undermining due process in capital proceedings.

12 The Guidelines have been implemented by one or more of these methods in Alabama, Arizona, California, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Montana, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Texas, and Wyoming. For an extended discussion of state implementation of the ABA Guidelines as of 2013, see Robin M. Maher, Improving State Capital Counsel Systems Through Use of the ABA Guidelines, 42 Hofstra L. Rev. 419 (2013). See also ABA Death Penalty Representation Project, Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/ImplementationFactSheetJul2018.pdf.
American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.\textsuperscript{13}

Through work in and study of these jurisdictions, the ABA has observed notable improvements in the quality of representation and the smooth functioning of their capital punishment systems following implementation of the Guidelines. For example, following the creation of an office of Indigent Defense Services in North Carolina and the adoption of performance standards consistent with the ABA Guidelines, judges, academics, and practitioners all observed a significant improvement in the quality of capital defense, accompanied by a sharp decrease in the number of capital trials that had previously been burdening the court system.\textsuperscript{14}

Any meaningful improvement, however, depends heavily on the jurisdiction’s commitment to monitoring and enforcing their Guidelines-based rules. Where jurisdictions have made compliance with the rules optional, have failed to address violations of the rules, or have failed to incorporate all the requirements of the Guidelines into those rules, issues with capital defense representation are likely to persist.\textsuperscript{15}

Capital cases are the most complex and time-consuming of all criminal cases. The Guidelines are a tool that capital jurisdictions can use to ensure that these most intricate of cases are handled in a fair and equitable manner that prioritizes both efficiency and accuracy, recognizing that death penalty cases are fundamentally different from other criminal matters. These fundamental differences mean that capital cases require jurisdictions to enact special procedures and protections to ensure due process. When capital counsel systems function in accordance with the Guidelines, they not only protect the integrity of the jurisdiction’s criminal justice system, but they also reduce the risk that scarce resources will be wasted due to mistake or reversible error in the conduct of a capital proceeding. The ABA believes that all death penalty jurisdictions would benefit from the adoption of the ABA Guidelines and encourages


\textsuperscript{15} See id. at 437-438 (discussing attempts to reform Georgia’s capital defender system).
Nebraska to utilize the Guidelines in the development of its new capital defense appointment and performance standards.

Thank you for undertaking this important study and for the opportunity to provide these remarks. We are happy to provide additional information or any further assistance that might facilitate your review of these issues.